

Ideological Restrictions On Immigration

I. INTRODUCTION

Twenty years after Sen. Joseph McCarthy's influence faded, the Immigration and Nationality Act of 1952,¹ still the basic codification of U.S. immigration law, is an important legacy of the period and the philosophy which bear his name.² Few of its provisions reflect the emotional anti-Communism associated with the McCarthy period as much as does section 212(a), which recites at considerable length the classes of aliens who cannot enter the United States either temporarily or for permanent residence.³ Not only are members of Communist organizations forbidden to enter, but also on the prohibited list are aliens "who advocate the economic, international, and governmental doctrines of world communism," regardless of whether they have Communist organizational affiliations.⁴ Although section 212(a)(28) also excludes those who advocate or belong to organizations advocating totalitarianism in general, this class is limited to those who advocate totalitarianism for the United States.⁵ Congress was concerned almost exclusively with aliens of Communist persuasion, especially Communist party members.⁶ This verbose subsection

¹Act of June 27, 1952, ch. 477, 66 Stat. 163, 8 U.S.C. § 1101 *et seq.* (1970).

²See R. GRIFFITH, *THE POLITICS OF FEAR* 30-48 (1970) for a general discussion of the politics of anti-Communism after World War II.

³There are 31 categories of excludable aliens, including ex-convicts, paupers, those with serious mental or physical illnesses, and those who have tried to enter the U.S. by fraud. Immigration and Nationality Act of 1952, § 212(a), 8 U.S.C. § 1182(a) (1970).

This section was taken nearly verbatim from the Internal Security Act of 1950, which in turn had modified a statute passed during World War I. Both the 1950 and 1952 acts were passed over President Truman's veto.

The 1950 act is commonly known as the McCarran Act; the 1952 immigration act often goes by the name "McCarran-Walter Act." The references are to their legislative sponsors, Sen. Patrick A. McCarran (D-Nev.), chairman of the Senate Judiciary Committee from 1949-53, and Rep. Francis E. Walter (D-Pa.), a leading member of the House Un-American Activities Committee at the time and later its chairman.

⁴8 U.S.C. § 1182(a)(28)(D) and (G)(v) (1970).

⁵8 U.S.C. § 1101(a)(37) (1970).

⁶See the Congressional findings passed as part of the Internal Security Act of 1950, Act of September 23, 1950, ch. 1024, § 2, 64 Stat. 987, *codified in* 50 U.S.C. § 781 (1970); 1 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW*

of almost 1000 words excludes nearly all aliens who have any volitional⁷ ties to Communist organizations or theoretical communism simply because of that belief or affiliation.

This article will examine section 212(a)(28) and the accompanying procedural provisions in light of political and legal developments of the years since the passage of the Immigration and Nationality Act. The analysis will suggest that section 212(a)(28) has outlived whatever usefulness it ever may have had, that the Supreme Court is unlikely to give it close constitutional scrutiny, and that therefore any Congressional review of the immigration laws should include repeal or substantial modification of section 212(a)(28).⁸

In considering the merits of ideological restrictions, this discussion will rely on both judicial and legislative statements of the law. For reasons to be discussed in section III, however, Congress, not the courts, must address the merits of the issue.⁹

II. THE ALIEN ADMISSION PROCEDURE

An alien planning a temporary visit to the United States must have a U.S. visa affixed to his passport. In most cases, the visa application procedure is fairly simple.¹⁰ The alien presents his passport, a photograph, and a three-page application form¹¹ at the U.S. consulate nearest his home. Usually the visa is granted on the same day the application is filed, although the consular officer may require additional documents to prove the identity and eligibility of the applicant. In hardship cases a visa may be granted by mail.¹²

If the consular officer determines that, under section 212(a), the alien is not eligible for a visa, his conclusion must be reviewed by the principal consular officer at the post. The State Department in Washington may review the consular officer's decision and issue an "advi-

AND PROCEDURE 2-225 (rev. ed., 1966) [hereinafter cited as GORDON & ROSENFELD].

⁷8 U.S.C. § 1182(a)(28)(I) (1970) permits the admission of aliens who were required by law or economic necessity to join Communist groups, if they have since disavowed Communism, thereby allowing anti-Communist emigrants from Iron Curtain countries to enter the United States.

⁸This article will not deal with the provisions which exclude probable spies and saboteurs from the United States. As is discussed in the text accompanying notes 92-95 *infra*, those provisions, 8 U.S.C. § 1182(a)(27) and (29) (1970), raise somewhat different questions than does subsection (a)(28), which provides for exclusion on ideological grounds alone, with no showing that the alien's admission would probably harm the United States or its citizens.

⁹*Cf. Developments in the Law — The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1134 (1972) [hereinafter cited as *Developments*].

¹⁰The procedure is specified by 22 C.F.R. § 41.110 *et seq.* (1974), and is described in detail in 1 GORDON & ROSENFELD, *supra* note 6, at 3-64 to 3-74.

¹¹State Department Form FS-257a, *reprinted in* 2 GORDON & ROSENFELD, *supra* note 6, at 10-87 to 10-89.

¹²22 C.F.R. § 41.114(a)(8) (1974).

sory opinion."¹³ Consuls usually follow such advice.¹⁴ The State Department may require consuls to submit certain classes of cases for advice,¹⁵ and will review individual cases which members of Congress or American attorneys call to its attention.¹⁶ No other procedure exists for review of the consul's determination whether an alien is admissible.¹⁷

If either the consular officer or the Secretary of State believes that an alien barred from entry by section 212(a) nevertheless ought to be admitted, he may recommend that the Attorney General invoke section 212(d)(3)(A) to waive the inadmissibility and grant the visa. The alien or his attorney may ask the State Department to make such a recommendation.¹⁸ The Attorney General has sole discretion to make the waiver decision.¹⁹ In practice, district directors of the Immigration and Naturalization Service (INS) pass on the waiver recommendations²⁰ and grant nearly all of them.²¹ An unsuccessful applicant cannot appeal.²² The Attorney General must make a detailed report to the Congress of cases in which ineligibility under subsection (a)(28) is waived.²³

Persons seeking permanent residence visas face a procedure similar to that for temporary visitors.²⁴ Such persons are not, however, entitled to waiver from the Attorney General.²⁵

An alien holding a valid permanent or temporary visa may still be found to be inadmissible by the INS at the border.²⁶ This rarely happens; few such persons are issued visas.²⁷ The standard procedure at the border consists of a hearing before a special inquiry officer of the INS, with appeal to the Board of Immigration Appeals.²⁸ Aliens may be excluded for reasons of national security under section

¹³ 22 C.F.R. § 41.130(c) (1974).

¹⁴ 1 GORDON & ROSENFELD, *supra* note 6, at 3-59.

¹⁵ 22 C.F.R. § 41.130(c) (1974).

¹⁶ 1 GORDON & ROSENFELD, *supra* note 6, at 3-71, 3-59.

¹⁷ *Id.* at 3-58 to 3-59 and the sources cited therein.

¹⁸ 22 C.F.R. § 41.95 (1974).

¹⁹ The waiver process is discussed in greater detail in section IV. B. of this article.

²⁰ 8 C.F.R. § 212.4(a) (1974).

²¹ *Kleindienst v. Mandel*, 408 U.S. 753, 768 (1972).

²² 8 C.F.R. § 212.4(a) (1974). Aliens who do not require visas, *e.g.*, Canadians, follow a somewhat different process which does not involve the State Department. If they believe they may be found ineligible to enter, they may directly petition the Attorney General for a waiver in advance of their planned visit. If the Attorney General denies them a waiver of ineligibility, they may appeal to the Board of Immigration Appeals. 8 U.S.C. § 1182(d)(3)(B) (1970); 8 C.F.R. § 212.4(b) (1974); 1 GORDON & ROSENFELD, *supra* note 6, at 2-247.

²³ 8 U.S.C. § 1182(d)(6) (1970).

²⁴ 22 C.F.R. § 42.110 *et seq.* (1974).

²⁵ 8 U.S.C. § 1182(d)(3) (1970).

²⁶ 8 U.S.C. § 1201(h) (1970).

²⁷ Gordon, *Finality of Immigration and Nationality Determinations*, 31 U. CHI. L. REV. 433, 439 (1964).

²⁸ 8 U.S.C. § 1226 (1970); 8 C.F.R. § 236 (1974).

212(a)(27-29) without a hearing.²⁹ Their cases must be reviewed by the regional commissioner of the INS, but no further administrative appeal is available. The commissioner may keep the reasons for exclusion confidential if he believes disclosure "would be prejudicial to the public interest, safety, or security."³⁰

Although an alien undergoing these review proceedings can be incarcerated at the border, he will usually be admitted to the U.S. on parole while the case is pending. The district director of the INS may grant parole and prescribe conditions and terms of parole.³¹ An alien or his attorney may request that parole be granted.³² Even if the parolee's freedom in the U.S. is unrestricted, and even if his parole continues for a long period of time, he is deemed never to have entered the country and his case is still governed by the standards for exclusion of non-residents, rather than the standards applying to the deportation of resident aliens.³³

Judicial review of exclusion orders is very limited. Congress in 1961 limited review to habeas corpus proceedings,³⁴ thereby nullifying an earlier Supreme Court decision³⁵ that exclusion orders could be tested by declaratory judgment actions under the Administrative Procedure Act.³⁶ The same 1961 statute bars judicial review if the excluded alien has departed the country pursuant to the exclusion order.³⁷ Although habeas corpus traditionally was available only to persons in physical custody, it has been extended to aliens admitted on parole.³⁸

The consular officer's decision whether to grant a visa is not subject to judicial review.³⁹ The Attorney General's decision on waiver

²⁹ 8 U.S.C. § 1225(c) (1970); 8 C.F.R. § 235.8 (1974).

³⁰ 8 C.F.R. § 235.8(c) (1974), discussed in H. Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 *FORDHAM L. REV.* 145, 161-68 (1958).

³¹ 8 U.S.C. § 1182(d)(5) (1970); 8 C.F.R. § 212.5(a) (1974), discussed in 1 *GORDON & ROSENFELD*, *supra* note 6, at 3-101 to 3-103.

³² J. WASSERMAN, *IMMIGRATION LAW AND PRACTICE* 278 (2d ed. 1973).

³³ 8 U.S.C. § 1182(d)(5) (1970); *Ma v. Barber*, 357 U.S. 185, 188-90 (1958); Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 *YALE L.J.* 760, 787-88 (1962).

³⁴ Act of September 26, 1961, Pub. L. No. 87-301, 75 Stat. 650, 653, adding 8 U.S.C. § 1105a(b) (1970).

³⁵ *Brownell v. Tom We Shung*, 352 U.S. 180 (1956).

³⁶ 5 U.S.C. § 701 (1970).

³⁷ 8 U.S.C. § 1105a(c) (1970), discussed in 2 *GORDON & ROSENFELD*, *supra* note 6, at 8-27 to 8-31.

³⁸ *Varga v. Rosenberg*, 237 F. Supp. 282, 285-86 (S.D. Cal. 1964); *Menon v. Esperdy*, 248 F. Supp. 261, 263 (S.D.N.Y. 1965), *aff'd* 413 F.2d 644 (2d Cir. 1969); *Hon Keung Kung v. District Director, INS*, 356 F. Supp. 571, 572-73 (E.D. Mo. 1973). These three immigration cases rely on *Jones v. Cunningham*, 371 U.S. 236, 239-40 (1963), in which the Supreme Court for the first time permitted a parolee from a penal institution to seek the writ.

³⁹ The law on this point is discussed at length and criticized in Rosenfield, *Consular Non-Reviewability: A Case Study in Administrative Absolutism*, 41

applications is "committed to agency discretion by law" and therefore denial of a waiver is also nominally immune from judicial review,⁴⁰ although the Supreme Court in the 1972 case of Belgian Marxist journalist Ernest Mandel granted such review.⁴¹ The government had cited the statutes barring review in its brief.⁴² The Court there held that if the Attorney General's reasons for denying a waiver were facially legitimate, judicial scrutiny was at an end.⁴³ It explicitly left open the question of whether judicial review could be had if the Attorney General specified no reasons at all.⁴⁴

Since the practical difficulties of obtaining judicial review deter most aliens from presenting their cases to the American courts, the number of appellate opinions on exclusion is very small. The visa application procedure takes place abroad; the alien obviously cannot come to the U.S. while the proceedings are pending. The Supreme Court has suggested that "an alien who has never presented himself at the borders of this country" may not be entitled to bring an action in U.S. courts challenging the denial of his visa application.⁴⁵

The *Mandel* case arose in circumstances which enabled the courts to deal with it without facing these procedural hurdles. In addition to Dr. Mandel, the excluded alien, the plaintiffs were eight American professors who had extended lecture invitations to him. They sought a declaratory judgment that subsections 212(a)(28) and (d)(3) were unconstitutional, and an injunction ordering the defendant Attorney General to waive Mandel's ineligibility for a visa. The Department of State had recommended a waiver, but the Attorney General had refused to grant it. The American plaintiffs asserted their first amendment rights to hear and meet with Mandel.⁴⁶ Mandel, as a non-resident alien, had no first amendment rights.⁴⁷ In 1971, a three-judge federal district court, in a 2-1 decision, granted the injunction and a declaratory judgment that these portions of section 212 were unconstitutional as applied to Mandel.⁴⁸ On direct appeal

A.B.A.J. 1109 (1955). A view sympathetic to the state of the law and collecting many case citations is in *Mandel v. Mitchell*, 325 F. Supp. 620, 647-48 (E.D.N.Y. 1971) (dissenting opinion), *rev'd sub nom.* *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

⁴⁰ 8 U.S.C. § 1182(d)(3) (1970); 5 U.S.C. § 701(a)(2) (1970).

⁴¹ *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

⁴² Reply Brief for Appellants at 7, *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

⁴³ 408 U.S. at 770. See text accompanying notes 128-31, *infra*.

⁴⁴ 408 U.S. at 770.

⁴⁵ *Brownell v. Tom We Shung*, 352 U.S. 180, 184 n. 3 (1956); *accord*, *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) (dictum).

⁴⁶ *Mandel v. Mitchell*, 325 F. Supp. 620, 624, 631-32 (E.D.N.Y. 1971), *rev'd sub nom.* *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

⁴⁷ 408 U.S. at 762.

⁴⁸ 325 F. Supp. 620.

by the government, the Supreme Court reversed by a vote of six to three.⁴⁹

The Court noted that few aliens have such American friends to assist them in being heard in the U.S. courts, and saw no ground on which it could distinguish renowned scholars from aliens who were less "articulate . . . well-known and . . . popular."⁵⁰ Hence, it concluded, a decision for Mandel would either nullify the entire exclusion procedure or require the courts to weigh first amendment interests on the basis of an alien's potential audience.⁵¹ The Court did not wish to do either.

Ordinarily, the alien admission procedure provides little opportunity for an alien to challenge his exclusion in the courts. But these practical considerations are by no means the only barriers to judicial examination of the statutes and regulations pertaining to exclusion. Even when exclusion cases reach the courts, judicial doctrines of long standing usually preclude scrutiny of the merits of the exclusion scheme.

III. BARS TO JUDICIAL REVIEW

The Supreme Court has consistently held that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁵² Although resident aliens are under the aegis of the Constitution and its due process clause, even in deportation proceedings, non-resident aliens have no right to enter and are entitled only to the proper functioning of whatever immigration process Congress has established, whether or not it is in accord with the substantive standards which the Constitution requires in other areas of the law and whether or not it provides for full judicial review.⁵³ In the words of a Supreme Court justice, "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores."⁵⁴

The courts have accepted this principle since the earliest immigration cases, late in the nineteenth century.⁵⁵ It was based on the

⁴⁹408 U.S. 753 (1972). Justice Blackmun wrote the opinion of the Court. Justices Marshall, Brennan and Douglas dissented.

⁵⁰*Id.* at 768.

⁵¹*Id.* at 768-69.

⁵²*United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

⁵³*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), and the cases cited therein; Gordon, *The Alien and the Constitution*, 9 CAL. WESTERN L. REV. 1, 21-22 (1972). This is true even if the non-resident has been admitted to the United States on parole. See text accompanying note 33, *supra*.

⁵⁴*Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (concurring opinion of Mr. Justice Murphy).

⁵⁵*Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (exclusion); *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (deportation).

status of the exclusion power as an "inherent power of sovereignty" in international law.⁵⁶ The more recent cases have accepted this doctrine without argument as "not merely a page of history . . . but a whole volume" which courts are compelled to follow.⁵⁷ Dissenting in *Kleindienst v. Mandel*, Justice Thurgood Marshall suggested that the argument deserved re-examination, if not merely because of the passage of time then because the doctrine was first expounded in cases upholding exclusion of Chinese and Japanese aliens because of their race, a criterion hardly consistent with modern social and legal thought.⁵⁸

The early immigration cases justified affirmance of exclusion orders by referring both to "inherent powers" and to those foreign affairs powers which the Constitution explicitly vests in the political branches of government.⁵⁹ Under either rationale, the Supreme Court held that the judiciary had no power to review the merits of the exclusion scheme unless Congress explicitly provided for review, and that Congress was not required to make such provision.⁶⁰

The Chinese Exclusion Case,⁶¹ decided in 1889, was supplanted as the leading authority for the "inherent powers" doctrine in 1936 by Mr. Justice Sutherland's famous opinion for the Supreme Court in *United States v. Curtiss-Wright Export Corporation*.⁶² Here the Court declared that in matters of foreign policy the federal government was not limited to the powers expressly or impliedly granted to it by the Constitution. In matters touching international relations, the political branches possessed the powers of sovereignty recognized by international law by virtue of the fact of sovereignty alone and not by virtue of the Constitution. Both the merits of this doctrine and the accuracy of the Court's historical analysis have been vigorously challenged,⁶³ but a majority of the Supreme Court has never shown

⁵⁶ 130 U.S. at 603-09.

⁵⁷ *Galvan v. Press*, 347 U.S. 522, 531 (1954), cited in *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

⁵⁸ 408 U.S. at 781-82 (dissenting opinion of Mr. Justice Marshall), discussed in the text accompanying notes 97-105 *infra*.

⁵⁹ 130 U.S. at 609; 149 U.S. at 711-12, discussed in Quarles, *The Federal Government: As To Foreign Matters, Are Its Powers Inherent As Distinguished From Delegated?*, 32 GEO. L.J. 375, 381 (1944).

⁶⁰ 142 U.S. at 660.

⁶¹ 130 U.S. 581 (1889), discussed in L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 18 (1972) [hereinafter cited as HENKIN].

⁶² 299 U.S. 304 (1936). The government charged Curtiss-Wright with violating an embargo on munitions exports. The embargo had been imposed by President Roosevelt pursuant to Congressional authorization, and the parties argued the permissibility of this delegation of legislative power, not the broad "inherent powers" question which the Court addressed in its opinion. The Supreme Court reversed the trial court's dismissal of the charges.

⁶³ HENKIN, *supra* note 61, at 289-91 n.10 cites many sources on both sides of the question. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 493-97 (1946), outlines the case against an "inherent powers" theory. Three dissenting opinions in deportation

any inclination to abandon the doctrine.⁶⁴

Immigration cases after *Curtiss-Wright* have continued to use "inherent powers" as one of several paths to the same result: affirmance of an alien's exclusion without regard to the substantive constitutional factors which the courts consider in decisions not involving aliens. The Supreme Court has continued to rely on the Oriental exclusion cases⁶⁵ as well as *Curtiss-Wright*, and has continued to refer both to "inherent powers" and to constitutional vesting of those powers in the political branches of government.⁶⁶ Opinions have also made explicit reference to the long history of judicial deference to Congress, and suggested that continued deference was appropriate regardless of what the Court might decide if writing on a clean slate.⁶⁷ A 1950 case suggested that non-review was justified because admission of an alien was a privilege and not a right,⁶⁸ a distinction restating the inherent power and no due process argument.⁶⁹

cases also argue against application of the "inherent powers" rationale. *Fong Yue Ting v. United States*, 149 U.S. 698, 737-38 (1893) (dissenting opinion of Mr. Justice Brewer); *Id.* at 757-58 (dissenting opinion of Mr. Justice Field); *Harisiades v. Shaughnessy*, 342 U.S. 580, 599-600 (1952) (dissenting opinion of Mr. Justice Douglas).

⁶⁴The Court has implicitly but not explicitly classified foreign relations questions into two types, those dealing primarily with individual liberty and those dealing primarily with governments. Except for cases involving aliens, it has used doctrines of limited review or non-review only in the second class of cases. For example, the decision whether to permit American citizens to travel to certain foreign countries can create international incidents, but it primarily involves the liberty of the persons who desire to travel. Therefore the Court has reviewed these cases on their merits. 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, Part 1, at 116-17 (1963); see the cases cited in notes 80-82 *infra*. On the other hand, the Court has declined to review questions where the impact is primarily on intergovernmental relations, such as the recognition of foreign governments or the ending date of hostilities. *Id.* at 113, 117; *Baker v. Carr*, 369 U.S. 186, 212-13 (1962).

Exclusion cases, however, have been an exception to this dichotomy. Even though exclusions are in the first category, directly involving personal liberty, the non-resident alien's lack of constitutional protections prevents the courts from weighing these personal liberty factors against Congressional policy.

⁶⁵See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

⁶⁶HENKIN, *supra* note 61, at 303-04 n.31.

The Supreme Court has never used the "political question" doctrine as the justification for non-review in immigration cases. It would lead to the same result by somewhat different reasoning. Under the "political question" theory, the judiciary would abstain entirely from examination of the merits of the question. Following *Curtiss-Wright*, once the court determines that a case deals with foreign affairs, issues relating to the substance of the Constitution become immaterial and the government action is held to be permissible. *Id.* at 213, 449-50 n.26.

⁶⁷*Galvan v. Press*, 347 U.S. 522, 531 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 587-91 (1952); *Id.* at 596-98 (concurring opinion of Mr. Justice Frankfurter).

⁶⁸*United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

⁶⁹The Supreme Court has rejected the right-privilege distinction in other contexts. *Graham v. Richardson*, 403 U.S. 365, 374 (1971) and the cases cited therein; *Van Alstyne, The Demise of the Right-Privilege Distinction in Constitu-*

The Supreme Court continues to find this state of the law acceptable, most recently in the *Mandel* case.⁷⁰ The courts, following the doctrines just discussed, ask only whether the ideological exclusion system is permissible under the powers of sovereignty invested in the government by international law.⁷¹ They do not consider its wisdom or compare it with the provisions of the Bill of Rights, which the non-resident alien is not permitted to invoke. No matter which of the several theories they use, the courts uphold the ideological exclusion scheme enacted by Congress.

Congress' inquiry, however, is broader in scope. The Congress has the power to, and should, ask whether ideological exclusions are necessary, wise, and consistent with other principles of the American government. The fact that ideological exclusions are permissible is no answer to those questions. The remainder of this article will examine the merits of the system of discretionary ideological exclusion established by section 212 of the 1952 act, pointing out how and why Congress should ask those questions and deal anew with the issue.

IV. POLICY CONSIDERATIONS

A. IDEOLOGICAL EXCLUSIONS

Enacted at a time when the domestic and international political climate was quite different from that of the mid-1970s, the exclusion standards are out of step with changing political and legal attitudes reflected in other areas of the law. Hence a re-examination of the assumptions on which they are based is in order. In this examination, the approaches of the Supreme Court to constitutional attacks on similar legislation not dealing with aliens provide a number of analogies useful in assessing the wisdom and necessity of ideological exclusion.

1. BELIEF, ASSOCIATION AND ACTION

Because the doctrines examined in section III significantly limit the scope of judicial review in exclusion cases, the ideologically-based restrictions on the entry of aliens have not been subject to the trend of judicial interpretation which has increasingly limited the exercise of government power on the basis of an individual's associations and beliefs.

tional Law, 81 HARV. L. REV. 1439 (1968). Its application to immigration cases is discussed in Note, *Immigrants, Aliens, and the Constitution*, 49 NOTRE DAME LAW. 1075, 1079-81 (1974).

⁷⁰ *Kleindienst v. Mandel*, 408 U.S. 753, 765-67 (1972).

⁷¹ The modern international law in this field is based in large degree on the U.S. Oriental exclusion cases, not vice versa. M. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 18 (1946).

The first constitutional challenge to the initial ideological exclusion law, the 1903 statute barring anarchists, raised, among other issues, the claimed first amendment rights of the alien facing deportation. The Supreme Court dismissed the challenge in *United States ex rel. Turner v. Williams*.⁷² The Court reasoned that since Congress had decreed that alien anarchists were not welcome in the United States, such persons had no constitutional rights and therefore the case presented no issue.

Fifty years later, in *Harisiades v. Shaughnessy*, the Court rejected a first amendment challenge to the deportation of a Communist party member. The Court cited only *Dennis v. United States*,⁷³ decided at the preceding term, which had affirmed the convictions of eleven leaders of the U.S. Communist party under the 1940 Smith Act forbidding conspiracies to overthrow the government. Unlike the *Turner* court, the *Harisiades* court recognized the first amendment rights of the resident alien, but applied the balancing test laid down in *Dennis* and subordinated those rights to the government's interest in preventing violent revolution.

Since that time, however, the Court has limited the scope of the Smith Act. To sustain a conviction for Communist party membership, the Court has held that the government must show intentional, active membership with knowledge of the party's illegal aims and with the specific intent to bring them about, not the mere voluntary listing of a name on the rolls.⁷⁴ The Supreme Court has similarly interpreted the section of the Smith Act forbidding advocacy of the overthrow of the government. The Court held that the Constitution permits conviction only of a defendant who has advocated concrete action toward overthrow, with some substantial likelihood that the action will take place "as speedily as circumstances would permit."⁷⁵

The trial court in the *Mandel* case contrasted the *Turner* and *Dennis* approaches and concluded that *Harisiades* compelled application of the Smith Act precedents in immigration matters generally, making no distinction between the deportation involved in *Harisiades* and the exclusion in *Mandel*.⁷⁶ It then took note of the post-*Dennis*

⁷²194 U.S. 279, 292 (1904).

⁷³*Harisiades v. Shaughnessy*, 342 U.S. 580, 591-92 & n.18 (1952), citing *Dennis v. United States*, 341 U.S. 494 (1951).

⁷⁴*Scales v. United States*, 367 U.S. 203, 221-23 (1961).

⁷⁵*United States v. Foster*, 9 F.R.D. 367, 391 (S.D.N.Y. 1949), *aff'd sub nom. Dennis v. United States*, 341 U.S. 494 (1951), *quoted with approval in Yates v. United States*, 354 U.S. 298, 326 (1957).

The Court has applied these tests in many areas other than criminal convictions under the Smith Act. See text accompanying notes 79-84 *infra*.

⁷⁶*Mandel v. Mitchell*, 325 F. Supp. 620, 628 (E.D.N.Y. 1971), *rev'd sub nom.*

Smith Act cases and held that they rendered section 212(a)(28)(D) unconstitutional and entitled Mandel to a visa.⁷⁷ This approach ignored the fact that, while resident aliens facing deportation have substantive constitutional rights, non-resident aliens being excluded do not. Thus, while the Smith Act cases might preclude deportation for mere theoretical advocacy of communism or totalitarianism,⁷⁸ they are not legal precedents which would be helpful in the courts to a person such as Mandel seeking to enter the United States.

Although principles of stare decisis do not lead from the Smith Act cases to section 212(a)(28), those cases are particularly instructive from a policy perspective. While no intrinsic reason requires that the standards which limit criminal prosecutions for ideological speech and association should also limit governmental action in non-criminal fields, the Supreme Court has applied the rules developed in the Smith Act cases in nearly every situation in which government has attempted to deal with individuals on the basis of their beliefs.⁷⁹

The Supreme Court during the late 1950s and early 1960s prohibited the executive branch from denying passports to American citizens who were Communist party members,⁸⁰ even when the citizens wanted to travel abroad in furtherance of the Communist cause.⁸¹ The Court emphasized that these decisions were based on the same ideological grounds used to deny passports when it upheld the ban on travel to Cuba because it applied not just to Communists but to all citizens.⁸²

In 1967, the Supreme Court in *United States v. Robel* cited the passport and Smith Act precedents in condemning a statute forbidding Communist party members to work in defense plants.⁸³ The Court said that the Constitution requires proof of active membership combined with knowledge of illegal aims and specific unlawful intent before a Communist can be barred from employment in a defense plant. The trial court in the *Mandel* case relied heavily on *Robel*, and suggested that it was inconsistent for the standards for mere presence

Kleindienst v. Mandel, 408 U.S. 753 (1972). The court's failure to distinguish between deportation and exclusion is criticized in the dissenting opinion, 325 F. Supp. at 638, and in *Recent Cases: Constitutional Law*, 40 U. CINCINNATI L. REV. 592, 596 (1971).

⁷⁷ 325 F. Supp. at 625-26.

⁷⁸ The Seventh Circuit so held, explicitly applying the Smith Act precedents to reverse a deportation order, in *Scythes v. Webb*, 307 F.2d 905, 907-08 (7th Cir. 1962).

⁷⁹ *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 448-49 (1974), cites the leading cases.

⁸⁰ *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

⁸¹ *Dayton v. Dulles*, 357 U.S. 144, 153 (1958).

⁸² *Zemel v. Rusk*, 381 U.S. 1, 16 (1965).

⁸³ 389 U.S. 258 (1967).

in America to be more stringent than the standards for working in industries which were particularly vulnerable to espionage and sabotage.⁸⁴

In contrast, section 212(a)(28) bars the entry of those who merely belong to Communist organizations or advocate communist theory.⁸⁵ The case law, most of it involving deportations, has not narrowed the scope of the statute. Conscious volitional membership in the Communist party, even without a showing of support for its violent aims, was held sufficient for deportation,⁸⁶ and would presumably be sufficient for exclusion. The Supreme Court has held that mere cooperation with Communists in wholly lawful endeavors cannot justify deportation,⁸⁷ but the exclusion statute bars those "affiliated" with Communist groups and so the result might be different in an exclusion case.⁸⁸ Because of the practical difficulties of obtaining judicial review of exclusion, and the doctrines under which the courts will not examine exclusions on their merits, there is very little judicial gloss to the exclusion provisions in section 212(a)(28).

Because of this degree of judicial deference to the Congress in immigration matters, immigration is almost the only area in which government is able to exert its power solely on the basis of a person's Marxist beliefs. An alien may be excluded from America on grounds which could not justify, if he were here, denial of a government job⁸⁹ or of a property tax exemption.⁹⁰ Exclusion has a greater potential than either of those to deprive a person of "all that makes life worth living."⁹¹ Congress should repeal or amend section 212(a)(28) in order to apply to the important and fundamental question of whether an alien is to be permitted to enter, the same standards which the law requires be applied to much less momentous interactions of individual and government.

2. NATIONAL SECURITY

Although the argument that section 212(a)(28) keeps out of the United States persons who would be a threat to the country and its

⁸⁴Mandel v. Mitchell, 325 F. Supp. 620, 628 (E.D.N.Y. 1971), *rev'd sub nom.* Kleindienst v. Mandel, 408 U.S. 753 (1972). The Supreme Court in *Mandel* did not discuss this aspect of *Robel*; cf. the dissenting opinion in *Mandel v. Mitchell*, 325 F. Supp. at 640-41.

⁸⁵8 U.S.C. § 1182(a)(28)(C-E) (1970), discussed in Note, *Opening the Floodgates to Dissident Aliens*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 141, 158-60 (1970) [hereinafter cited as *Floodgates*].

⁸⁶*Galvan v. Press*, 347 U.S. 522, 528 (1954).

⁸⁷*Bridges v. Wixon*, 326 U.S. 135 (1945); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957).

⁸⁸8 U.S.C. § 1182(a)(28)(C) (1970).

⁸⁹*Elfbrandt v. Russell*, 384 U.S. 11 (1966). That the person is an alien would not bar him from these benefits. *Sugarman v. Dougall*, 413 U.S. 634 (1973).

⁹⁰*Speiser v. Randall*, 357 U.S. 513 (1958).

⁹¹*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

citizens has validity as to some of the people whom the subsection excludes, it is not valid with respect to many others. Laws written much more narrowly would better serve this legitimate objective. The essential problem with this justification for subsection (a)(28) is that those other laws exist and hence for this purpose the subsection is unnecessary. Another provision of section 212 explicitly excludes from entry those aliens whom a consular officer believes are likely to commit espionage or sabotage or foment public disorder in the United States.⁹² The same provision bars those whom it is reasonably suspected would work for the violent overthrow of the U.S. government.⁹³ In addition, another subsection provides for the exclusion of aliens whom the immigration officials believe would "engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."⁹⁴

While both these subsections are open to some of the same criticisms applicable to subsection (a)(28), they cover all aliens whose exclusion is justified by legitimate national security interests. The only additional effect of section 212(a)(28) is to exclude aliens who are being kept out for what they believe, not for what they might do to harm the United States.⁹⁵

To the extent that the prohibitions on entry go beyond those necessary to national security, they harm America's image abroad. They suggest that the United States is not strong enough or secure enough to tolerate the presence of those with hostile political and economic views. Many infer that the U.S. government considers the arguments of Marxists, even those Marxists without communist organizational ties, highly compelling and therefore dangerous. The exclusion standards imply that the Communists are correct in saying the American ideal of freedom of belief is a sham, and cause some foreigners to wonder how much difference exists between bureaucratic and intolerant Communist governments and the bureaucratic and intolerant American government.⁹⁶

Eliminating exclusions on the basis of ideological belief alone would improve America's international image without endangering the nation's security. It would not open America's doors to those who would commit politically-motivated crimes.

⁹² 8 U.S.C. § 1182(a)(29) (1970).

⁹³ *Id.*

⁹⁴ 8 U.S.C. § 1182(a)(27) (1970).

⁹⁵ See *Developments*, *supra* note 9, at 1159-60, and *Recent Developments: Constitutional Law — Immigration*, 47 WASH. L. REV. 155, 157-58, 171 & n.65 (1971).

⁹⁶ Shils, *America's Paper Curtain*, 8 BULL. OF THE ATOMIC SCIENTISTS 210, 210-11 (1952); Guzman, *The Treatment of Good Neighbors*, 8 BULL. OF THE ATOMIC SCIENTISTS 252, 258 (1952); *Floodgates*, *supra* note 85, at 145-46 n.28.

3. IDEOLOGY AND RACE

Much of the basic doctrine which the courts have used to uphold ideological restrictions on immigration was developed in connection with racial restrictions. The first bars to immigration to the United States, other than the now-notorious Alien Law of 1798, were against Chinese and Japanese in 1884.⁹⁷ Ideological restrictions did not reappear until 1903; they have been with us ever since.⁹⁸ The Oriental exclusion laws survived all constitutional challenges, and by 1903 the Supreme Court was able to say:

That Congress may exclude aliens of a particular race from the United States . . . [is a principle] firmly established by the decisions of this court.⁹⁹

In 1965, Congress eliminated the proportional national immigration quotas, the last vestige of racial restriction, and replaced them with a provision barring discrimination for or against a would-be immigrant on the basis of his race.¹⁰⁰ In today's social and political milieu, a return to outright racial exclusions is unthinkable.

The Supreme Court used the Oriental exclusion cases as part of its justification for refusing to scrutinize section 212(a)(28) in *Kleindienst v. Mandel*.¹⁰¹ Justice Marshall, in dissent, questioned the wisdom of relying on those cases in light of changing attitudes about race and more modern cases subjecting racial classifications to the strictest scrutiny under the equal protection¹⁰² and due process¹⁰³ clauses.¹⁰⁴ Even though non-resident aliens' lack of due process protections presumably justifies the majority decision under a strict stare decisis analysis, it hardly justifies continued ideological exclusions from a policy point of view. Similarly, although we used to exclude people because of their race, this is no argument for or

⁹⁷ 23 Stat. 115 (1884), discussed in *Floodgates*, *supra* note 85, at 141 n.2.

⁹⁸ 32 Stat. 1213 (1903), discussed in *Floodgates*, *supra* note 85, at 141 n.2, and in *Recent Decisions: Constitutional Law*, 3 GA. J. OF INT'L. & COMP. L. 457, 459 (1973). The constitutionality of this statute was affirmed in *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904).

⁹⁹ *The Japanese Immigrant Case*, 189 U.S. 86, 97 (1903), citing *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

¹⁰⁰ Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, amending 8 U.S.C. § 1152(a) (1970). There is a minor exception. A person may be granted immigrant status because he has fled his homeland to avoid persecution on account of race. 8 U.S.C. § 1153(a)(7)(A) (1970).

¹⁰¹ 408 U.S. 753, 765-66 (1972), citing *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

¹⁰² *McLaughlin v. Florida*, 379 U.S. 184 (1964) (cohabitation of unmarried interracial couples); *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation laws).

¹⁰³ *Bolling v. Sharpe*, 347 U.S. 497 (1954) (District of Columbia school integration), holding that the due process clause imposes on the federal government the same standards that the equal protection clause imposes on the states.

¹⁰⁴ 408 U.S. at 781-82 (dissenting opinion of Mr. Justice Marshall). Marshall's opinion cites none of the more recent cases.

against excluding them today because of what they believe. Justice Brewer in 1893 warned those eager to exclude Oriental aliens that the power to exclude them was also the power to exclude other classes who might fall out of political favor in the future.¹⁰⁵ Section 212(a)(28) has proven him right.

4. THE EXCHANGE OF IDEAS

The ideological exclusion system created by section 212(a)(28) has hampered international academic and scientific consultation. United States authorities have excluded a sizeable number of foreign scientists and scholars seeking to visit America to advance not Marxism but only their academic disciplines. Furthermore, the rationality of exclusions on the basis of belief is questionable, in that the Supreme Court has ruled that foreign publications cannot be excluded because of their ideological content.¹⁰⁶

The foreign publications case was *Lamont v. Postmaster General*, decided in 1965.¹⁰⁷ The Court struck down a statute requiring the postal authorities to detain incoming international mail which they determined to be "communist political propaganda," to inform the addressee that it was being held, and to deliver it only if the addressee made a specific request. The Court held that the statute impermissibly burdened the first amendment rights of the recipients.¹⁰⁸ The issue of the first amendment rights of American citizens becomes more complicated when the claimed right is to hear a foreign national in person, which was the principal issue in *Kleindienst v. Mandel*.¹⁰⁹ There the Court refused to extend the *Lamont* rationale to require the admission of an alien Marxist for a lecture tour. But the dissents noted the anomaly that, while Dr. Mandel could not come to the U.S. because of his ideological beliefs (there being no assertion that he had Communist organizational affiliations or that his presence would be harmful to the United States), his

¹⁰⁵ *Fong Yue Ting v. United States*, 149 U.S. 698, 743 (1893) (dissenting opinion of Mr. Justice Brewer).

¹⁰⁶ *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

¹⁰⁷ *Id.*

¹⁰⁸ A similar regulation, the requirement of a license to import goods from China and North Vietnam, was upheld as applied to books and periodicals. *Teague v. Regional Commissioner of Customs*, 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969). The Second Circuit upheld the regulation as being merely incidental to a valid government purpose, distinguishing *Lamont* on this ground. No such purpose is apparent for section 212(a)(28); see text accompanying notes 92-96 *supra*. Justice Black wrote an opinion dissenting from the denial of certiorari in *Teague*, believing the Second Circuit decision to be inconsistent with *Lamont*. The author of Case Comment, *Constitutional Law — Alien Exclusion*, 47 NOTRE DAME LAW. 341, 347-48, 351 (1971), would have used the *Teague* approach to decide *Mandel*.

¹⁰⁹ 408 U.S. at 762. A non-resident alien has never been held to have first amendment rights.

books could circulate freely.¹¹⁰ Dissenting Justice Marshall would have held section 212(a)(28) unconstitutional on its face on the strength of *Lamont*.¹¹¹

One commentator discussing *Mandel* suggested a possible distinction between permanent immigrants and temporary visitors. The admission of an alien for a short-term visit, he indicated, could be analogized to the communication of ideas discussed in *Lamont*, even if the admission of a person to become a permanent resident of the United States could not.¹¹² The *Mandel* case in particular lends itself to this analysis in that Dr. Mandel planned to come to the U.S. for a lecture tour, and after his visa was denied addressed one of his planned audiences by transatlantic telephone.¹¹³ The Supreme Court is unlikely to adopt such a distinction, given its reliance in *Mandel* on precedents of minimal judicial review of all immigration cases, both temporary and permanent.¹¹⁴ But this could be a policy rationale for legislation limiting section 212(a)(28) to aliens seeking permanent immigrant visas, thereby wiping out the anomaly created by the juxtaposition of *Lamont* and *Mandel*: that an alien Marxist may send his writings into the United States and discuss Marxism by telephone with groups of Americans, but may not set foot in the U.S. simply because of his ideology.

This can be analyzed two ways. On the one hand, it suggests that section 212(a)(28) is unobjectionable because it does not keep ideas out of America. The ideas can be transmitted by any medium except the physical presence of an excludable alien. Judge Bartels, dissenting from the trial court decision in favor of Mandel, took this approach.¹¹⁵

These same facts, however, can lead to the conclusion that section 212(a)(28) is ineffective, useless, and irrational.¹¹⁶ If the ideas cannot be kept out, as *Lamont* suggests, what difference does it make how they are brought here? The ideas are presumably no more dangerous when carried in person than when sent by mail or telephone. If the alien's presence incites disorder or revolution, he can be excluded for that reason, without reliance on subsection (a)(28).¹¹⁷ Dr. Mandel reminded Americans that he proposed to bring "my revolutionary

¹¹⁰ *Id.* at 776 & n.2, 784 (dissenting opinion of Mr. Justice Marshall).

¹¹¹ *Id.* at 784 (dissenting opinion of Mr. Justice Marshall). See also text accompanying notes 144 and 145, *infra*. The trial court in *Mandel* did likewise. 325 F. Supp. at 626.

¹¹² Note, *Constitutional Law: Alien Exclusion*, 14 HARV. INT'L. L.J. 158, 164-65 (1973).

¹¹³ 408 U.S. at 759.

¹¹⁴ *Id.* at 765-67.

¹¹⁵ 325 F. Supp. at 640-61 (dissenting opinion).

¹¹⁶ Comment, *Exclusion of Nonimmigrant Aliens*, 4 N.Y.U.J. INT'L. L. & POL. 494, 501 (1971).

¹¹⁷ See text accompanying notes 92-94 *supra*.

views which are well-known to the public," not "high explosives."¹¹⁸

Furthermore, personal contact is not the same as the written word or even a telephone call. Even the judges who voted against Mandel conceded this fact.¹¹⁹ Justice Marshall in his dissent collected the leading discussions of this proposition.¹²⁰ Face-to-face contact between persons of different nations is particularly important to the academic and scientific communities. Although written literature and lectures which can be recorded on tapes of course have their place in academic endeavors, much progress is made at the frontiers of a discipline by spontaneous exchange of hypotheses, speculations, and questions.¹²¹ Scholarship knows no national boundaries.

Discussion of the effects of section 212(a)(28) on the travel of foreign scientists and scholars to the U.S. is not mere hypothetical speculation. The list of such persons excluded outright or granted visas only after lengthy delays is long and neither begins nor ends with Ernest Mandel. The *Bulletin of the Atomic Scientists* devoted an entire 50-page issue in October 1952 to the difficulties American immigration policy posed for the international scientific community.¹²² The magazine presented numerous case histories of distinguished European scientists barred by section 212(a)(28) from traveling to America. Some who were not barred outright were given visas only after months of delay, by which time the meetings they planned to attend in the U.S. were long past. Although the number of such exclusions has undoubtedly declined since that time, they continue to occur.¹²³

¹¹⁸ Appendix at 54, *Kleindienst v. Mandel*, 408 U.S. 753 (1972), cited in *Id.* at 784 (dissenting opinion of Mr. Justice Marshall).

¹¹⁹ 408 U.S. at 765 (opinion of the Court by Mr. Justice Blackmun); 325 F. Supp. at 641 (dissenting opinion).

¹²⁰ 408 U.S. at 776 nn. 1 & 2 (dissenting opinion of Mr. Justice Marshall).

¹²¹ *Floodgates*, *supra* note 85, at 147 & n.36; *Developments*, *supra* note 9, at 1154 & n.101; *Sweezy v. New Hampshire*, 354 U.S. 234, 261-63 (1957) (concurring opinion of Mr. Justice Frankfurter); Weisskopf, *Report on the Visa Situation*, 8 BULL. OF THE ATOMIC SCIENTISTS 221, 222 (1952).

¹²² 8 BULL. OF THE ATOMIC SCIENTISTS 209-58 (1952).

¹²³ *Floodgates*, *supra* note 85, at 145-46; Editorial, *A Wooden Welcome*, *Wall Street Journal*, November 25, 1974, at 14, col. 1. The latter describes the plight of scholars from Communist countries who have fallen out of favor with their own governments, but who nevertheless have sufficient ties to Communism to create problems under section 212(a)(28) when they seek to visit or immigrate to the United States.

In March 1975, a petition for certiorari was filed in the first such case to reach the Supreme Court after *Mandel*. *Lowe v. Secretary of State*, No. 74-1140, *petition for cert. filed*, 43 U.S.L.W. 3501 (March 10, 1975). Keith Lowe, a Jamaican citizen, was admitted on a non-immigrant visa. He attended college in the U.S. and became an Assistant Professor of Literature at the University of California, San Diego. Seeking permanent resident status in the U.S., he returned to Jamaica to apply for an immigrant visa at the American consulate, pursuant to 8 U.S.C. §1255(c). The consul found him inadmissible under section 212(a)(28) on the basis of his associations while a student in the United States.

"The value to society of the perspective gleaned from exposure to people of different nationalities is difficult to quantify, but recognizably existent."¹²⁴ Section 212(a)(28) makes that perspective more difficult to obtain, without any compensating justification. Thus Congress should consider its repeal.

B. WAIVER OF EXCLUSION

Section 212(a)(28) is only one part of the ideological exclusion scheme. If the State Department recommends waiver, the Attorney General has the power under section 212(d)(3)(A) to waive exclusions for any reason or for no reason.¹²⁵ Like the definition of the excludable classes, the waiver provisions are beyond effective judicial review because of the non-resident alien's lack of due process protections and the doctrines of non-review of immigration matters.¹²⁶ The waiver provisions raise troubling questions of policy. While they were enacted with the best of motives, and can be used to mitigate the harshness of the exclusion law, they do not provide the Attorney General with statutory standards to guide his discretion. Standardless, unreviewable administrative discretion is generally disfavored in American law because experience has shown that it is often abused.¹²⁷ Hence the waiver provisions provide yet another argument for elimination of the ideological exclusion system.

In *Kleindienst v. Mandel*, which was the first Supreme Court case directly addressing the waiver provisions, the Court accepted the Attorney General's facially legitimate reasons for exclusion as satisfactory and declined to look any further at the discretionary provisions, despite evidence that the reasons given were without merit.¹²⁸ Justice Marshall, in dissent, criticized this treatment of the issue in light of the first amendment considerations involved in the *Mandel* case.¹²⁹ The courts have usually demanded far more than facially legitimate explanations before permitting government actions on the basis of a person's beliefs and associations.¹³⁰ "The requirement of

Lowe and several of his faculty colleagues sued to require issuance of an immigrant visa. The District Court dismissed without opinion, and the Court of Appeals for the D.C. Circuit affirmed, again without opinion. Petition for Certiorari at 7-12. Certiorari was denied May 27, 1975. 95 S. Ct. 1997.

¹²⁴ *Floodgates*, *supra* note 85, at 147. See the cases cited in notes 80 and 81 *supra*.

¹²⁵ 8 U.S.C. § 1182(d)(3)(A) (1970). The waiver provision applies to all excludable classes except those pertaining to espionage and sabotage.

¹²⁶ See text accompanying notes 52-69 *supra*.

¹²⁷ *E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see the authorities cited in notes 149 and 150 *infra*, and *Cantwell v. Connecticut*, 310 U.S. 296, 305-06 (1940).

¹²⁸ 408 U.S. at 769; *cf. Id.* at 777-78 (dissenting opinion of Mr. Justice Marshall).

¹²⁹ *Id.* at 777-78 (dissenting opinion of Mr. Justice Marshall).

¹³⁰ *Recent Decisions: Constitutional Law*, 14 VA. J. INT'L. L. 177, 183 (1973);

'facial legitimacy' would appear to be one which the Attorney General could establish in nearly every case, given the original classification of an alien as excludable."¹³¹ The *Mandel* court expressly left open the question whether the Attorney General need specify his reasons at all when denying waiver.¹³²

The lack of enunciated justifications, or their secrecy, would make meaningful judicial review impossible and would require the courts to defer by necessity to the executive branch. The Supreme Court used analogous reasoning in 1953 in upholding exclusion of an alien on the basis of secret findings. Since the alien was not entitled to judicial review, they reasoned, there was no need to disclose the findings.¹³³ There the Court was not faced with the first amendment claims of American citizens, which caused it to give substantive review in *Mandel*. Gordon and Rosenfield note in their treatise on *Immigration Law and Procedure*, however, that in recent years few aliens have been excluded without a hearing or without disclosure of the reasons for exclusion.¹³⁴

Congress provided the waiver procedure to allow for extenuating circumstances when humanitarian considerations or an unusually strong public interest made it advisable to admit an otherwise excludable alien.¹³⁵ But some of those denied visas under section 212(a)(28) have refused to seek waiver from the Attorney General, feeling their application "would imply an acknowledgment of their guilt and an acceptance of the rightness of the law."¹³⁶ A 1971 article quoted a State Department official as saying that persons who were "active in leftist student organizations or invited to speak at highly publicized meetings sponsored by leftist organizations" were not likely to be granted a waiver. Persons out of the public eye and those visiting America for reasons unrelated to Marxism were more likely to be permitted to enter.¹³⁷

The waiver provisions raise troubling questions of policy, which have been discussed only by dissenters on the Court. Justice Brewer, in 1893, was the first to articulate the concern. Dissenting in one of the Oriental exclusion cases, he objected to a statutory provision

Note, *Constitutional Law — Alien Exclusion*, 14 HARV. INT'L. L.J. 158, 164 & n.41, 166-67 (1973); see the cases cited in notes 80-83 *supra*.

¹³¹ *Recent Decisions: Constitutional Law*, 14 VA. J. INT'L. L. 177, 182-83 (1973).

¹³² 408 U.S. at 769.

¹³³ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); accord, *Nishimura Ekiu v. United States*, 142 U.S. 651, 663-64 (1892).

¹³⁴ 1 GORDON & ROSENFELD, *supra* note 6, at 3-130.

¹³⁵ H.R. REP. NO. 1365, 82d Cong., 2d Sess. (1952), reprinted at 2 U.S. CODE CONG. & AD. NEWS (1952) 1653, 1705-06.

¹³⁶ Shils, *America's Paper Curtain*, 8 BULL. OF THE ATOMIC SCIENTISTS 210, 215 (1952).

¹³⁷ *Developments*, *supra* note 9, at 1154 n.97.

giving one border official absolute discretion to admit or exclude aliens in accordance with his own racial or ideological preference, however rational or irrational his choice might seem to another person, and however consistent or inconsistent it was with the spirit of the immigration laws or the Constitution.¹³⁸ Justice Field, dissenting in the same case, compared the provision to the infamous Alien Law of 1798, which had injected partisan politics into the process of immigration and exclusion.¹³⁹ President Truman made the same comparison in his veto message on the 1952 act.¹⁴⁰

In a 1953 "national security" exclusion case, excluded alien Ignatz Mezei was confined by the immigration authorities since no other country would admit him. Dissenting Justice Jackson objected to allowing the Attorney General sole power to order what amounted to indefinite incarceration. Jackson, who had served as a prosecutor at the Nuremberg trials, compared the procedure to those used in Nazi Germany and in Communist countries.¹⁴¹ Even Justice Frankfurter, whose insistence on judicial restraint manifested itself in most immigration cases,¹⁴² joined Jackson's dissenting opinion which argued that the summary and secret procedure, allegedly required because of the national security element of the case, violated procedural due process protections.¹⁴³

The Supreme Court in *Lamont v. Postmaster General* held unconstitutional the post office policy of seizing incoming mail deemed to be communist propaganda, and delivering it only on request. The Court said that placing a government official, even a ministerial one, astride the international stream of ideas was impermissible.¹⁴⁴ There the Court was dealing with a procedure that was much less objectionable by this standard than is section 212(d)(3); the government could not entirely prohibit delivery of any mail, and no government official was given discretion to pick and choose among "communist political propaganda." All such propaganda was subject to the detention-

¹³⁸ *Fong Yue Ting v. United States*, 149 U.S. 698, 741-42 (1893) (dissenting opinion of Mr. Justice Brewer).

¹³⁹ *Id.* at 746-50 (dissenting opinion of Mr. Justice Field).

¹⁴⁰ U.S. PRESIDENT, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN 1952-53, at 441, 445.

¹⁴¹ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 225-26 (1953) (dissenting opinion of Mr. Justice Jackson).

¹⁴² See *Harisiades v. Shaughnessy*, 342 U.S. 580, 596-98 (1952) (concurring opinion of Mr. Justice Frankfurter). An excerpt is quoted in the text accompanying note 151 *infra*.

¹⁴³ 345 U.S. at 218. The exclusion was upheld, 5-4. Justice Clark's majority opinion upheld it on the grounds that an unadmitted alien had no due process rights and that the courts could not look beyond the procedure authorized by Congress in immigration cases. Justice Black also wrote a dissenting opinion, in which Justice Douglas joined.

¹⁴⁴ 381 U.S. 301, 306 (1965).

notification procedure.¹⁴⁵

Dissenting in *Mandel*, Justice Douglas was particularly perturbed by section 212(d)(3). He suggested that the power to act on personal prejudices made the statute unconstitutional in that it put the Attorney General in the business of censoring ideas.¹⁴⁶ Douglas had found the same fault with the State Department's prohibition of travel to Cuba.¹⁴⁷

In earlier cases the Court had found statutes constitutionally wanting on this ground. The Attorney General's position under section 212(a)(28) and (d)(3) is similar to that of the police commissioner in *Kunz v. New York*.¹⁴⁸ The commissioner could, without any statutory standards to guide him, grant, deny, or revoke permits for streetcorner religious speakers. The Supreme Court held that the lack of any standards made the government official's power over the public expression of religious views unconstitutionally excessive.¹⁴⁹ Justice Frankfurter expressed the rationale thus in a "loyalty-security" case:

Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability.¹⁵⁰

Because it permits the exercise of standardless and unreviewed administrative discretion, the waiver procedure for those excluded under section 212(a)(28) is open to abuse and difficult to justify. Hence it contributes to, rather than mitigates, the inconsistencies between the ideological exclusion system and the principles which govern most other areas of the law. It provides yet another reason to eliminate the ideological exclusion provisions.

V. CONCLUSION

The respective roles of the judiciary and the Congress in matters of immigration policy were clearly stated by Mr. Justice Frankfurter, an

¹⁴⁵ *Id.*, discussed in *Kleindienst v. Mandel*, 408 U.S. 753, 781 (1972) (dissenting opinion of Mr. Justice Marshall). The criteria for deciding what was "communist political propaganda" were not at issue in *Lamont*.

The *Mandel* majority noted the similarity between the *Mandel* and *Lamont* cases, 408 U.S. at 764-65, but then based its decision on the other alien exclusion cases, notwithstanding the fact that they, unlike *Mandel*, did not involve the first amendment interests of American citizens. *Id.* at 765-67.

¹⁴⁶ *Id.* at 771-74 (dissenting opinion of Mr. Justice Douglas).

¹⁴⁷ *Zemel v. Rusk*, 381 U.S. 1, 26 (1965) (dissenting opinion of Mr. Justice Douglas).

¹⁴⁸ 340 U.S. 290 (1951), discussed in *Floodgates*, *supra* note 85, at 164.

¹⁴⁹ 340 U.S. at 294, and the cases cited therein; *accord*, *Staub v. City of Baxley*, 355 U.S. 313, 325 (1958) (permit requirement for labor organizing).

¹⁵⁰ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (1951) (concurring opinion of Mr. Justice Frankfurter).

immigrant himself and a lifelong civil libertarian, in voting to affirm the deportation of several aliens for their membership in the Communist party:

In their personal views, libertarians like Mr. Justice Holmes and Mr. Justice Brandeis doubtless disapproved of some of these policies, departures as they were from the best traditions of this country and based as they have been in part on discredited racial theories. . . . But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress¹⁵¹

The Supreme Court has indicated that it continues to feel constrained to defer to the legislative branch in immigration matters, and to adhere to almost a century of precedent barring excluded aliens from claiming that the exclusion scheme is inconsistent with the Bill of Rights.¹⁵² The shield of the Constitution does not extend to the non-resident alien seeking admission. But this article has discussed policy factors similar to those underlying the guarantees of the Bill of Rights, which suggest that Congress, the one branch of government constitutionally able to do so, should eliminate the ideological exclusion provisions from the immigration law.

One of the "best traditions of this country" that Frankfurter referred to is America's status as a nation of immigrants. For centuries this nation, and the colonies which preceded it, have been known around the world as a haven for ideological nonconformists and dissidents. The Statue of Liberty proclaims from its pedestal, "I lift my lamp beside the golden door." Section 212(a)(28) prompted an Australian professor to write a biting satire of that inscription, in which the statue tells foreign scientists, "I *slam* the golden door" (emphasis in original).¹⁵³

To suggest that Congress should repeal or drastically alter section 212(a)(28) and welcome visitors and new Americans regardless of what they think is not to advocate opening our doors to spies, saboteurs, and common criminals who would come here to threaten the security of Americans and their government. The United States can be adequately protected against such persons without excluding aliens solely because of what they think or used to think; the narrower laws which exclude those who would commit anti-social acts should be kept on the books. It is the purely ideological restrictions that make the United States appear unfeeling, fearful, and out of touch with its history and traditions. "If there is any fixed star in our constitutional," historical, and philosophical "constellation, it is that

¹⁵¹ *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (concurring opinion of Mr. Justice Frankfurter).

¹⁵² *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

¹⁵³ *Sawyer, The Statue of Liberty Speaks*, 8 BULL. OF THE ATOMIC SCIENTISTS 5 (1952).

no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"¹⁵⁴

Congress has not taken a comprehensive look at America's immigration policies since 1952, when its goal was not only comprehensive codification but also the use of immigration policy as a weapon in the cold war. Ideological restrictions on immigration are out of place in a world in which leaders of the United States and of the major Communist nations meet regularly, seeking to build new bridges of cooperation in the mutual interest of the United States and the Communist countries.

International law and the Constitution as interpreted by the Supreme Court permit the United States to exclude would-be visitors on the basis of ideology. But in the legal and political milieu of today, and in keeping with what Mr. Justice Frankfurter called "the best traditions of this country,"¹⁵⁵ we should not keep people out simply because of their political and economic beliefs when they cannot persuade a government official to admit them in spite of those beliefs.

Robert D. Bacon

¹⁵⁴ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁵⁵ *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (concurring opinion of Mr. Justice Frankfurter).

