GRANTING FOREIGNERS FREE SPEECH RIGHTS: THE END OF IDEOLOGICAL EXCLUSIONS?

I. Introduction

United States citizens have been culturally deprived of the opportunity to interact with numerous foreign individuals. The Executive branch[1] has excluded such distinguished authors and artists as Gabriel García Márquez,[2] Carlos Fuentes,[3] Dario Fo,[4]

[1] This Note uses the terms "Executive branch" and "administration" interchangeably to refer to the governmental body which decides to exclude foreigners. Officers who perform this function include the Attorney General, State Department officials, and consular officers. *See infra* notes 74-80 and accompanying text (discussing Attorney General's responsibilities) and notes 93-107 and accompanying text (discussing consular officers' authority to exclude foreigners).

[2] Gabriel García Márquez is a Colombian novelist and winner of the 1982 Nobel Prize in Literature. Among his many works are the critically acclaimed novels Love in the Time of Cholera (1988), Autumn of the Patriarch (1976), and One Hundred Years of Solitude (1962). Since 1972, Márquez has been denied a temporary visa many times by various administrations because of his Communist ties and his outspoken views criticizing United States involvement in Central America. The State Department has allowed Márquez to visit the United States periodically by granting a waiver of excludability, however, these visits were limited to occasions where Márquez was officially invited and specific limitations were placed on his stay. Márquez has insisted on an unconditional visa since 1971 and has refused to visit the United States since 1982 for reasons of "principle and personal dignity." *See* Laber, *Why Some Writers Aren't Welcome Here*, N.Y. Times, Apr. 29, 1984, § 7 (Book Review), at 28, col. 2 [hereinafter Laber]. Márquez commented on his refusal to accept the conditional visas: "I was endorsing this exclusionary system, and not only to my own prejudice but to the prejudice of many writers, artists and scientists from all over the world who are in the same situation." *See* Goodman, *Protest Voiced At U.S. Exclusion Of Visitors Because Of Their Ideas*, N.Y. Times, Sept. 20, 1984, at A18, col. 1 [hereinafter *Protest Voiced*]. Finally, in 1984, after numerous protests, Márquez was offered a "clean visa" that makes no reference to his excluded status and he planned to accept the visa. *Id.* at col. 1.

[3] Carlos Fuentes is a Mexican novelist and diplomat. In addition to his many novels, Fuentes has served his country as cultural officer of the Ministry of Foreign Affairs and as Mexican Ambassador to France. Fuentes was first refused admission to the United States in 1961. In 1963, when invited to the United States to attend publication of his novel, The Death of Artemio Cruz (1962), he initially declined because of his previous visa denial. However, when Secretary of State Dean Rusk left town, special arrangements were made to grant Fuentes a limited five day visa. *See* Suplee, *Conferees See Threat To Civil Liberties*, Wash. Post, Sept. 19, 1984, at B15, col. 4 [hereinafter Suplee]. Fuentes questioned the exclusion policy, asking why "are my books, and those of other excludables, published here[,] . . . our voices heard on TV and radio, whereas only our physical persons, surely the least dangerous part of our intellectual or political or moral totality, are judged dangerous? The answer seems clear: We are being punished for our political opinions." *Id.* Fuentes has been an outspoken critic of United States policy toward Latin America. *See, e.g.*, Fuentes, *The Real Latin Threat*, N.Y. Times, Sept. 5, 1985, at A27, col. 3 (arguing that United States should focus on improving Latin American economy); *7 Authors Assail U.S. Over Nicaragua Policy*, N.Y. Times, Apr. 18, 1983, at A2, col. 4 (Carlos Fuentes, Gabriel García Márquez, Julio Cortázar, Graham Greene, and other authors assailed President Reagan for waging " 'immoral, dangerous and inhuman' war against Nicaragua.") [hereinafter *7 Authors*].

[4] Dario Fo is a popular Italian satirist, playwright, and actor. In 1980, Fo and his

Graham Greene,[5] and Julio Cortázar.[6] Political figures denied entry into the United States include Nino Pasti, Peace Council member and former Italian Senator;[7] Hortensia Allende, widow of former Chilean President Salvador Allende Gossens;[8] as well as hundreds of foreign delegates seeking to attend a disarmament conference at the United Nations.[9] These excluded aliens are only a sample of the foreigners which the United States government attempted to bar pursuant to sections 212(a)(27)-(29),

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wife were about to embark on an American tour beginning in New York City when the State Department denied their applications for visas to enter the United States. The State Department described the timing of the tour as "inappropriate." Bernstein, *Ideas Not Welcome!*, N.Y. Times, July 15, 1980, at A19, col. 1. Fo was associated with a group called *Soccorso Rosso* or Red Aid, a leftist group which helped people imprisoned for politically motivated crimes. The American Embassy considered the group sympathetic to the terrorist movement. *Id.* The reason given for the State Department's decision to deny a visa to the Italian artist was not "that Fo is going to foment revolution or throw bombs[.] . . . It's just that . . . Dario Fo has never had a good word to say about [the United States]." *Id.* (citations omitted) (brackets and ellipses in original). In 1984, the State Department waived inadmissibility for a short visit to allow Fo to attend the opening of his play, *Accidental Death of an Anarchist* (original Italian text 1970), on Broadway. *See* Gussow, *U.S. To Give Visa To Fo, Controversial Writer*, N.Y. Times, Oct. 31, 1984, at C19, col. 1.

5 Graham Greene is a British novelist who has written numerous novels including GETTING TO KNOW THE GENERAL (1984); THE QUIET AMERICAN (1955) (predicting implications of United States involvement in Vietnam); THE UGLY AMERICAN (1955); THE HEART OF THE MATTER (1948); THE POWER AND THE GLORY (1940); and STAMBOUL TRAIN (1932). Greene was a member of the Communist party which "bothered American officials." *See* Shenker, *Graham Greene At 66*, N.Y. Times, Sept. 12, 1971 (Book Review) at 2, col. 1. The State Department did allow him to enter the country for short periods to see his plays performed. Greene described the problems he encountered in visiting the United States: "[O]ne had to plan quite a bit in advance. I had to get permission from the Attorney General in Washington, and . . . had to say which plane [I] was arriving on and which plane [I] was leaving with . . . ." *Id.*

6 Julio Cortázar was an Argentinean writer involved with, among other organizations, UNESCO. His works include LIBRO DE MANUEL, (A MANUAL FOR MANUEL, 1978), LOS PREMIOS (THE WINNERS, 1965), RAYUELA (HOPSCOTCH, 1963), and LAS ARMAS SECRETAS (BLOW UP AND OTHER STORIES, 1959, which inspired the film BLOW UP by the director Michalangelo Antonioni). *See* Fraser, *Julio Cortázar Dies In Paris; Argentine Writer Of Fiction*, N.Y. Times, Feb. 13, 1984, at D11, col. 2. Cortázar supported both the Cuban and Nicaraguan revolutions. *Id.*

7 Nino Pasti, a retired NATO general, has criticized the deployment of United States missiles in Europe. The State Department denied him entry in 1983 when groups concerned about nuclear weapons invited him to speak. *See Protest Voiced*, *supra* note 2, at A18, col. 2. *See also* Abourezk v. Reagan, 592 F. Supp. 880, 882 (D.D.C. 1984), *vacated*, 785 F.2d 1043, 1048 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987), *on remand*, 1988 WL 59640 (D.D.C. June 7, 1988).

8 The State Department denied Hortensia de Allende a visa forcing her to reject an invitation in 1983 to speak to educational institutions and church groups. Her involvement in the World Peace Council, considered a Communist front by United States government officials, was the reason for her exclusion. Allende v. Schultz, 845 F.2d 1111, 1113 (1st Cir. 1988); *Protest Voiced*, *supra* note 2, at A18, col. 1. She was also a "vocal opponent of U.S. intervention in Chile . . . ." Suplee, *supra* note 3, at B15, col. 3 (quoting Floyd Abrams).

9 *See* N.G.O. Comm. on Disarmament v. Haig, No. 82 Civ. 3636 (S.D.N.Y. June 10, 1982) (LEXIS, Genfed Library, Dist file), *aff'd*, 697 F.2d 294 (2d Cir. 1982) (State Department excluded 320 people, mostly Japanese, from entering United States to attend a nuclear disarmament conference sponsored by United Nations).

the ideological exclusion provisions of the Immigration and Nationality Act ("INA").[10] In 1988 alone, 951 individuals were prevented from entering the United States under the ideological exclusion sections.[11] The ideological exclusion sections granted the Executive branch wide discretion to exclude an applicant based on his beliefs.[12]

However, in 1987, Congress enacted section 901 of the Foreign Relations Authorization Act, which prevented exclusion based solely on a foreigner's beliefs.[13] By repealing the termination provisions of section 901,[14] Congress prohibited visa denials or exclusions based on "beliefs, statements, or associations" which would be protected if engaged in by a United States citizen in the United States.[15] The Executive branch may exclude an alien based on "foreign policy or national security" reasons as long as the exclusion is not based on the foreigner's beliefs.[16] The purposes of prohibiting exclusion based on belief include expanding United States citizens' exposure to international opinion, promoting the reputation of the United States as an open society, and better facilitating international travel.[17]

Unless courts depart from a deferential form of review and apply an intermediate level of judicial scrutiny to decisions to ex-

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10 Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (codified at 8 U.S.C. § 1101 (1988)). The ideological exlusion sections appear at INA, § 212(a)(27)-(29), 8 U.S.C. § 1182 (a)(27)-(29).

11 Over 44,000 individuals were initially refused visas under the ideological exclusion sections and, upon further review, 951 were eventually prevented from entering the United States. *See* May, *Visa Policy Banning Ideologues, Leaders Criticized; Defenders Point To Terrorism*, L.A. Times, May 2, 1989, at A15, col. 2. Approximately 500-1000 aliens per year have been denied temporary visas under section 212(a)(28) over the last 10 years. Approximately 400 aliens have been denied visas under sections 212(a)(27) and 212(a)(29) over the same 10 year period. Bureau of Consular Affairs, U.S. Dep't of State, Annual Report of the Visa Office (1980, 1984, 1986 and 1988 eds.).

12 *See infra* notes 60-80 and accompanying text (discussing ideological exclusion sections).

13 Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1399-1401 (1987), *amended by* Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, H.R. CONF. REP. No. 343, 101st Cong., 1st Sess. § 128(b) (1989) (repealing termination provisions) [hereinafter § 901].

14 Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, H.R. CONF. REP. No. 343, 101st Cong., 1st Sess. § 128(b) (1989). *See infra* notes 86-89 and accompanying text (discussing repeal of temporary provision of §901).

15 § 901(a), *supra* note 13.

16 *Id.* at § 901(b)(1). The prohibition against exclusion based on belief does not affect Executive branch authority to exclude a foreigner if he has engaged, or is likely to engage in, terrorist activities, or foreigners who seek to enter as officials of a purported labor organization which is, in fact, an instrument of a totalitarian state. *Id.* at § 901(b)(2), (3). *See infra* notes 83-85, 92 and accompanying text (discussing exceptions to prohibiting exclusions based on belief). The prohibition on ideological exclusions also does not apply to those who have assisted in Nazi and other persecutions. *Id.*

17 H.R. CONF. REP. No. 475, 100th Cong., 1st Sess. 163, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2370, 2424.

clude foreigners pursuant to section 901, the recent amendment will be meaningless. In reviewing decisions to exclude foreigners, courts should require that the Executive branch show a substantial relationship between the exclusion and the governmental purpose of promoting foreign policy, protecting national security, or preventing terrorism.[18] This heightened level of scrutiny will effectuate congressional intent to prohibit exclusion based on belief and protect United States citizens' first amendment rights to receive information and ideas.[19]

Part II of this Note analyzes the legislative history of the ideological exclusion sections, reviews current world events to illustrate the glaring anachronism of exclusions based on ideology, and discusses the impact of section 901. Part III discusses judicial review of Executive branch decisions to exclude foreigners based on their beliefs. Part IV analyzes the conflict between the government's interest in setting immigration policy and the first amendment rights of citizens to receive information and ideas, and contends that citizens' first amendment rights have not been adequately protected. This Note concludes that as ideological exclusion impedes the flow of information and personal contact between citizens of the United States and other countries, the citizens of every country involved are denied the important benefits which accompany cultural, political, and intellectual exchange.

II. Exclusion Based on Belief

A. *Legislative History: Predecessors to the Ideological Exclusion Sections of the INA*

The Immigration Act of 1903 ("1903 Act") first permitted exclusion from the United States based on ideological grounds.[20] While earlier legislation restricted certain classes of individuals

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[18] *See infra* notes 195-206 and accompanying text (discussing proposal for heightened judicial review of exclusion decisions).

[19] *See infra* notes 196-99 (contending deferential judicial review will allow Executive branch to exclude based on beliefs thereby thwarting congressional intent).

[20] Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213. Individuals were excluded on ideological grounds by the following Acts: Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898-99; Act of Feb. 5, 1917, ch. 29, § 2, 39 Stat. 874, 875-76 (repealed 1952); Act of Oct. 16, 1918, ch. 186, § 2, 40 Stat. 1012 (repealed 1952); Act of June 28, 1940, ch. 439, 54 Stat. 670, 671 ("Alien Registration Act") (repealed 1952); and the Internal Security Act of 1950, ch. 1024, 64 Stat. 987. *See generally* 8 U.S.C. §§ 136-37 (repealing above noted Acts).

based on nationality,[21] criminal behavior,[22] and mental disability or physical disease,[23] the 1903 Act excluded "anarchists, or persons who *believe in* or advocate the overthrow by force or violence of the Government of the United States . . . or of all forms of law . . . ."[24] Although the 1903 Act may have appeared necessary to maintain national security,[25] the exclusion provision required only a showing of mere belief in the overthrow of government by force, without regard for the probability or even possibility of harmful conduct on the part of the person excluded.[26] By granting the Executive branch the authority to exclude foreigners solely on the basis of their beliefs, Congress delegated broad discretionary powers to the Executive branch to scrutinize the views of individuals seeking entry into the United States.

Congress established the power to exclude aliens based on ideological grounds as a direct response to an anarchist's assassination of President McKinley in 1901.[27] The legislative response to the assassination was the first in a series of legislative responses to immediate crises which have caused immigration law to become contradictory and in need of reform.[28] In 1940, Congress expanded the scope of ideological exclusion by passing the Alien Registration Act.[29] As the nation confronted the threat posed by emerging Fascist and Nazi forces, the Alien Registration Act allowed exclusion if an alien advocated political doctrines involving violent activity against the government at any time in the past.[30]

By allowing exclusion based on prior statements or beliefs, the Alien Registration Act allowed the Executive branch to effec-

[21] Act of Mar. 3, 1875, ch. 141, §§ 1, 2, 4, 18 Stat. 477 (prohibiting the importation of Chinese "coolie" labor), *repealed by* Act of Oct. 20, 1974, 88 Stat. 1387, 8 U.S.C. §§ 331-39 (Supp. 1990).

[22] Act of Mar. 3, 1875, ch. 141, §§ 3, 5, 18 Stat. 477 (prohibiting prostitutes and convicted criminals from entering United States).

[23] Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (repealed 1966) (excluding lunatics, idiots, and persons unable to care for themselves without becoming public charges). Also excluded by the amendment in the Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, were paupers, persons suffering from a contagious or loathsome disease, and polygamists. *See* U.S. IMMIGRATION POLICY 45 (R. Hofstetter ed. 1984).

[24] Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213, 1214 (emphasis added).

[25] *See* T. ALEINIKOFF & D. MARTIN, IMMIGRATION PROCESS AND POLICY 351-52 (1985) [hereinafter ALEINIKOFF & MARTIN].

[26] *See supra* note 24 and accompanying text.

[27] Leon Czolgosz, who only had tenuous connections with an anarchist group, shot the President in 1901. Legislative activity began immediately and resulted in the statute to exclude anarchists. The statute became law in March 1903. *See* ALEINIKOFF & MARTIN, *supra* note 25, at 193, 352.

[28] *Id.* at 183.

[29] Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (repealed 1952).

[30] *Id.* at ch. 439, § 2, 54 Stat. 671.

tively deny an alien entry into this country permanently. An applicant faced exclusion based on prior statements regardless of whether he altered his views or renounced his prior beliefs.[31] Thus, this broad prior statement provision enabled the government to exclude an individual based on a past statement regardless of how long ago it was made or whether the person still adhered to the belief. The Alien Registration Act, therefore, set the stage for future legislation allowing for permanent exclusion of a potential visitor based on his prior beliefs without any limiting considerations.

By reaffirming the "former belief" doctrine created in the Alien Registration Act, the ideological exclusion sections of the Internal Security Act permanently barred those foreigners who had ever been members of the Communist party or one of its affiliates. In addition, the Internal Security Act broadened the scope of the acting administration's discretion by expanding its authority to exclude anyone whose acts would be prejudicial to the public interest or endanger the public welfare.[32] Under such a broad inclusion, the requirement that a foreigner be a member of a Communist organization or have past affiliations with that organization no longer existed. The government could exclude a person merely by asserting that the person's activities would prejudice the public interest. This expansion, without the exercise of meaningful judicial review, created a powerful tool for the Executive branch to exclude foreigners who merely disagreed with the acting administration.

B. *History of the Cold War and Enactment of the INA*

The conclusion of World War II shifted American concern away from the enemies of Nazism and Fascism to a new enemy—Communism.[33] The anti-Communist sentiment became official

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[31] *See* 2 C. Gordon & S. Mailman, Immigration Law and Procedure § 2.47a, at 2-336 (1989) ("root premise of [Alien Registration Act] then was that a person who was once a Communist was forever precluded from entry or reentry") [hereinafter Gordon & Mailman]. A recent example of this occurred in 1986 when a United States immigration judge upheld the deportation of author Margaret Randall. The author renounced her United States citizenship in 1967 after marrying a Mexican national and returned to the United States in 1984 under a visitor's permit after getting a divorce. The immigration service charged her with overstaying her visa. At the deportation hearing in 1986, the author testified that denouncing her citizenship was a big mistake. Yet the judge ruled that her books, Spirit of the People (criticising United States involvement in Vietnam), and Cuban Women Now (a series of interviews with Cuban Women) advocated Communism and ordered deportation. *See Author Held Deportable Because Of Writings,* N.Y. Times, Sept. 3, 1986, at A15, col. 1.

[32] Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (repealed 1952).

[33] *See generally* A. Theoharis, Seeds of Repression: Harry S. Truman and Origins

policy in the realm of foreign affairs with the implementation of President Truman's policy of "containment."[34] However, the battle against Communism did not remain solely in the field of foreign policy. Since the Communist threat was perceived as part of a world conspiracy, the battlefront shifted to the domestic scene to expose infiltrators threatening the American way of life.[35] Thus, congressional committees were established to expose Communist infiltrators.[36]

As the threat of Communism from abroad became intertwined with domestic subversives, Congress took measures to limit the influence from foreign individuals by enacting such provisions as the ideological exclusions of the INA.[37] However, President Truman strongly criticized the exclusion sections in his veto message:

> Seldom has a bill exhibited the distrust evidenced here for citizens and aliens alike . . . .
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> . . . .
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> Heretofore, for the most part, deportation and exclusion have rested upon findings of fact made upon evidence. Under this bill, they would rest in many instances upon the "opinion" or "satisfaction" of immigration or consular employees. The change from objective findings to subjective feelings is not compatible with our system of justice. The result would be to restrict or eliminate judicial review of unlawful administrative action.[38]

Notwithstanding President Truman's legitimate substantive and procedural due process concerns, Congress overrode his veto.[39] This congressional action highlighted the pervasive fear of Communism as well as the political danger to any legislator who opposed

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OF McCARTHYISM (1971) (discussing public opinion supporting measures to combat Soviet threat).

[34] Truman's "containment" policy called for United States support of the "free peoples of the world" who were resisting armed minorities and outside threats, and economic assistance to Western European countries in an effort to reduce Soviet Communist influence. *See* M. BELKNAP, COLD WAR POLITICAL JUSTICE 142 (1977).

[35] *See* S. LIPSET & E. RAAB, THE POLITICS OF UNREASON: RIGHT-WING EXTREMISM IN AMERICA, 1790-1970 220-47 (1970) [hereinafter LIPSET & RAAB] (describing extent to which Communists were perceived to be involved in American institutions).

[36] *See, e.g.*, INTERNAL SECURITY MANUAL, S. DOC. NO. 47, 83rd Cong., 1st Sess. 221-24 (1953) (listing dozens of hearings on Communist and subversive infiltration of, among others, unions, minority groups, and the entertainment industry).

[37] *See infra* notes 60-80 (discussing INA, § 212(a)(27)-(29), 8 U.S.C. § 1182(a)(27)-(29)).

[38] 98 CONG. REC. 8082, 8084 (1952) (President Truman's veto message).

[39] *Id.*

Communist exclusionary measures.[40]

The increasing fear of Communism stemmed from the belief that "subversives" were infiltrating all segments of American life. The "guilt by association" techniques of "McCarthyism" fueled this fear, expanding the number of alleged subversives to epic proportions.[41] To reduce the harmful spread of Communist and subversive influence in the United States, Congress passed the ideological exclusion sections of the INA.[42] Section 2 of the Internal Security Act, a predecessor to the INA, elaborated on the necessity for the legislation and provided a clear indication of the prevailing fear of Communism:

> Congress hereby finds that—
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> (1) There exists a world Communist movement which . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups . . . , espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world. . . .
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> . . . .
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> (5) The Communist dictatorship . . . in furthering the purposes of the world Communist movement, establishes . . . and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization. . . .
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> . . . .
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> (15) [I]n the United States [the] . . . organization . . . [is] rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements . . . that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. . . . Communist organization[s] . . . present a clear and present danger to the security of the United States and to the existence

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[40] This political danger was grounded in the hysteria which swept the country in the form of McCarthyism.

> Throughout the country, there was a witch hunt, not so much for conspirators as for ideological defectors. The basic monistic formula was applied: Communism was evil, and those who trafficked in such evil were illegitimate and to be excluded from the market place of ideas—and even from the market place of jobs.

LIPSET & RAAB, *supra* note 35, at 224.

[41] *See* V. NAVASKY, NAMING NAMES 23-24 (1980) (describing techniques of McCathyism and perceived Communist conspiracy to dominate the United States). *See also* LIPSET & RAAB, *supra* note 35, at 220-24 (describing "guilt by association" and "innuendo" techniques of McCarthyism).

[42] INA § 212(a)(27)-(29), 8 U.S.C. § 1182(a)(27)-(29) (1988).

> of free American institutions, and make it necessary that Congress . . . enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.[43]

Congress, by enacting the ideological exclusion sections, responded to the hysteria which condemned Communism as the worst of evils that needed to be stopped at all costs.

C. *The End of the Cold War and the New Era*

Whatever actual threat of Communism existed at the time Congress enacted the ideological exclusion sections of the INA, the situation is different today. Fear of Communist infiltration into cherished American institutions and society is now a remote concern. Americans no longer fear Communism as a threat because of the remarkable changes occurring throughout the world. The "Cold War" is over and the threat that the ideological exclusions guarded against no longer exists.[44]

The Soviet Union, once considered the symbol of Communist "evil" by the United States government,[45] is undertaking a momentous restructuring of its society incorporating elements of democracy, a market economy, and increased openness.[46] In an effort to concentrate on these domestic changes, the Soviet government reduced its foreign military presence.[47] Following the

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43 Internal Security Act of 1950, ch. 1024, § 2, 64 Stat. 987 (repealed 1952).

44 *See After The Cold War*, NEWSWEEK, May 15, 1989, at 20; Rosenthal, *Cold War's End*, N.Y. Times, Dec. 4, 1989, at A1, col. 6. *But see* Wines, *Webster And Cheney At Odds Over Soviet Military Threat*, N.Y. Times, Mar. 7, 1990, at A1, col. 5 (disagreement between Director of Central Intelligence and Secretary of Defense as to whether Soviet Union will continue to pose a military threat to United States); Kondracke, *The World Turned Upside Down*, THE NEW REPUBLIC, Sept. 18 & 25, 1989, at 26 (debate among right-wing commentators as to whether Cold War really over).

45 President Ronald Reagan had labelled the Soviet Union the "evil empire." *See Help Who?*, N.Y. Times, Oct. 18, 1989, at A28, col. 1.

46 *See, e.g.*, Whitney, *Lifeline For Moscow*, N.Y. Times, Feb. 16, 1990, at A8, col. 5 (Central Committee of the Communist Party of the Soviet Union voted to give up its constitutional monopoly on political power and allow other political parties to form); *Up-To-The-Minute Scores From The Revolution In The East Bloc*, N.Y. Times, Feb. 18, 1990, § 4 (Week in Review), at 2, col. 2 (partially competitive elections resulted in revamped Congress of People's Deputies symbolizing Gorbachev's effort to shift power from party functionaries to elected officials) [hereinafter *East Bloc Revolution*]; Keller, *Soviets Approve The Right To Own Small Businesses*, N.Y. Times, Mar. 7, 1990, at A1, col. 3 (Soviet Parliament approved property law which gives private citizens right to own small businesses for first time since 1920's); *Gorbachev Takes New Post And Pledges To Speed Move Toward A Market Economy*, N.Y. Times, Mar. 16, 1990, at A1, col. 6. M. GORBACHEV, PERESTROIKA NEW THINKING FOR OUR COUNTRY AND THE WORLD 75 (1987) (Soviet Union wants more openness about public affairs in every sphere of life) [hereinafter PERESTROIKA].

47 *See* Trainor, *Shift In The Western Alliance's Focus: From Moscow To A United Germany?*, N.Y. Times, Feb. 18, 1990, at A20, col. 1 (Soviet Union reduced number of troops in Central Europe from 400,000 to 195,000).

Soviet lead, radical political, economic, and social changes are also occurring across Eastern Europe.[48] East Bloc countries have scheduled free elections to choose new parliaments and new local and regional governments.[49] In virtually all of these nations the Communist parties are losing their majority support and relinquishing their monopoly on political power.[50] The secret police, which in the past have functioned to stifle dissent, have either been dismantled or severely limited in their authority and size.[51] Perhaps the most significant event of the Revolution of 1989,[52] is the "seemingly inevitable reunification of Germany."[53] The drastic restructuring of countries across Eastern Europe evince a trend toward more democratic, open, and permissive governments.

The restructuring of Central Europe, the democratization of the Soviet Union and East Bloc countries, as well as the overwhelming improvement in Soviet-American relations,[54] have shifted debate in the United States away from combatting the Soviet threat to capitalizing on new opportunities presented by these rapid changes.[55] American citizens need to examine what measures should be taken to further encourage positive develop-

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48 *See generally East Bloc Revolution*, *supra* note 46, at 2-3, col. 1-6 (briefly discussing and predicting upcoming elections).

49 The following countries have elections scheduled for the fall of 1990: East Germany, Hungary, Poland, Romania, Bulgaria, Czechoslovakia, and the Soviet Union. Citizens of Poland and the Soviet Union are voting for local and regional governments while the other countries are electing new parliaments. *See East Bloc Revolution*, *supra* note 46, at 2, col. 6.

50 For instance, in East Germany the Communist Party renamed itself the Party of Democratic Socialism and its ranks have been reduced from approximately 2.4 million members to 890,000 in a few months. In Poland, the Communist Party and Solidarity are leading the country in a partnership. The Czechoslovak Communist Party has lost its control over the government and a well organized opposition is running the country. *Id.*

51 In East Germany, the government agreed to dismantle the secret police after public outcry from a suggestion to keep some form of intelligence service. *Id.* at 2, col. 4. The secret police in Czechoslovakia has been disbanded. *Id.* at 3, col. 3. Romania's secret police has been dissolved entirely and in Bulgaria, the hardliners who previously ran the police have been replaced. *Id.* at 3, col. 6.

52 President George Bush, in his State of the Union address, labelled the events occurring in Central Europe as the "Revolution of '89" sweeping away "a world whose fundamental features were defined in 1945." Apple, *Bush Calls On Soviets To Join In Deep Troop Cuts For Europe As Germans See Path To Unity*, N.Y. Times, Feb. 1, 1990, at A1, col. 6.

53 Friedman & Gordon, *Steps To German Unity: Bonn As A Power*, N.Y. Times, Feb. 16, 1990, at A1, col. 3 (describing the role of former allied powers—France, England, Soviet Union, and the United States—in the reunification process).

54 *See* Weinraub, *President Wishes Gorbachev Well On Soviet Change*, N.Y. Times, May 25, 1989, at A1, col. 4. *See also* Rosenthal, *Bush And Gorbachev Proclaim A New Era For U.S.—Soviet Ties; Agree On Arms And Trade Aims*, N.Y. Times, Dec. 4, 1989, at A1, col. 3.

55 *See, e.g.*, Rosenbaum, *Peace Dividend: A Dream For Every Dollar*, N.Y. Times, Feb. 18, 1990, § 4 (Week in Review), at 1, col. 1 (changes in Soviet Union and Eastern Europe may permit United States to spend less money on military and more money elsewhere).

ments around the world. One such inquiry focuses on the need for increased interaction between people from this country and other countries. Increased interaction would assist American citizens in understanding different cultures. Moreover, permanent relationships between American citizens and foreigners will establish bonds that can influence the trend toward increased democratic reform.[56]

The old fears of the "Cold War" have dissipated and increased cooperation has taken their place. Increased contact between United States citizens and Soviet citizens through numerous exchange programs has caused a mutual understanding to develop between the different societies.[57] As cooperation and mutual understanding between the United States and Communist or former Communist nations rapidly increases, there appears to be a trend toward global integration welcomed by a majority of the nations throughout the world.[58] Congress has recognized that excluding foreigners based on beliefs represented an anachronism since Cold War suspicions no longer have a rational basis. The recent repeal of the ideological exclusion sections reflects an intention to bring American immigration policy up-to-date. Just as the Berlin Wall, a physical barrier between the East and West, will be removed since it is no longer neces-

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[56] *See* Boren, *New Decade, New World, New Strategy*, N.Y. Times, Jan. 2, 1990, at A19, col. 3. The author urges, *inter alia*, a

> "[dramatic] increase . . . [in] student exchange programs at the undergraduate college level with the Soviet Union, Eastern Europe and key nations in Latin America. This action would help build lasting bonds of friendship[,] . . . make it more difficult to reverse recent advances toward freedom[,] . . .
>
> . . . .
>
> . . . [and improve] the ability of Americans to deal with the new international environment. The study of foreign languages and international studies in schools and universities must be markedly increased."

Id. at A19, col. 5.

[57] *See, e.g.*, "Dialogue for Democracy," a program sponsored by the Democracy Project and the New School for Social Research which represents one example of increased interaction. Soviet and American officials and scholars joined together to examine each nation's democracy (event held Mar. 2-3, 1990 at the New School for Social Research, New York, New York). *See* advertisement in THE NATION, Mar. 12, 1990, at 338.

[58] *See, e.g.*, PERESTROIKA, *supra* note 46, at 13.

> [The Soviet people] want to cooperate on the basis of equality, mutual understanding and reciprocity. . . . The situation does not allow us to wait for the ideal moment: constructive and wide-ranging dialogue is needed today. That is what we intend when we arrange television links between Soviet and American cities, between Soviet and American politicians and public figures, between ordinary Americans and Soviet citizens. . . . We encourage contacts with exponents of different outlooks and political convictions. In this way we express our understanding that this practice helps us to move toward a mutually acceptable world.

Id.

sary,[59] a similar fate has befallen the ideological obstacle of the INA.

D. *The Ideological Exclusion Sections of the INA*

Section 212(a) of the INA lists thirty-three classes of presumably undesirable aliens who are ineligible to receive visas and are excluded from admission into the United States unless specific exceptions are provided for in the INA.[60] While these categories represent an accumulation of concerns over the past years,[61] the reasons for exclusion may no longer be viable.[62] Sections 212(a)(27)-(29), the ideological exclusion sections of the INA, were frequently used to justify exclusion of foreigners.[63] The

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59 *See* Schmemann, *Czechoslovak President Visits Wall And Buries It*, N.Y. Times, Jan. 3, 1990, at A13, col. 3 (spokesman for East German President confirmed plans to tear down the 100-mile concrete barrier).

60 INA, § 212(a)(1)-(33), 8 U.S.C. § 1182(a)(1)-(33) (1988). The INA excludes, among others, aliens who are criminals, insane, mentally retarded, former Nazis, sexual deviants, or members of Communist or subversive organizations. *Id.*

61 *See* Lennon v. INS, 527 F.2d 187, 189 (2d Cir. 1975) (exclusion provisions represent "a magic mirror, reflecting the fears and concerns of past Congresses").

62 "Many of [the exclusion provisions] surely would not be included by modern Congresses—at least not in anything like their current form—if somehow all present immigration provisions were to disappear from the books and today's Congress had to sit down to create a new code from scratch." ALEINIKOFF & MARTIN, *supra* note 25, at 183. *See* Select Commission on Immigration and Refugee Policy, Final Report 282-83 (1981) (cited in ALEINIKOFF & MARTIN, *supra* note 25, at 183, concluding that existing exclusionary grounds should not be retained).

63 INA, § 212(a)(27)-(29), 8 U.S.C. § 1182 (a)(27)-(29). These sections state in relevant part:

> (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:
>
> . . . .
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely . . . to engage in activities which would be prejudicial 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 . . . opposition to all organized government;
>
> (C) Aliens who are members of or affiliated with . . . the Communist Party of the United States . . . .
>
> (D) Aliens . . . who advocate . . . the establishment in the United States of a totalitarian dictatorship . . . .
>
> . . . .
>
> (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, [or] (B) engage in any . . . activities of any organization which is . . . registered under section 786 of Title 50.

Id. See supra note 11 and accompanying text (stating number of aliens excluded under ideological exclusion sections).

Executive branch could exclude an alien if he endangered the safety, security, or public interest of the United States; was a member or affiliated with an organization which advocates opposition to all organized government or individually advocates such views;[64] or was a member or affiliated with a Communist organization.[65]

The prohibition in section 212(a)(27), which denied entry to anyone who might engage in activities "prejudicial to the public interest, or endanger the welfare, safety, or security of the United States,"[66] provided a broad category for exclusion. Under section 212(a)(27), membership in an organization hostile to the United States and embarrassment or criticism of United States foreign policy in this country were considered activities prejudicial to the public interest.[67] Therefore, while section 212(a)(27) allowed exclusion for legitimate national security concerns, such as preventing terrorism, the broad scope of the language also encompasses anyone whose views were critical of the government. Such broad language allowed officials to exclude individuals because of their opposition to the policies of the acting administration and extended their power beyond the legitimate goal of assuring national security.

By including individuals who would endanger the "public interest" or the "general welfare," Congress gave the Executive branch unlimited power to deny a United States citizen the opportunity to hear unpopular or just plain different viewpoints. Since the judiciary had established a deferential standard of review of decisions in this area,[68] the acting administration could censor unpopular, radical, or simply contrary views on any topic of the invited non-citizen speaker. Congress modified this basis for exclusion with passage of section 901 which allows exclusion based on foreign policy, national security, and terrorist reasons.[69] These broad categories still provide the same potential for abuse as their predecessors.

Section 212(a)(28) specifically addressed the types of beliefs of the invited speaker which allowed the government to invoke

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

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

66 INA, § 212(a)(27), 8 U.S.C. § 1182(a)(27). This portion of the INA is very similar to section 22 of the Internal Security Act. *See supra* note 32 and accompanying text.

67 *See* Abourezk v. Reagan, 592 F. Supp. 880 (D.D.C. 1984), *vacated*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987), *on remand*, 1988 WL 59640 (D.D.C. June 7, 1988).

68 *See infra* notes 116-24 and accompanying text.

69 *See infra* notes 81-85 and accompanying text (analyzing categories for exclusion).

the exclusion section.[70] Anarchists or anyone either belonging to or affiliated with the Communist party or espousing the doctrines of world Communism were ineligible for visas or admission into the United States.[71] This section provided for exclusion based solely on the applicants beliefs or affiliations without regard for his propensity for violence or the threat he posed to national security. As long as the visa applicant fell within either the anarchist or broadly worded Communist definition, the Executive branch could exclude him from the United States.[72] The reasoning behind this provision is that anarchists and Communists by definition threatened the public interest.[73]

Although the ideological exclusion sections granted the Executive branch the power to deny entry to those aliens who fell within the enumerated categories, the provisions were not a complete bar to entry. The INA allowed the Attorney General, upon recommendation of the Secretary of State or the consular officer, to waive the relevant sections and allow temporary entry to a nonimmigrant.[74] Complete discretion was given to the Attorney General as to whether or not to waive inadmissibility and allow the applicant to enter the United States. Sections 212(a)(27) and (29) did not require the waiver provision.[75]

In 1977, Congress passed the McGovern amendment[76] to

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[70] INA, § 212(a)(28)(A)-(D), 8 U.S.C. § 1182(a)(28)(A)-(D) states in part:

> Aliens who are, or at any time have been, members of any of the following classes:
>
> (A) . . . anarchists;
>
> (B) Aliens who advocate or teach . . . opposition to all organized government;
>
> (C) Aliens who are members of or affiliated with . . . the Communist Party of the United States . . . .
>
> (D) Aliens not within any of the other provisions of this paragraph who advocate . . . the establishment in the United States of a totalitarian dictatorship . . . .

Id.

[71] *Id.*

[72] *See supra* notes 30-32 and accompanying text.

[73] *See supra* notes 31-43 and accompanying text.

[74] INA, § 212(d)(3), 8 U.S.C. § 1182(d)(3) states the waiver provision as follows:

> Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) of this section (other than paragraphs (27) and (29)), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General . . . .

Id.

[75] *Id.*

[76] 22 U.S.C. § 2691 (1988).

the INA to achieve greater United States compliance with the Helsinki Accords.[77] This amendment to the INA altered the waiver provision for exclusion based on membership in, or affiliation with, a proscribed organization. The amendment requires the Secretary of State to recommend that the Attorney General grant a waiver unless the Secretary of State determines that admission of the alien endangers security interests of the United States.[78] Thus, exclusion cases are generally brought upon the Attorney General's refusal to waive exclusion under section 212(a)(28).[79] The waiver section does not apply to aliens excluded under sections 212(a)(27) or (29) since these sections do not involve membership or affiliation in a particular organization. Even in cases where an alien is excluded pursuant to section 212(a)(28), the Communist and anarchist affiliation section, the McGovern amendment does not require the Attorney General to waive inadmissibility, rather, only that the Secretary of State recommend a waiver.[80] Therefore, the Attorney General retains complete discretion to deny entry.

E. *Recent Amendment to the INA Prohibiting Exclusion Based on Belief*

Section 901(a) prohibits visa denials or exclusions based on "beliefs, statements, or associations which, if engaged in by a United States citizen in the United States would be protected under the Constitution."[81] While the Executive branch may justify exclusion based on "foreign policy or national security" rea-

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[77] *See* Conference of Security and Cooperation in Europe: Final Act, 73 DEP'T STATE BULL. 323 (Sept. 1, 1975), *reprinted in* INT'L HUMAN RIGHTS INSTRUMENTS 470.1 (R. Lillich ed. 1986). The Helsinki Accords, an international declaration, promotes the free movement of citizens across national borders and the free exchange of ideas between citizens of different nations. *Id.* For a discussion of the relationship between the Helsinki Accords and ideological exclusions of foreigners, see Miranda, *Rethinking the Role of Politics in United States Immigration Law: The Helsinki Accords and Ideological Exclusion of Aliens*, 25 SAN DIEGO L. REV. 301 (1988).

[78] In national security cases a different procedure is exercised. The Secretary of State is required to certify to both houses of Congress that entry would be harmful to the security interests of the United States. 22 U.S.C. § 2691. However, there is no record that a Secretary of State ever utilized this procedure. *See* Shapiro, *Ideological Exclusions: Closing The Border To Political Dissidents*, 100 HARV. L. REV. 930, 931 n.12 (1987) [hereinafter Shapiro].

[79] *See, e.g.*, Abourezk v. Reagan, 592 F. Supp. 880 (D.D.C. 1984), *vacated*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987), *on remand*, 1988 WL 59640 (D.D.C. June 7, 1988).

[80] *Id.*

[81] § 901, *supra* note 13, at 1399-1401 (1987). Section 901 states in part:

> (a) IN GENERAL. — . . . [N]o alien may be denied a visa or excluded from admission into the United States . . . because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United

sons,[82] the exclusion would not be permissible if based on "beliefs, statements, or associations" of the visa applicant.[83] The prohibition against exclusion based on belief does not affect Executive branch authority to exclude terrorists[84] or foreigners who seek to enter as officials of purported labor organizations which are, in fact, instruments of totalitarian states.[85]

Congress first enacted section 901[86] as a temporary measure in 1987 and required that its provisions would remain in force until March 1989.[87] However, in October 1988 Congress extended section 901 to remain in force for two more years.[88] During this period several bills were introduced which attempted to amend the ideological exclusion sections of the INA, but were unsuccessful.[89] Ultimately, Congress repealed the two year expiration clause of section 901 expressing an intent to prohibit ex-

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> States citizen in the United States, would be protected under the Constitution of the United States.
>
> (b) CONSTRUCTION REGARDING EXCLUDABLE ALIENS. — Nothing in this section shall be construed as affecting the existing authority of the executive branch to deport, to deny issuance of a visa to, or to deny admission to the United States of, any alien—
>
> (1) for reasons of foreign policy or national security, except that such deportation or denial may not be based on past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States;
>
> (2) who a consular official or the Attorney General knows or has reasonable ground to believe has engaged . . . in a terrorist activity or is likely to engage after entry in a terrorist activity; or
>
> (3) who seeks to enter in an official capacity as a representative of a purported labor organization in a country where such organizations are in fact instruments of a totalitarian state. . . .

Id.

[82] *Id.* at § 901(b)(1).

[83] *Id.*

[84] "[T]errorist activity" is defined as "organizing, abetting, or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily harm to individuals not taking part in armed hostilities." *Id.* at § 901(b)(3).

[85] *Id.* The prohibition on ideological exclusions also does not apply to those who have assisted in Nazi and other persecutions. *Id. See* GORDON & MAILMAN, *supra* note 31, § 2.47b, at 2-338.

[86] § 901, *supra* note 13.

[87] The Foreign Relations Authorization Act was a temporary measure enacted by Congress at the end of 1987 as a stopgap measure. Nonimmigrant visas submitted during 1988, as well as applications for admissions based on those visas sought through March 1, 1989, were affected by the temporary provision of section 901. *See* Practicing Law Institute, *Recent Changes Affecting the Grounds for Exclusion and Deportation*, 362 PLI/LIT 589 (1988).

[88] An extension of the Amendment was enacted in 1988. Act of Oct. 1, 1988, Pub. L. No. 100-461, 161, 102 Stat. 2268. *See* GORDON & MAILMAN, *supra* note 31, § 2.47b, at 2-338.

[89] For an evaluation of the amendment proposals, see Helton, *Reconciling the Power to Bar or Expel Aliens on Political Grounds with Fairness and the Freedoms of Speech and Association: An Analysis of Recent Legislative Proposals*, 11 FORDHAM INT'L L.J. 467 (1988).

clusions based on belief and to afford foreigners the same first amendment rights of speech and association that United States citizens enjoy.

The purposes of prohibiting exclusion based on belief include expanding United States citizens' exposure to international opinion, promoting the reputation of the United States as an open society, and better facilitating international travel under the requirements of the Helsinki Accords.[90] Exclusion based on belief negatively affected three distinct groups involved in the visa denial: United States citizens', the United States government, and excluded foreigners. United States citizens were denied the opportunity to hear differing opinions in the world community and interact with foreign individuals. The United States government, by denying entry to those foreigners who held certain beliefs contrary to American values, actually contradicted fundamental American freedom of expression values and presented a negative image of the United States.[91] Foreigners excluded were denied the opportunity to visit the United States and interact with United States citizens. Exclusions based on belief resulted in negative effects on each party involved without any countervailing purposes to justify these negative effects. Therefore, Congress prohibited ideological exclusions and reformed current law to reflect fundamental first amendment values.

Although section 901 limits the Executive branch's power to exclude aliens on the basis of their beliefs, it may exclude an alien for "foreign policy" or "national security" reasons unrelated to the individual's beliefs, statements, or associations.[92]

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[90] H.R. CONF. REP. NO. 475, 100th Cong., 1st Sess. 163, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2370, 2424. For a description of the purpose of the Helsinki Accords, see *supra* note 77.

[91] *See* Laber, *supra* note 2, at 28, col. 3. Jeri Laber, Executive Director of the United States Helsinki Watch Committee, comments:

> [Excluded people state] that the United States is the only Western democracy that imposes a political test for visas for visitors and that American citizens would be justifiably outraged if they were forced to submit to questioning about their beliefs and associations . . . . They marvel at the hypocrisy of American leaders whenever they criticize other governments for violating their commitments under the Helsinki Accords, an agreement dedicated to encouraging the free exchange of ideas and the free movement of citizens across national borders.

Id.

[92] § 901(b)(1), *supra* note 13. Justifications for exclusion under this section may include showing that the United States government does not recognize a specific government or group and to safeguard the lives and property of United States citizens abroad. H.R. CONF. REP. NO. 475, 100th Cong., 1st Sess. 163-64, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2370, 2424-25.

While section 901 is a positive step in eradicating the anachronism of ideological exclusion, the broad language used in section 901(b)(1), whereby the Executive branch may exclude aliens, will allow an acting administration to bypass the prohibition on exclusion based on belief by citing one of the enumerated justifications. The Executive branch may need only assert that the reason for exclusion falls within the broad foreign policy, national security, terrorist, or purported labor organization categories to justify excluding foreigners who criticize administration policy. Without meaningful judicial review of such decisions, the acting administration will have the ability to exclude a foreigner based on his beliefs thereby contradicting congressional intent and preventing American citizens from being exposed to international opinion.

F. *Enforcement of the Ideological Exclusion Sections*

Consular officials at American embassies in other countries or immigration officials review visa applications upon a foreigner's attempt to enter the United States.[93] Under the ideological exclusion sections, the consular official or immigration officer questions an applicant as to his affiliations with Communist organizations and if he is associated with a Communist group, he is "excludable" under section 212(a)(28).[94] As a result of the prohibition against exclusion based on the ideology of the applicant, the consular officer should no longer inquire into an applicant's affiliation with Communist organizations as this is not a relevant factor in the decision to grant a visa. However, the State Department still requires consular officers to make such inquiries.[95]

To determine visa eligibility, a consular officer may also check an Automated Visa Lookout System.[96] Of the two million

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[93] *See* 8 C.F.R. § 212.4(a)(2) (1990). Consular officers are authorized to issue nonimmigrant visas and decide whether an exclusion should be authorized. Section 221(a) provides that "a consular officer may issue . . . to a nonimmigrant who has made proper application therefor, a nonimmigrant visa . . . . " INA, § 221(a), 8 U.S.C. § 1201(a) (1988). Section 221(g) leaves total discretion to the consular officer to determine whether the alien is excludable, stating that: "[n]o visa . . . shall be issued to an alien if (1) it appears to the consular officer . . . that such alien is ineligible to receive a visa . . . under section 1182 . . . or (3) the consular officer knows or has reason to believe that such alien is ineligible . . . ." INA, § 221(g), 8 U.S.C. § 1201(g).

[94] *See* 2 C. GORDON & G. GORDON, IMMIGRATION LAW AND PROCEDURE § 16.04[9][a], at 16-55 (rev. ed. 1989).

[95] *See* STATE DEP'T CABLE 88-377093 (Nov. 19, 1988), *reprinted in* 65 INTERPRETER RELEASES 1272 (Dec. 5, 1988). *See also* GORDON & MAILMAN, *supra* note 31, § 2.47b, at 2-338.2.

[96] The Automated Visa Lookout System contains lists having "a lot of names [which] were put in [during the 1950's and 1960's] without a lot of checking on who they were." *See* May, *Scholar Will Try To Clear Name From Visa Lists*, N.Y. Times, Aug. 23, 1986, at A26,

names on the list, approximately 50,000 people were on it because of membership in "subversive organizations, terrorist activities, espionage or a history of Nazism."[97] Once the consular officer has determined the applicant is "excludable" under section (27) or (28), he would, in uncontroversial cases, decide whether to grant a waiver.[98] However, in the more politically controversial denials, the State Department decides whether to grant a waiver.[99]

If neither the consular officer nor the State Department waived exclusion, the foreigner excluded abroad had no right to review that decision.[100] A hearing, however, is required if an alien reaches the United States border unless the Executive branch excludes the foreigner based on national security grounds.[101] The minimal review and appeal process available to a foreigner stopped abroad or even at the border of the United States does not provide a sufficient check or redress against abuse of the broad discretionary powers of the consular officer or the official at the State Department.[102] The absence of any judicial review of decisions abroad allows the consular officer to exclude someone on the basis of insufficient or incorrect information. In addition, the procedures allow the consular officer great discretion to waive ineligibility.[103]

Section 901 grants a consular official, as well as the Attorney General, the authority to exclude an individual for terrorist activities. The consular official retains great authority because section 901 allows exclusion if the official has reasonable ground to believe the alien engaged in terrorist activity or "is likely to engage after entry in a terrorist activity."[104] Therefore, the consular officer may exclude a foreigner based on his subjective belief that the visa applicant will engage in terrorist activity. This grant of

col. 6. One example of reliance on the list cost Japanese scholar, Choichito Yatini, six weeks in detention. His name was on the list because of his arrest during a protest against the Vietnam War in 1968. *Id.* This example shows that when too much discretion is given to consular officers without an appropriate appellate procedure injustices will and do occur.

[97] *Id.* (quoting State Department spokesman James Callahan).

[98] *See* 53 Fed. Reg. 40,867 (1988) (codified at 8 C.F.R. § 212 (1989)).

[99] 3 DEP'T OF STATE, FOREIGN AFFAIRS MANUAL pt. II, in 3 C. GORDON & S. MAILMAN, IMMIGRATION LAW AND PROCEDURE § 41.122 (rev. ed. 1989).

[100] 3 C. GORDON & S. MAILMAN, IMMIGRATION LAW AND PROCEDURE § 8.14, at 8-122 (rev. ed. 1989).

[101] *See* INA, §§ 235(c), 236, 8 U.S.C. §§ 1225(c), 1226 (1988).

[102] *Id. See* UNITED STATES COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR 46 (1980) (criticizing the amount of discretion granted to consular officers) [hereinafter TARNISHED GOLDEN DOOR].

[103] *See* 51 Fed. Reg. 322,294 (1986) (codified at 8 C.F.R. § 212 (1989)).

[104] § 901(b)(2), *supra* note 13.

authority presents the same potential for erroneous decisions at American embassies abroad that the former ideological exclusion sections presented. Similarly, the excluded foreigner cannot seek judicial review of any negative decision.[105]

The provisions of section 1201 allow a consular officer to deny entry to a legitimate candidate based solely on the officer's subjective belief that the candidate poses a danger to national security or should not be admitted into the country for the reasons outlined in section 901.[106] If the consular officer bases his decision on a mistaken belief the alien has no remedy since no appeal procedure abroad for petitioning aliens exists.[107] Without appropriate guidelines, and in the absence of judicial review these decisions will be, at best, arbitrary or, at worst, discriminatory.

III. Judicial Review of the Executive Branch's Decisions Under Sections 212(a)(27) and (28) of the INA

The "facially legitimate and bona fide" standard of review established by the Supreme Court does not effectively balance the competing interests of government against those of citizens who have invited a foreign speaker or who wish to hear one.[108] In *Galvan v. Press*,[109] the Supreme Court held that there is no due process limitation on the actions of Congress with regard to immigration policies.[110] Aliens who seek redress for a constitutional violation, such as an ideological exclusion, lack standing and a court will not have subject matter jurisdiction to review the exclusion.[111] Consequently, plaintiffs challenging ideological

[105] *See* Tarnished Golden Door, *supra* note 102, at 49 (quoting testimony of Benjamin Gim, former President of the Association of Immigration and Nationality Lawyers, discussing the inadequate system for review of consular visa decisions). Mr. Gim stated that:

> the most serious [problem] is the power to which is vested in the American consul to issue or refuse a visa, and that decision is not reviewable by even the Secretary of State, and it certainly is not reviewable in the courts. . . . [T]hat's one . . . area where there is such a potential for abuse, and it is being abused, that it needs reform.

Id.

[106] INA, § 221, 8 U.S.C. § 1201 (1988).

[107] *See supra* note 100.

[108] Kleindienst v. Mandel, 408 U.S. 753 (1972). *See infra* notes 122-45 and 189-95 and accompanying text.

[109] 347 U.S. 522 (1954).

[110] *Id.* at 531. *But see* Jean v. Nelson, 472 U.S. 846 (1985) (detained excludable aliens have right to nondiscriminatory parole considerations); Wong Wing v. United States, 163 U.S. 228 (1896) (due process clause is applicable to foreigners charged with criminal offenses); United States v. Henry, 604 F.2d 908 (5th Cir. 1979) (excludable aliens have constitutional right to criminal proceeding regarding immigration violations).

[111] *Mandel*, 408 U.S. 753 (1972).

exclusions are United States citizens who are deprived of their right to meet with the foreigner to exchange ideas and obtain information.[112]

The United States Supreme Court first addressed the ideological exclusion of aliens invited by American citizens in *Kleindienst v. Mandel*.[113] In *Mandel*, faculty and student groups invited Ernest Mandel, a Marxist editor and author, to debate and speak at their universities. Mandel had been admitted to the United States on two prior occasions upon the Attorney General's waiver of ineligibility. However, on the third attempted visit, the Attorney General refused to waive ineligibility. The Immigration and Naturalization Service ("INS") acting on behalf of the Attorney General, cited noncompliance with the scheduled itinerary on Mandel's previous trip as a reason for the denial of the waiver.[114] Those who had invited Mandel to this country brought suit claiming that the acting administration denied them their first amendment rights by not allowing them to meet, speak, or debate with Mandel.[115]

In denying the claim, the Supreme Court relied on the long standing policy of deferring to Congress' plenary power[116] in admitting aliens and excluding ones who possess "those characteristics which Congress has forbidden."[117] The Court chose not to balance the government's interest in excluding aliens against the citizens' first amendment rights to receive information.[118] Consistent with its hands-off approach, the Court established the "facially legitimate and bona fide standard."[119] The Court held that

> when the Executive exercises . . . [the power to exclude aliens] negatively on the basis of a *facially legitimate and bona fide* reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal com-

[112] The United States citizen has standing because he is asserting a claim on his own behalf. His claim is that the government is depriving him of the right to obtain information and the citizen, therefore, is not asserting the rights of a third party. *Cf.* Warth v. Seldin, 422 U.S. 490 (1975).

[113] 408 U.S. 753 (1972).

[114] *Id.* at 759.

[115] *Id.* at 762.

[116] *Id.* at 766. The term "plenary" means "[f]ull, entire, complete, absolute, . . . unqualified." BLACK'S LAW DICTIONARY 1038 (5th ed. 1979).

[117] *Mandel*, 408 U.S. at 766 (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967)). For a discussion of the cases which courts rely on as the basis for Congress' power, see *infra* notes 125-30 and accompanying text.

[118] *Mandel*, 408 U.S. at 770.

[119] *Id.*

munication with the applicant.[120]

The "facially legitimate and bona fide" standard gives considerable deference to the Executive branch[121] and provides only a cursory review of the discretionary decisions of State Department officials and consular officers.[122] Justice Blackmun, writing for the majority,[123] recognized the legitimate first amendment rights of citizens to receive information.[124] The Supreme Court, however, sustained the Attorney General's authority to exercise virtually complete discretion in the area of ideological exclusion.

The Court primarily relied on late nineteenth century cases which held that the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers — a power to be exercised exclusively by the political branches of government . . . ."[125] The Court further asserted that "[s]ince [the decisions in the *Chinese Exclusion Case*[126] and *Fong Yue Ting v. United States*[127]], the Court's general reaffirmations of this principle have been legion."[128]

The *Chinese Exclusion Case*,[129] which upheld the statutory exclusion of Chinese laborers seeking to emigrate to the United States, did not confront the first amendment issue raised by American citizens in *Mandel*. Because the government asserted no interest against the competing constitutional rights of the American citizens in the *Chinese Exclusion Case* and *Fong Yue Ting* the holdings in those cases were not dispositive of the central issue in *Mandel*.[130] There-

[120] *Id.* (emphasis added).

[121] The Supreme Court will not intervene in the decisions of the Executive branch unless the reasons given for failure to waive exclusion do not meet the "facially legitimate and bona fide" standard. *See id.*

[122] The Supreme Court declined to decide whether the Executive branch would violate first amendment rights of citizens or violate another provision of the Constitution if the State Department refused to waive the inadmissability section without giving any reason. *Id.*

[123] Justice Blackmun delivered the majority opinion in which Chief Justice Burger, Justice Stewart, Justice White, Justice Powell, and Justice Rehnquist joined. Justice Douglas, Justice Marshall, and Justice Brennan dissented.

[124] *Mandel*, 408 U.S. at 762-64.

[125] *Id.* at 765 (quoting Brief for Appellants, at 20) (ellipses in original).

[126] 130 U.S. 581 (1889) (exclusion of Chinese laborers was constitutional exercise of legislative power since exclusion power is an incident of sovereignty).

[127] 149 U.S. 698 (1893) (right to exclude any class of aliens is an inherent right of sovereign nation).

[128] *Mandel*, 408 U.S. at 765-66 (footnote omitted).

[129] 130 U.S. 581 (1889).

[130] *See Mandel*, 408 U.S. at 781 (Marshall, J., dissenting). *See also* Shapiro, *supra* note 78, at 942, stating:

> Reliance on the *Chinese Exclusion Case* . . . obscures the fact that the constitutional rights of American citizens are abridged by the ideological exclusion of

fore, the Court's reliance on cases not implicating first amendment rights was misguided.

Even though the *Mandel* court recognized that exclusion of an invited foreign speaker implicates citizens' first amendment rights,[131] it was weary of allowing first amendment challenges to visa denials. The Court assumed that "[i]n almost every instance [where] an alien [is] exclud[ed] under § 212(a)(28), there are probably those who would wish to meet and speak with him."[132] The prospect of numerous claims raised further concerns about the difficult position of a reviewing court having to choose which foreigners to allow to enter the country to address United States audiences. Since "the First Amendment does not protect only the articulate, well known, and the popular,"[133] a bona fide claim made by an American citizen would force courts to grant admission in virtually all cases.

The majority foresaw two unsatisfactory results in requiring that the Executive branch's power yield when a citizen asserts a valid first amendment claim. First, every claim would prevail, nullifying the plenary discretionary authority which Congress granted the Executive branch.[134] Second, courts would have to weigh the strength of the audience's interest against the government's interest in refusing to waive inadmissability.[135] The Court found this alternative of weighing audience and governmental interests unappealing. The Court's hesitancy may be attributed to the assumption that any balancing test would involve an inquiry into the size of the audience or the substance of the speaker's ideas.[136]

Justice Marshall, in his dissent, answered the majority's concerns by applying the "compelling governmental interest" analysis.[137] Under this standard, the government may restrict first amendment rights only if the restriction is necessary to further a

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> foreign speakers. Furthermore, the assertion of national sovereignty begs the difficult constitutional question. The Bill of Rights, after all, was adopted to limit the exercise of sovereign powers that are inconsistent with transcendent national values.

Id. (footnotes omitted).

[131] *Mandel*, 408 U.S. at 765.

[132] *Id.* at 768.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 769.

[136] *Id.*

[137] *Id.* at 783 (Marshall, J., dissenting). Justice Marshall states: "I do not mean to suggest that simply because some Americans wish to hear an alien speak, they can automatically compel even his temporary admission to our country. Government may prohibit aliens from even temporary admission if exclusion is necessary to protect a compelling governmental interest." *Id.*

compelling governmental interest.[138] This analysis focused on the government's interest in excluding the alien when a citizen asserts a claim that is not a "demonstrated sham."[139] Marshall's proposed standard, therefore, shifted the burden to the government to show a compelling interest in not allowing an alien into the country when the citizens assert a valid claim. This approach strikes a better balance between the citizens' and the government's competing concerns than the current deferential standard. Thus, if the government establishes a legitimate overriding concern, exclusion would be valid despite the citizens' wish to hear, speak, or debate with the foreigner.

The "facially legitimate and bona fide" standard does not adequately protect the important right to receive information guaranteed by the first amendment.[140] The Court, by giving deference to the inherent power of the sovereignty, has ignored the fundamental rights of citizens to receive information despite the fact that it recognized such a right. The two unsatisfactory consequences of a contrary decision, allowing every claim to prevail and weighing the audience's interest in hearing the speaker against the government's interest in excluding the individual, rest on the faulty assumption that any claim asserted by an American citizen would require the government to waive inadmissability. The protected right to receive information presupposes that the speaker will convey pertinent information. The mere "wish to speak with [the foreigner]"[141] would not be an assertion of the right to receive information under the first amendment. The inquiry that a reviewing court would undertake would not be an evaluation of the *type* of information imparted, as the Court suggests,[142] but rather, whether the invitation to lecture or debate is a guise to get the foreigner into the country for other reasons. This inquiry does not require an evaluation of the "size of audience or the probity of the speaker's ideas" which the Court feared.[143]

Applying the "facially legitimate and bona fide" standard presents another complication because the Court has not offered any assistance in defining a "facially legitimate and bona fide" reason for denial. As a result of the lack of clarification, court decisions subsequent to *Mandel* have inconsistently applied the ambiguous

[138] *Id.*
[139] *Id.* at 783 n.6.
[140] *Id.* at 777. For a suggestion of a stricter form of judicial review with regard to exclusions based on section 901, see *infra* notes 195-206 and accompanying text.
[141] *Mandel*, 408 U.S. at 768.
[142] *Id.* at 769.
[143] *Id.*

standard. Responses have ranged from allowing virtually any government justification to pass the facially legitimate test[144] to requiring more than a conclusory statement[145] to justify exclusion.

Abourezk v. Reagan,[146] provided the Supreme Court with an opportunity to clarify its position on the "facially legitimate and bona fide" standard. *Abourezk* involved three consolidated actions with fact patterns similar to *Mandel.* In all three cases, the State Department, pursuant to section 212 (a)(27) of the INA, denied temporary visas to foreigners who were invited to speak by United States citizens.[147] The United States Court of Appeals for the District of Columbia was concerned that the government could avoid the McGovern amendment if visa denials were allowed under section 212(a)(27) on the basis of affiliation with a Communist organization.[148] Consequently, the court of appeals held that section 212(a)(27) denials must be based on reasons other than affiliation with a Communist organization to prevent the government from avoiding the McGovern amendment.[149] The basis of the court's ruling was statutory and, therefore, it did not discuss the constitutional issue. The Supreme Court affirmed without rendering an opinion.[150] While the Court underscored the confusion and unsettled nature of the law dealing with ideological exclusions, it did not offer any guidance in the *Abourezk* affirmance nor has it offered any guidance since. The Supreme Court should clarify the appropriate standard to apply to decisions to exclude foreigners.

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[144] *See* N.G.O. Comm. on Disarmament v. Haig, No. 82 Civ. 3636 (S.D.N.Y. June 10, 1982) (LEXIS, Genfed Library, Dist file), *aff'd,* 697 F.2d 294 (2d Cir. 1982). Over 300 aliens affiliated with the World Peace Council were denied entry to observe a United Nations disarmament conference because, according to the Attorney General, the World Peace Council was an instrument of Soviet Foreign Policy and allowing the aliens to enter would negatively affect the public interest and national security. *Id.*

[145] Abourezk v. Reagan, 592 F. Supp. 880 (D.D.C. 1984), *vacated,* 785 F.2d 1043 (D.C. Cir. 1986) (bare assertion that individual presents harm to foreign policy not legitimate reason for exclusion), *aff'd by an equally divided court,* 484 U.S. 1 (1987), *on remand,* 1988 WL 59640 (D.D.C. June 7, 1988).

[146] 592 F. Supp. 880 (D.D.C. 1984), *vacated,* 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided court,* 484 U.S. 1 (1987), *on remand,* 1988 WL 59640 (D.D.C. June 7, 1988).

[147] *Abourezk,* 785 F.2d at 1048-49. This scenario differs from *Mandel* which involved a denial under section (28) and a refusal by the Attorney General to waive ineligibility. The distinction between sections (27) and (28) is important because the latter is subject to the McGovern amendment and can be waived by the Attorney General upon recommendation by the Secretary of State while the former cannot be waived in such a manner. *See supra* notes 76-80 and accompanying text (discussing McGovern amendment).

[148] *Abourezk,* 785 F.2d at 1048-49.

[149] *Id.* at 1057.

[150] 484 U.S. 1 (1987).

IV. Competing Interests: The Government's Interest in Excluding Aliens and Citizens' Rights to Receive Information

Underlying judicial deference to Executive branch decisions in the immigration area is the assumption that the government's interest in excluding aliens is paramount to citizens' first amendment rights to receive information. Governmental authority over the exclusion of aliens rests on its sovereign power. Reliance on inherent sovereign power to defer to Executive branch decisions without scrutinizing the reasons given for exclusion results in the subordination of United States citizens' first amendment rights.[151] Therefore, reliance on the government's sovereign power as a basis for the application of deferential review should rest on sound precedent and valid policy reasons.

The Supreme Court has held that congressional power to regulate the entry of aliens into this country is plenary and consequently established the deferential standard of review in exclusion cases.[152] However, the plenary power of Congress stems from the broad language of the Court's early immigration decisions.[153] The origin of congressional power does not lie in the Constitution, but in the sovereign power of the United States.[154] The Supreme Court's hesitancy to formulate a stricter review of Executive branch decisions to exclude is due to a concern of encroaching on Congress' power over immigration.[155]

The justifications for granting broad congressional power primarily concern the political nature of the decision and the desire to maintain national security.[156] Elected branches of government have the responsibility to manage foreign affairs.[157] While the political process subjects elected officials to accountability, it

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[151] *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

[152] *See id.* at 765-70.

[153] The Supreme Court relied on the *Chinese Exclusion Case*, 130 U.S. 581 (1889), which noted that "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise . . . cannot be granted away or restrained on behalf of any one." *Id.* at 609. *Accord* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (power to deport is "absolute and unqualified"). For a criticism of the Supreme Court's reliance on the *Chinese Exclusion Case*, see Shapiro, *supra* note 78, at 942.

[154] *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[155] *See Mandel*, 408 U.S. at 766-67.

[156] *Id.* at 765.

[157] *See Fong Yue Ting*, 149 U.S. 698 (1893). The Court stated that "[t]he power to exclude . . . being a power affecting international relations, is vested in the political departments of the government, . . . except so far as the judicial department has been authorized by . . . statute, or . . . the Constitution, to intervene." *Id.* at 713.

does not act as a check on the unelected judiciary.[158] However, the Attorney General and the Secretary of State, both appointed positions, are not subject to the same accountability as elected positions. Thus, the President controls their appointments and any check on their actions by voters would be indirect. Furthermore, the electorate would most likely not hear about the exclusion of an alien decided abroad since the media will probably not report it. As the electoral process will not deter potential Executive abuse of discretion, the exercise of judicial review is necessary to protect first amendment rights of American citizens.

The Executive branch also contends that it requires flexibility in granting admission to foreigners to better protect the security of this country.[159] The government argues that if it were required to justify every visa denial its basic function would be impaired thereby rendering it inoperative.[160] A different standard of review taking into account the Executive branch's function and allowing it to perform effectively would remedy this concern. In addition, the broad powers now granted to the Executive branch allow it to exclude individuals who pose no threat to national security.[161]

The recent congressional action prohibiting ideological exclusion evinces an intent to limit the broad discretion afforded the Executive branch.[162] Section 901 grants foreigners seeking to enter the United States the same constitutional protection guaranteed to American citizens in the areas of belief or association.[163] Courts reviewing decisions to exclude foreigners should apply the same standard which applies when the government attempts to restrict the speech of American citizens.[164] Courts must provide an alternative to the deferential "facially legitimate and bona fide" standard in reviewing exclusion decisions under

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158 *See infra* notes 192-95 and accompanying text.

159 *Cf. Mandel*, 408 U.S. at 765 (The Executive branch argued that the power to exclude aliens is necessary for "defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government . . . .").

160 *Id.*

161 An example of exclusion where no security threat was involved was in the exclusion of Farley Mowat, a Canadian naturalist and author of the book NEVER CRY WOLF (1963). He was denied entry into the United States in 1985 because a Canadian newspaper quoted him as saying he had fired a 22-caliber rifle at a United States Strategic Air Command plane. The author said, while he meant the statement as a joke, INS officials took it seriously. Lardner, *Canadian Writer Rejects INS Offer Of 'Parole'; Jousting Over U.S. Visit Continues*, Wash. Post, Apr. 27, 1985, at A3, col. 3.

162 *See supra* notes 81-92 and accompanying text (discussing section 901).

163 *See supra* note 81.

164 *See infra* notes 195-97.

section 901. Continued application of the "facially legitimate and bona fide" standard will allow the Executive branch to evade the prohibition against ideological exclusion. The alternative must encompass both protection of citizens' first amendment rights and the government's ability to function effectively in the area of immigration control.

Mandel reaffirmed the constitutional guarantee of the "right to receive information and ideas."[165] The Court rejected the government's argument that, since the students and professors who invited Professor Mandel to speak have free access to his books, speeches, and tapes, his absence would not prevent them from receiving information.[166] Evaluating the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning," the Court dismissed the government's argument.[167] Although the Court emphasized that nowhere is the right to receive information more vital than in schools and universities, it created a standard which does little to protect those very same rights. Instead, the Court chose to acquiesce to Congress' power to exclude aliens based on questionable precedent.[168]

The Supreme Court has emphasized the "firmly imbedded"[169] notion that Congress is exclusively entrusted to formulate policies concerning the entry of aliens into this country. Just as "firmly imbedded," or even more so,[170] are the protections guaranteed by the first amendment. The right to gather and receive information[171] is a corollary right to the first amendment guarantee of free speech. Just as citizens have a right to speak freely, they also have a right to receive information and ideas.[172]

The power to regulate immigration, which originated as an inherent power of the sovereign state,[173] finds its limitations in

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[165] Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

[166] *Id.* at 765.

[167] *Id.*

[168] *Id.* at 763. *See supra* notes 125-30.

[169] Galvan v. Press, 347 U.S. 522, 531, *reh'g denied*, 348 U.S. 852 (1954).

[170] "Congress shall make no law . . . abridging the freedom of speech . . . . " U.S. CONST. amend. I. No such explicit reference is made for Congress' power to control immigration. This power is inferred from the concept of sovereignty.

[171] *See infra* notes 176-89.

[172] *See* Stanley v. Georgia, 394 U.S. 557 (1969) (statute making private possession of obscene matter a crime violates first amendment); Lamont v. Postmaster General, 381 U.S. 301 (1965) (statute withholding mail considered "communist political propaganda" until person affirmatively requests mail is unconstitutional); Martin v. Struthers, 319 U.S. 141, 143 (1943) (freedom of speech necessarily protects right to receive literature).

[173] *See* Fong Yue Ting v. United States, 149 U.S. 698 (1893).

the Bill of Rights.[174] The Bill of Rights was adopted to curb the exercise of sovereign power when such exercise collided with the basic rights of individuals.[175] Refusing to address violations of individual liberties in the face of an assertion of inherent sovereign power would reduce the Bill of Rights to a useless addendum to the Constitution.

The right to receive information and ideas was first discussed in *Meyer v. Nebraska*.[176] Teachers who taught grades eight and under were prohibited by Nebraska law from instructing their students in any modern language other than English.[177] The Court held that, under the fourteenth amendment,[178] citizens have a right "to contract, to engage in any of the common occupations of life, [and] to acquire useful knowledge . . . ."[179] Consequently, a listener has a constitutionally protected right to contract with a speaker to learn and grow as an individual.

In addition to an educational setting, the Court upheld the right to receive information in the area of broadcasting. *Red Lion Broadcasting Co. v. FCC*[180] involved a challenge to the fairness doctrine which required publicly licensed radio stations to present a certain number of public issues to keep listeners informed. The doctrine required that stations give fair coverage to each side of the issue.[181] In unanimously upholding the constitutionality of the doctrine, the Court stated:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged . . . by Congress . . . .[182]

Nor should Congress be allowed to abridge the right of the public to gain access to information which is in the hands of a non-citizen. Absent legitimate national security concerns, the same importance

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[174] *See generally* I. BRANT, THE BILL OF RIGHTS 3-15 (1965) [hereinafter BRANT]; J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 315 (3d ed. 1978) (Bill of Rights is check on government's power).

[175] *See generally* BRANT, *supra* note 174, at 3-15.

[176] 262 U.S. 390 (1923).

[177] "An act relating to the teaching of foreign languages in the State of Nebraska," Apr. 9, 1919 (cited in *Meyer*, 262 U.S. at 397).

[178] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

[179] *Meyer*, 262 U.S. at 399.

[180] 395 U.S. 367 (1969).

[181] *Id.* at 369.

[182] *Id.* at 390 (citations omitted).

of maintaining an uninhibited marketplace of ideas applies to foreigners invited to this country to provide different and important viewpoints. Indeed, the dialogue between the invited speaker and host-citizens may provide the only means of obtaining truth or at least exposing citizens to different points of view, cultures, or opinions.

The rationales given for the right to receive information apply equally to the area of exclusion of foreigners.[183] The importance of access to information and different cultures strongly supports the need for stricter judicial review of governmental decisions in exclusion cases. The Supreme Court has deemed the free flow of information an important "instrument to enlighten public decisionmaking in a democracy."[184] The first amendment guarantees freedom of speech to allow citizens to more effectively govern themselves.[185] If government officials prevent United States citizens from hearing differing viewpoints without meaningful judicial scrutiny, those officials can diminish or, at least, selectively limit access to information. Citizens will not hear the voices of those around the world whose opinions most likely differ from the United States government.[186] It is imperative that speakers from other countries address United States audiences to keep the citizenry appraised of differing viewpoints which will allow a better assessment of the country's role in the world and the actions of its elected officials.

As the right to receive information is a necessary component of a representative form of government,[187] this right should be closely guarded.[188] Formulation and implementation of foreign policy represents a major responsibility of national leaders. Foreigners, who may have first-hand information about particular countries or issues, provide particularly crucial knowledge since their information may be the only reliable data available. To better evaluate the policies of the United States in the world arena, citizens must have access to the views of individuals residing in other countries. The right to

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183 In addition to the uninhibited marketplace rationale, see T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 6-7 (1966) [hereinafter EMERSON]; for a discussion of the following rationales for allowing citizens access to information: necessity for informed self-governance, importance of advancing knowledge and discovering truth, and achieving social stability with gradual change. *Id.*

184 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

185 A. MEIKLEJOHN, POLITICAL FREEDOM; THE CONSTITUTIONAL POWERS OF THE PEOPLE 88-89 (1960) [hereinafter MEIKLEJOHN].

186 *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 126 (1958) (noting the importance of allowing American citizens to interact with people of different nations).

187 *See* MEIKLEJOHN, *supra* note 185, at 88-89.

188 EMERSON, *supra* note 183, at 10 ("[T]he greater the degree of political discussion allowed, the more responsive is the government . . . to the will of the people . . . .").

receive information goes to the core values of the first amendment[189] and deserves protection against an overreaching Executive branch which acts in some cases, not as protector, but as censor.

V. Changing the Deferential *Mandel* Standard

The Supreme Court should recognize the need for stricter review in construing exclusions pursuant to section 901 and depart from the "facially legitimate and bona fide" standard.[190] The current standard used to review exclusion decisions should be replaced with one that better protects the right to obtain information without hindering the government's ability to ensure national security, promote foreign policy objectives, or prevent terrorism. This approach would be much more efficient than carving out numerous exceptions to the deferential standard. In addition to more adroitly balancing the competing interests, a new standard will create a uniformity which lower court decisions currently lack.[191]

Stricter judicial review is also necessary because of the Executive branch's conflicting responsibilities as enforcer and judge in ideological exclusion decisions. Since Congress has enumerated broad criteria for excluding aliens, the Executive branch is free to act as protector of the public interest with virtually unlimited powers.[192] Under the "facially legitimate and bona fide" standard, the Executive branch can merely assert that the foreigner's actions will run contrary to United States foreign policy or national security.

The only limit to Executive branch actions in this area would be a form of self-policing. To the extent that the Executive branch acts in conformity with the Constitution, encroachment on United States citizens' first amendment rights to receive information will enter into the analysis. However, since virtually any reason offered under the "facially legitimate and bona fide" stan-

189 *See generally id.* at 6-7.

190 *See supra* notes 119-24 (discussing the "facially legitimate and bona fide" standard).

191 *Compare* N.G.O. Comm. on Disarmament v. Haig, No. 82 Civ. 3636 (S.D.N.Y. June 10, 1982) (LEXIS, Genfed Library, Dist file), *aff'd*, 697 F.2d 294 (2d Cir. 1982) (legitimate reason for exclusion: Attorney General determined World Peace Council to be an instrument of Soviet foreign policy and allowing aliens to enter to participate in disarmament rally would negatively affect the public interest and national security of the United States), *with* Abourezk v. Reagan, 592 F. Supp. 880 (D.D.C. 1984), *vacated*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987), *on remand*, 1988 WL 59640 (D.D.C. June 7, 1988) (illegitimate reason for exclusion: entry into the United States will threaten foreign policy objectives solely because aliens were members of Communist or anarchist organizations).

192 *See infra* notes 193-95 and accompanying text.

dard[193] will satisfy constitutional requirements, constitutional adherence does little to protect first amendment rights under a self-policing analysis.

Some motivation for the administration considering citizens' first amendment rights in temporary visa decisions may be found in a desire to avoid increased scrutiny by either courts or Congress. If the Executive branch abuses its power to exclude based on foreign policy or national security grounds, legislative and judicial branches may intervene to remedy the situation.[194] This analysis presupposes that the administration, under the current structure of narrow judicial review, is capable of such an obvious abuse. However, the power of the Executive branch is so broad that courts will accept virtually any reason given for exclusion. Therefore, the Executive branch has no incentive to weigh the concerns of the inviting citizen to forestall increased scrutiny of its own actions.

Several factors militate against relying on these rather minimal restraints upon the administration's power. In deciding the fate of a visa applicant, the acting administration need not concern itself with the possibility of negative public response to a denial. Even in cases where the applicant's views differ from those of the administration, the decision will not present a political problem for the Executive branch. The lack of pressure from the electorate, which would normally act as a check against the abuse of power of the elected branch, stems from the absence of a large natural constituency which is affected by the decisions and the absence of scrutiny by the media because of the nature of visa denials as remote events which may have little effect on the viewing public.

Relatively few members of the general population are affected by a decision to exclude a foreigner. Even though a potentially large audience would have attended a speech or conference and are denied access to the speaker by the administration's refusal to grant a visa request, it is the organizers of the event who will have firsthand knowledge of the exclusion. These organizers represent a substantially smaller number of voters than the potential audience and the number of voters who hear about the exclusion is limited by the organizer's ability and desire to disseminate that information. Consequently, in most cases, a

193 *See supra* note 120 and accompanying text.

194 Congress may create specific categories within which the foreigner must fall before being excluded. Courts may scrutinize the Executive branch's reasons for denial if it appears that the Executive branch has abused its discretionary power.

refusal to admit an invited speaker on the basis of his beliefs will have little adverse political consequences for an acting administration. Since the electorate does not act as a deterrent, an acting administration need not consider any backlash from the relatively small number of citizens affected.

The nature of the visa denial provides another reason for the absence of public response and the unchecked power of the Executive branch. Denials often occur at remote areas causing these decisions to go unreported in the domestic press. Even if the media reports the event, there is still the problem of protecting individual rights, that of the United States citizen to hear and gather information, as well as the foreigner's free speech rights, through the majoritarian electorate process. If the views a citizen seeks to hear are unpopular, he still has a right to hear them. That citizen will have difficulty convincing others not to vote for the current administration because the particular individual was denied his right to hear someone speak. Regardless of the substance of the information or exchange sought, the electoral process will be unable to correct the denial of an individual citizen's right to receive information.

An acting administration will still abridge citizens' first amendment rights even if the administration acts under a "good faith" belief that it is protecting the national security or promoting foreign policy. The Executive branch does not sit as an impartial observer in the process of excluding aliens. On the contrary, the acting administration takes the affirmative step to exclude the foreigner after he attempts to visit the United States. The Executive branch, whether it does or does not have a "good faith" belief, is concerned with the outcome of its decision to exclude. Therefore the administration cannot, nor should it be, in a position to impartially evaluate the competing concerns since its concerns are tipping one side of the scale.

VI. Reviewing Section 901 Exclusions: A Proposal for Stricter Judicial Scrutiny

Congress has prohibited exclusion of foreigners for beliefs, statements, or associations which would be protected by the Constitution if engaged in by United States citizens.[195] The Supreme Court has established numerous standards for determining when the government abridges first amendment freedom of expression

[195] § 901, *supra* note 13.

and associational rights.[196] In cases where the Executive branch attempts to exclude a foreigner because of the content of his speech, courts should apply the same standard which applies to United States citizens. The abridgement of first amendment rights arises in different contexts and courts apply different standards with varying degrees of judicial scrutiny. Thus, the level of review suggested in this section focuses on Executive branch decisions to exclude foreigners under section 901.

To effectuate the purposes of section 901 which grants foreigners the same first amendment rights as United States citizens, courts should apply a stricter form of scrutiny than the "facially legitimate and bona fide" standard. Application of the "facially legitimate and bona fide" standard, or a similar deferential approach, will enable the Executive branch to evade the prohibition against exclusion based on belief. An acting administration could simply assert that exclusion of a particular individual was based not on his beliefs, but on one of the enumerated provisions of section 901. Mere assertion of promoting foreign policy, protecting national security, or excluding terrorists without any offer of evidence will withstand a deferential form of review.

For instance, assertion that the individual has ties to a country which the United States imposes sanctions against would allow an acting administration to exclude the visa applicant citing a negative effect on foreign policy. This justification would seem to fulfill constitutional requirements since the negative effect on foreign policy represents a "facially legitimate and bona fide" reason for exclusion. However, this type of exclusion would contradict congressional intent to protect the foreigner's associational rights under section 901.[197] Courts would need to examine evidence of foreign policy ramifications if the foreigner was allowed to enter the country, an inappropriate inquiry under the "facially legitimate and bona fide" standard, to further congressional intent to prohibit exclusions based on belief. The broad national security and terrorist categories present similar problems if courts apply a deferential form of judicial review.[198]

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196 *See generally* GUNTHER, CONSTITUTIONAL LAW 972-1461 (11th ed. 1985) (describing applications of numerous standards depending on factual context of particular cases) [hereinafter GUNTHER].

197 The Executive branch may deny entry "for reasons of foreign policy . . . except that such . . . denial may not be based on . . . associations which, if engaged in by a United States citizen . . . would be protected . . . ." § 901(b)(1), *supra* note 13. A United States citizen's association with a country which the United States has imposed sanctions against would be protected under the United States Constitution.

198 The State Department applied the broad terrorist provision to exclude Gerry Adams, a member of the British Parliament. Adams, president of Sinn Fein which is a

Although courts have taken a deferential approach in other areas where the Executive branch cited national security reasons for its actions,[199] this approach is not appropriate where Congress has explicitly prohibited exclusion based on belief. Therefore, congressional action requires courts to apply stricter judicial scrutiny to guard against evasion of congressional intent.

Recognition of the need for stricter judicial review, however, does not necessarily require application of the strictest form of scrutiny. The most searching inquiry is inappropriate when reviewing exclusions based on foreign policy, national security, or terrorist grounds. The argument for strict scrutiny stems from the grant of first amendment rights to foreigners. Courts have consistently applied the strictest form of scrutiny when the government attempts to restrict the speech of individuals and this form of review might seem applicable to decisions to exclude foreigners under section 901.[200] However, strict judicial scrutiny would unduly hinder the Executive branch in promoting foreign policy, protecting national security, and preventing terrorism.[201] The Executive branch, if required to prove a compelling governmental interest and the absence of less restrictive means,[202] would only be justified in excluding someone if no other alternatives are available to effectuate its goals. Since foreign policy and national security concerns involve a number of different factors, only one of which is exclusion of an alien, the Executive branch would almost never meet this requirement.

Since neither deferential review nor strict scrutiny will protect foreigners' free speech rights and allow the Executive branch

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political party in Ireland, was excluded because of his support of the armed struggle in Northern Ireland and because of his membership in the Irish Republican Army. The State Department based exclusion on these reasons despite the fact that an Irish court dismissed charges of membership in the IRA for lack of evidence. *See* Adams v. Baker, CV 88-1701-S (D. Mass., filed July 22, 1988). Application of deferential judicial review would allow such exclusion to occur.

199 *See*, *e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (sustaining President's authority to seize steel mills in absence of congressional action to assure supply of steel necessary in continuing Korean War effort).

200 For application of strict judicial review, see Hess v. Indiana, 414 U.S. 105 (1973) (statement advocating illegal action at some indefinite future time insufficient to permit the state to punish speech since no evidence or rational inference that words intended to produce and likely to produce imminent disorder); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (first amendment protects advocacy of violence "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

201 Strict scrutiny, at least in the area of equal protection analysis, has been described as " 'strict' in theory and fatal in fact . . . ." GUNTHER, *supra* note 196, at 588.

202 *See*, *e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (strict first amendment scrutiny requires precisely drawn means to further compelling state interests).

to effectively promote its interests, courts should apply an intermediate level of review. Courts should require the Executive branch to show that the exclusion of an individual is "substantially related"[203] to the governmental interest to ensure that assertion of an enumerated category cannot become mere pretext for exclusions based on belief.[204] By examining the exclusion to determine whether there is a substantial relationship between it and the asserted foreign policy, national security, or terrorist purpose outlined in section 901, courts will prevent the Executive branch from evading the prohibition on exclusions based on belief. In addition, the intermediate level of review will not prevent the Executive branch from performing its function because, where legitimate foreign policy, national security, and terrorist concerns exist, the acting administration will be capable of sustaining its burden of showing a substantial relationship. The intermediate level of review, therefore, will reflect congressional intent to allow foreigners the same free speech and associational rights that American citizens enjoy while allowing the Executive branch the flexibility to promote the public interest.

Intermediate judicial review has been applied in the past to cases involving national security and foreign policy interests and first amendment rights.[205] Courts' applications of an intermediate form of review in cases where national security and first amendment rights conflict reflect an attempt to balance the competing concerns rather than subverting constitutional claims to assertions of national security and foreign policy reasons. Courts

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[203] *See* Craig v. Boren, 429 U.S. 190 (1976) (gender classifications must serve important governmental objectives and must be substantially related to those objectives); NAACP v. Button, 371 U.S 415 (1963) (state failed to show substantial interest to justify broad prohibition abridging first amendment rights); Shelton v. Tucker, 364 U.S. 479 (1960) (requiring teachers to list membership in organizations not substantially related to achieving goal of ensuring competent teachers); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (power to regulate for a permissible end cannot unduly infringe on protected freedoms); Lovell v. Griffin, 303 U.S. 444 (1938) (broad prohibition against distribution of literature unnecessary to accomplish legitimate purpose).

[204] *See supra* notes 195-203 and accompanying text (heightened judicial review is necessary to protect citizens' rights to receive information and to eliminate exclusions based on ideology).

[205] *See* Haig v. Agee, 453 U.S. 280 (1981) (examining harmful effects on national security and foreign policy if government granted visa to ex-CIA agent); New York Times Co. v. United States, 403 U.S. 713, 730 (1971) ("The Pentagon Papers Case") (White, J., concurring) (Executive responsibility for conducting foreign affairs and preserving nation's security does not justify injunction against newspaper publishing classified history of Vietnam War); United States v. Robel, 389 U.S. 258 (1967) (legislation prohibiting members of Communist organizations from working at defense facilities not sufficiently related to goal of screening disloyal individuals); Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964) (irrebuttable presumption that individuals who are members of particular organizations will engage in activities inimical to United States security held unconstitutional).

have begun to depart from the deferential review of exclusion decisions and have required the Executive branch to prove that the presence of the individual would harm foreign policy or the public interest.[206] Courts should engage in the same type of scrutiny when reviewing section 901 exclusions to effectuate congressional intent.

In addition to protecting foreigners' free speech rights, an intermediate level of scrutiny requiring the Executive branch to show a substantial relationship between the exclusion and the reason given for the exclusion will better protect citizens' first amendment rights to receive information and ideas. By prohibiting exclusion based on belief, Congress indicated that it preferred to expose United States citizens to differing viewpoints and world opinions rather than retaining a complete exclusion of a class of individuals. Requiring the Executive branch to prove a substantial relationship between exclusion and the goals sought to be achieved, will ensure that citizens are not denied the opportunity to interact with foreign individuals unless necessary to achieve an overriding governmental interest.

Placing the burden on the Executive branch to show a substantial relationship between exclusion and its interest stems from the presumption that United States citizens have the right to receive information. The administration is better situated to prove the necessity for exclusion as it possesses the pertinent information, and thus should have the burden of showing a substantial relationship between the exclusion and the goal sought to be achieved. This approach would not hinder the administration's ability to protect the national interest since, where actual foreign policy or national security concerns exist which warrant exclusion, the Executive branch could satisfy the substantial relationship requirement. By increasing the scrutiny of judicial review based on these standards, exclusion decisions will become less arbitrary. The grounds for denial will not fluctuate from one administration to the next, rather, precedent will be established

[206] *See* Allende v. Shultz, 845 F.2d 1111, 1116 (1st Cir. 1988) (government may not exclude based on bare assertion that individual's presence may prejudice foreign policy concerns); Abourezk v. Reagan, 785 F.2d 1043, 1053 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987), *on remand*, 1988 WL 59640 (D.D.C. June 7, 1988) (exclusion should be based on "activities" which foreigner might engage in and not on mere entry or presence); Harvard Law School Forum v. Shultz, 633 F. Supp. 525 (D. Mass.) (issuing preliminary injunction prohibiting Secretary of State from preventing PLO member to participate in debate with American professor), *vacated*, 852 F.2d 563 (1st Cir. 1986).

to balance the interests of United States citizens, foreign visitors, and the government.

VII. Conclusion

Exclusion statutes have been enacted in response to particular events which may or may not have threatened national security. Perceived threats to national security spurned the enactment of these laws which have become entwined in the present immigration policy. While ideological exclusions addressed the fears of earlier times, section 901 addresses the opportunities and needs of today.

In requiring only that a reason be "facially legitimate and bona fide" to deny entry into the United States, the Supreme Court gives insufficient weight to first amendment rights of United States citizens. The "facially legitimate and bona fide" standard, as a practical matter, allows the Executive branch a wide degree of latitude in deciding who may or may not enter this country. Since the Executive branch tends to protect national security interests over assertions of first amendment rights, the result is exclusion of foreign views from the American "marketplace of ideas." Consequently, United States citizens do not benefit from the experience, knowledge, and insight obtained through intercultural exchange.

Application of a deferential standard to exclusion decisions pursuant to section 901 will result in the Executive branch evading the prohibition against exclusion based on belief. When determining foreigners' free speech rights courts should apply the same standard that applies to United States citizens. However, in reviewing section 901 exclusions, courts should require the Executive branch to show that exclusion is substantially related to the foreign policy, national security, or terrorist reasons asserted. This form of review will ensure that Executive branch decisions are based on legitimate reasons and not ideological grounds—reflecting congressional intent to grant foreigners free speech rights and to better protect United States citizens' first amendment rights.

To respond to the remarkable changes occurring throughout the world, United States citizens will need the information and experience gained through increased discourse with foreign individuals. Ideological exclusion stood as an archaic barrier to mutual understanding and respect which Congress sought to abolish response to current world events. By applying height-

ened judicial scrutiny to decisions to exclude foreigners, courts will further an immigration policy which more closely aligns with traditional American freedom of expression values.

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