VISA DENIALS ON IDEOLOGICAL GROUNDS: AN UPDATE

A Report of the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York

January 1985

In 1981, the Association issued a report by the Committees on Civil Rights, Entertainment and Sports Law, Federal Legislation, Immigration and Nationality Law, and International Law, recommending the repeal of sections 27-29 of the Immigration and Naturalization Law (known as the "ideological exclusion" provisions of the McCarran-Walter Act) and proposing alternative language.[1] *The Committee on Immigration and Nationality Law in 1984 reiterated that recommendation of repeal and revision, incorporating sections of the previous report, but adding to, updating and revising the earlier report.*

In 1984 Congress had again an opportunity to effect major revisions in this country's immigration laws. The legislation considered by the Senate and House might have provided for sanctions against employers of illegal aliens, altered some of the visa categories, or "legalized" aliens who arrived here before a certain date. But it would have left unscathed and largely unexamined the disturbing legacy of the McCarthy era that permits the denial of visas to the United States on ideological grounds. The controversy stirred by such denials may explain but does not excuse a failure to address the issue.[2] In the hopes of encouraging the Legislature to confront the controversy when it next examines these laws, we recommend the repeal of sections 212(a)(27)-(29) of the Immigration and Naturalization Act,[3] and their replacement with language that reflects

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[1] 36 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 288 (1981).

[2] In 1981, Sen. Alan Simpson, who last year co-sponsored the Simpson-Mazzoli bill to reform the immigration law, commented that on this issue, "[t]he less said the better." Pear, *No Changes Sought on Excluding Aliens*, N.Y. Times, Feb. 15, 1981, at 28, col. 1. This Committee does not agree.

[3] Immigration and Nationality Act § 212, 8 U.S.C. § 1182 (1982).

> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be preju-

this country's values.

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dicial to the public interest, or endanger the welfare, safety, or security of the United States;

(28) Aliens who are, or at any time have been, members of any of the following classes:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided*, That nothing in this paragraph, or in any other provision of this Act, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(E) Aliens not within any of the other provisions of this paragraph, who are a member of or affiliated with any organization during the time it is registered or required to be registered under section 786 of Title 50, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of

officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or other printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (G) of this paragraph;

(I) Any alien who is within any of the classes described in subparagraphs (B) to (H) of this paragraph because of membership in or affiliation with a party or organization or a section, subsidiary, branch, affiliate, or subdivision thereof, may, if not otherwise ineligible, be issued a visa if such alien establishes to the satisfaction of the consular officer when applying for a visa and the consular officer finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes, or (ii) (a) since the termination of such membership or affiliation, such alien is and has been, for at least five years prior to the date of the application for his visa, actively opposed to the doctrine, program, principles, and ideology of such party or organization or the section, subsidiary, branch, or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. Any such alien to whom a visa has been issued under the provisions of this subparagraph may, if not otherwise inadmissible be admitted into the United States if he shall establish to the satisfaction of the Attorney General when applying for admis-

The McCarran-Walter Act

In 1952, Senator Pat McCarran exhorted the Senate to re-

form the country's immigration laws, because "criminals, Communists and subversives are even now gaining admission into this country like water through a sieve"[4]—whence the McCarran-Walter Act, enacted over President Truman's veto, was a product of the paranoia of that time.[5] It is a law in which communists and anarchists are lumped together with prostitutes, professional beggars and psychopaths, among other categories of people who may be denied entry.

The Text

Though born of a fear of active subversion, the language of the Act does not focus on activity. Rather,

> section (a)(28) . . . is explicit in its selective direction against that which is specifically not active subversion but belief and preachment. It operates not only against present adherence to disfavored political doctrines, associations and programs but also against any past adherence to them. It embraces not advocacy alone but teaching as well, and any affiliation with

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> sion to the United States and the Attorney General finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and when necessary for such purposes, or (ii) (a) since the termination of such membership or affiliation, such alien is and has been, for at least five years prior to the date of the application for admission actively opposed to the doctrine, program, principles, and ideology of such party or organization or the section, subsidiary, branch, or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. The Attorney General shall promptly make a detailed report to the Congress in the case of each alien who is or shall be admitted into the United States under (ii) of this subparagraph;
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> (29) 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 the 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 or required to be registered under section 786 of Title 50. . . .

[4] Margolick, *Reprise on McCarran Act*, N.Y. Times, June 4, 1982, at B1.

[5] Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1101-1557 (1982)).

> any organization that either advocates or teaches the doctrines of programs. It reaches not only personal advocacy or teaching but also either writing or publishing or wittingly circulating or printing or displaying (or possessing for any of these purposes) any printed or written matter advocating or teaching the disfavored doctrines of programs; beyond that it extends to membership in or affiliation with any organization so resorting to the printed or written word or its circulation. Present or past Communist party membership or affiliation are also embraced in the subsection.[6]

Thus the sections known as the "ideological exclusion" provisions of the Act are vague in form and sweeping in scope. They declare aliens ineligible to receive visas, among other grounds, whenever a consular officer or the Attorney General "has reason to believe" that an alien seeks entry "to engage in activities which would be prejudicial to the public interest" (section 27), or would engage, after entry, in any "activity subversive to the national security" (section 29), or if the alien is, or was at any time, an anarchist, a Communist, or affiliated with any organization that supports or advocates "the economic, international, and governmental doctrines of world communism..." (section 28).

As President Truman warned, "[s]eldom has a bill exhibited the distrust evidenced here for citizens and aliens alike."[7] On their face, then, the ideological exclusion provisions conflict with the traditional values of the United States. In practice, the law is an unabashedly cynical betrayal of those proclaimed beliefs.

The Practice

The liberty to teach, to write, to publish, and to associate are freedoms American citizens take for granted.[8] Not only are these activities to be tolerated whatever their ideological content, but also they are to be affirmatively protected. Thus, for instance, the State of Alabama was not entitled to compel the National Association for the Advancement of Colored People (NAACP) to produce lists of its members, because that compelled disclosure

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[6] Mandel v. Mitchell, 325 F. Supp. 620, 625 (E.D.N.Y. 1971), *rev'd sub nom*, Kleindienst v. Mandel, 408 U.S. 753 (1972).

[7] 98 CONG. REC. 8082, 8084 (1952) (veto message of Pres. Truman, June 25, 1952).

[8] *See* U.S. CONST., amend. I.

might deter the exercise of the right of association.[9] In case after case, the Supreme Court has, similarly, "characterized the freedom of speech and that of the press as fundamental personal rights and liberties."[10] Nor is the tolerance and even encouragement of all speech, publication or association viewed as an endorsement of any particular expression. The value protected is the freedom of expression, not the expression of a particular opinion.

But though we profess devotion to democracy and free speech, we practice that devotion more conscientiously at home, where we know the Constitution requires ideological tolerance. We face the world, it seems, with fear of the ideas that may invade from abroad, and so we deny entry to foreigners with unpopular beliefs.

For instance, in November 1983, Nicaragua's Interior Minister and the President of the Salvadoran Constitutional Assembly were denied visas because their activities here "would be prejudicial to the public interest."[11] The Nicaraguan, Tomas Borge, is a leftist. He was scheduled to speak at the University of Chicago, and the United States Government did not want to give him "a propaganda platform" here.[12] Roberto d'Aubuisson, a Salvadoran who has been linked to right-wing death squads, hoped to make a private trip to Miami. Commenting on these two exclusions, Elliott Abrams, the Assistant Secretary of State for Human Rights and Humanitarian Affairs, said, "We're not keeping anybody's views out . . . We are keeping out certain officials for certain foreign policy reasons."[13]

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9 NAACP v. Alabama, 357 U.S. 449, 466 (1958).

10 Schneider v. State, 308 U.S. 147, 161 (1958).

11 Smith, *Salvadoran Rightest and Key Sandinista Are Barred by U.S.*, N.Y. Times, Nov. 30, 1983, at A1.

12 *Id.* at A11.

13 Dionne, *Barring Aliens for Political Reasons*, N.Y. Times, Dec. 8, 1983 at A20. Mr. d'Aubuisson was subsequently given a visa to visit the United States—a change in position that can only raise questions about the legitimacy and bona fides of the initial denial. N.Y. Times, Dec. 4, 1984, at A9, col. 1. This admission contrasts with the denial of visas to four Salvadoran mothers which prevented them from receiving the first Robert F. Kennedy Memorial Human Rights Award in recognition of their work regarding political prisoners who disappeared and/or were murdered in El Salvador. The women were apparently told their presence in this country could "put the security of the United States in danger." N.Y. Times, Nov. 13, 1984, at A8, col. 6. Later, the State Department stated that "the mothers committee [had

This invocation of foreign policy is without legal basis. Presumably Mr. Abrams meant that the Administration denied these visas in order to convey disapproval of the policies endorsed by Borge and d'Aubuisson in their official capacities. The denial of the d'Aubuisson application, for instance, coincided with the Administration's escalating criticism of the death squads in El Salvador. But section 27, under which the two applications were denied, draws no distinction between foreign officials and private people; it does not say applicants may be excluded so long as the purpose of the exclusion is to send a diplomatic message.[14] In any event, a comment by Secretary of State Schultz suggests the motive was not just a foreign policy one: "As a general proposition I think we have to favor freedom of speech, but it can get abused by people who do not wish us well. . . ."[15]

Mr. Abrams' explanation is also inadequate because, in practice, the Act's sweeping provisions, its broad and discretionary interpretation and the Administration's unwarranted foreign policy exclusions do not keep out only selected foreign officials. Scholars, writers and Nobel Prize winners have been denied the opportunity personally to present their views here and their would-be audiences have been prohibited from hearing those views. On the blacklist of foreigners have appeared the names Carlos Fuentes,[16] Dennis Brutus,[17] Gabriel Garcia Marquez,[18] and many others. The explanations offered for such use of the law show the provisions to be as anachronistic as applied as they are on their face.

Consider the case of Durio Fo, well-known Italian playwright and actor.[19] In August 1983, he and his actress wife, Franca

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made] some preposterous charge that two young men were lured into our embassy in San Salvador and disappeared." N.Y. Times, Dec. 4, 1984, at A9, col. 1.

14 *See supra* note 3.

15 Atkinson, *Congressmen, Others Denounce Denial of Visas to Critics of U.S.*, Wash. Post, Dec. 3, 1983, at A12.

16 Fuentes is a Latin American writer and Nobel laureate. *See generally Free Trade in Ideas: A Constitutional Imperative*, The Center for National Security Studies, a project of the American Civil Liberties Union, Public Policy Report (May 1984) [hereinafter cited as *Free Trade*], and the sources cited therein, at A20-21.

17 Brutus is an internationally known poet and critic of apartheid. *See generally Free Trade* and the sources cited therein, *supra* note 16, at A3-6.

18 Marquez, another Nobel prize winner, is a Latin American writer. *See generally Free Trade* and the sources cited therein, *supra* note 16, at A22-23.

19 *See generally Free Trade* and the sources cited therein, *supra* note 16, at A13-14.

Rame, were denied visas. They were to come to the United States to perform at the New York Shakespeare Festival and to lecture at the New York University School of the Arts and the Yale Drama School. In justifying the denial of the visas, the State Department reiterated the grounds offered in May 1980 when Fo and Rame were unable to perform here in an Italian festival sponsored by the Italian government and New York University. According to *The New York Times* in 1980:

> A spokesman for the American Embassy said that the moment for Mr. Fo's visit had been judged "inappropriate". Other sources said the action was due to the couple's active role in a group called Soccorso Rosso, or Red Aid, which the embassy regarded as "sympathetic to the terrorist movement". Soccorso Rosso is a leftist organization that helps people imprisoned for politically motivated crimes.[20]

In refusing Fo his visa in 1980, the State Department conceded that Fo has actively denounced terrorism and political violence. "Nobody in State thinks that Fo is going to forment revolution or throw bombs," an officer at the Italian desk of the State Department told one reporter. "It's just that Fo's record of performance with regard to the United States is not good. Dario Fo has never had a good word to say about [the United States]."[21]

Another illustration of the potential for capriciousness is the story of Angel Rama.[22] A Uruguayan who left his country when a military junta came to power, Mr. Rama was a Venezuelan citizen who often visited the United States. A literary essayist and scholar of Latin American literature, he has received a Guggenheim Fellowship, a fellowship from the Woodrow Wilson Center, and visiting scholar invitations from a number of countries, including Israel. In 1981, he was appointed tenured professor at the University of Maryland.

A year later, the Immigration and Naturalization Service (INS) denied his application for permanent residence in the United States, under Section 28. But the INS would not reveal the grounds for the

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[20] Tanner, *Satirist Is Hurt By Absurdities of Life in Italy*, N.Y. Times, May 22, 1980, at A17, col. 1.

[21] Munk, *Cross Left*, The Village Voice, June 2, 1980, at 86. Mr. Fo was recently allowed to enter the United States on the occasion of the New York production of his play, *Accidental Death of a Anarchist*. *See supra* note 13.

[22] *See generally Free Trade* and the sources cited therein, *supra* note 16, at A10-12.

denial, making it impossible to challenge the Service's decision. They would say only that Mr. Rama might qualify if he declared himself a "defector" from Communism. Having truthfully sworn he was never a Communist, Mr. Rama could hardly now swear he was a defector. And still the "evidence" against him remained secret. When Mr. Rama died in a plane crash in Madrid in November 1983, he had not been able to return to his teaching position, or to uncover the "evidence" against him.

Of course, the Government does not limit its exclusionary activity to cultural figures. Hortensia de Allende, Salvador Allende's widow, has frequently visited the United States; in March 1983, however, this Administration denied her a visa, so that she was unable to speak in San Francisco on women's issues and visit universities in the area.[23] Mrs. Allende has been an outspoken critic of General Pinochet's military regime in Chile, and purportedly because she was an active member of the World Peace Council, designated by the United States Government as a Soviet front, her proposed visit was considered prejudicial to public interest.

So, too, was the visit of General Nino Pasti.[24] A former member of the Italian Senate, General Pasti was stationed at the Pentagon from 1963 through 1966 as a member of the NATO Military Committee, and has been a vocal opponent of the decision to place cruise and Pershing II missiles in Western Europe. When the General sought a visa last October so he could address groups concerned about the direction of American nuclear weapons policies, he was denied entry to this country.

Other political figures barred from this country include Bernadette Devlin McAliskey,[25] Irish nationalist and former member of the British Parliament; Reverend Ian Paisley,[26] Protestant leader from Northern Ireland; and some 320 delegates from Japan and other countries, seeking to attend the June 1983 United Nations special session on disarmament.[27] And there are surely many others, without fame or notoriety, excluded for their beliefs.

The Government has in the past argued that, though many nonimmigrant visas are initially denied under section 28, in most cases

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23 *See generally Free Trade* and the sources cited therein, *supra* note 16, at 1, 5, A17.
24 *See Free Trade*, *supra* note 16, at 6; Atkinson, *supra* note 15.
25 N.Y. Times, June 7, 1983, at A4, col. 3; Wash. Post, June 7, 1983, at A5, col. 1.
26 N.Y. Times, Mar. 30, 1983, at A7, col. 5.
27 N.Y. Times, June 4, 1982, at § II, p.1, col. 5.

the denial is subsequently reversed when the Justice Department, on the request of the State Department that has found an applicant "inadmissible," grants a waiver.[28] Even if this were accurate, the statement would be misleading.

First, the application process is cumbersome and expensive for both the applicant and the United States Government. Before a waiver can be granted each alien must be individually cleared by the government's intelligence agencies.[29] As a result, in many cases the frustration, unpredictability and expense of bureaucratic delay have caused applicants either to withdraw their applications in disgust or to miss the very conference they wished to attend.

One such victim of delay was Professor Jean Pierre Vigier, a French physicist. Professor Vigier, who is a Marxist, received an invitation to attend the annual meeting of the American Association for the Advancement of Science in Houston, Texas in January 1979. Although he had previously traveled to the United States without difficulty, when he applied for his visa in November 1978, the U.S. Consular Office informed him that his application would have to be reviewed in Washington. This caused a four-week delay which affected his application for travel funds from the French government. Although Vigier received a visa on December 27, 1978, the delay made it impossible for him to participate in the conference.[30]

Similarly, in May of 1980, bureaucratic delay caused Professor Andrew Taylor, President of the British Association of University Professors, to decline an invitation to attend the Annual Meeting of the American Association of University Professors. In a letter to his United States counterpart, Professor Martha Friedman, head of the American Association of University Professors, Taylor explained:

> I am afraid that I always have had visa problems with your State Department. Because of my political background, I am always refused a visa to enter your country. In the past I have been able to obtain a special restricted visa to attend scientific

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28 *Implementation of the Helsinki Accords: Hearings Before the Commission on Security and Cooperation in Europe*, 96th Cong., lst Sess. (April 5, 1979) [hereinafter cited as *Helsinki Hearings*] at 76 (statement of Barbara M. Watson, Asst. Secretary for Consular Affairs, Dept. of State). *See infra*, at 260, on McGovern Amendment.

29 *Id.* at 76-77.

30 *Helsinki Hearings* at 144 (statement of John Edsall, Chairman of the American Assoc. for the Advancement of Sciences' Committee on Scientific Freedom and Responsibility); *see id.* at 75 (reply of Asst. Secretary Watson regarding the Vigier case).

> conferences but this entails a long complicated process requiring an application to be made many months in advance, the completion of very long detailed questionnaires and not knowing if I am actually going to get a visa until about four days before departing for the United States. On this occasion I obviously do not have the time to carry out this procedure.[31]

Second, many foreigners find our system of ideological scrutiny so demeaning that they refuse to apply for visitors' visas. According to Laurie Sapper, General Secretary of the British Association of University Teachers, the intrusiveness of such an inquiry into one's beliefs is enough to discourage many potential visitors:

> The record of actual refusals is small, not because of the liberal attitude of the United States Government, but because many of our members, as a matter of principle, consider it anathema to have to attest as to their political views and affiliations; thus many academics will not apply because they do not wish to place themselves in the position of signing declarations to this effect.[32]

The severe limitations on their freedom during the visit are further indignities that undoubtedly discourage foreigners from applying.

Finally, the law does not provide for waivers where the determination of excludability has been made under the broad language of Section 27 (covering activites "prejudicial to the public interest") rather than Section 28.[33] The visa denials for Tomas Borge, Roberto d'Aubuisson and Hortensia de Allende, among others, could not have been reversed.

The Helsinki Accords

The Reagan Administration focuses its human rights concerns on Communist governments, and attacks those that restrict emigration and otherwise abridge civil liberties. Indeed, those governments deserve criticism. But while we reproach others for denying fundamental freedoms, the McCarran-Walter Act makes the United States notable among democratic nations for its exclusion of foreign visitors on ideological grounds.[34] These provisions diminish our declarations of principle, and contradict the

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31 Letter from Prof. Andrew Taylor to Prof. Martha Friedman (May 29, 1980).

32 Letter from Prof. Tom Bottomore to Ms. Sophie C. Silberberg (Feb. 8, 1980).

33 *See supra* note 3 for pertinent text of the Act.

34 *Free Trade*, *supra* note 16, at 3.

spirit of the Final Act of the Conference on Security and Co-operation in Europe.[35] That international agreement (commonly known as the "Helsinki Accords"), signed in 1975, calls upon participating nations to facilitate movement and contacts among those nations. Specifically, it states:

> [t]he participating States intend to facilitate wider travel by their citizens for personal or professional reasons and to this end they intend in particular: gradually to simplify and to administer flexibly the procedures for exit and entry.[36]

The continued application of the ideological exclusion provisions does not facilitate wider travel or simplify procedures for entry into the United States. Rather, it bars our ports to those with unhomogenized ideas, without requiring evidence or offering recourse.

The McGovern Amendment

To achieve greater compliance with the principles of the Helsinki Accords, in 1977 Congress enacted the so-called McGovern Amendment to the McCarran-Walter Act.[37] The McGovern Amendment streamlines the non-immigrant visa application process for people excludable, under Section 28, because of "membership in a proscribed [*e.g.*, Communist] organization." It presumes that such people are eligible for a visa unless within 30 days after they apply for admission the Secretary of State certifies in writing to the Speaker of the House of Representatives and the Chairman of the Senate Foreign Relations Committee that United States security interests would be adversely affected by the applicant's admission.[38]

The McGovern Amendment has removed some of the admission barriers for certain foreigners previously denied visas on political grounds, including Communist trade union officials from the Soviet Union and Communist political leaders interested in participating in conferences with members of the Communist Party in the United States.[39] It has not accomplished its

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35 This agreement is reprinted at 14 INT'L LEGAL MATERIALS 1292 (1975).

36 *Id.* at 1314.

37 22 U.S.C. § 2691(a).

38 *Id.* This is the waiver procedure discussed *supra*, at 257-58.

39 *Helsinki Hearings* at 110-11 (statement of David Carliner, General Counsel, A.C.L.U.).

purpose, however.

First, the McGovern Amendment does not apply to people excludable for reasons other than "membership in a proscribed organization." As discussed above, it thus offers no hope to those denied visas under Section 27's broad and vague proscription of foreigners whose activities "would be prejudicial to the public interest. . . ." To circumvent the McGovern Amendment, the government could simply rely increasingly on Section 27.

Second, it has been argued that compliance with the Amendment has at times been decidedly pro forma. Thus, when hundreds of Japanese and others were denied visas to attend the United Nations session on disarmament in June 1982, the New York Civil Liberties Union argued in the Second Circuit that the Department of State sent to the Attorney General a purely pro forma recommendation that waivers be granted, at the same time as it communicated its desire that the waivers be denied.[40] The NYCLU's brief contended that the State Department thus circumvented the statutory requirement to report to Congress.[41]

Though the McGovern Amendment was an attempt to reduce the capriciousness of the law's application, it does not achieve that goal. Nonetheless, the present Administration has sought to restrict further the already narrow waiver procedure provided. In October 1983, the State Department submitted to Congress a proposal to amend the McGovern Amendment to permit the Secretary of State to consider "foreign policy factors" as a reason to deny waivers.[42]

Even if the McGovern Amendment did accomplish what it was intended to, it does not sufficiently reduce the abuse of a law that, at its best, is still unacceptable. The substantive provisions should be revised.

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40 Brief for Appellant at 24-25, NGO Committee on Disarmament v. Haig, No. 82-6147 (2d Cir. June 18, 1982).

41 *Id.* at 25.

42 Telephone interview with James Callahan, Press Officer for Consular Affairs Bureau, State Department. Senator Percy submitted the proposal as S.2033, 97th Cong., 2d Sess. (Nov. 1, 1983). It has languished in the Foreign Relations Committee since that date.

The First Amendment

> "It is now well established that the Constitution protects the right to receive information and ideas."[43]
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> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ."[44]

Yet those ideals are frustrated each time a lecture is cancelled or a conference limited because a foreigner is denied a visa on ideological grounds. The line of cases acknowledging the Government's exclusive power to exclude aliens[45] are not to the point, for in those cases the rights of Americans were not at stake.

Nor has the Supreme Court ever squarely addressed this question. *Kleindienst v. Mandel*,[46] decided in 1972 and often cited on this point, does not in fact resolve the issue. In that case, Ernest Mandel, a Belgian journalist, editor, author and self-proclaimed Marxist, was found inadmissible under Section 28. The State Department recommended that the Justice Department waive Mandel's inadmissibility, but his application for a visa was nonetheless denied. The reason offered for that denial was that on previous visits to the United States Mandel had allegedly violated the conditions of his visa.[47] Interestingly, the Government did not rely on that purported justification in its defense of the visa denial. Indeed, the State Department had admitted that Mandel might not have been aware of any such conditions. The Supreme Court nevertheless made that explanation the basis for an apparently narrow holding:

> We hold that when the Executive exercises this power [to consider a waiver] 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 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 whosoever is advanced is a

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43 Stanley v. Georgia, 394 U.S. 557, 564 (1969).

44 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

45 *E.g.*, The Chinese Exclusion Case, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

46 408 U.S. 754 (1971).

47 *Id.* at 757-59.

question we neither address nor decide in this case.[48]

The Court thus focused on the waiver issue, and relied on the "facially legitimate" reason for the denial offered by the Justice Department, a reason that did not on its face implicate first amendment rights. Though there is much language in the opinion about the Government's exclusive reign over immigration matters,[49] the Court has still not definitively spoken on the constitutionality of Section 28 exclusions based solely on objectionable ideologies or associations.

The Court may, however, soon have to confront that issue.[50] One can hope in that event it will acknowledge that, in Justice Douglas' words, "[t]hought control is not within the competence of any branch of government."[51] Of course, the invocation of the first amendment does not mean other principles may be ignored. Nor should mention of "aliens," however, cast such a spell on the Court that first amendment rights are trampled without proof of a countervailing compelling governmental interest. The Court should recognize ideological exclusions as control of more than just our borders.

Repeal and Revision

But we do not need to argue that the exclusion provisions are unconstitutional in order to protest the damage they cause our intellectual and cultural life, and our moral integrity. Foreign visitors are turned away, discouraged from applying to enter, or granted visas only after intolerable delays, solely because of suspect beliefs. As a result, our citizens are denied exposure to ideologies relevant to our world, however antithetical to our dominant beliefs. They are denied scholarly and cultural presentations by people whose alleged or actual political views, unrelated to the purpose of the visa application, are unconventional. In short, what we see, hear and experience is regulated by

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48 *Id.* at 770.

49 *Id.* at 765-70.

50 Suits have been brought by the ACLU and others to challenge the denial of visas to Hortensia de Allende, Tomas Borge and two Cuban women, all invited to speak in the United States. Aborezk v. Reagan, No. 83-3739 (D.D.C. July 27, 1984); City of New York v. Shultz, No. 83-3741 (D.D.C. July 27, 1984); Cronin v. Shultz, No. 83-3895 (D.D.C. July 27, 1984) (Those cases have been decided in the government's favor. *See* 592 F. Supp. 880 (D.D.C. 1984). Appeals are pending in the D.C. Circuit).

51 Kleindienst v. Mandel, 408 U.S. at 773 (Douglas, J., dissenting).

our government, which need not explain, defend or justify its actions.

Under these circumstances, the American political process suffers when people must struggle to understand and resolve current controversies without exposure to those most familiar with the issues. For example, the resolution of such contemporary questions as the appropriate level of military aid to El Salvador, or the provision of covert support for Nicaraguan insurgents, is impeded when the American public may not have direct access to such figures as d'Aubuisson and Borge. Even a later reversal of the State Department's position would not undo this damage. The functioning of our political system is impaired.

While our intellectual and political life is damaged, these exclusion provisions also mar our moral image, here and abroad. They cannot be reconciled with our role as signatory to an international agreement intended to encourage the free exchange of ideas and movement of citizens, or with our condemnation of injustices in other countries.

To remove that shadow of hypocrisy, and to affirm the principles underlying our Bill of Rights, the Association in 1981 proposed that the present sections 212(a) (27)-(29) be repealed, and be replaced with the following consolidated provision:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
> * * *
>
> Aliens with respect to whom the Secretary of State and Attorney General determine that there are reasonable grounds to believe that an immediate, grave and direct danger exists they would, after entry, (i) engage in activities prohibited by the criminal laws of the United States relating to espionage, sabotage, terrorism, or other activity endangering the national security, (ii) engage in any activity which, by force, violence or other unlawful means, seeks to oppose, control, or overthrow the Government of the United States. This determination shall be made within 30 days of receiving an application for a non-immigrant visa, and, if adverse, shall be so certified to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the

Senate.[52]

This proposal deletes all language from present section 28, which turns on the advocacy of anarchist or Communist doctrines or membership in organizations supporting such doctrines. For the reasons we have set forth, we believe that denials of visas based solely on the applicants' alleged political beliefs or affiliations have no place in our immigration laws. It is incongruous to exclude advocates of Communism or other ideologies when their domestic counterparts run for public office and enjoy the right of free speech, and hypocritical to do so while we boast and even preach of that domestic freedom.

This proposal does incorporate those portions of present sections 27 and 29 that focus on the danger of activities, not merely beliefs or advocacy, threatening the national security or related law enforcement interests.[53] Narrowing the present provisions would eliminate their overbreadth and vagueness, and avoid conflict with our interests in free expression and movement. This language would require that, to justify denial of a visa, the anticipated activity of the alien violate the criminal laws pertaining to the national security or other specific related subjects, and that the danger of such activity not be merely conjectural, trivial or remote, but rather "immediate, grave and direct."[54]

The second sentence of the proposal, relating only to non-immigrant visas, borrows the 30-day time limit and the certification provisions of the 1977 McGovern Amendment, which were designed to insure that non-immigrant visa applications receive a prompt review under present section 28 and that any denials be prominently noted.[55] These timeliness and reporting procedures have in many cases been helpful, and are incorporated in this proposed revised section.

Other proposals for reform of the statute also deserve consideration. Thus, the American Civil Liberties Union has drafted a bill, for which it seeks congressional sponsorship, applying a first

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52 36 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 291 (1981).

53 Nor would speech that was part of a criminal conspiracy be protected, for it would be covered by laws prohibiting conspiracy.

54 *Cf.* New York Times v. United States, 403 U.S. 713 (1971).

55 *See supra* note 52.

amendment standard to limit exclusion.[56] That is, the bill provides that a foreigner may not be denied a visa or excluded from the United States because of "past or expected speech, activity, belief, affiliation or membership, which, if held or conducted within the United States, would be protected by the First Amendment to the Constitution".[57] The bill also creates a private right of action for members of the public to enforce the substantive provision.[58] The private cause of action would provide much-needed judicial review, and thus destroy the insularity of consular determination in this area. Another proposal is H.R. 4509, introduced in 1983 by Congressman Barney Frank to shift the law's focus from ideology and association to actual threats to national security.[59]

Conclusion

The people excluded under these provisions have no "right" to enter this country; those Americans who are denied contact with them may or may not have a first amendment right violated by the foreigners' exclusion. But whatever the constitutional rights at issue, more important is the question of what is right. Having power is one thing and using it is another. Whatever the government *may* do in this area, it ought not to do this: exclude from this country people whose political views are not to its liking.

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incident of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.[60]

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56 Copies in the possession of the American Civil Liberties Union and the Association of the Bar of the City of New York.

57 *Id.*

58 *Id.*

59 H.R. 4509, 98th Cong., lst Sess., 129 CONG. REC. 10579 (1983).

60 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Justice Brandeis wrote that passage in 1927. In 1985, we must refurbish our courage and our confidence by discarding these remnants of a fearful age.

Committee on Immigration and Nationality Law

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* Mr. Anderegg dissents from the report as outlined in his separate dissent, which follows.

** Members of the drafting subcommittee. Ms. Englander was the principal author of the report.

DISSENT

by J. Philip Anderegg

The foregoing report[1] recommends repeal of sections 212(a)(27) to (29) of the Immigration and Nationality Act[2] and proposes for consideration in place thereof: (1) the "consolidated provision" set forth in the 1981 report of the Committees on Civil Rights, Entertainment and Sports Law, Federal Legislation, Immigration and Nationality Law, and International Law of the Association of the Bar of the City of New York,[3] (2) a bill introduced by Congressman Barney Frank (D-Mass.) entitled the "Immigration Exclusion and Deportation Amendments of 1983"[4], and (3) a draft bill prepared by the American Civil Liberties Union.[5] Despite any verbal defects and arguable excesses therein, sections 212(a)(27) to (29) are in substance both desirable and constitutional, whereas each of the three substitutes proposed is inadequate since each would, at a minimum, deprive the United States of its present power to exclude

(i) aliens who out of elementary national self-respect or for reasons of state ought to be excluded, and

(ii) aliens advocating the overthrow or control of or opposition to the Government of the United States, by force or violence.

Aliens can be excluded by the Executive Branch only on grounds of exclusion statutorily set forth.[6] Hence, in order to be available, grounds of exclusion must be set forth in the statute. They presently appear in sections 212(a)(1) to (33).

Section 212(a)(27) makes excludable aliens

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[1] Visa Denials on Ideological Grounds: An Update, A Report of the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York (January, 1985), *supra* at 249 [hereinafter cited as 1985 Committee Report].

[2] Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1101-1157 (1982).

[3] 36 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 288, 291 (1981).

[4] H.R. 4509, 98th Cong., 1st Sess., 129 CONG. REC. 10579 (1983).

[5] Copies in the possession of the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York and the American Civil Liberties Union.

[6] Gegiow v. Uhl, 239 U.S. 3, 9 (1915).

> who the consular officer or the Attorney General knows 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.

The class of aliens so defined is understood by the State Department, and rightly, to include among others "[a]liens who while in the United States might engage in political or conspiratorial activities against the United States or foreign governments."[7] Political or conspiratorial activities conducted in the United States by an alien and directed against foreign governments can obviously be "prejudicial to the public interest" of the United States or "endanger [its] welfare, safety, or security," even if those activities do not go beyond pure speech. Therefore, the word "activities" in section 212(a)(27) ought to be construed as not requiring anything more than speech.

Reasons of state constitute an additional and important reason for excluding the alien. Even the *New York Times*, no friend of exclusions on ideological grounds, has acknowledged that reasons of state may on rare occasions justify an exclusion at the request of a friendly foreign government.[8]

None of the proposed substitutes for sections 212(a)(27) to (29) would permit exclusion of such an alien. Neither the "consolidated provision" of the 1981 Committee Report[9] nor the Frank bill[10] authorizes exclusion of an alien for anticipated activities "which would be prejudicial to the public interest, or endanger the welfare ... of the United States" as provided by section 212(a)(27). While the American Civil Liberties Union draft bill leaves section 212(a)(27) unchanged, it would add to section 212(a) new subsection, (k)(l) providing:

> Notwithstanding any other provisions of this section, no alien may be denied a visa or excluded from admission into the United States because of (a) any past or expected speech, activity, belief, affiliation or membership which, if held or conducted in the United States, would be protected by the First

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7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, Pt. II, § 41.91(a)(27), example 1.1, *reprinted in* 6 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 32-214 (rev. ed. 1984).

8 *Nanny at the Gates*, N.Y. Times, June 9, 1983, at A22, col. 1.

9 *See supra* note 3.

10 *See supra* note 4.

> Amendment to the Constitution, or (b) the expected consequences of any activity which the alien may conduct in the United States if that activity would be protected by the First Amendment to the Constitution.[11]

Section 212(a)(27), as limited by this proposed subsection, would provide no ground for excluding an alien on the basis of political activities conducted by the alien in the United States and directed against a foreign government. All three of the proposed substitutes for sections 212(a)(27) to (29) are therefore insufficient on this ground alone.

Indeed, if anything, the grounds of exclusion in section 212(a)(27) need to be broadened rather than narrowed, in order to avoid the present verbal requirement that the exclusion be based on anticipated activities of the alien in the United States. The State Department takes the position, correctly enough, that the United States ought to and can exclude under this section

> [a]liens who are notorious for allegedly engaging in excesses including physical brutality while in political power in their native land, or who were prominently identified with any former regime which did so.[12]

Indeed this means exclusion of such aliens irrespective of any anticipation that they will engage in such excesses (or indeed in any activity of any kind) in the United States if admitted. Section 212(a)(33), limited in its scope to former Nazis, is inadequate for this purpose.[13]

Admittedly there exists the possibility of exclusions under section 212(a)(27) which are groundless or foolish, and perhaps the exclusions of Hortensia de Allende and Nino Pasti referred to in the 1985 Committee Report are instances of such. But it is better to have the exclusion power of section 212(a)(27) than to be without it, and to rely on publicity to limit abuse thereof. To this end, a possi-

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[11] *See supra* note 5, at § 102.

[12] *See supra* note 7, at 32-215, example 1.4.

[13] Section 212(a)(33) excludes:

> Any alien who during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—
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> (A) the Nazi government in Germany,
>
> (B) any government in any area occupied by the military forces of the Nazi government of Germany, or
>
> (C) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

ble amendment of the section might require that all exclusions thereunder, along with the grounds therefor, be reported to the Speaker of the House and the chairman of the Senate Committee on Foreign Relations, in a manner somewhat similar to that required by the McGovern Amendment,[14] restricting exclusions on the basis of an alien's membership in or affiliation with a proscribed organization, *i.e.*, pursuant to section 212(a)(28).

Even more compelling are the reasons for retaining section 212(a)(28) in place of the 1985 Committee Report's proposed substitutes. Clauses (i) to (iv) of subparagraph (F) of that section make excludable, among others, aliens of the following categories:

(i) aliens who advocate the otherthrow by force or violence of the Government of the United States,
(ii) aliens who advocate the duty, necessity or propriety of the unlawful assaulting or killing of any officer of that government,
(iii) aliens who advocate the unlawful damage, injury, or destruction of property, and
(iv) aliens who advocate sabotage.

The United States surely ought to possess and to exercise the power to exclude those aliens, even if their advocacy[15] does not exceed the bounds which are constitutionally protected for similar advocacy conducted within the United States by persons lawfully present there. Under *Brandenburg v. Ohio*[16] the government may not, consistently with the first amendment, forbid advocacy of the use of force or of law violation "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[17] It is in the nation's interest, however, indeed it is essential, to maintain the power, which under section 212(a)(28)(F) the government possesses, to deny entry even to those aliens of the above categories whose advocacy, past or prospective, lies short of the threshold established by *Brandenburg* on the criminality of advocacy of violence. Otherwise, the government would be required to bear the agony of deporting or imprisoning such aliens if, after entry, their advocacy rises to the level of such incitement.

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14 22 U.S.C. § 2691(a) (1982).

15 The advocacy in question, under § 212(a)(28)(F), is advocacy in which the aliens have engaged abroad.

16 395 U.S. 444 (1969).

17 *Id.* at 447.

Indeed, the United States should retain the power to exclude the aliens within categories (i) to (iv) even if the government could obtain dependable assurance that their advocacy after entry would be within first amendment bounds. A man in his right mind does not admit to his house another who urges that the house be pulled down against the will of the owner, even if the urging is in gentle or scholarly tones. Neither should a nation.

Exclusion of aliens of those categories (i) to (iv) under authority of section 212(a)(28)(F) cannot fairly be described as exclusion based on the alien's entertainment of ideas or maintenance of beliefs. Rather it is exclusion based upon advocacy of action, even if the particular means to be employed in that action have not been specified in the advocacy. The action advocated is the violent overthrow, or the assaulting or killing, or the injury or sabotage. These are actions, events in the real world. They are not mere abstract doctrine, and no constitutional or indeed any other, reason exists requiring that a particular mode of carrying out those actions be advocated in order to make advocacy of those actions grounds for exclusion.[18]

Neither is such exclusion open to the objection that it denies entry to aliens knowlegeable, for example, in the doctrines of violent revolution, from whom Americans desire and arguably have a first amendment right to receive firsthand information.[19] So long as such alien scholars desire to visit the United States merely to teach or to discuss the content of such doctrines and not to advocate their realization here, they are not within those categories (i) to (iv), and section 212(a)(28)(F) does not call for, nor authorize, their exclusion. The first amendment right of Americans to receive information has never been held to include a right to compel, via the waiver mechanism of section 212(d)(3) or otherwise, the admission of aliens who advocate, even with ardor short of the *Brandenburg* threshold on criminality, the violent overthrow of the United States Government.

None of the three proposed substitutes for sections (212)(a)(27)

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[18] This is true despite the Supreme Court's holding in *Yates v. United States*, 354 U.S. 298 (1957), that in order to be punishable under the Smith Act, 18 U.S.C. § 2385, advocacy of forcible overthrow must include advocacy of some form of action, now or in the future, to achieve such overthrow and not only advocacy of forcible overthrow as an end ultimately to be achieved.

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

to (29) referred to in the 1984 Committee Report would provide power to exclude aliens of the aforementioned categories (i) to (iv) above set out. The first proposed substitute, the "consolidated provision" set out in the 1981 Committee Report, permits exclusion of an alien, so far as here relevant, only on reasonable grounds to believe that "an immediate, grave and direct danger exists" that the alien would "after entry, . . . engage in any activity which, by force, violence or other unlawful means, seeks to oppose, control or overthrow the Government of the United States."[20] This language would provide no authority, such as currently provided by section 212(a)(28)(F), for excluding an alien directly on the basis of any advocacy or indeed of any activity of any kind whatever in which the alien has engaged outside the United States. Moreover, if an alien were to be excluded under this language on the basis of anticipated advocacy, then by virtue of the word "unlawful" that expected advocacy would have to meet the *Brandenburg* threshold in order to justify the alien's exclusion.

Secondly, the Frank bill would so far as here relevant only make excludable:

> [a]ny alien who a consular officer or the Attorney General knows or has reasonable grounds to believe probably/likely would engage after entry in any activity (i) which is prohibited by the laws of the United States relating to espionage or sabotage, (ii) which endangers public safety or national security, or (iii) 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.[21]

This language contains no reference to advocacy, and Representative Frank has expressed the view that advocacy should never be a ground of exclusion.[22] Therefore, it must be concluded that H.R. 4509 contains no equivalent of section 212(a)(28)(F), and would provide no grounds for excluding aliens of categories (i) to (iv).

Finally, in light of the new subsection (k)(l)[23] which it would add to section 212, the American Civil Liberties Union draft bill fails

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20 *See supra* note 3, at 291.

21 *See supra* note 4, at § 2(a).

22 B. Frank, Remarks at the Meeting of the Association of the Bar of the City of New York (Apr. 2, 1984) (available at the Association of the Bar of the City of New York).

23 *See supra* note 11 and accompanying text.

to provide any adequate power to exclude aliens of the categories (i) to (iv). Subsection (k)(l) would require that an alien's advocacy of the violent overthrow of the government must rise to the threshold of incitement to imminent lawless action described in *Brandenburg* in order to constitute a basis for excluding the alien. Since all three proposed substitutes fail to provide for the exclusion of aliens of the aforementioned categories (i) to (iv), section 212(a)(28) should be retained in preference to those substitutes.

The 1985 Committee Report finally recommends repeal of section 212(a)(29), which excludes 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 the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security, [or] (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. . . .

Each of the three proposed substitutes for sections 212(a)(27) to (29) would remove from the statute at least some of the exclusionary grounds provided by section 212(a)(29). While the consolidated provisions would retain much of the substantive basis for exclusion contained in section 212(a)(29), it would require for exclusion not merely reasonable grounds to believe that the alien would after entry engage in specified activity; instead it would require that there be immediate, direct and grave danger of such conduct.[24] The Frank bill would drop the excludability under section 212(a)(29) of aliens likely to engage in "activities . . . prohibited by the laws of the United States relating to . . . public disorder," or likely to engage in "other activity subversive to the national security."[25] An alien ought to be excludable if there is reasonable ground to believe that he would engage in such activities, whether or not those activities can be said to "endanger public safety or national security" as the Frank proposal requires.

The American Civil Liberties Union draft bill[26] would leave section 212(a)(29) intact. The new subsection (k)(l) which that bill

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[24] *See supra* note 3, at 291.
[25] *See supra* note 21.
[26] *See supra* note 5.

would add to section 212, however, would limit the scope of section 212(a)(29), especially in clause (B) thereof, by imposing a first amendment threshold on the anticipated activity of that clause which might be made the basis for exclusion of an alien.

In support of its contention that sections 212 (a)(27) to (29) should be repealed, the 1985 Committee Report describes several alleged shortcomings of the current law. It criticizes the waiver procedure of section 212(d)(3) as lengthy, cumbersome and expensive. The particular cases set forth in that report hardly support this conclusion. Ernest E. Mandel, the protagonist in *Kleindienst v. Mandel*,[27] was not subjected to either burdensome or expensive requirements in either of his two applications for a visa involved in that case. In fact he received within three months of his first visa application notice that each, along with a separate waiver application in each, had been denied.[28] Nor was the lapse of time between application and decision excessive in the case of Jean Paul Vigier, also discussed in the 1985 Committee Report. Vigier received his visa, apparently with a waiver, little over a month after he applied. In any event, the time and trouble involved in the waiver procedure are questions of administration. Even if that procedure is time-consuming, cumbersome or both, that is not a reason for changing the statutory grounds of exclusion.

The 1985 Committee Report asserts that provisions of the Immigration and Nationality Act[29] exclude foreign visitors from the United States on ideological grounds, and that these provisions contradict the "spirit" of the Helsinski Final Act,[30] from which the report quotes a passage concerning travel for personal or professional reasons appearing in the third or "Basket 3" part of that Final Act.[31] Nothing in the quoted passage, and nothing elsewhere in the Helsinski Final Act, either commits any signatory state or declares it to be the intention of any signatory state to admit aliens who advocate, or who publish writings which advocate, or who are members or affiliates or organizations which advocate, the forcible overthrow of

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27 408 U.S. 753.

28 *Id.* at 756-59.

29 *See supra* note 2.

30 Final Act of the Conference on Security and Cooperation in Europe (Aug. 1, 1975), *reprinted in* 14 INT'L LEGAL MATERIALS 1292 (1975).

31 *Id.* at 1314.

the government of that state. Hence there is no conflict between sections 212(a)(27) to (29) and the Helsinki Final Act.

The 1985 Committee Report also contends that the McGovern Amendment[32] has not accomplished its purpose, because it does not apply to people excludable for reasons other than membership in a proscribed organization. This contention is without foundation. The scope and purpose of the amendment, as is apparent from its language, is to expedite the grant of non-immigrant visas to aliens who are excludable solely by reason of membership in, or affiliation with, proscribed organizations. By its express wording and since its original enactment the Amendment has been inapplicable to the admission of aliens who are excludable on other grounds.

In a section captioned "The First Amendment," the 1985 Committee Report quotes Supreme Court statements to the effect that the Constitution protects the right to receive information and ideas, and that it is the purpose of the first amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail. The report then asserts that this purpose is "frustrated each time a lecture is cancelled or a conference limited because a foreigner is denied a visa on ideological grounds."[33] The implication that visas are denied on ideological grounds is insufficient and misleading.

For the most part, visas are not denied on "ideological grounds," if by that term is meant the mere belief, faith or conviction of the alien visa applicant. Mainly, the sections under discussion, 212(a)(27) to (29), do not authorize visa denials on ideological grounds. Instead, they authorize visa denials by reason of *acts* or *actions* of the alien, namely:

1) anticipated or expected activities of the alien in the United States if he were admitted (sections 212(a)(27) and (29)),

2) past, actual advocacy of
   a) opposition to all organized government (section 212(a)(28)(B)), or of
   b) the economic, international, and governmental doctrines of world communism, or of the establishment of a totalitarian dictatorship in the United States (section 212(a)(28)(D)), or of

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[32] *See supra* note 14.

[33] 1985 Committee Report, *supra* at 262.

c) the violent overthrow of the United States Government or the necessity of killing its officers or the destruction of property or sabotage (section 212(a)(28)(F)),

3) publication of writings effecting advocacy as summarized at (2) above (section 212(a)(28)(G)), or

4) membership in or affiliation with

a) any Communist party or any totalitarian party advocating the establishment of a totalitarian dictatorship in the United States (sections 101(a)(37) and 212(a)(28)(C)), or

b) any organization which carries out advocacy as summarized at (2) above (sections 212(a)(28)(B), (D) and (F)), or

c) any organization which carries out publication as summarized at (3) above (section 212(a)(28)(H)).

The only ground for denying a visa in section 212(a)(27) to (29) requiring nothing more than a belief on the part of the alien is the ground of section 212(a)(28)(A), namely, the status of an alien as an anarchist, which can mean as little as the status of one who believes in anarchism, the theory that all government is evil. Section 212(a)(28)(A) is not, however, an important basis for the denial of visas on what the 1985 Committee Report calls "ideological grounds."

Every advocacy, even of terror, sabotage, violent overthrow of government, killing of government officers, destruction of property, or theft of technology, can be characterized as an ideology. The denial of a visa to one who embraces any of these ideologies does not, however, frustrate the purpose of preserving an uninhibited marketplace of ideas in the United States. On the contrary, the denial of visas to aliens embracing such ideologies serves that goal. The issue is not one of thought control, or, in the words of Justice Marshall, of keeping "certain ideas out of circulation in this country."[34] Rather, the issue is one of advocacy to action, and the extent of the advocacy to action of a violent or lawless kind on the part of an unadmitted non-resident alien which should be countenanced before the alien's application for entry to the United States is denied.

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[34] *Kleindienst*, 408 U.S. at 784 (Marshall, J., dissenting).

Decisions such as *Noto v. United States*[35] and *Brandenburg v. Ohio*,[36] expansively uphold the right of residents of the United States to teach the moral propriety of economic or political change and of the use of violent means to effect it. However, they do not justify a repeal of sections (212)(a)(27) to (29) and replacement thereof with one of the substitutes proposed in the 1985 Committee Report. The choice of statutory grounds of exclusion is no doubt a political one to be made by the Congress. The government is not constitutionally obliged either to admit or to exclude either

a) aliens who advocate overthrow of the Government by force or violence but whose advocacy is genteel, or
b) aliens who advocate such overthrow, but whose advocacy includes incitement to imminent lawless action.

Neither do we need to admit either of these classes of aliens in order for our people to be informed on current controveries or currents in the world, or in order to preserve our commitment to free speech. Hence we ought to exclude both classes; to admit either is to invite the ultimate achievement of such overthrow. Moreover, for the United States to admit either class will be to show itself to the world not as noble and tolerant, but as a wooden, doctrinaire practitioner of extreme first amendment principles, developed in a domestic context, in international circumstances where they are unrealistic and ill-founded. At home, among its own people, the United States can perhaps count on some element of loyalty to the nation. In passing upon the requests of unadmitted non-resident aliens to enter, either temporarily or permanently, it cannot. Whatever their imperfections therefore, sections 212(a)(27) to (29) are in substance desirable, and their retention is much to be preferred to their replacement by any of the substitutes for them proposed in the 1985 Committee Report.

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[35] 367 U.S. 290 (1961).

[36] 395 U.S. 444. *See supra* notes 16-17 and accompanying text.