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Rethinking the Role of Politics in United States Immigration Law: The Helsinki Accords and Ideological Exclusion of Aliens

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INTRODUCTION

In 1975 the United States became a signatory to the Helsinki Accords,¹ pledging itself to facilitate and foster greater international freedom of movement and exchange of ideas. In general, the United States has attempted to meet all of its obligations under the Accords. However, certain aspects of United States domestic law operate in direct contravention of the provisions of the Accords. In particular, the Immigration and Nationality Act of 1952 (INA),² the basic statute governing immigration matters, contains several provisions that inhibit the free flow of ideas and persons across national boundaries. Known collectively as the "ideological exclusion" provisions, these provisions have been and continue to be used to bar entry of noncitizens to the United States because of their espousal of proscribed ideologies.³

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The views expressed in this Article are those of the author and do not necessarily reflect the views of the United States Catholic Conference.

1. Conference of Security and Cooperation in Europe: Final Act, 37 DEP'T STATE BULL. 323 (Aug. 1, 1975), *reprinted in* INT'L HUMAN RIGHTS INSTRUMENTS 470.1 (R. Lillich ed. 1986) [hereinafter Final Act].

2. Immigration and Nationality Act of 1952, §§ 101-360, 8 U.S.C. §§ 1101-1503 (1982) [hereinafter INA].

3. 8 U.S.C. § 1182(a) contains the exclusion provisions of the INA. Exclusion proceedings are used to determine the inadmissibility of an alien into the territorial limits

This Article's purpose is to examine the statutory framework and case law addressing the ideological exclusion of aliens from the United States in light of the Helsinki Accords. It is important to note that Congress has suspended temporarily the application of certain ideological provisions until March 1, 1989.⁴ This measure was passed with a "sunset" provision because both houses of Congress have expressed interest in comprehensive, permanent revisions in the area of deportation and exclusion.⁵ This Article is intended to contribute to the ongoing dialogue concerning such permanent and much needed changes. The Article also will analyze proposed changes to the INA and suggest amendments and revisions to United States immigration law.

INTERNATIONAL FRAMEWORK: HELSINKI ACCORDS

The Conference on Security and Cooperation in Europe (the Conference), held in Helsinki, Finland, began in the summer of 1973 and lasted for approximately two years, culminating in a Final Act signed by participating states on August 1, 1975.⁶ The idea for these talks dates back to 1954, when the Soviet Union proposed to discuss European security with the United States and its NATO allies.⁷ Al-

of the United States, and may take place before entry (denial of visa abroad when an inspector determines inadmissibility), or after entry (deportation proceedings based on an excludable ground when entering or upon reentering). *See generally* 1 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* §§ 232-234 (rev. ed. 1987); T. ALEINIKOFF & D. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 16, 20 (1985).

4. On December 22, 1987, the President signed into law the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, 101 Stat. 1331 (Dec. 22, 1987). Section 901, title IX, of the Authorization Act suspends until March 1, 1989 sections of the INA that had prohibited admission into the United States because of beliefs or associations, or the anticipated content of statements made by a noncitizen while in the United States. The provision extends to visa applications made during 1988, admissions sought after December 31, 1987, and before March 1, 1989, and deportations based on activities during 1988 or for which deportation proceedings are pending during the same year. *Id.* § 901(d), 101 Stat. at 1400. The temporary change does not apply to denials of visas or admission based on foreign policy considerations or national security as long as these exclusions are not based on beliefs or activities protected by the Constitution, and terrorist activities. 133 CONG. REC. H11,297-351 (daily ed. Dec. 14, 1987); H.R. CONF. REP. NO. 475, 100th Cong., 1st Sess. 72, 73, 162-65 (1987) [hereinafter REP. NO. 475]; *See Alien — To Free Speech*, N.Y. Times, Dec. 15, 1987, at A30, col. 1.

5. A "sunset" provision limits the applicable time period of a statute. For the applicable time period of section 901(a), *see supra* note 4. *See* REP. NO. 475, *supra* note 4, at 165; 64 INTERPRETER RELEASES 1391-92 (Dec. 21, 1987); Blumenthal, *Congress Lifts Political Beliefs Bar to Aliens Under McCarran-Walter Act*, Wash. Post, Dec. 17, 1987, at A11, col. 1.

6. *See* Final Act, *supra* note 1. The Final Act is separated into four primary "baskets" or sets of issues that were negotiated: Basket I relates to questions of European security; Basket II relates to cooperation in economics, science and technology, and the environment; Basket III involves cooperation in humanitarian areas; and Basket IV is intended to set up follow-up actions.

7. *See* H.R. REP. NO. 1149, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 1159, 1161.

most twenty years later the political atmosphere of détente made it possible to bring together virtually all the states of Europe (except Albania), the United States, Canada and a number of non-European Mediterranean states which attended the conference as observers. The negotiations resulted in unanimous agreement, with all participating states becoming signatories to the newly created international instrument.⁸

The Helsinki Accords (the Accords) do not have the force of a treaty. They can be described as either an international declaration or a United Nations resolution.⁹ As such, obligations created under the agreement are moral, rather than legal, in character. Notwithstanding the agreement's nontreaty status, Congress ratified it and, in 1976, created a joint executive-congressional commission for the purpose of furthering the objectives of the Accords.¹⁰ Congress specifically intended that the commission enhance East-West economic cooperation and generate "a greater interchange of people and ideas between East and West."¹¹

A basic objective of the Conference was to foster cooperation in humanitarian and other fields. This objective is the focus of one part of the Accords, referred to as Basket III.¹² Both the United States and its NATO allies pushed strongly for the inclusion of Basket III as a major component of the Accords.¹³ Basket III addresses basic principles of international travel, as well as freedom of expression and the exchange of ideas. The participating states pledged to "facilitate freer movement and contacts individually and collectively, whether privately or officially, among persons, institutions and organizations. . . ."¹⁴

In order to realize the goal of greater international travel, the Accords urge signatory states to attempt "gradually to simplify and to administer flexibly the provisions for exit and entry" applicable to their respective territories.¹⁵ In addition, the Accords encourage member states to "facilitate the dissemination of oral information

8. *Id.*

9. For a discussion of United Nations resolutions and international declarations, see generally W. BISHOP, *INTERNATIONAL LAW* 46-51 (1962).

10. See Act of June 3, 1976, Pub. L. No. 94-304, 90 Stat. 661 (1976) (codified as amended at 22 U.S.C. §§ 3003-3009 (1985 & Supp. 1987)); see also H.R. REP. NO. 1149, *supra* note 7, at 1159 (legislative history).

11. See 22 U.S.C. § 3002.

12. H.R. REP. NO. 1149, *supra* note 7, at 1161.

13. *Id.*

14. Final Act, *supra* note 1, at 470.7.

15. *Id.* at 470.8.

through the encouragement of lectures and lecture tours by personalities and specialists . . . as well as exchange of opinions at round table meeting, seminars, symposia, summer schools, congresses, and other bilateral and multilateral meetings.”¹⁶

As a signatory to the Accords, the United States has committed itself to carrying out these obligations. Although Congress did pass legislation aimed at bringing the United States into greater compliance with the Accords, the legislation did little to alter the treatment accorded politically controversial aliens by existing immigration procedures and requirements.¹⁷ The chairman of the Helsinki Commission recently testified before Congress that “the ideological restrictions of the [INA] . . . contradict the very spirit of the Helsinki Accords, and at the same time damage the role of the United States in the Helsinki process.”¹⁸ The Chairman further testified that the United States is the “only signatory state that systematically excludes foreigners on the basis of their beliefs and affiliations as a formal statutory matter.”¹⁹ As such, the United States cannot claim an exemplary compliance record in an area relating directly to the humanitarian objectives that the Accords were intended to further.

UNITED STATES DOMESTIC LAW

Historical Background

The development of United States immigration laws, particularly the exclusion of aliens because of their political beliefs or associations, began with the Immigration Act of 1903.²⁰ As a direct result of the assassination of President William McKinley by a Czech anarchist, the statute focused on individuals who belonged to organizations that advocated the violent overthrow of the government.²¹ The exclusionary principles established by the 1903 Act remained essentially unchanged in the course of subsequent recodifications by Congress throughout the early decades of the twentieth century, with the Anarchist Act of 1918 constituting the basic law in this area until

16. *Id.* at 470.10-12. The Reagan Administration is on record as affirming these principles: “Expanding contact borders and permitting a free exchange or interchange of information and ideas increase confidence; sealing off one’s people from the rest of the world reduces it.” N.Y. Times, Jan. 17, 1984, at A8, col. 3 (transcript of President Reagan’s speech on Soviet-American relations).

17. Carliner, *U.S. Compliance with the Helsinki Final Act: The Treatment of Aliens*, 13 VAND. J. TRANSNAT’L L. 397 (1980); see also *infra* note 138 and accompanying text.

18. *Exclusion and Deportation of Aliens: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 125 (1987) (testimony of Steny H. Hoyer, Chairman of the Helsinki Commission) [hereinafter 1987 *Hearing*].

19. *Id.*

20. Immigration Act of 1903, ch. 1012, 32 Stat. 1213, 1222.

21. See 1 C. GORDON & H. ROSENFELD, *supra* note 3, at § 247a.

the middle of the century.²²

A major change occurred in 1940 with passage of the Alien Registration Act,²³ which expanded the temporal reach of these exclusionary provisions. Aliens now could be excluded from entry if at any time in the past they had advocated doctrines involving political violence against the government.²⁴ The Alien Registration Act established the principle that having once been associated with objectionable political beliefs, a person could be permanently forbidden to enter or reenter the United States.²⁵ If these restrictions reflected the political atmosphere in the United States before World War II, the immediate aftermath of the war and the ensuing cold war brought about changes that added greater specificity to the procedures and requirements which applied to exclusion of aliens on ideological grounds.

After the war, relations between the United States and the Soviet Union became particularly strained, and the late 1940s and early 1950s saw the onset of the cold war between the world's two new superpowers. In this tense and suspicious atmosphere, important changes in United States immigration law were not long in coming. In 1950, Congress enacted the Internal Security Act.²⁶ Section 22 of the Internal Security Act was the first specific exclusion of any present or past member of the Communist Party or its affiliates from admission to the United States. Further, the Internal Security Act declared in sweeping language that no alien would be allowed to enter the United States "to engage in activities which would be prejudicial to the public interest, or would endanger the public welfare or safety of the United States."²⁷

Modern Statutory Framework

In 1952, Congress overrode President Truman's veto and passed the INA.²⁸ The INA retained the old grounds for ideological exclu-

22. See Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898, 911; Act of Feb. 5, 1917, ch. 29, 39 Stat. 874; Anarchist Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012.

23. Alien Registration Act of 1940, ch. 439, 54 Stat. 670.

24. See 1 C. GORDON & H. ROSENFELD, *supra* note 3, at § 247a.

25. Alien Registration Act of 1940, 54 Stat. at 673.

26. Internal Security Act of 1950, ch. 1024, 64 Stat. 987.

27. *Id.* § 22(a), 64 Stat. at 1006.

28. President Truman wanted to liberalize the immigration laws. He stated of the ideological exclusion legislation: "seldom has a bill exhibited the distrust evidenced here for aliens and citizens alike. . . ." (cited in *Mandel v. Mitchell*, 325 F. Supp. 620, 625 (E.D.N.Y. 1971), *rev'd sub nom.* *Kleindienst v. Mandel*, 408 U.S. 763 (1972)). Truman appointed a commission to assess the newly passed legislation, and the commission issued

sions while adding new ones. The exclusion grounds are found in the INA, Title II, section 212.²⁹ There are three separate ideological exclusion sections, two of which, sections 212(a)(27) and (29), overlap. Noncitizens who are excludable under section 212(a)(29) may also be, and sometimes are, excluded under subsection 212(a)(27).³⁰ Both sections are broad in scope and at least one part of section 212(a)(29) already has been repealed by Congress.³¹

Because much of the controversy surrounding the ideological exclusion provisions concerns sections 212(a)(27) and (28), section 212(a)(29) will be discussed only to the extent that it is incorporated in proposed legislative changes.³²

Section 212(a)(27)

The language of section 212(a)(27), which is basically the same as section 22 of the Internal Security Act of 1950, purports to exclude “[a]liens who the consular officer or the Attorney General know or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.”³³ The scope of this provision is very broad, and does not limit the types of concerns that the government may use to bar aliens from entering the country. It has been recognized

its findings on January 1, 1953, concluding that the immigration laws “flout fundamental American traditions and ideas, display a lack of faith in America’s future, damage American prestige and position among other nations, [and] ignore the lessons of the American way of life.” T. ALENIKOFF & D. MARTIN, *supra* note 3, at 54.

29. INA § 212, 8 U.S.C. § 1182(a) (contains 33 classes of aliens who are barred from entering the United States on economic, health, criminal, quasi-criminal and moral, entry and documentary, technical, and political grounds); *see generally* T. ALENIKOFF & D. MARTIN, *supra* note 3, at 184-92.

30. *Exclusion and Deportation Amendments of 1983: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 202 (1984) (testimony of Assistant Secretary of State for Consular Affairs, Joan M. Clark) [hereinafter *1983 Hearing*].

31. Subversive Activities Control Act of 1950, 8 U.S.C. § 1102 (1950) (reference to section 7 of Subversive Activities Control Act in subsection 212(a)(C), repealed by Act of Jan. 2, 1968, Pub. L. No. 90-237, 81 Stat. 765 (1968)).

32. INA § 212(a)(29), 8 U.S.C. § 1182(a)(29) states:

Aliens with respect to whom the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, (A) engage in activities which would be prohibited by laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security, (B) engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States, by force, violence, or other unconstitutional means, or (C) join, affiliate with, or participate in the activities of any organization which is registered under section 7 of the Subversive Activities Control Act of 1950.

33. INA § 212(a)(27), 8 U.S.C. § 1182(a)(27). *See* Internal Security Act of 1950, § 22(1), 64 Stat. at 1006; *see also* H.R. REP. NO. 1365, 82d Cong., 2d Sess. 30 (1952); S. REP. NO. 1137, 82d Cong., 2d Sess. 19 (1952), *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1703.

that foreign policy concerns fall within the expansive language of section 212(a)(27). Thus, the government may bar noncitizens if they come from countries or belong to organizations hostile to the United States if it believes that their admission would be an embarrassment or that such noncitizens would criticize United States foreign policy once admitted.³⁴

The State Department's Foreign Affairs Manual indicates examples of aliens who might be excluded under section 212(a)(27). These include aliens who conspire against the United States government or any foreign government while in the country, a known member of a terrorist organization, a person known to be associated with a criminal organization, or a person who had practiced physical brutality while holding political office or who was associated with a government that practiced such brutality.³⁵

Aliens who were denied admission based on section 212(a)(27) criteria include Thomas Borge (1983), Nicaragua's Interior Minister; Nino Pasti (1984), former member of the Italian senate and retired general of the Italian armed forces and, at present, a member of the World Peace Council, which is considered by the State Department to be a front for the Soviet Union;³⁶ Olga Finlay and Leonor Rodriguez (1983), members of the Federation of Cuban Women; and Hortensia Allende (1985), the widow of former Chilean President Salvador Allende Gossens, and also a member of the World Peace Council.³⁷ Each of these individuals sought nonimmigrant visas for the purpose of attending conferences in the United States as invitees of United States citizens. All belong to organizations or governments considered to be hostile to the United States. Further, each denial of a nonimmigrant visa resulted in litigation, discussed in greater detail below. More importantly, however, the denial of visas to these individuals constitutes direct violation of the Helsinki Accords, provisions relating to the free flow of ideas and persons across national boundaries regardless of political ideology.³⁸

34. See *Abourezk v. Reagan*, 592 F. Supp. 880, 885-86 (D.D.C. 1984), *vacated*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd per curiam*, 108 S. Ct. 252 (1987).

35. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL pt. II, § 41.91(a)(27), *reprinted in* 6 C. GORDON & H. ROSENFELD, *supra* note 3, at § 41.91(a)(23)-(28) [hereinafter FOREIGN AFFAIRS MANUAL] (regulations indicate that consular officers must obtain an advisory opinion from the State Department before an alien is excluded under this provision).

36. See *Abourezk*, 785 F.2d at 1048.

37. See *Allende v. Schultz*, 605 F. Supp. 1220, 1222 (D. Mass. 1985).

38. See *supra* notes 14-16.

Section 212(a)(28)

The most controversial of the three ideological exclusion provisions is section 212(a)(28).³⁹ This provision is the only one for which a waiver of inadmissibility is available.⁴⁰ Section 212(a)(28) concerns itself with the political beliefs and ideology of aliens who want to enter the United States. The denial of a waiver under this section ultimately was challenged before the United States Supreme Court. The decision in that case has been, in turn, the source of much case law addressing ideological exclusion under immigration and nationality law.⁴¹

Section 212(a)(28) covers persons who:

1. are anarchists;⁴²
2. advocate or teach opposition to all organized government, or who are members of or affiliated with organizations opposing organized government;⁴³
3. are members of or affiliated with: the Communist Party of the United States; any communist or totalitarian party in the United States or anywhere in the world; any section, subsidiary, branch, subdivision of such organizations; or any predecessors or successors of such groups in the United States or elsewhere;⁴⁴
4. are not within other provisions of paragraph (28) who advocate world communism or the establishment of a totalitarian dictatorship in the United States, or are members of or affiliated with any organization advocating such doctrines, either through its own utterances or any written or printed publications issued or published with the permission, consent, authority or funds of such an organization;⁴⁵
5. are members of or affiliated with any organization subject to section 7 of the subversive Activities Control Act of 1950;⁴⁶
6. advocate or teach or belong to any organization that advances the violent overthrow of the United States government or all forms of law, or advocate the killing of an official of any government because of his or her official capacity, and destroy property or commit

39. INA § 212(a)(28), 8 U.S.C. § 1182(a)(28).

40. *Id.* § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A).

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

42. INA § 212(a)(28), 8 U.S.C. § 1182(a)(28)(A).

43. *Id.* § 1182(a)(28)(B). *See FOREIGN AFFAIRS MANUAL, supra* note 35, at § 42.91(a)(28)(1.2) (an advocate is a person who advises, recommends, furthers by overt act, and admits belief in a proscribed doctrine).

44. INA § 212(a)(28), 8 U.S.C. § 1182(a)(28)(C). *See FOREIGN AFFAIRS MANUAL, supra* note 35, at § 42.91(a)(28)(1.1) (a proscribed organization is anyone of the parent, subsidiary, or affiliate groups that has a Communist affiliation or that advocates the violent overthrow of the United States government, or the killing of any official of any organized government, destroys property or commits sabotage).

45. INA § 212(a)(28), 8 U.S.C. § 1182(a)(28)(D).

46. *Id.* § 212(a)(28), 8 U.S.C. § 1182(a)(28)(E).

sabotage;⁴⁷

7. knowingly write, publish, circulate, distribute, print or display materials that advocate or teach opposition to organized government, the violent overthrow of the United States or any organized government, and the killing of officials of such government through subversive activities;⁴⁸

8. are members of or affiliated with organizations that distribute, circulate, write, publish, print, display or possess any written or printed materials described in paragraph 7 above.⁴⁹

Except with regard to anarchists, section 212(a)(28) has an escape clause. If a person can convince the consular officer at the time of visa application that membership in or affiliation with the proscribed organizations or doctrines ended before his or her sixteenth birthday, or occurred involuntarily, by operation of law, or to obtain employment, food rations, or other essentials of living, he or she may be admitted.⁵⁰ In addition, the consular officer may grant admission if the person had terminated the affiliation or membership at least five years before applying for the visa, and has since been in active opposition to the proscribed doctrine or organization.⁵¹ The State Department has interpreted active opposition to include overt actions, like delivering speeches and writing articles or essays, as well as various covert activities.⁵² Further, the Attorney General may admit an alien if it is determined to be in the public interest of the United States to do so.⁵³

On its face, section 212(a)(28) is at odds with Basket III provisions of the Helsinki Accords. In an action that would seem, at the very least, to be a tacit admission that the immigration laws of the

47. *Id.* § 212(a)(28), 8 U.S.C. § 1182(a)(28)(F). The State Department interprets this section as authorizing control over terrorism, which is not defined in the Act. *See 1987 Hearing, supra* note 18, at 36-37; T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 201-02.

48. INA § 212(a)(28), 8 U.S.C. § 1182(a)(28)(G).

49. *Id.* § 212(a)(28), 8 U.S.C. § 1182(a)(28)(H). *See FOREIGN AFFAIRS MANUAL, supra* note 35, at § 42.91(a)(28)(1.3) (affiliation is interpreted as the giving, loaning, or promising of support or money or any other thing of value to a proscribed organization; some type of positive action is needed, mere intellectual curiosity is insufficient; if facts indicate an affiliation with a proscribed organization the State Department will conduct an investigation).

50. INA § 212(a)(28), 8 U.S.C. § 1182(a)(28)(I)(i).

51. *Id.* § 212(a)(28)(I)(ii), 8 U.S.C. § 1182(a)(28)(I)(ii).

52. *See FOREIGN AFFAIRS MANUAL, supra* note 35, at § 41.91(a)(28)(vii).

53. INA § 212(a)(28), 8 U.S.C. § 1182(a)(28)(I)(ii)(b) (the Attorney General must submit a detailed report to Congress for each alien who is admitted under this section).

United States conflict with its obligations under the Accords, Congress passed the McGovern Amendment in 1977.⁵⁴ The law was enacted “[f]or purposes of achieving greater United States compliance with the provisions of the Final Act. . . .”⁵⁵ At the time, Congress was concerned about the compliance of other countries and thus set the United States as the exemplar of international conduct under the Accords.⁵⁶

The McGovern Amendment provides for waiver of excludability in individual cases unless the security interests of the United States would be threatened by admitting the applicant in question. Within thirty days of receiving an application for a nonimmigrant visa from an applicant who is otherwise eligible for admission, except for excludability under section 212(a)(28), the Amendment indicates that the Secretary of State should recommend to the Attorney General that the exclusion be waived unless the Secretary of State finds that admission would threaten security interests of the United States.⁵⁷ The McGovern Amendment, however, does not apply to representatives of labor organizations who are considered agents of a totalitarian state⁵⁸ and anyone connected with the Palestine Liberation Organization.⁵⁹ The Amendment further recommends that the Secretary of State refuse waivers to persons coming from countries that are not in substantial compliance with the Accords, especially Basket III.⁶⁰

The Immigration and Naturalization Service (INS) and the State Department have streamlined the procedure for granting waivers under the McGovern Amendment. They have transferred the au-

54. 22 U.S.C. § 2691 (*as amended* Aug. 15, 1979, Pub. L. No. 96-60, tit. I, § 109, 93 Stat. 397).

55. *See* 22 U.S.C. § 2691(a). *But see* Foreign Relations Authorization Act, Fiscal Year 1979 Pub. L. No. 95-426, § 126(a), 92 Stat. 963 (*as amended* Nov. 22, 1983, Pub. L. No. 98-164, tit. X § 1011(a)(1), 97 Stat. 1061. Although Congress has expressed its desire to have the United States comply with the Basket III provisions of the Accords (lowering international travel barriers in order to facilitate a greater exchange of persons and ideas), it did make a reservation of reciprocity. The United States should impose travel restrictions only against the citizens of foreign countries that impose travel restrictions against United States citizens traveling within the particular foreign country. *See also* H.R. REP. NO. 1160, 95th Cong., 2d Sess. 45, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2486.

56. H.R. REP. NO. 1160, *supra* note 55, at 45; *see also* H.R. CONF. REP. NO. 537, 95th Cong., 1st Sess. 30-31, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 1660-61 [hereinafter REP. NO. 537].

57. Legislative history supports the statutory interpretation that the McGovern Amendment creates a presumption of waiver: “[t]he conference substitute provides that . . . the Secretary of State . . . should recommend that the Attorney General grant approval . . . unless . . . the admission of such alien be contrary to the security interests of the United States.” REP. NO. 537, *supra* note 56, at 1661.

58. *See* 22 U.S.C. § 2691(b).

59. *Id.* § 2691(c).

60. *Id.* § 2691(d).

thority to grant waivers to consular officers. Previously, only the Attorney General's designate, the district director, had the power to grant waivers upon a recommendation from the Secretary of State. This new arrangement applies only to section 212(a)(28)(C) of the INA.⁶¹

A number of well-known cultural and political figures have been denied visas under section 212(a)(28), including Latin American literary figures Carlos Fuentes,⁶² Gabriel Garcia Marquez,⁶³ Julio Cortazar,⁶⁴ Ernesto Sabato,⁶⁵ Angel Rama,⁶⁶ as well as the Italian playwright, Dario Fo, and his wife, Franca Rama.⁶⁷ Mr. Fo and his wife were denied visas even though the State Department indicated that it never believed that they would "foment revolution or throw bombs" while in the United States.⁶⁸ The purpose of their trip was to participate in a drama festival cosponsored by New York University and the Italian government.⁶⁹ The State Department finally gave them visas in 1984 after denials in 1980 and 1983. A number of political figures have been denied nonimmigrant visas under section 212(a)(28) as well. These include Bernadette Delvin, former member of the British Parliament,⁷⁰ Robert D'Aubussion, leader of El Salvador's ARENA party,⁷¹ and hundreds of delegates from Japan and other countries who attempted to attend a United Nations conference on disarmament in 1982.⁷²

61. See 51 Fed. Reg. 32,294-96 (Sept. 10, 1986); see *supra* note 44 (members of proscribed organizations).

62. Mexican scholar, author, Robert F. Kennedy Professor of Latin American Studies at Harvard University until 1989; see *FREE TRADE IN IDEAS: A CONSTITUTIONAL IMPERATIVE* (1985) (proceedings of Conference held Sept. 18, 1984, at Washington, D.C.) [hereinafter *FREE TRADE IN IDEAS*].

63. Columbian author, recipient of the 1982 Nobel Prize in Literature. Garcia Marquez has been both denied and granted nonimmigrant visas since 1960; see *FREE TRADE IN IDEAS, supra* note 62, at 71-74.

64. See 1983 *Hearing, supra* note 30, at 107.

65. See *FREE TRADE IN IDEAS, supra* note 62, at 66.

66. See 1983 *Hearing, supra* note 30, at 108.

67. See *FREE TRADE IN IDEAS, supra* note 62, at 66.

68. See 1983 *Hearing, supra* note 30, at 107; see also Tanner, *Satirist is Hurt by Absurdities of Life in Italy*, N.Y. Times, May 22, 1980, at 17, col. 1.

69. See *FREE TRADE IN IDEAS, supra* note 62, at 91-100; see also Munk, *Cross Left*, The Village Voice, June 2, 1980, at 86, col. 1.

70. Richter & Warnow, *Do Not Enter: Visa War Against Ideas* 5, 10 (1986) (transcript from film made for public broadcasting on file with the author). Other Irish excluded are Ian Paisley and Danny Morrison. Mr. Morrison came illegally after the denial of his visa; he was apprehended and incarcerated for a week before he was deported back to Ireland. Two years later he returned to stand trial and was granted a visa.

71. *Id.* at 11.

72. *Id.* at 6. See, e.g., *NGO Comm. on Disarmament v. Haig*, 697 F.2d 294 (2d

In sum, denial of visas to these people was based on general foreign policy concerns rather than on any perceived danger to national security of the United States. These exclusions have affected people from both ends of the political spectrum. The denials of visas under both sections 212(a)(27) and (28) have resulted in recent litigation in the federal courts.

JUDICIAL DETERMINATIONS

The general rule on judicial review of immigration decisions to exclude noncitizens from the United States is that Congress has plenary power to condition entry of those seeking to enter the country. As implemented or enforced by the executive branch, this power is not subject to judicial review.⁷³ The power of Congress to exclude aliens is not enumerated in the Constitution. Rather, it derives from the inherent powers of sovereignty reflected in both domestic and international law.⁷⁴

Congress may exclude aliens who pose a threat to national security, who participate in certain types of political activities, and even those who espouse political opinions which otherwise would be protected by constitutional guarantees.⁷⁵ There are no due process limitations on such congressional actions. In *Galvan v. Press*,⁷⁶ the Supreme Court reviewed due process issues associated with deportation proceedings involving a noncitizen who was “duped into joining the Communist Party.”⁷⁷ The Court stated:

[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens [B]ut the slate is not clean [T]he formulation of these policies is entrusted exclusively to Congress [T]his has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.⁷⁸

As a result of this doctrine, aliens who are denied admission to the United States based on any of the ideological exclusion grounds set out in section 212(a) of the INA have no standing to sue, and courts lack subject matter jurisdiction to review such exclusions.

Cir. 1982).

73. See *The Chinese Exclusion Case*, 130 U.S. 581 (1899); see also *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).

74. See *United States v. Curtiss-Wright Export Corp.*, 229 U.S. 304, 318-22 (1936).

75. See generally *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206 (1953) (exclusion process does not deprive the alien of any rights, even if the exclusion was based on confidential information that if disclosed would be prejudicial to the public interest).

76. 347 U.S. 522 (1954).

77. *Id.* at 530.

78. *Id.* at 530-31.

Although aliens may lack standing to challenge section 212(a) exclusions in the courts, the same is not necessarily true for United States citizens. In the course of the past decade, United States citizens have asserted successfully that they do have such standing based on their first amendment rights to receive information. In an area long closed to judicial review, this particular development has created significant case law with respect to ideological exclusion under immigration laws.⁷⁹

The leading first amendment Supreme Court case focusing upon alien exclusion is *Kleindienst v. Mandel*.⁸⁰ Ernest Mandel, a Belgian Marxist economist, was denied a nonimmigrant visa in 1969. Mr. Mandel had planned to attend a conference at Stanford University and to speak with faculty members from various universities and organizations located in Cambridge, Massachusetts and New York City.⁸¹ Mr. Mandel twice previously had been allowed to enter the United States for similar activities. Both times he was granted a waiver of excludability pursuant to section 212(d)(3) of the Act.⁸² Restrictions had been placed upon his activities during his past visits, which he had ignored. As a result, his next application was denied under subsections 212(a)(28)(D) and (G)(v), which preclude entry of noncitizens who advocate or teach world communism.⁸³ Mr. Mandel was forced to give his talk by telephone.

Soon thereafter, Mr. Mandel and the United States citizens who had invited him filed an action in federal district court against the government, asserting that their first amendment rights had been violated.⁸⁴ The Court disagreed with the plaintiffs' first amendment argument.⁸⁵ At the district court level, the government had contended that neither the United States citizen plaintiffs nor Mr.

79. See, e.g., *Kleindienst*, 408 U.S. 753; *NGO Comm. on Disarmament*, 697 F.2d 294; *Abourezk*, 592 F. Supp. 880 (D.D.C. 1984), *vacated*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd*, 108 S. Ct. 252 (1987); *Allende v. Schultz*, 605 F. Supp. 1220 (D. Mass. 1985).

80. 408 U.S. 753 (1972).

81. *Id.* at 756-57.

82. *Id.* at 756.

83. *Id.* at 757-59.

84. *Id.* at 759-60. See *Mandel v. Mitchell*, 325 F. Supp. 620 (E.D.N.Y. 1971). See also *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Stanley v. Georgia*, 394 U.S. 557, 564 (1968) (freedom of expression involves the right to receive information and ideas).

85. *Kleindienst*, 408 U.S. at 765 (the government put forth two arguments: that there was no restriction on the plaintiff's first amendment rights since what was restricted was "action," and that the first amendment did not apply because technological developments in communications such as telephones had supplanted the necessity for Mr. Mandel's physical presence in the United States).

Mandel had standing to sue. The district court rejected the government's argument, holding that Mr. Mandel and those who invited him had standing.⁸⁶ The Supreme Court did not address the standing issue; nor did the Court address the question of subject matter jurisdiction. Significantly, the Court did not appear to be troubled by the question. In a six to three decision the Court held that the Attorney General had exercised properly his power to deny the waiver, especially in light of Mr. Mandel's failure to abide by prior entry conditions:

[W]hen the Executive exercises this power negatively on the basis of a *facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatever is advanced is a question we neither address nor decide in this case.⁸⁷

Thus, although the Court let stand the district court's determination regarding standing, it established the minimal standard of reasonableness for judicial review of decisions to deny a waiver.

In *Abourezk v. Reagan*,⁸⁸ the Court of Appeals for the District of Columbia Circuit decided a case involving similar issues. In *Abourezk*, United States citizens invited Thomas Borge, Interior Minister of Nicaragua, Olga Finlay and Leonor Lezcano Rodriguez, both members of the Federation of Cuban Women, and Nino Pasti to participate in various speaking activities throughout the country. Nonimmigrant visas were denied to all four pursuant to section 212(a)(27) of the INA. Three different cases originally were filed, later consolidated at the appellate level.⁸⁹

The United States citizens placed three arguments before the court. First, they claimed that section 212(a)(27) does not authorize the government to deny visas because of foreign policy concerns. Rather, the law speaks to issues of "public interest or . . . welfare . . . or security."⁹⁰ The court found it to be consistent with the congressional intent underlying the statute to review foreign policy concerns as a sufficient national interest to warrant protection through the exclusion of aliens.⁹¹ The plaintiffs also argued that section 212(a)(27) covers only "activities" and not the mere entry or presence of aliens. The court agreed, concluding that the word "activi-

86. *Mitchell*, 325 F. Supp. at 631-32.

87. *Kleindienst*, 408 U.S. at 770 (emphasis added).

88. 785 F.2d 1043 (D.C. Cir.), *aff'd*, 108 S. Ct. 252 (1986) (per curiam).

89. *Abourezk*, 785 F.2d at 1047.

90. *Id.* at 1062.

91. *Id.* at 1053 (statutory interpretation is accomplished by first examining the law's plain meaning, then by ascertaining congressional intent); *see Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

ties” would be superfluous and misleading if aliens could be excluded based on mere entry or presence.⁹² Since the legislative history was ambiguous on this question, the court remanded the issue to the district court for a clarification of congressional intent.⁹³ Finally, plaintiffs argued that the government had used section 212(a)(27) to bypass the McGovern Amendment’s limitation on section 212(a)(28). The court explicitly stated that the government may not use section 212(a)(27) to “swallow-up” section 212(a)(28) or, more specifically, circumvent the McGovern Amendment by excluding an alien who is otherwise admissible to the United States because of his or her affiliation with a proscribed organization.⁹⁴

[W]hen an alien is a member of a proscribed organization, so that subsection (28) applies, the government may bypass that provision and proceed under subsection (27) only if the reason for the threat to the “public interest[,] . . . welfare, safety, or security” is independent of the fact of membership in or affiliation with the proscribed organization.⁹⁵

The court faulted the government for not having developed criteria or standards for identifying threats as distinct from membership.⁹⁶ As to the constitutional issues raised by the plaintiffs concerning their first amendment rights, the court did not express an opinion.⁹⁷

92. *Abourezk*, 785 F.2d at 1054.

93. *Id.* at 1056.

94. *Id.* at 1056-58 (the court stated that to exclude aliens on account of their perceived political bent or proclivities with respect to proscribed organizations contravenes the congressional intent expressed in the McGovern Amendment, which was intended to fulfill the United States’ pledge pursuant to the Accords to promote the free flow of ideas and people across national boundaries).

95. *Id.* at 1058 (emphasis added).

96. The *Abourezk* case was remanded to the district court to determine Congress’ intent concerning “activities” as opposed to mere presence or entry. Further, the government was instructed to come up with appropriate guidelines for determining if a section 212(a)(27) threat was independent of membership in a proscribed organization, in which case section 212(a)(28) would apply. *Id.*

97. *Id.* at 1060 n.24. *Abourezk’s* only dissent was by Judge Bork. Although he agreed with the majority’s findings that the court had jurisdiction and that the plaintiffs had standing, he disagreed with the statutory analysis the majority used to reach its holding. First, the dissenting opinion enunciated the principle that courts should defer to the Executive’s reasonable interpretation of the INA’s exclusion provisions, especially in light of the assertion that the Executive is the “sole organ of the federal government in the field of international relations” and does not require an act of Congress to implement its authority in that area. *Id.* at 1063 (Bork, J., dissenting opinion).

Judge Bork then stated that subsection (27) of the Act preserves in the Executive broad power to exclude persons from the United States. *Id.* at 1064. After examining the legislative history, he concluded that since Congress meant “activities” to encompass both entry and presence, there was no need to remand the case for further clarification of congressional intent. *Id.* at 1066. Next, Judge Bork stated his belief that the McGovern Amendment did not apply to the instant case, and thus no danger existed that subsection (28) would be subsumed by subsection (27). Therefore, the dissent argued, the majority’s

On appeal, the Supreme Court affirmed the appeals court decision by a three to three vote.⁹⁸ The equally divided court did not write an opinion, and issued its decision per curiam.⁹⁹ Although *Abourezk* does not set national precedent, it is controlling in the District of Columbia Circuit.

In *Allende v. Schultz*,¹⁰⁰ a federal district court adopted the standard suggested by *Abourezk*. Hortensia Allende applied for a non-immigrant visa in Mexico City. The purpose of her planned trip was to speak with various scholars, politicians, and religious leaders who had invited her to the United States. The visa application was denied pursuant to section 212(a)(28)(C).¹⁰¹ Because the McGovern Amendment came into play, the consular officer in Mexico City requested an advisory opinion from the State Department headquarters in Washington, D.C. The advisory opinion reaffirmed the original decision and further determined that Mrs. Allende was ineligible to receive a visa under section 212(a)(27) as well, for which there is no waiver of inadmissibility.¹⁰² Accordingly, the consular officer returned Mrs. Allende's passport and informed her that the visa was denied under section 212(a)(27).

Soon thereafter, the United States citizens who had extended invitations to Mrs. Allende initiated action against the visa denial on the ground that their first amendment rights had been violated. The government moved to dismiss the action, arguing that the plaintiffs had no standing to sue, the court lacked subject matter jurisdiction, and the complaint failed to state a claim upon which relief could be

argument that exclusion under subsection (27) must be independent of subsection (28) was incorrect. *Id.* at 1069-70. In Bork's view, the McGovern Amendment should be interpreted narrowly: "[it] sought to end the statutory policy of excluding *all* members of subsection (28) organizations automatically, where there was nothing more than the fact of membership as the basis" for exclusion. *Id.* at 1072.

Unlike the majority, Bork specifically answered the constitutional challenge of the plaintiffs. He rejected their first amendment challenge because it would, in effect, diminish the Executive's power to conduct foreign policy. By analogy, the dissent stated that preventing United States citizens from traveling to a foreign country (Cuba) "is certainly not less serious constitutionally than preventing that country's citizens from coming to the United States." *Id.* at 1075 (citing *Zemel v. Rusk*, 381 U.S. 1 (1964) (upholding the prevention of international travel)). Bork concluded his dissent by postulating that the *Abourezk* majority is cautiously beginning a process of "judicial incursion into the U.S.'s conduct of foreign affairs." *Id.* at 1076.

98. *Abourezk*, 108 S. Ct. 252 (per curiam) (Justice Blackmun did not vote because a former law clerk was a party in the case; Justice Scalia recused himself because earlier he had voted on the government's request for the full appeals court to rehear the case). See also Kamen, *Court Upholds Curb on Visa Denials*, Wash. Post, Oct. 20, 1987, at A9, col. 4.

99. For a discussion of oral argument before the court, see 64 INTERPRETER RELEASES 1149-50 (Oct. 9, 1987).

100. 605 F. Supp. 1220 (D. Mass. 1985).

101. *Id.* at 1222.

102. *Id.*

granted.¹⁰³ Since the last argument was related to the first two, the court decided only the issues of standing and jurisdiction.

The court denied the government's motion to dismiss, finding that plaintiffs had standing. Furthermore, although it recognized that a narrow standard of review applied in the field of immigration and naturalization, the court found jurisdiction because fundamental rights of United States citizens were affected.¹⁰⁴ The government then moved for summary judgment, arguing that it had "legally adequate reasons" for refusing the visa. These reasons related to information contained in classified affidavits indicating that Mrs. Allende was a member of two proscribed organizations, both affiliated with the Communist Party of the Soviet Union, and her presence in the country would be "prejudicial to the conduct of foreign affairs of the United States."¹⁰⁵

The court found that affiliation with these organizations was not, in itself, a facially legitimate and bona fide reason to exclude Mrs. Allende under section 212(a)(27). Instead, the court held that she should be excluded under section 212(a)(28).¹⁰⁶ In addition, the court found the claim of prejudice to the conduct of foreign affairs "entirely conclusive" and inadequate. The court believed that the reason for denying Mrs. Allende the nonimmigrant visa was because the government did not agree with or was afraid of what she might say once admitted to the United States. The planned "activities" were protected speech and association; thus, the government could not deny entry under section 212(2)(7) "solely on account of the content of speech."¹⁰⁷ The unclassified materials were rejected and summary judgment was denied, without prejudice, leaving the government free to establish a "facially legitimate and bona fide reason" to refuse the visa, if it could.¹⁰⁸

103. *Id.* at 1222-23.

104. *Id.* at 1223. *See also* *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977) (the government's political power in this area is not completely immune from judicial review).

105. *Allende*, 605 F. Supp. at 1224 (citing affidavit of Under Secretary of State, Lawrence S. Eagleburger, at para. 12; and Deputy Assistant Secretary of State, Louis P. Goeltz, at para. 17).

106. *Id.* at 1225.

107. *Id.* at 1226. *See, e.g.*, *Bane v. Spencer*, 393 F.2d 108 (1st Cir. 1968), *cert. denied*, 400 U.S. 866 (1970) (summary judgment may not be granted on materials to which the opposing counsel does not have access). *Compare* *El-Werfalli v. Smith*, 547 F. Supp. 152, 154 (S.D.N.Y. 1982) (government provided the court with information for *in camera* inspection with regard to classified documents that served as a legitimate reasonable basis for exclusion).

108. *Allende*, 605 F. Supp. at 1226; *see also* *Harvard Law School Forum v. Schultz*, 633 F. Supp. 525, 531-32 (D. Mass. 1986) (discretionary denial of travel permit

The parties renewed cross-motions for summary judgment before the district court in March 1987.¹⁰⁹ The government declassified parts of the previously classified materials. In support of its motion, the government argued that Mrs. Allende is an active member of the World Peace Council, considered by the State Department to be an instrument of the Soviet Union's foreign policy. Further, the government contended, it is the foreign policy of the Soviet Union to seek unilateral Western disarmament by covertly manipulating United States public opinion through such organizations as the World Peace Council. Because of the delicate relations between the United States and the Soviet Union, activities involving the World Peace Council are contrary to the United States' interests. Beginning in 1982, the Executive implemented a policy of refusing entry to aliens who are members of the organization.¹¹⁰

In addition to her activities in the World Peace Council, Mrs. Allende participated in three international conferences between 1977 and 1981, during which she criticized the United States, spoke in support of women's issues, and called for disarmament. According to the government, participation in these conferences was a legitimate and bona fide reason independent of her membership in the World Peace Council to warrant denial of her visa under section 212(a)(27) of the INA.¹¹¹

The district court found that Mrs. Allende fit squarely in section 212(a)(28) of the exclusion provisions of the INA and that her participation in the international conferences was incidental to, and not separate from, her membership in the World Peace Council. Thus, the government had no lawful basis for proceeding under section 212(a)(27) of the Act; rather, it should have used section 212(a)(28). In any event, the government failed to establish a facially legitimate and bona fide reason to waive admission in eligibility under section 212(a)(28)'s McGovern Amendment.¹¹²

Abourezk and *Allende* are the major cases building upon the "facially legitimate and bona fide reason" standard that was postulated by the Supreme Court in *Kleindienst*. If the Executive is to deny a nonimmigrant visa on one of the ideological exclusion grounds set out in section 212(a), its reason for doing so must be consistent with congressional intent, especially when the denial is

under section 212(a)(28)(F) to member of the Palestine Liberation Organization's (PLO) United Nations Observer Mission, based on the foreign policy ground of not affording official recognition to PLO was not facially legitimate; such denial was "directly related to the suppression of a political debate with American citizens").

109. *Allende*, No. 83-3984-CL (D. Mass., Mar. 31, 1987).

110. *Id.* at 8. (declassified affidavit of Under Secretary of State, Lawrence S. Eagleburger, at 3-8).

111. *Id.* at 9.

112. *Id.* at 13.

based on membership or affiliation with an organization proscribed by section 212(a)(28). Legislative intent under this section brings the McGovern Amendment into play with its corresponding presumption of waiver. The Executive may use section 212(a)(27) only if the excluded alien does not fall under any of the other exclusionary provisions. It may not use section 212(a)(27) to circumvent the McGovern Amendment, and if the noncitizen is excludable under both categories, section 212(a)(27) must be an independent ground apart from mere membership in a proscribed organization. In addition, the reason for denying the visa must be content-neutral, with due regard for the first amendment rights of protected speech and association of United States citizens who are affected by a denial.

AMENDING THE IDEOLOGICAL EXCLUSION PROVISIONS

Rationale for Change

Critics of the ideological exclusion provisions have stated a number of reasons why the present law should be amended. First, the statutory language reflects a period in American history characterized by anticommunist hysteria.¹¹³ The spirit of the McCarthy period is present in "xenophobic legislation . . . whose guiding emotion was fear . . . that the wrong people would get into the country and overwhelm and or subvert us."¹¹⁴ Furthermore, the ideological exclusion provisions of United States immigration law clearly undermine American democracy abroad. Foreign critics of the present law waste no time in pointing out that the United States is the only Western democracy that uses political tests for the issuance of visas.¹¹⁵ American citizens who visit most countries in Western Europe need only show their passports to enter.¹¹⁶

113. J. Edgar Hoover, late Director of the FBI, perhaps best expressed this sentiment when he said that "[c]ommunism in reality is not a political party. It is a way of life. It reveals a condition akin to disease that spreads like an epidemic, a quarantine is necessary from infecting this nation," reprinted in Richter & Warnow, *supra* note 70, at 4; see also *Turned Back in Toronto*, Wash. Post, Apr. 29, 1985, at A10, col. 1.

114. *Why Fear Foreigners' Free Speech?*, N.Y. Times, Nov. 13, 1986, at A30, col. 1; 1987 Hearing, *supra* note 18, at 128 ("when the [INA] was passed in 1952 some thought that the only way to save freedom was by restricting it") (statement of Steny H. Hoyer).

115. 1987 Hearing, *supra* note 18, at 128 (ideological restrictions of the INA are an international embarrassment, and philosophically and intellectually unjustifiable) (statement of Steny H. Hoyer); *id.* at 292 ("the reputation of the United States, a country known around the world for its commitment to free speech, can only be diminished") (written testimony of Center for Constitutional Rights).

116. *Id.* at 125 (the INA is a "splinter in our eye, and other Helsinki signatories

At home, the restrictions on admission are criticized because they curtail the first amendment rights of United States citizens. Some members of the Supreme Court have agreed with this contention. Justices Brennan and Marshall, dissenting from the majority opinion in *Kleindienst*,¹¹⁷ stated that the United States government had no compelling interest for preempting the first amendment rights of those citizens who wanted to hear Mr. Mandel in person.¹¹⁸ They stated further that keeping controversial ideas out of the country is not a governmental concern comparable to national security, public health, or law enforcement.¹¹⁹ The Justices distinguished the precedents established in a long line of exclusion cases from the situation in *Kleindienst*: none of the other cases involved first amendment rights of United States citizens.¹²⁰ Justice Douglas also dissented from the majority in *Kleindienst*. He distinguished the other exclusion cases based on the role of ideological considerations in the exclusion of Mandel: Congress never intended to give the Attorney General the power to "pick and choose" among ideologies of aliens who wish to lecture in the United States.¹²¹ Certain members of Congress agree: "We have inherited a statutory scheme which really puts the government in a position of deciding what is and is not fit for the American people to hear, and read, and talk about."¹²²

Critics also have indicated that the actual statutory language is very broad in scope and vague in content.¹²³ The Attorney General and consular officials may deny visas to an alien who seeks "to engage in activities . . . prejudicial to the public interest" or who would engage in activities upon entering that are "subversive to the national security."¹²⁴ Most sweeping of all, the eight paragraphs of section 212(a)(28) cover all noncitizens who are or were members of affiliates of Communist or anarchist groups.¹²⁵ In reality, the McGovern Amendment has made most of section 212(a)(28) anachronistic since out of 45,900 visas denied under this section in 1986,

try to make it a beam") (statement of Steny H. Hoyer); *1983 Hearing, supra* note 30, at 147 (statement of Jeri Leber, Executive Director, Helsinki Watch Committee). *See also 1987 Hearing, supra* note 18, at 220 (statement of Morton Halperin, Director, Center for National Security Studies, on behalf of the American Civil Liberties Union).

117. *See* 408 U.S. 754, 774 (1972) (Marshall, J., dissenting).

118. *Id.* at 779.

119. *Id.* at 783.

120. *Id.* at 782.

121. *Id.* at 774 (Douglas, J., dissenting).

122. *1983 Hearing, supra* note 30, at 47 (statement of Rep. Barney Frank, D-Mass.). *See also 1987 Hearing, supra* note 18, at 129 (statement of Steny H. Hoyer).

123. *1983 Hearing, supra* note 30, at 103 (statement of Arthur Helton on behalf of the Committee on Immigration and Nationality Law of the Bar of the City of New York, which sponsored a report advocating amending the ideological exclusion grounds, entitled *Visa Denials on Ideological Grounds: An Update* (1984)).

124. *1983 Hearing, supra* note 30, at 103-04.

125. *Id.*

45,300 were waived.¹²⁶ At the very least, if the ideological exclusion provisions are retained, they can only be administered in a consistently fair manner if they are better defined and simplified.¹²⁷

More important than administrative vagaries, however, is the fact that the ideological exclusion provisions violate international agreements to which the United States is a signatory. Specifically, these provisions are not consistent with the United States' obligation to facilitate international travel and encourage the free flow of ideas across national boundaries.¹²⁸ Curiously, the McGovern Amendment, which was designed to bring the United States into greater compliance with the Helsinki Accords, has had the effect of complicating the visa process. Having to obtain a waiver of inadmissibility does little to diminish the humiliation many international cultural and political leaders feel as a result of the entire visa process.¹²⁹

Proposed Changes

In recent years, changes to the ideological exclusion grounds have been proposed. Since 1983, three similar bills have been introduced into Congress.¹³⁰ In 1983 and 1987, the Subcommittee on Immigration, Refugees, and International Law of the House Judiciary Committee held hearings on proposed changes to the exclusion and deportation provisions of the INA.¹³¹ In the Senate, Senator Daniel Moynihan (D-N.Y.) introduced legislation which would revise the exclusion grounds of the INA.¹³²

126. 1987 Hearing, *supra* note 18, at 129.

127. See generally Gordon, *The Need to Modernize Our Immigration Laws*, 13 SAN DIEGO L. REV. 1 (1975) (suggests that a complete revision of section 212 is highly desirable).

128. See 1983 Hearing, *supra* note 30, at 142-48; Remnick, *At PEN Taking on the Write Wing*, Wash. Post, Jan. 13, 1986, at D1, col. 4 (statement by E.L. Doctorow, stressing that universal freedom of expression is of critical importance to the international community of writers).

129. See 1983 Hearing, *supra* note 30, at 136-37 (statement of William Styron, American author, on behalf of PEN American Center).

130. H.R. 4509, 98th Cong., 1st Sess. (Nov. 18, 1983); H.R. 5227, 98th Cong., 2d Sess. (Mar. 22, 1984); H.R. 1119, 100th Cong., 1st Sess. (Feb. 18, 1987).

131. See generally 1987 Hearing, *supra* note 18; 1983 Hearing, *supra* note 30.

132. H.R. 1119, *supra* note 130. The Senate revision would eliminate section 212(a)(28), and retain sections 212(a)(27) and (29). Section 212(a)(29) would be redesignated section 212(a)(28). According to this revision, if the Attorney General determines that a particular person is excludable under either of the above sections, he must consult with the Secretary of State. A denial of the visa would be reviewed by a court established by the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-11 (1982), which would affirm the decision or instruct the Secretary of State to grant the visa and the Attorney General to admit the alien. S. 28, 100th Cong., 1st Sess.

Most recently, Representative Barney Frank (D-Mass.) introduced a bill, H.R. 1119, that contained several significant changes to the ideological exclusion provisions.¹³³ Section 212(a)(3) of the bill, which would replace sections 212(a)(27), (28) and (29) of the INA, sets out the criteria for determining whether to exclude certain aliens on political and public safety grounds:

(3) SECURITY GROUNDS - Any alien who a consular officer or the Attorney General knows, or has reasonable grounds to believe, is likely to engage after entry in —

(A) any activity proscribed by the laws of the United States relating to espionage or sabotage,

(B) any other criminal activity which endangers public safety or national security,

(C) any activity a purpose of which is the opposition to, or the control . . . of, the government, or of the United States by force, violence, or other unconstitutional means or

(D) any terrorist activity is excludable.¹³⁴

The proposed bill clearly represents an attempt to focus on specific, actual threats to national security, much as does section 212(a)(29) of the present law.¹³⁵ However, it departs markedly from present law by completely eliminating exclusion based on public interest considerations and membership or affiliation with Communist or anarchist groups.¹³⁶ In addition, the proposed bill defines terrorist activities as “[o]rganizing, abetting, or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily injury to individuals not taking part in armed hostilities.”¹³⁷ Once again, the emphasis is on specific acts, not belief or affiliation. In this regard, the proposed legislation brings United States immigration law into greater conformance with the provisions of the Helsinki Accords pertaining to greater exchange of ideas and persons across national boundaries.¹³⁸

(1987).

133. H.R. 1119, *supra* note 130. See Greenhouse, *House Gets A Bill to Ease Visa Law*, N.Y. Times, Feb. 19, 1987, at B6, col. 6. Representative Peter Rodino (D-N.J.) also has introduced a bill at the request of the State Department, which would amend various exclusion grounds of the INA, including ideological exclusions. H.R. 3293, 100th Cong., 1st Sess. (1987). See also *infra* note 138 (statement by Abraham Sofaer, Dep't of State Legal Advisor).

134. H.R. 1119, *supra* note 130, § 212(a)(3).

135. See INA § 212(a)(29), 38 U.S.C. § 1182(a)(29).

136. See *supra* note 33; see INA § 212(a)(28), 8 U.S.C. § 1182(a)(28).

137. H.R. 1119, *supra* note 130, § 2(a)(D). This definition would be added to 8 U.S.C. § 101(a) as subsection (43).

138. The Reagan Administration generally supports H.R. 1119 in order to bring the INA into “modern reality.” It does not object to the elimination of the exclusion grounds solely on the membership or affiliation with a proscribed organization or doctrine. The Administration would retain section 212(a)(28)(F) because it is used to control terrorism. Any replacement of this provision would need to provide assurances against possible export of technological information, national security interests, and intelligence information. Moreover, the Administration would like to retain a waiver of exclusion and impose conditions, if necessary, to visas waived under this section. Further, the

The definition of "terrorist activities" in H.R. 1119 includes substance and jurisdiction elements, but lacks a clear element of intent. Thus, there is no requirement that there be proof of the purpose (intent) for which the terrorist activity is committed. As such, this definition is overbroad in that it potentially covers conduct not considered "terrorist" under existing federal law.¹³⁹ If one purpose of this legislation is to give clarity to the definition of terrorism,¹⁴⁰ the definition of "terrorist activities" should, at the very least, be consistent with other federal law in this area.

RECOMMENDATIONS AND CONCLUSION

Even a cursory review of the ideological exclusion provisions of the INA reveals the significant gap that exists between those provisions and the principles expressed in the Helsinki Accords.¹⁴¹ The present provisions inhibit rather than foster greater international travel and free exchange of ideas across national boundaries.¹⁴² Although there

Administration opposes the elimination of section 212(a)(27)'s standard of "prejudicial to the public interest" because it is needed for foreign policy considerations. However, the Administration would accept language to limit exclusion to those instances which "implicate serious foreign policy considerations." See generally *1987 Hearing, supra* note 18, at 34-43 (statement of Abraham Sofaer, Dep't of State Legal Advisor), 44-45, 47 (Alan Nelson, INS Comm'r; John Bolton, Assistant Att'y General), 54-58 (Alan Nelson, INA Comm'r). See also *supra* note 133 (H.R. 3293 introduced to Congress representing the Administration's amendments to INA).

139. Congress already has expressed its concern about such a possibility in regard to the Omnibus Diplomatic Security and Antiterrorism Act which contains the same inductive approach in defining terrorist actions as H.R. 1119:

[T]he committee of conference does not intend that chapter 113A reach nonterrorist violence inflicted upon American victims. Simple barroom brawls or normal street crime, for example, are not intended to be covered by this provision. To ensure that this statute is used only for its intended purpose, the conference substitute requires that the Attorney General certify that in his judgment such offense was intended to coerce, intimidate, or retaliate against a government or civilian population.

H.R. CONF. REP. NO. 783, 99th Cong., 2d Sess., reprinted in 1986 U.S. CODE & ADMIN. NEWS 1959, 1960 [hereinafter REP. NO. 783].

140. See Levitt, *Is "Terrorism" Worth Defining?*, 13 OHIO N.U.L. REV. 97 (1986); Falvey, *Legislative Responses to International Terrorism: International and National Efforts to Deter and Punish Terrorists*, 9 B.C. INT'L COMP. L. REV. 323 (1986); Korblum & Jachnycky, *Politics, the Courts and Terrorism: Are The Laws Adequate?* 26 JUDGE'S J. 16, 21 (Winter 1987); Larshan, *Extradition, The Political Offense Exception and Terrorism: An Overview of the Three Principal Theories of Law*, 4 B.U. INT'L L.J. 231, 234 (1986).

141. See *1987 Hearing, supra* note 18, at 325-31 (statement of Int'l Human Rights Law Group).

142. Other international agreements that conflict with the ideological exclusion provisions of the INA include the Universal Declaration of Human Rights, art. 19, 3 U.N. GAOR 1, 71 U.N. Doc. A/810 (1948), and its counterpart, The International

have been attempts in Congress to bring United States domestic law into greater conformance with the Helsinki Accords, the only significant success has been the passage of the McGovern Amendment¹⁴³ in 1977. The visa application process has been used to circumvent the McGovern Amendment by basing exclusion on provisions that are not subject to the McGovern Amendment's presumption of waiver. In addition, the McGovern Amendment itself is something of a mixed blessing, since it has the effect of complicating, rather than simplifying, exit and entry procedures, contrary to the obligation on the part of signatories of the Accords.

Because of traditional judicial review doctrines, United States courts have been reluctant to scrutinize government action in this area of immigration law, and because the federal government has plenary power to control entry into United States territory, aliens excluded on ideological grounds are not entitled to any constitutional guarantees.

In recent years, United States citizens have persuaded the courts to recognize that they, as citizens, do have standing on first amendment grounds to challenge government actions in this area. However, efforts by United States citizens to have courts review governmental infringement on their first amendment rights to associate and receive information because of a denial of an immigrant visa for permanent residency, and possible deportation of persons whose writing and teachings advocate proscribed doctrines, have been unsuccessful.¹⁴⁴

The Helsinki Accords arose during the period in which there was a thaw in the cold war between the United States and the Soviet

Covenant on Civil and Political Rights, art. 19, U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (everyone has the right to freedom of opinion and expression without political interference and to receive and impart information and ideas through any media regardless of frontiers); Charter of the Organization of American States, art. 31, 119 U.S.T. 39, T.I.A.S. No. 2361 (1951) (member states undertake to facilitate free cultural interchange by every medium of expression).

143. 22 U.S.C. § 2691.

144. In *Randall v. Meese*, C.A. No. 85-3415 n.5 (D.D.C. 1987), the district court refused to decide questions related to first amendment rights of United States citizens. Its focus was on the INS action against the alien plaintiff, Margaret Jo Randall, which denied her application for adjustment of status to become a lawful permanent resident of the United States (Randall lost her United States citizenship earlier while in Mexico) because she was statutorily ineligible. The government found Randall ineligible for an immigrant visa because she came under the purview of section 212(a)(28)(G)(v) of the Act. As to the first amendment allegations of the United States citizen plaintiffs, the court stated:

[i]nsofar as plaintiffs allege that their right to association with Randall's ideas would be affected by her deportation they go beyond the jurisdiction of this Court. That Randall may be deported and thereby will not share ideas with citizens of this country because of her physical absence is a consequence of deportation and not reviewable by this Court. Additionally, any pattern or practice of the INS to curtail information by denying visas is also not applicable to the matters before this Court.

Id.

Union. Unfortunately, that spirit of international cooperation is not quite as evident today. Nevertheless, there is good reason to anticipate movement in Congress toward a much needed overhaul of the entire body of exclusion and deportation laws.

The law should be amended to eliminate mere membership in Communist or anarchist groups as a ground for exclusion, and to eliminate the broad "public interest" language which provides the Executive authority to exclude noncitizens who simply do not agree with the foreign policy stance of the administration in power. Congress should carefully review efforts by the Executive to retain section 212(a)(27) by substituting the present language with linguistic changes that do not remove foreign policy considerations from the visa process.¹⁴⁵ Only aliens who are likely to engage, after entry, in activities that pose a direct threat to the national security of the United States ought to be excluded. The Accords recognize that any lessening of travel restrictions would need to take security restrictions into considerations.¹⁴⁶

Further, any legislation that adds a new ground for exclusion based on terrorism should take into consideration existing international and domestic law defining, or at least relating to, terrorism.¹⁴⁷

145. See *supra* note 138.

146. See Final Act, *supra* note 1, at 470.8 ("to ease regulations concerning movement of citizens from other participating states to their territory, with due regard to security requirements").

147. International law has approached the problem of terrorism through the creation of various international instruments that prohibit specific acts:

(a) Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 (aircraft hijacking);

(b) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570;

(c) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 (diplomatic protection);

(d) Convention Against the Taking of Hostages, Dec. 17, 1979, 18 I.L.M. 1457 (1979);

(e) Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, 18 I.L.M. 1419 (1979) (nuclear sabotage);

(f) Convention on Offenses and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768.

See also European Convention on the Suppression of Terrorism, 15 I.L.M. 1272 (1976), reprinted in R. LILICH, *TRANSNATIONAL TERRORISM: CONVENTION AND COMMENTARY* 120 (1982).

In addition, two federal statutes contain specific references to terrorism. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. § 1801). Section 101(c) defines terrorism as actions that:

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a

In fact, Congress recently has passed legislation requesting the President to begin negotiations leading to an international convention that would prevent and control terrorism.¹⁴⁸ Significantly, Congress gave high priority to defining the behavior constituting terrorism.¹⁴⁹ Scholars have identified the elements of terrorism as: (a) intent, (b) substance, and (c) jurisdiction.¹⁵⁰

The principle underlying both the first amendment and the Helsinki Accords is the concept of an open "marketplace of ideas." Under the first amendment, United States citizens are guaranteed the rights to receive and exchange ideas with whomever they wish. The Basket III provisions of the Accords extend this principle to the international arena by facilitating the free exchange of ideas and persons across national borders. The Accords, as an international declaration, seek to accomplish universal freedom of expression, a goal which is of particular significance to the international community of writers.

Current United States immigration law and regulation, however, is used to exclude foreigners from the United States because of their ideological orientation. Amending the ideological exclusion provisions of the INA along the lines proposed by pending legislation and this Article's recommendations would do much toward eradicating the most egregious violations of the Helsinki Accords by the United States. The amendments will serve to strengthen the principles of democracy and pluralism both at home and around the world.

criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended —

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping;

and

(D) to occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum

Id. § 101(c).

See also Omnibus Diplomatic Security and Antiterrorism Act of 1986, § 1201, Pub. L. No. 99-399, 100 Stat. 853, 895-96.

148. Omnibus Diplomatic Security and Antiterrorism Act of 1986, § 1201(a), 100 Stat. at 895-96 (Sense of Congress that the President should establish a process to encourage the negotiation of an international convention to prevent and control all aspects of international terrorism).

149. *Id.* § 1201(c)(1), 100 Stat. at 896 (the international convention should provide an explicit definition of terrorism). *See* REP. NO. 783, *supra* note 139 (legislative history states that "the negotiation of a definition of conduct constituting terrorism . . . is a higher priority").

150. Levitt, *supra* note 140, at 99, 104; Falvey, *supra* note 140, at 323. *International Terrorism: International and National Efforts to Deter and Punish Terrorists*, 9 B.C. INT'L COMP. L. REV. 323.