

2011

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Alexander Wohl

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Recommended Citation

Wohl, Alexander. "Free Speech and the Right of Entry Into the United States: Legislation to Remedy the Ideological Exclusion Provisions of the Immigration and Nationality Act." *American University International Law Review*. 4, no. 2 (1989): 443-488.

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FREE SPEECH AND THE RIGHT OF ENTRY INTO THE UNITED STATES: LEGISLATION TO REMEDY THE IDEOLOGICAL EXCLUSION PROVISIONS OF THE IMMIGRATION AND NATURALIZATION ACT

Alexander Wohl*

O liberty! What crimes are committed in your name.

Madame Roland (1793)¹

INTRODUCTION

Americans hear constant reference today to the evils of the McCarthy era, that period of the Cold War when the government conducted interrogations to ferret out possible sources of communism.² The government placed innocent people on blacklists because of their political views and associations,³ and routinely denied them rights guaranteed

* J.D. Candidate, 1990, Washington College of Law, The American University.

1. INT'L THESAURUS OF QUOTATIONS 351 (Tripp ed. 1987).

2. See N. KITTRIE & E. WEDLOCK, JR., THE TREE OF LIBERTY — A DOCUMENTARY HISTORY OF REBELLION AND POLITICAL CRIME IN AMERICA 395-480 (1986) (describing the judicial reaction to the legislative and executive regulation of suspect political individuals and doctrines during the cold war); S. KANFER, A JOURNAL OF THE PLAGUE YEARS, 80-143 (1973) (examining how the blacklist affected the entertainment industry); L. HELLMAN, SCOUNDREL TIME 8-12, 35-40 (1976) (describing the author's testimony before Congress and a general description of blacklists used during the period); Hiss, *How McCarthyism Silenced America*, 7 BARRISTER 1, 12-13 (Fall 1980) (describing one "victim's" recollections of the McCarthy period). See generally FUND FOR THE REPUBLIC, DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES (1955) (offering a comprehensive listing of trials of alleged Communists).

The McCarthy period is named for its most outspoken attacker of so-called Communists, Senator Joseph McCarthy, although the virulent anti-communism began before his arrival and continued after his death. See C. BELFRAGE, THE AMERICAN INQUISITION 1945-1960, 117-27 (1973) (describing Senator McCarthy's anti-Communist attacks and how he used them to gain fame); see also D. CAUTE, THE GREAT FEAR, THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER 45-50 (1978) (offering a less emotional McCarthy profile).

3. See BELFRAGE, *supra* note 2, at 70-79 (describing the loyalty testing and blacklisting of those with any connections to liberal groups); CAUTE, *supra* note 2, at 17-27, 31-40 (presenting an introduction to the anti-Communist purges of the 1940s and 1950s); KITTRIE & WEDLOCK, *supra* note 2, at 395 (summarizing the effect of the fear of communism on the United States government, and the judicial response); see also R. ROVERE, LOYALTY AND SECURITY IN A DEMOCRATIC STATE, 73-296 (1977) (listing newspaper and magazine articles from the McCarthy period).

by the first amendment.⁴ Although citizens of the United States generally take these rights and liberties for granted, remnants from this infamous era continue to threaten these freedoms. This Comment focuses on proposed legislation that, if enacted, would reform one of the most prominent holdovers of the McCarthy era, the 1952 Immigration and Nationality (McCarran-Walter) Act.⁵ The McCarran-Walter Act grants the government the far-reaching power to exclude or deport foreign visitors on the basis of their political beliefs, affiliations, or speech.⁶

A tenuous balance exists between protecting the national security of the United States and respecting the freedoms put forth in the Constitution and the Bill of Rights. The Constitution accords Congress vast powers to regulate the admission of aliens.⁷ Supreme Court interpreta-

4. U.S. CONST. amend. I. The first amendment states, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." *Id.*

Although the Bill of Rights does not explicitly grant the freedom of association, the courts have incorporated this liberty through the fourteenth amendment and expanded it through judicial decree. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The Supreme Court stated that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assumed by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

5. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 414, ch. 477, 66 Stat. 163 (1952), 8 U.S.C. §§ 1101-1582 (1982 & Supp. IV 1986).

6. *Id.* § 1182(a)(27)-(29) (1982). For the purposes of this Comment, the term "exclusion" means the denial of a visa granting permission to enter the United States, a power that arises in the executive branch and that can be manifested through the offices of the Attorney General, the Secretary of State, or the Immigration and Naturalization Services (INS). *Id.* § 1182 (Supp. IV 1986). The term "deportation" means the removal of one who has received a visa and is found to violate one of the laws of immigration or entry to the United States. *Id.* § 1251 (Supp. IV 1986). See A.C. GORDON AND H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 4-1, 4-6, 4-182 (1988) (examining the exclusionary and deportation provisions of the McCarran-Walter Act).

7. U.S. CONST. art. I, § 8, cl. 4. Aliens who are attempting to enter the country are subject to a line of precedent establishing Congress' authority over immigration and the limited judicial review employed in that area. See *Boutillier v. INS*, 387 U.S. 118, 123 (1967) (allowing the exclusion of a homosexual alien under Congress' plenary power to exclude aliens); *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339-40 (1909) (discussing Congress' power to regulate aliens). These regulations and procedures do not necessarily need to meet the constitutional standards applicable to United States citizens. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (denying a special immigration status for an illegitimate child and his natural father); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (finding the permanent exclusion of a United States serviceman's alien wife without a hearing constitutional). See *infra* notes 73-76 and accompanying text (discussing and noting the difference between alien rights in the exclusion and deportation contexts). In *Kleindienst v. Mandel*, the Supreme Court adopted a standard which gives complete deference to the executive branch as mandated by Congress as long as denials are made for a "facially legitimate and bona fide" reason. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). See *infra* notes 77-160 and

tions of the Constitution also extend to recognize the right of an American citizen to receive information and ideas.⁸ The Court has weighed these rights against the government's interest in protecting its citizens.⁹ Because aliens have less protection under the Constitution than American citizens, the rights addressed in American courts are generally the rights of American citizens, who have the first amendment right to receive information.¹⁰ Dissatisfied citizens, political activists, and scholars have argued for the repeal of the McCarran-Walter Act because it infringes, although often legitimately, on first amendment rights.¹¹ Re-

accompanying text (discussing the case law interpretation of the *Kleindienst* standard).

Although this Comment focuses on the exclusionary aspects of the law, the proposed legislation discussed here revamps both the exclusionary and deportation sections of the McCarran-Walter Act. See Immigration Exclusion and Deportation Amendments, H.R. 4427, 100th Cong., 1st Sess. reprinted as amended in IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. (1988). A California district court recently held the deportation provisions of the McCarran-Walter Act unconstitutional as overbroad under the first amendment. *American-Arab Anti-Discrimination Comm. v. Meese*, No. CV 87-02107-SVW, slip op. at 51-53 (C.D. Cal. Jan. 29, 1989).

8. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (recognizing a constitutionally-protected right to receive information and ideas). The freedom to receive information requires the uninhibited debate of public issues that all members of society can participate in as contemplated by the first amendment. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); see also *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (emphasizing that censoring prisoners' mail violates the first amendment guarantee of freedom of speech); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 392 (1969) (finding that the right of the viewing and listening public is relevant in a dispute over first amendment rights); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (holding that the first amendment protects an individual's right to receive unsolicited Communist propaganda); see Note, *First Amendment Limitations on the Exclusion of Aliens*, 62 N.Y.U. L. REV., 149, 177-79 (1987) [hereinafter *First Amendment Limitations*] (arguing that the *Procunier* case is analogous to the alien exclusion cases in that the courts will not review questions of prison administration and exclusion).

9. See *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (weighing the rights of a citizen to receive information through door-to-door advertising of religious meetings against the community's interest in protecting its citizens).

10. See *infra* note 73 and accompanying text (discussing the issue of standing for alien plaintiffs in first amendment cases); see also *American-Arab Anti-Discrimination Comm. v. Meese*, No. CV 87-02107-SVW, slip op. at 7-31 (C.D. Cal. Jan. 29, 1989) (finding that resident aliens charged under the McCarran-Walter Act have standing to challenge their deportation on first amendment grounds).

11. See CAUTE, *supra* note 2, at 39, 254 (1978) (noting newspaper accounts criticizing the passage of the McCarran-Walter Act); M. KONVITZ, CIVIL RIGHTS IN IMMIGRATION 53-92 (1953) (describing one scholar's criticism of the McCarran-Walter Act); 8 BULL. ATOM. SCIENTISTS 210, 210-61 (1952) (devoting an entire issue to criticism of American visa policy and noting that the 1952 immigration law slowed the advancement of American science and learning interests).

President Truman vetoed the McCarran-Walter Act, labeling it "thought control" and calling it "a mass of legislation which would perpetuate injustices of long standing against many other nations of the world. . . [and which would] intensify the repressive and inhumane aspects of our immigration procedures." President's Message to Congress Vetoing the Immigration and Nationality Act, 1952-53 PUB. PAPERS 441 (June

cent litigation surrounding individuals denied entry into this country has focused renewed attention on the Act,¹² including attempts in Congress to repeal, reform, and amend it.¹³

This Comment argues that Congress must amend those provisions of the Act that directly conflict with the rights and liberties guaranteed in the first amendment. These provisions of the Act are a holdover from a time of rampant xenophobia, and no longer express the beliefs or values of the American people. Further, this Comment argues that the lack of a clear legislative mandate creates confusion in the courts. Finally, this Comment recognizes that even though the Executive Branch must retain certain latitude regarding the exclusion and deportation of aliens, such action must occur without interfering with an individual's first amendment rights.

Part I of this Comment examines the legislative history of immigration restrictions in the United States. Part II explores recent cases and identifies the standards that courts adopt to evaluate whether alien visitors may be excluded under the McCarran-Walter Act. Part III ana-

25, 1952).

12. See *Visa Denials on Ideological Grounds: An Update*, 8 SETON HALL LEGIS. J. 249, 263 (1985) [hereinafter *Visa Denials*] (describing New York City lawyers' call for a repeal and revision of the McCarran-Walter Act); 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, 480-502 (1988) (examining recent legislative proposals to amend the Act); Kalyen, *U.S. Visa Policy, The Machinery of Exclusion*, 43 BULL. ATOM. SCIENTISTS 21, 25 (1987) (examining the methods of excluding aliens); Schapiro, *The Excludables*, MOTHER JONES, Jan. 30, 1986, at 29 (examining numerous exclusions and detentions of prominent individuals under the McCarran-Walter Act); Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930, 933 (1987) (suggesting that the ideological exclusionary provisions are "constitutional anomalies"); Slovinsky, *Banned in the U.S.A.*, 13 HUM. RTS. 16, 17 (Winter 1986) (analyzing the ideological exclusion provision of the McCarran-Walter Act); Tilner, *Ideological Exclusions of Aliens: The Evolution of a Policy*, 2 GEO. IMMIGR. L.J. 1, 1-85 (1987) (presenting a comprehensive history of American ideological exclusionary policy); *First Amendment Limitations*, *supra* note 8, at 151 (examining the lower courts' interpretation of the legal standard for the ideological exclusion of aliens from the United States after the Supreme Court decision in *Kleindienst*); Comment, *Immigration and the First Amendment*, 73 CAL. L. REV. 1889, 1928 (1985) [hereinafter, *Immigration and the First Amendment*] (urging that the Supreme Court abandon the special rules it uses for analyzing cases dealing with immigration and the first amendment).

13. *Exclusion and Deportation of Aliens: Hearings on H.R. 1119 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 25-394 (1987) [hereinafter *Exclusion Hearings*]. Congressional hearings on H.R. 1119, a bill to amend the exclusionary provisions of the immigration act, offers an opportunity to examine the range of opinions on this issue. *Id.* At the hearings, a number of parties called for Congress to pass H.R. 1119. *Id.* at 79-90, 94-123, 140-53, 216-36, 238-394. See *infra* notes 146-221 and accompanying text (describing current legislative proposals to amend the McCarran-Walter Act).

lyzes the standards set forth by the courts. Part IV examines current legislative proposals designed to amend or repeal the McCarran-Walter exclusionary provisions. Part V analyzes this legislation. Part VI recommends that adoption of this legislation will reconcile the conflict between the three branches of government and the American citizens' right to receive information.

I. HISTORICAL UNDERPINNINGS

A. EARLY ANTI-SEDITION LAWS

The history of governmental exclusion of aliens is a long one, based on fears of internal, as well as external dissent.¹⁴ Early American leaders worried about dissenting opinion and the possibility that such opinion might turn into action against the government.¹⁵ The fear of dissent and disruption was often attributed to the arrival of foreigners,¹⁶ or to an isolationist reaction to global¹⁷ or national crises.¹⁸ Thus, when the nation and the world are in turmoil, and immigration levels are high, American xenophobia escalates.¹⁹

14. See KITTRIE & WEDLOCK, *supra* note 2, at 3-128 (discussing the methods the early American settlers and governments used to deal with popular unrest).

15. See S.E. MORRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE*, 352, 377 (1952) (describing Federalist Party attempts to quell dissenting opinion); COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, *GROUND FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT 5-22* (Comm. Print 1988) [hereinafter *GROUND FOR EXCLUSION*]; see *Dennis v. United States*, 341 U.S. 494, 521 (1951) (Frankfurter, J., concurring) (affirming the criminal conspiracy convictions of leaders of the American Communist Party and examining the history of sedition in the United States). As early as 1790, several state constitutions expressly imposed liability for abuse of the right of free speech. *Id.* at 521. In 1798, Congress passed the Alien and Sedition Act under the directive of President Adams, to silence his critics at a time when the French Revolution had aroused cries for similar rebellion in the United States. Alien and Sedition Act, ch. 58, 1 Stat. 570 (1798), 50 U.S.C. § 21 (1982). The Act was one in a series of anti-alien laws that one commentator cites as the beginnings of the American immigration policy of deportation. Tilner, *supra* note 12, at 8-13.

16. See G. PERRETT, *AMERICA IN THE TWENTIES* 78-81 (1982) (describing the alleged danger of new immigrants); see also Tilner, *supra* note 12, at 16 (describing problems due to immigration); CAUTE, *supra* note 2, at 224-26 (investigating reaction from "fear of the germ-carrying alien").

17. See F. ALLEN, *ONLY YESTERDAY* 16, 38-62 (1964) (describing how the fallout from World War I led to the fear of Bolshevism); KONVITZ, *supra* note 11, at 122-23 (describing American reaction to several global events); Tilner, *supra* note 12, at 10 (depicting how the French Revolution caused fear in the United States).

18. See ALLEN, *supra* note 17, at 38-62 (describing how labor unrest led to the Palmer raids and a general fear for "public safety"); Tilner, *supra* note 12, at 26-29 (describing how President William McKinley's assassination by "a self-proclaimed anarchist" revived American xenophobia).

19. See ALLEN, *supra* note 17, at 138-62 (revealing the turmoil in the United States stemming in large part from distrust of foreigners in the aftermath of World

There is a constant conflict between protecting the borders of the United States and protecting the rights of its citizens, as propounded in the Constitution and Bill of Rights.²⁰ Legal disputes traditionally center around whether the government should punish individuals who actually participate in "crimes" or whether the government also should prosecute those who are passively involved in the act through writing and suggesting such actions.²¹ By the beginning of the 20th century, the legal basis for restricting immigrants and visitors to the United States encompassed both thought and action.²²

War I); Tilner, *supra* note 12, at 64 (concluding that intolerance to new ideas increases during periods of international tensions); Koffler and Gershman, *Seditious Libel*, 69 CORNELL L. REV. 816, 830 (1984) (arguing that two periods of national hysteria, the Great Red Scare and McCarthyism, followed two periods of international crises, World War I and World War II).

20. Koffler and Gershman, *supra* note 19, at 825. Even Thomas Jefferson, among others, condemned the Sedition Act at its conception. *Dennis v. United States*, 341 U.S. 494, 521-22 (1951) (Frankfurter J., concurring). Nevertheless, the concept of silencing critical speech and political association remained part of this country's heritage. See *Gitlow v. New York*, 268 U.S. 652, 668 (1925) (sustaining a criminal anarchy statute conviction for advocating the necessity of accomplishing the Communist revolution); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (upholding convictions for conspiring to violate the 1918 amendments to the Espionage Act). Jefferson's condemnation of the Sedition Act was due more to his belief in federalism and that states should hold this power than to a belief in unrestrained speech on political matters. See *Dennis v. United States*, 341 U.S. 494, 523 (1951) (noting Jefferson's letter to Abigail Adams).

21. See Tilner, *supra* note 11, at 4-51 (examining the differences in the early Alien and Sedition Acts regarding the inclusion of punishment for seditious writing or speaking); PERRETT, *supra* note 16, at 52-53 (describing criminal syndicalism laws in 32 states); see also *Yates v. United States*, 354 U.S. 298, 324 (1957) (distinguishing advocacy of action from advocacy of belief); *Whitney v. California*, 274 U.S. 357, 371-72 (1927) (affirming two convictions under a 1919 criminal syndicalism statute and denying the contention that the state may not punish those who abuse freedom of speech). But see *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (overturning a criminal syndicalism statute as a violation of the first and fourteenth amendments and establishing the rule that the government may only prohibit speech that is directed to inciting or producing imminent lawless action and is likely to produce imminent lawless action).

22. Immigration Act of 1903, Pub. L. No. 162, ch. 1012, 32 Stat. 1213 (1903), 8 U.S.C. §§ 1101, 1182 (Supp. IV 1986). The anti-anarchist law was passed in the aftermath of President McKinley's assassination by a self-proclaimed anarchist. KONVITZ, *supra* note 11, at 28. In its original form, the Act provided for the exclusion and deportation of anarchists and others who believed in or advocated the violent or forceful overthrow of the United States government. *Id.*

The Supreme Court eventually rejected a challenge to the Immigration Act. *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290 (1904). Turner was a British citizen who had entered the country on a speaking tour and declared himself an anarchist during a New York lecture. *Id.* at 282-83. In his defense, Turner challenged the Act for failing to differentiate between philosophical and militant anarchists, thereby violating the first amendment. *Id.* at 285, 292-93. The Court upheld the statute, stating that Congress has almost unlimited power to exclude aliens, state the terms on which they may enter the country, and deport those who enter in violation. *Id.* at 289-90.

Many legal historians have suggested that the first amendment was essentially ig-

World War I and its aftermath compounded the exclusionary tendencies of the American people.²³ This ethnocentrism, combined with rising class conflict, growing socialist organizations,²⁴ and the developing Russian Revolution,²⁵ increased suspicion and turned attention to alleged anarchists, socialists, and communists.²⁶ Major Supreme Court cases of that era involved anti-war protests of Charles Schenck, Jacob

nored during the years between the Sedition Act of 1798 and the Espionage Act of 1917. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514, 517-18 (1981). More recent studies have suggested, however, that post-World War I activity did not arise from a void and, although courts rarely ruled in favor of first amendment liberties, there were numerous cases contesting the meaning of the first amendment and contributing to the elaboration of judicial doctrine in later years. *Id.* at 595.

23. See ALLEN, *supra* note 17, at 16, 38-62 (examining the reactions of the returning soldiers and their families following World War I); KONVITZ, *supra* note 11, at 122 (describing the American post-war fear of aliens); PERRETT, *supra* note 16, at 53-55 (recounting several postwar incidents demonstrating the continuing fever pitch of emotion in the United States at that time); Tilner, *supra* note 12, at 39 (reviewing the increase of American xenophobia following the end of World War I); see also ROVERE, *supra* note 3, at 8-71 (compiling newspaper articles of the post-World War I period detailing American attitudes); Rabban, *supra* note 22, at 519 (surveying the effect of World War I and other incidents of the period on the first amendment).

24. ALLEN, *supra* note 17, at 40. Many liberal intellectuals and members of the labor movement supported socialistic ideals. *Id.*; see R. STEEL, WALTER LIPPMAN AND THE AMERICAN CENTURY, 23-44 (1981) (examining Walter Lippman's conversion to and growth away from the socialist movement). A mass Socialist Party membership never developed, however. ALLEN, *supra* note 17, at 40. One study of the period estimated the number of members of the Socialist Party, the Communist Labor Party and the Communist party combined to be "hardly more than two-tenths of one percent of the adult population of the country; *id.* at 40-41. Nevertheless, post-war America was a place where unfounded fear of "Bolsheviks" existed. *Id.* at 49-50. This fear led to the use of virulent anti-labor attacks on socialists, Jews, labor organizers, Slavs, and the International Workers of the World. *Id.* See also BELFRAGE, *supra* note 2, at 9-14 (describing the historical roots of socialism in the United States).

25. See ALLEN, *supra* note 17, at 16-17 (describing the postwar effects of anti-Bolshevism sentiment). The "Red Scare" of this period found its worst outpourings in the so-called Palmer Raids of 1919-20, named after A. Mitchell Palmer, the United States Attorney General at the time. *Id.* at 46-49; PERRETT, *supra* note 16, at 59-62; Tilner, *supra* note 12, at 46-47. In the Palmer Raids, the executive branch applied the 1918 Sedition Act to eliminate the "threat" of Communists and Socialists through deportation of anyone associated with those organizations. See ALLEN, *supra* note 17, at 46-49 (examining the guilt by association used during the Palmer Raids); See also ROVERE, *supra* note 3, at 40-71 (compiling newspaper articles of the period describing the Raids).

26. See ALLEN, *supra* note 17, at 38-62 (discussing "The Big Red Scare"); PERRETT, *supra* note 16, at 51-71 (examining the backlash against the Socialist movement). Legislation specifically targeting Communists did not become law until 1950. See *infra* notes 47-54 and accompanying text (examining the specific anti-communist provisions of certain laws). There was definitely a switch from a governmental focus on anarchists to concentration on communists, however, as the Palmer Raids and other Congressional activities demonstrated. Tilner, *supra* note 12, at 51; see ALLEN, *supra* note 17, at 41-50 (describing government prosecution of activities of the post-World War I dissenters).

Frohwerk, and Eugene Debs.²⁷ In each case, the Court convicted the protester of violating the 1917 Espionage Act,²⁸ and in the *Schenck* case, applied the "clear and present danger" test that outlawed sufficiently "dangerous" speech.²⁹

Congressional enactment of the Espionage Act and other World War I era anti-alien laws³⁰ came at the peak of the nation's xenophobia during this period; shortly thereafter these emotions began to recede in post-war malaise.³¹ The statutes lay dormant for several decades, until the period surrounding World War II. It was then that Congress again became active in restricting the rights of aliens and Communists, using much of the legislation that was already on the books.³²

27. See *Debs v. United States*, 249 U.S. 211, 216 (1919) (finding a speech criticizing the war and prophesizing "a sane socialist society" violated the Espionage Act); *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (finding that defendant's newspaper's message criticizing the American government's entry into World War I and accusing the government of murder for sending American troops to France violated the Act); *Schenck v. United States*, 249 U.S. 47, 52-53 (1919) (finding that printing of a leaflet that urged opposition to the draft violated the Act).

28. *Debs v. United States*, 249 U.S. 211, 216 (1919); *Frohwerk v. United States*, 249 U.S. 204, 210 (1919); *Schenck v. United States*, 249 U.S. 47, 52-53 (1919). See Rabban, *supra* note 22, at 582-86 (examining the Espionage Act cases in the context of the history of the first amendment).

29. *Schenck v. United States*, 249 U.S. 47, 52-53 (1919). The "clear and present danger test" measured the illegality of speech in terms of proximity and degree. *Id.* In *Schenck*, Justice Oliver Wendell Holmes ruled that defendants' written attacks on the government obstructed the draft and criminally violated the Espionage Act, overcoming the presumption of freedom of association. *Id.* Holmes wrote that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.*

One commentator has noted that Holmes' decision abandoned ordinary judicial restraints on criminal convictions, such as *mens rea*, and replaced them with rhetoric in line with anti-socialist sentiment of the times. Koffler and Gershman, *supra* note 19, at 832. But see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) (arguing that words alone should not provide a basis for a criminal conviction, and that a need for a marketplace of ideas exists). Some scholars suggest that Holmes' early opinions in cases like *Schenck* paved the way for his later, more liberal readings of the first amendment. Koffler and Gershman, *supra* note 19, at 840.

30. Espionage Act of June 15, 1917, ch. 29, 39 Stat. 874, 18 U.S.C. § 11, 791-94 2388, 3241 (1982).

31. Tilner, *supra* note 12, at 51. With peace and prosperity, the fears that normally generated anti-alien reaction dissipated. *Id.*

32. See *infra* notes 50-59 and accompanying text (describing how anti-communist legislation such as the McCarran-Walter Act derived from earlier anti-alien laws).

B. OUTLAWING COMMUNISM

1. *The 1940 Alien Registration Act*

Although the span of years known today as the McCarthy period is not unique in American history for its scapegoating or lack of tolerance, it was exceptional in its ferocity.³³ While World War II was the major force generating the hysteria and fear of foreigners that created the Cold War,³⁴ McCarthyism had its roots in the years preceding the war and the laws created during that time. One of the earliest and most important laws that helped shape the struggles over ideological exclusions was the Alien Registration Act of 1940, commonly known as the Smith Act.³⁵

The Smith Act had its basis in the great fear of communism and political upheaval.³⁶ In many states, the fear led to the enactment of criminal syndicalism and anarchy statutes, subsequently incorporated into the Smith Act.³⁷ Designed to prohibit conspiracies and directed

33. CAUTE, *supra* note 2, at 17-18. The author notes that while the Cold War period was a discredited one in American history, it was not as painful or destructive as similar periods in other countries, such as the eras of Stalin, Hitler, or the French Revolution. *Id.* Nevertheless, because the Cold War years were violations of the United States' "traditions, ideals and rhetoric," as well as against individuals, the author suggests that "when America sins, she sins doubly." *Id.* at 18.

Alger Hiss, whose case attracted international notoriety, has suggested that to fully understand the origins of McCarthyism, one needs to reexamine other periods of scapegoating in United States history. Hiss, *supra* note 2, at 53. These periods of scapegoating, according to Hiss, include the Salem witch-hunts, the Alien and Sedition Acts, the Know-Nothing (anti-Roman Catholic) movement of the 19th century, the Palmer Raids, the internment of Japanese-Americans during World War II, and former President Richard Nixon's "disregard of the Constitution" during the Watergate scandal. *Id.*

34. See CAUTE, *supra* note 2, at 224-26 (describing the unfounded rise in the fear of foreigners in the period prior to World War II); Tilner, *supra* note 12, at 53 (highlighting World War II's exacerbation of an already intense preoccupation with national security). Alger Hiss argues that the period immediately following World War II was one of instability and was highly susceptible to "rabble rousing and scapegoating." Hiss, *supra* note 2, at 54.

35. Alien Registration (Smith) Act, Pub. L. No. 76-670, ch. 439, 54 Stat. 670, 671 (1940) (codified as amended at 18 U.S.C. §§ 2385-2387 (1982)). The act, named after Congressman Howard W. Smith of Virginia, was the first peacetime federal sedition law since the Alien and Sedition Acts of 1798. KITTRIE AND WEDLOCK, *supra* note 2, at 356.

36. See BELFRAGE, *supra* note 2, at 35 (explaining that the Smith Act was similar in nature to the Alien and Sedition Laws); see also S. KUTLER, *THE AMERICAN INQUISITION - JUSTICE AND INJUSTICE IN THE COLD WAR*, 152-53 (1982) (describing the background of the Smith Act and several of its more prominent uses).

37. CAUTE, *supra* note 2, at 70-75. The Smith Act made it a crime to advocate, teach, publish, or distribute any material promoting any group that has the goal of overthrowing the government. Alien Registration (Smith) Act, ch. 439, 54 Stat. 670,

primarily at the Communist Party, the Smith Act placed a heavy burden of proof on the government to secure convictions.³⁸ The suspicious nature of the times, however, led the Supreme Court to often lighten this burden.³⁹ To further aid the prosecution of Communists, Congress added former belief in, or advocacy of, the proscribed doctrines, and former membership in the proscribed organization to the list of grounds for exclusion and deportation from the United States to the Smith Act.⁴⁰

*Dennis v. United States*⁴¹ was the case that substantially helped affirm this policy. The Court in *Dennis* sustained the Smith Act conspiracy convictions of twelve Communist party members.⁴² The Court tried to define what threshold action was necessary to prosecute political activists such as Communists under the Smith Act.⁴³ Although the early

671 (1940) (codified as amended at 18 U.S.C. §§ 2385-2387 (1982)); see Linde, "Clear and Present Danger" Reexamined: *Disonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1176-78 (1970) (examining the Smith Act in terms of the clear and present danger test).

38. 18 U.S.C. § 2385 (1982). The Government had to prove that the violation was done "knowingly or wilfully." *Id.*

39. CAUTE, *supra* note 2, at 144. The author states that the Supreme Court, from 1946 to 1953, under Chief Justice Fred Vinson, complied with the directives of administrative persecution and Congressional inquisition. *Id.*

40. *Id.* at 229. The change broadened a Supreme Court interpretation of the 1918 Act whereby only present belief and standing in proscribed organizations was punishable. *Kessler v. Strecker*, 307 U.S. 22, 30 (1939).

41. *Dennis v. United States*, 341 U.S. 494 (1951).

42. *Id.* at 517. The court of appeals had held that the petitioners turned a peaceful Communist group into one working toward the violent and forceful overthrow of the government. *Id.* at 498. In its plurality opinion, the court portrayed the Communist party as a highly sophisticated and dangerous organization. *Id.* The court noted that Congress has the power to protect the government from armed rebellion. *Id.* at 50.

43. *Id.* The *Dennis* decision offers a variety of interesting opinions. *Id.* at 494-592. The plurality found that only a low degree of activity was necessary for guilt under the Smith Act. *Id.* at 509 (plurality opinion). The Chief Justice stated that the clear and present danger test does not mandate that the government must wait until the last minute before executing a plan to prosecute the parties. *Id.* at 498. Justice Frankfurter's concurring opinion distinguishes between a statement expressing an idea that prompts its hearer to take unlawful actions, and those statements advocating that such action be taken. *Id.* at 518 (Frankfurter, J., concurring). Justice Jackson agreed with the distinction, yet noted the difficulty of drawing such a line. *Id.* at 572 (Jackson, J., concurring). He suggested that it would be virtually impossible to determine whether conduct would create a clear and present danger of violent overthrow, noting that such a determination would include an appraisal of imponderables which would baffle even the most sophisticated and informed foreign officers and politicians. *Id.* The dissenting Justices, Justices Black and Douglas, envisioned setting a higher threshold for the "clear and present danger" test. *Id.* at 580-81. Justice Douglas pointed out that while the freedom to speak is not absolute, this case was not one of extreme illegality. *Id.* at 581 (Douglas, J., dissenting). Justice Black agreed, noting that the petitioners were not charged with any overt acts but merely that they had agreed to assemble, talk, and publish certain ideas at a later date. *Id.* at 579 (Black, J., dissenting).

Eighteen years later, in *Brandenburg v. Ohio*, which limited the government's ability

governmental restrictions on individuals prior to and through the enactment of the Smith Act did not specifically name the Communist party as its primary focus, the intent of the restrictions was clear.⁴⁴ By the beginning of the 1950s, the Supreme Court already had upheld anti-Communist party legislation.⁴⁵

With the death of Chief Justice Fred M. Vinson in 1953 and his replacement by Earl Warren, however, the Supreme Court began to revise its philosophy of guilt by association with the Communist party.⁴⁶ *Yates v. United States*⁴⁷ was the most crucial decision of this period. In *Yates*, the Court effectively reversed the *Dennis* ruling and

to prohibit speech, Justice Douglas sharply criticized *Dennis*, suggesting that the clear and present danger test was so "twisted and perverted" that it made the trial of the teacher of marxism an all out political event. *Brandenburg v. Ohio*, 395 U.S. 444, 454 (1969).

44. See CAUTE, *supra* note 2, at 229-30 (discussing the gradual progression toward immigration legislation specifically prohibiting communists from admission into the United States).

45. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952) (upholding the deportation of aliens who were previously members of subversive groups). Loyalty oaths, another way in which both state and federal governments attempted to ensure that their employees were not communists, received a record of mixed approval from the Supreme Court. Compare *Garner v. Board of Public Works*, 341 U.S. 716, 720 (1951) (upholding a Los Angeles loyalty oath statute on the grounds that past loyalty may have a reasonable relationship to present and future trust) with *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (finding an anti-Communist party loyalty oath unconstitutional on the grounds that membership itself may be innocent, thereby causing the oath to violate due process). One historian suggests that although Congress intended the 1940 revision of the 1918 Immigration Act to target the Communist party, the party may actually have escaped such persecution. CAUTE, *supra* note 2, at 229.

46. See *Noto v. United States*, 367 U.S. 290, 300 (1961) (reversing the Smith Act conviction of a Communist worker through a finding of insufficient evidence of illegal party advocacy); *Yates v. United States*, 354 U.S. 298, 338 (1953) (reversing the Smith Act convictions of 14 "second-string" Communist party officials); *United States v. Robel*, 389 U.S. 258, 260 (1967) (finding that the Subversive Activities Control Act of 1959, which imposed heavy criminal penalties on any member of a Communist-action organization who engaged in any employment in any defense facility violated the first amendment freedom of association because the means chosen to achieve the ends was not the least drastic means). But see *Scales v. United States*, 367 U.S. 203, 254-55, (1961) (affirming the Smith Act conviction of a district Communist party chairman under the membership clause rather than under the more frequently used advocacy and organizing clauses of the Smith Act). In his dissent in *Scales*, Justice Douglas compared the law and the Court's ruling with the repressive Eighteenth Century Alien and Sedition Acts. *Id.* at 263. See also Mollan, *Smith Act Prosecutions: The Effect of the Dennis and Yates Decisions*, 26 U. PITT. L. REV. 705, 747-48 (1965) (concluding that after *Yates*, courts could restrict speech based on either advocacy or incitement to action).

Many statutes targeting Communists, in particular those dealing with loyalty oaths, were overturned on the grounds of "vagueness" and "overbreadth." See *Baggett v. Bullitt*, 377 U.S. 360, 366 (1964) (striking down as vague a Washington state loyalty oath); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961) (striking down Florida loyalty oaths as unconstitutionally vague).

47. *Yates v. United States*, 354 U.S. 298 (1953).

distinguished an action involving the overthrow of the government from abstract discussion or writing suggesting such action.⁴⁸ Although the decision in *Yates* reduced the number of Smith Act prosecutions,⁴⁹ the Supreme Court still upheld the convictions of communists under the membership clause of the Smith Act.⁵⁰

The Smith Act was one of the many laws Congress created during that period to address the communist "problem."⁵¹ Others included the

48. *Id.* In contrast to its decisions in cases specifically targeting the Communist party, the Supreme Court, in the so-called NAACP cases, went out of its way to make the necessary separation between illegal action and constitutionally protected expression for that organization. Emerson, *Freedom of Association*, 74 YALE L.J. 1, 30 (1964). In one such case, the government prosecuted members of the NAACP for their refusal to produce branch membership lists. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958). The government was attempting to ascertain whether certain alleged members of the Communist party or communist-front organizations were active in the NAACP. *Id.* at 467. The Court, however, held for the NAACP. *Id.*

49. CAUTE, *supra* note 2, at 208. By the end of 1956 there were 145 indictments under the Smith Act resulting in 108 convictions, 10 severances, and 10 acquittals. *Id.*

50. *Scales v. United States*, 367 U.S. 203, 252-53 (1961). In *Scales*, the state originally arrested the defendant in 1954 and charged him with knowing membership in the Communist party. *Id.* at 206. The Supreme Court upheld his conviction by a 5-4 vote on the grounds that although the Court attributed no violent action to Scales himself, his words and conduct demonstrated that he was both active within the Party and fully conversant with its illegal activity. *Id.* at 254-55. Interestingly, there was a contrary ruling in the companion case. *See Noto v. United States*, 367 U.S. 290, 299 (1961) (holding that clear proof that a defendant specifically intends to accomplish the aims of the organization through violence is necessary for a conviction under the Smith Act). In *Noto*, the Court overturned the lower court's ruling. *Id.* at 300. The Court distinguished the two cases, stating that the proof sufficient in *Noto* to support the jury's verdict of present illegal party advocacy was lacking in *Scales* "in any adequately substantial degree." *Id.* at 299.

The courts have significantly expanded the first amendment freedoms of speech and association since the creation of the Smith Act and the Internal Security Act. *See Tinker v. Des Moines Community School District*, 393 U.S. 503, 512-13 (1969) (holding that students are allowed freedom of expression in schools provided it does not cause disorder or disturbance); *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1968) (finding unconstitutional an Ohio criminal syndicalism statute because it failed to distinguish between mere advocacy and incitement to imminent lawless action); *see also Rabban, supra* note 22, at 594 (noting that the modern trend of first amendment expansion had its roots in pre-World War I litigation).

Even with this expansion, however, courts are reluctant to correct executive decisions on immigration policy when they interact with the first amendment. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1957). Instead, they bow to a history of a strong legislature and the assignment of power to the Executive. *Id.* at 761. Some commentators argue that the judiciary must change its overly deferential tests and be more willing to engage in "normal," more stringent first amendment review. *See Immigration and the First Amendment, supra* note 12, at 1890 (arguing that there is no reason to show special deference to the government in cases that harm citizens' first amendment interests); *First Amendment Limitations, supra* note 8, at 200 (suggesting that the "facially legitimate and bona fide" standard adopted in *Kleindienst v. Mandel* is unjustified). *See infra* notes 77-87 and accompanying text (examining the *Kleindienst* decision).

51. *See Tilner, supra* note 12, at 55-56 (describing the incorporation of the Smith Act and other legislation into the McCarran-Walter Act).

Displaced Persons Act of 1948⁵² and the Internal Security Act of 1950.⁵³ In Title I of the Internal Security Act, Congress banned the admission of aliens whose entrance to the United States "would be prejudicial to the public interest, or would endanger the welfare or safety of the United States."⁵⁴ Furthermore, the Act extended rules requiring suspect organizations, including domestic "Communist-action" and "Communist-front" groups, to register with the government.⁵⁵ This restrictive legislation, however, only laid the groundwork

52. Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009, 1014 (1948) (codified as amended at 50 U.S.C. App. § 1951 (1982)).

53. The Internal Security (McCarran) Act of 1950, ch. 1024, Pub. L. No. 81-831, § 781, 64 Stat. 987 (1950) (codified as amended at 50 U.S.C. § 781 (1982)). The Internal Security Act marked the first time that communists and fascists were specifically excludable. SENATE SUBCOMM. ON IMMIGRATION AND REFUGEE AFFAIRS OF THE COMM. ON THE JUDICIARY, U.S. IMMIGRATION LAW AND POLICY: 1952-1986, S. REP. NO. 100, 100th Cong., 1st Sess. 7 (1987) [hereinafter CRS REPORT]. The increasing awareness of many Americans to the existence of a world Communist movement occurred through events such as the Communist takeover of mainland China, the subversion of Eastern European democracies, and the Korean War. KITTRIE & WEDLOCK, *supra* note 2, at 407. This growing cognizance helped create the national mood necessary for the advancement of anti-subversive legislation such as the 1950 McCarran Act. *Id.* The Act required such a high degree of investigation into individuals' backgrounds to see if they fell within the definition of "totalitarian," that several congressmen, including Senator McCarran and Representative Walter, suggested to the State Department that the term should not apply to Nazis and Fascists. CAUTE, *supra* note 2, at 253.

54. The Internal Security (McCarran) Act of 1950, ch. 1024, title I, § § 1-32, 64 Stat. 987 (codified as amended at 8 U.S.C. § § 1102-82, 18 U.S.C. § § 791-95, 22 U.S.C. § § 611, 618, 50 U.S.C. § § 781-826). Other features of the Act included registration of Communist organizations, the strengthening of the espionage laws, and the detention of potential spies and saboteurs in times of emergency. *Id.* title II, § § 100-16, 64 Stat. 1019 (codified as amended at 50 U.S. § § 811-26).

Several senators who opposed the Internal Security Act offered a compromise bill that was never discussed on the Senate floor, due largely to Senator McCarran's dominating role as chairman of the Judiciary Committee. Tilner, *supra* note 12, at 63. Instead, when the bill's sponsors incorporated into law what was intended as "a liberal maneuver to divert the cannibal's appetite" they unintentionally helped make its provisions more restrictive. CAUTE, *supra* note 2, at 39. President Truman vetoed the measure, saying it would not achieve the intended objective and "would make a mockery of the Bill of Rights and of our claims to stand for freedom in the world." President's Message to Congress Vetoing the Internal Security Bill, 1950 PUB. PAPERS 645, 650. A few senators, including Hubert Humphrey, also joined the opposition to the Internal Security Act. *Id.* Congress, however, resoundingly overrode the veto in an election year campaign characterized by "red-baiting." See CAUTE, *supra* note 2, at 39-40 (describing the practice by nominees of both political parties during the 1948-1952 election campaigns of labeling their opponents Communists or communist sympathizers); see also BELFRAGE, *supra* note 2, at 58, 137 (examining individual election campaigns).

55. 50 U.S.C. § 782(10) (1982). The Act defined "Communist-action organization" and "Communist-front organization" as non-diplomatic groups in the United States that are substantially directed or controlled by Communist foreign governments. *Id.* In addition, the primary purpose of the group must be to give aid and support to a Communist-action organization, a Communist foreign government, or the world Com-

for a much more comprehensive immigration bill addressing a wide range of immigration policies.

2. *The McCarran-Walter Act*

The McCarran-Walter Act⁵⁶ was the culmination of the battle between conservative anti-immigrationists and more liberal, less xenophobic congressmen.⁵⁷ The Act took a systematic approach to the "immigration problem," codifying and combining earlier laws⁵⁸ and modifying and reinforcing previous policy.⁵⁹ The McCarran-Walter Act is a law that has evoked controversy since its inception,⁶⁰ including both a strongly worded presidential veto and a subsequent congressional override.⁶¹ This Comment focuses on sections 212(a)(27)-(29) of

munist movement. *Id.* By broadening the bill's language, the government extended the rules to the so-called "fellow travelers" and non-subversive, progressive, and left wing groups as well as the Communist organizations. CAUTE, *supra* note 2, at 136; *see* GROUNDS FOR EXCLUSION, *supra* note 15, at 48-50 (examining the legislative history of the Act).

56. 8 U.S.C. § 1182 (1982). The Act was named for its sponsors, Senator Pat McCarran (D. Nevada) and Representative Francis E. Walter (D. Pennsylvania). KONVITZ, *supra* note 11, at 53 n.152.

57. CRS REPORT, *supra* note 53, at 1. *See* CAUTE, *supra* note 2, at 39 (describing the legislative battles over the Act); Tilner, *supra* note 11, at 63 (describing congressional debate over the Act). Many of the same battles that took place over the Internal Security Act two years earlier were repeated, including a presidential veto. *See supra* notes 53-54 and accompanying text (describing the history surrounding these earlier legislative skirmishes).

58. CRS REPORT, *supra* note 53, at 1. One comparative study of the two documents notes that in one instance the McCarran-Walter Act treats subversion less comprehensively than the Internal Security Act of 1950 in only one instance: the definition of "totalitarian party" in the 1952 Act fails to include parties like the Nazis or Fascists. Tilner, *supra* note 12, at 68 n.496.

59. CRS REPORT, *supra* note 53, at 2-3. The legislation was based in large part on Senator McCarran's restrictionist belief that "assimilation is the key to a sound immigration system." *See* KONVITZ, *supra* note 10, at 53 (quoting Senator McCarran's views as expressed in a letter to the *Christian Science Monitor* of January 10, 1953). Aside from retaining ideological exclusions, the Act eliminated racial or sexual discrimination as a bar to immigration and introduced a national origins quota system. CRS REPORT, *supra* note 53, at 3.

60. *See supra* notes 11-12 and accompanying text (listing sources of dissenting opinion).

61. President's Message to Congress Vetoing the Immigration and Nationality Act, 1952-53 PUB. PAPERS 441. Truman suggested in his veto message the creation of a commission to examine American immigration policy. *Id.* Following Congress' failure to heed his advice, the President unilaterally established a commission to examine United States immigration and naturalization policies and to make recommendations. *See* Tilner, *supra* note 12, at 72. Not surprisingly, the commission's report was highly critical of the legislation, and recommended its repeal. *Id.*

According to one commentator, the 1952 legislation adopted the view that immigration was a source of danger to the nation and that therefore legislation regulating it should be protectionist in nature. CRS REPORT, *supra* note 53, at 3. The Truman

the Act that incorporate, as well as add to, the ideological exclusionary provisions of the 1950 Internal Security Act, the 1940 Alien Registration (Smith) Act, and other legislation.⁶² The criticisms of these sections result from their vagueness and their focus on belief and association instead of activity as grounds for exclusion.⁶³

Section 212(a)(28) is the most criticized of the three provisions for two reasons: first, it lacks a time limit for punishment for advocating the proscribed activities; and second, it punishes the mere writing, publishing or distribution of materials connected with the proscribed activities.⁶⁴ The result is that the United States government may prohibit entry of individuals interested only in speaking to American citizens,

Commission, however, believed that such legislation should reflect openness and friendliness. *Id.* But see CAUTE, *supra* note 2, at 28-29 (pointing out that Truman was a fervent anti-Communist, a position based on more than just a determination not to be outgunned by the Republicans). Others have suggested that Truman's knowledge of history, in particular his awareness of President Jefferson's example of dealing with the Alien and Sedition Act hysteria of 1798, enabled him to keep calm in Senator McCarthy's presence. MORRISON, *supra* note 15, at 1051.

62. 8 U.S.C. § 1182(a)(4) (1982). Other portions of section 212 have also recently aroused controversy, notably section 212(a)(4), the provision allowing for the exclusion of aliens who are afflicted with psychopathic personality, a sexual deviation, or a mental defect. *Id.*; see also Silvers, *Exclusion and Expulsion of Homosexual Aliens*, 15 COLUM. HUM. RTS. L. REV. 295, 322-32 (1984) (arguing that exclusion on the basis of homosexuality cannot withstand scrutiny under constitutional standards); Note, *Homosexual Aliens Excludable without Certificate as Psychopathic Personalities — In re Longstaff*, 716 F.2d 1439 (5th Cir. 1983), 18 SUFFOLK U.L. REV. 537, 537 (examining the *In re Longstaff* decision finding that even voluntarily admitted homosexuality precludes lawful admission and bars subsequent naturalization). One commentator has categorized the McCarran-Walter Act as one that groups Communists and anarchists with such social outcasts as prostitutes, professional beggars, and psychopaths. *Visa Denials*, *supra* note 12, at 252.

Recent congressional committee activity on a bill that would limit the government's power to exclude certain individuals demonstrated the conflicting opinions in this area of immigration law. Michaelson, *Panel Approves Tighter Limits for the Exclusion of Foreigners*, 46 CONG. Q. 1731, June 25, 1988.

63. 8 U.S.C. §§ 1101-1524 (1982). Section 212(a)(27) excludes aliens who, based on the consular officer's or the Attorney General's belief or knowledge, seek to enter the United States solely to engage in activities that threaten the public interest or endanger the welfare, safety, or security of the United States. *Id.* § 1182(a)(27). Section 212(a)(29) allows the consular officer or the Attorney General to exclude individuals they have reasonable ground to believe would engage in espionage, sabotage, public disorder, or other subversive activities after entry; or advocate the unlawful overthrow of the United States government; or affiliate with any organization that is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950. *Id.* § 1182(a)(29)(A)-(C).

64. *Id.* § 1182(a)(28)(G)-(H). A study of these sections suggests that labelling sections (27) and (29) as ideological exclusions may be inappropriate because they do not explicitly allow for rejections of aliens on the basis of political belief, advocacy, or affiliation. Tilner, *supra* note 12, at 66. The author suggests, however, that sections (27) and (29) are "anticipatory exclusions," because they are based on an alien's likely future conduct in the United States. *Id.* at 66-67.

based simply on the government's perception that their views are antithetical to the mission of, or belief in, the government of the United States.⁶⁵ Moreover, the Act as a whole states that the consular officer's denial of a visa is nonreviewable, and the officer has no duty to reveal the reasons for denial.⁶⁶ At least one commentator has suggested that the lack of duty to notify disregards the due process rights of aliens.⁶⁷

This flaw was partially corrected in 1977, with the passage of the so-called McGovern Amendment.⁶⁸ This legislation provides that the Secretary of State should recommend to the Attorney General that a waiver be granted to any alien attempting to enter the country, whose exclusion is based solely on membership or affiliation with one of the proscribed organizations.⁶⁹ Some observers have applauded the McGovern Amendment as an initial step in revising the law.⁷⁰ Yet others have criticized it as a token gesture or a symbolic protection of individual rights.⁷¹ The number of challenges to ideological restrictions for entry

65. See Shapiro, *supra* note 12, at 934 (suggesting that the ideological basis of sections 212 (a)(27)-(29) results in unconstitutional censorship).

66. See KONVITZ, *supra* note 11, at 33-39 (describing the procedural provisions of the Immigration and Naturalization Act of 1952). Even though the power was nonreviewable, prior to the passage of the McGovern amendment, the Attorney General waived ineligibility under Section 212(a)(28) in nearly all instances. See *Kleindienst v. Mandel*, 408 U.S. 753, 768 (1972) (including government's brief with table of waivers from 1967 to 1971). The McGovern Amendment made this waiver virtually mandatory. McGovern Amendment, Aug. 17, 1977, Pub. L. No. 95-105, tit. I, § 112, 91 Stat. 844, 848 (1977) (codified as amended at 22 U.S.C. § 2691 (1982)). See *infra* notes 67-70 and accompanying text (discussing the McGovern amendment).

67. See KONVITZ, *supra* note 11, at 46-53 (examining procedural due process issues); see also *supra* note 8 and *infra* notes 72-77 and accompanying text (discussing alien rights).

68. 22 U.S.C. § 2691 (1982).

69. *Id.* Congress passed the McGovern Amendment to promote United States compliance with the Final Act of the Conference on Security and Cooperation in Europe. *Id.* The Attorney General is not required to waive the restrictions, yet has done so extensively since passage of the amendment. See *Exclusion Hearings*, *supra* note 13, at 61 (revealing in Representative Mazzoli's questioning that, out of 45,900 rejections based on section 212(a)(28), the Attorney General has issued 45,372 waivers).

The current chairman of the Congressional Committee representing the United States at the Helsinki Conference, Representative Steny H. Hoyer, has noted that the Soviet Union and Eastern European countries use sections (27)-(29) as a counterattack to allegations of human rights violations. *Id.* at 127-33. See Micanda, *Rethinking the Role of Politics in United States Immigration Law: The Helsinki Accords and Ideological Exclusion of Aliens*, 25 SAN DIEGO L. REV. 301, 323 (1988) (suggesting there is a gap between the Immigration and Nationality Act and the principles established at the Helsinki Conference).

70. *Visa Denials*, *supra* note 12, at 260; Shapiro, *supra* note 12, at 931.

71. See *Abourezk v. Reagan*, 785 F.2d 1043, 1059 n.22 (D.C. Cir. 1986) (commenting on dissent's criticism that the Attorney General can deny a visa under section (a)(28) despite Secretary of State's recommendation to allow alien entry), *aff'd per curiam*, 484 U.S. 1 (1988); *Visa Denials*, *supra* note 12, at 261 (noting argument that compliance with the McGovern Amendment is *pro forma*); Slovinsky, *supra* note 12,

into the United States indicates that the McGovern Amendment waiver has not effectively resolved the standards for admission or exclusion into the United States. The law remains a confusing mass of ideological conditions promulgated at a time when the government was more fearful of foreigners and had a lower tolerance for the first amendment rights of United States citizens.

II. LEGAL RULINGS ON IDEOLOGICAL EXCLUSIONS

The exclusions and delays in admission to the United States under the McCarran-Walter Act affect a wide range of individuals in a variety of fields.⁷² The individuals who challenge the exclusions are often the American citizens who arranged for the alien's visit and who are claiming an infringement of their first amendment right to receive information.⁷³ Courts' interpretations of aliens' rights are mixed, and

at 18 (labelling the McGovern Amendment a symbolic protection); *see also* Tilner, *supra* note 12, at 78-79 (charging that the government has frequently circumvented the McGovern Amendment).

72. *See* Abourezk v. Reagan, 785 F.2d 1043, 1048-49 (D.C. Cir. 1986) (examining the exclusions under the McCarran-Walter Act of Nino Pasti, a peace activist and former member of the Italian Senate; Tomas Borge, Interior Minister of Nicaragua; and Olga Finlay and Leonor Rodriguez Lezcano, members of the Federation of Cuban Women), *aff'd per curiam*, 484 U.S. 1 (1987); Allende v. Shultz, 845 F.2d 1111, 1113 (1st Cir. 1988) (pertaining to the exclusion by the Department of State of Hortensia Allende, wife of the former Chilean President because of her membership in two organizations considered to be affiliated with the Communist party); CAUTE, *supra* note 2, at 251-53 (listing scientists, labor leaders, and artists, including Pablo Picasso, who were excluded shortly after enactment of the Subversive Activities Control Act of 1950 and which continued with the enactment of the McCarran-Walter Act); Helton, *Alien Exclusion*, THE NATION 737 (May 28, 1988) (describing several exclusions on allegedly political grounds, including Vietnamese economist and former South Vietnamese Prime Minister Nguyen Xuan Oanh, and British Member of Parliament Gerry Adams); Browne, *Author of "Wolf" Book Barred*, N.Y. Times, Apr. 24, 1985, at A14 (reporting detainment of Canadian writer Farley Mowat because of his alleged affiliation with leftist organizations); Hevesi, *Belgian Writer Held at Newark Airport as a Suspected Communist*, N.Y. Times, Sept. 27, 1986, at B1 (reporting the detainment of journalist Tom Ronse because communist documents were found in his baggage); *State Department Denies Visa For Ian Paisley*, N.Y. Times, Mar. 20, 1983, at L7 (reporting the visa denial of the Reverend Ian Paisley, a militant Protestant leader from Northern Ireland to protect the public interest); *see also* Schapiro, *supra* note 12, at 30-32 (highlighting the exclusion of several international figures, including Italian author Dario Fo, Nobel laureate Gabriel Garcia Marquez, and dissident South African poet Dennis Brutus); *First Amendment Limitations*, *supra* note 12, at 149 n.9 (listing numerous exclusions, including Colombian journalist Patricia Lara, right-wing Salvadoran politician Roberto d'Aubisson, and Irish nationalist Bernadette Devlin).

73. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). *See* Abourezk v. Reagan, 785 F.2d 1043, 1048-49 (D.C. Cir. 1986) (stating that the challenge to the exclusion was based on a first amendment right to dialogue), *aff'd per curiam*, 484 U.S. 1 (1987). In *Abourezk*, the Court determined that the plaintiffs, a group of Americans who had invited several foreigners to visit and challenged the exclusion of those aliens, were not endowed with a right of action under the McCarran-Walter Act. *Id.* at 1050. The

have frequently denied aliens the liberties granted to American citizens and found in the Bill of Rights.⁷⁴ Furthermore, courts apply a different standard for resident aliens as opposed to those trying to enter.⁷⁵ Aliens

Court held, however, that the plaintiffs could bring suit under the Administrative Procedure Act (APA) because agency action had caused them injury and the APA was aimed at protecting their interests. *Id.* at 1050.

In a recent case, the government cancelled a non-immigrant alien student's visa and prevented him, under section 212(a)(27), from reentering the country for national security reasons. *El-Werfalli v. Smith*, 547 F. Supp. 152, 153 (S.D.N.Y. 1982). The court found that American citizens had not invited the student to speak. *Id.* He subsequently filed a habeas corpus petition but the court upheld the exclusion, noting that the government only has to have a facially legitimate reason for its actions. *Id.* at 153.

74. *Compare Plyler v. Doe*, 457 U.S. 202, 206-30 (1982) (holding that a Texas statute that denied free public education to illegal alien children violated the equal protection clause), *reh'g denied* 458 U.S. 1131 (1982) and *Hampton v. Wong*, 426 U.S. 88, 99-117 (1976) (ruling that a Federal Civil Service Commission regulation barring resident aliens from civil service employment was unconstitutional because it denied aliens due process) and *Graham v. Richardson*, 403 U.S. 365, 370-83 (1971) (holding that state laws denying welfare benefits to aliens, who have not lived in the United States for a certain number of years, violate the equal protection clause) and *Bernal v. Fainter*, 467 U.S. 216, 219-22 (1984) (deciding that a state law prohibiting aliens from becoming notary publics did not satisfy the strict judicial scrutiny test and violated the fourteenth amendment) with *Jean v. Nelson*, 472 U.S. 846, 854-57 (1985) (remanding issue of validity of INS detention of Haitian immigrants to determine possible discriminatory regulations).

More recently, beyond considerations of national sovereignty and foreign policy, courts are more willing to grant at least "fundamental rights" to resident aliens. *TRIBE, AMERICAN CONSTITUTIONAL LAW* § 5-16, at 360-61 (1988).

75. See U.S. CONST. art I, § 8, cl. 4 (granting Congress the power "to establish a uniform Rule of Naturalization"). Although the Constitution repeatedly uses the word "citizen," and the Bill of Rights refers exclusively to "persons," not citizens, neither defined "citizenship" until after the Civil War. *TRIBE, supra* note 74, § 5-16 at 355-56. Congress has periodically conditioned the entry, stay, and naturalization of aliens upon compliance with requirements that courts would otherwise hold to violate the constitutional rights of American citizens. *Id.* at 358.

The procedures of naturalization for resident aliens is a judicial process and thus must meet minimum standards of fairness, while nonresident aliens do not benefit from any of the individual protections of the Bill of Rights. *Id.* at 359. The rationale for this difference in treatment for illegal aliens is based on the Constitution's lack of extraterritorial scope that consequently allows the federal government to utilize the full discretionary power accorded it under international law. *Id.* at 359 n.30; see *Shaughnessy v. United States*, 345 U.S. 206, 212 (1953) (distinguishing between procedural safeguards given to aliens within the United States and those seeking entry); *Carlson v. Landon*, 342 U.S. 524, 534 (1952) (stating that if aliens fail to obtain and maintain citizenship by proper naturalization processes, they remain subject to the plenary power of Congress to expel them); *Fong Yue Ting v. United States*, 149 U.S. 698, 738 (1893) (noting that authority to deport aliens must conform with Constitutional provisions); see also *Immigration and the First Amendment, supra* note 12, at 1900 (comparing the due process rights of aliens in exclusion versus deportation decisions).

But see *American-Arab Anti-Discrimination Comm. v. Meese*, No. CV 87-02107-SVW, slip op. at 32-33 n.11 (C.D. Cal., filed Jan. 26, 1989) (finding for first amendment purposes in a McCarran-Walter deportation action no distinction between immigrant and nonimmigrant aliens). In *American-Arab Anti-Discrimination Committee*, the district court acknowledged the government's substantial authority to prevent aliens

seeking admission are granted fewer rights⁷⁶ and are more susceptible to the claims of domestic security or foreign affairs matters under the McCarran-Walter Act.⁷⁷

A. THE *Kleindienst* STANDARD

The Supreme Court has generally followed a "hands-off" policy in matters relating to immigration and the First Amendment.⁷⁸ The Court

from entering the United States, but noted the important differences in this power in the exclusion and deportation contexts. *Id.* at 35-36. The court pointed out that even in those cases in which the government's deportation power was affirmed, such power must conform to the Constitution. *Id.* at 34-35. The court ruled that there is no different Bill of Rights for aliens in the deportation setting. *Id.* at 42-46. Furthermore, the district court contrasted Congress' powerful plenary immigration power in the substantive due process area with a lesser power in the first amendment field. *Id.* at 39, 46-48. The court suggested that the Government's view, that aliens are free to say whatever they wish but the Government maintains the ability to deport them for the content of their speech, was just as chilling to speech as initially disallowing the speech. *Id.* at 48. One critic of the California district court's decision suggested that since deportation is not a criminal punishment, Judge Wilson erred in applying the *Brandenburg* free speech restraints on criminal prosecutions to deportations. Fein, *Free Speech Sanctuary for Terrorists*, Wash. Times, Jan. 31, 1989, at F1. The author suggested that preventing the fundraising for a "terrorist organization" that the plaintiffs were charged with did not in any way resemble the potential first amendment violation of wearing a PFLP button which the judge in the case compared it to. *Id.* at F4.

76. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (affirming that the Attorney General may exclude from the United States, without a hearing, the alien wife of a citizen who had served honorably in the United States forces during World War II). The Court noted that although Congress normally supplies the conditions of the privilege of entry into the United States, it may in broad terms authorize the executive to exercise the power in the best interests of the country during a time of national emergency. *Id.* at 543. The dissenters challenged the lack of procedural due process without questioning the majority's characterization of the Congressional power. *Id.* at 550 (Jackson, J., dissenting).

One commentator suggests that the standard of due process for all aliens and all citizens should be identical. *Immigration and the First Amendment*, *supra* note 12, at 1926-28; see also *infra* note 220 and accompanying text (discussing the due process rights of aliens in current legislative reforms in this area).

77. See *Exclusion Hearings*, *supra* note 12, at 60 (noting State Department legal adviser Abraham Sofaer's view that courts should not question whether excluding or admitting an alien has a serious adverse impact on our foreign policy or national security). At least one committee has criticized a foreign policy rationale as one without legal basis. *Visa Denials*, *supra* note 12, at 255.

78. See *Fiallo v. Bell*, 430 U.S. 787, 792-96 (1977) (discussing the limited scope of judicial review inquiry into immigration legislation); *Immigration and the First Amendment*, *supra* note 12, at 1898 (summarizing the Supreme Court's review process regarding first amendment and immigration issues); Note, *Selective Enforcement of Immigration Laws on the Basis of Nationality as an Instrument of Foreign Policy*, 56 NOTRE DAME L. REV. 704, 708-12 (1981) (examining judicial review of the immigration power); *Immigration Law: The Role of the Supreme Court in Policy Development*, 22 NEW ENG. L. REV. 131, 140-46 (1987) (discussing the limited scope of judicial review in immigration law); see also Gibney, *The Role of the Judiciary in Alien Admissions*, 8 B.C. INT'L COMP. L. REV. 341, 366-74 (1985) (examining the establish-

initially established a basic precedent in *Kleindienst v. Mandel*.⁷⁹ *Kleindienst* was the first case since the Court's 1903 decision in *United States ex rel. Turner v. Williams*⁸⁰ to address the government's exclusion of a person on ideological grounds.⁸¹ In *Kleindienst*, the plaintiffs were United States citizens who challenged the denial of a visa to Ernest Mandel, a Belgian socialist newspaper editor, under section 212(a)(28) of the McCarran-Walter Act.⁸² The plaintiffs claimed the Act violated their right to receive information and to associate with whom they chose.⁸³ The Supreme Court upheld the visa denial, stressing the importance of legislative prerogative in foreign affairs matters.⁸⁴ The Court acknowledged the first amendment issues raised in the case,⁸⁵ yet declined to conduct a balancing test because the executive branch had denied the visa on "facially legitimate and bona fide" grounds.⁸⁶ The Court suggested that basing the decision on first

ment of judicial deference to the political branches of government and arguing for increased judicial activism in immigration matters). But see Comment, *National Origin as a Retaliatory Weapon in Foreign Policy: The Iranian Students Cases*, 20 SANTA CLARA L. REV. 993, 1007-08 (1980) [hereinafter *Iranian Student Cases*] (noting the disturbing ramifications resulting from courts' decisions affirming a narrow standard of review in immigration law).

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

80. *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904).

81. *Id.* at 292-93. See *supra* note 22 and accompanying text (discussing the *Turner* case).

82. *Kleindienst v. Mandel*, 408 U.S. 753, 759 (1972).

83. *Id.* at 762-63. Mandel was an original party to the suit along with six Americans but was denied standing. *Id.* at 760. The Court established that an alien has no standing to bring a constitutional challenge to the denial of a visa. *Id.* at 762. The government had admitted Mandel on two earlier occasions, based on the Secretary of State's recommendation that the Attorney General waive the McCarran-Walter Act prohibition. *Id.* at 756. The government claimed that Mandel violated the terms of his earlier visa by engaging in fundraising activities. *Id.* at 758 n.5. Although Mandel was prosecuted under anti-Communist statutes, he asserted on his visa applications that he was not a member of the Communist party. *Id.* at 756. He did not dispute, however, that he advocated the doctrines of world communism. *Id.*

84. *Id.* at 765-67. The Court adopted Justice Frankfurter's reasoning from *Galvan v. Press*, 347 U.S. 522, 530-32 (1954), that courts should adhere to the traditional approach of deferring to Congressional power in legal matters relating to aliens. *Kleindienst v. Mandel*, 408 U.S. 753, 767 (1972).

85. *Kleindienst v. Mandel*, 608 U.S. 753, 765 (1972). The Court noted that mere recognition of first amendment rights was not dispositive of an inquiry. *Id.* at 765-66. A deprivation must be measured against the historical role of Congress in determining the admission and exclusion of aliens to the United States. *Id.*

86. *Id.* at 770. The Court summarized by noting that under section 212(a)(28), Congress delegated conditional exercise of the power of exclusion to the executive. *Id.* Members of the executive branch need only demonstrate that the exclusion was based on facially legitimate and bona fide reasons. *Id.* If this test is met, courts will not engage in further discretion or balancing of interests. *Id.*

The dissenters challenged this position. *Id.* at 770-85. Justice Douglas took a strict position that the government has no authority to restrain free discussion. *Id.* at 776

amendment grounds would allow all aliens to be admitted and would consequently transform Congress's plenary power into a "nullity."⁸⁷ The Court's opinion also stressed that application of a balancing test would unnecessarily clog the courts with individual reviews of exclusion decisions.⁸⁸

B. APPLYING THE *Kleindienst* STANDARD

The lower courts have had difficulty in consistently interpreting and applying the *Kleindienst* standard. In *Abourezk v. Reagan*,⁸⁹ United States citizens challenged the denial of non-immigrant visas under section 212(a)(27) of the McCarran-Walter Act to a number of individuals including: Tomas Borge, the Interior Minister of Nicaragua; Nino Pasti, a former Italian Senator, NATO general and peace activist with the World Peace Council; and Olga Finlay and Leonor Rodriguez Lezcano, Cuban women who are experts on status of women and family law in Cuba.⁹⁰ Following the Supreme Court's analysis in *Kleindienst*, the circuit court decided the case based on statutory interpretation rather than constitutional issues.⁹¹ The court never expressly invoked the *Kleindienst* standard, instead basing its ruling on the government's

(Douglas, J., dissenting). Justice Marshall acknowledged that government has the power to restrict first amendment rights, however, only if the restriction is necessary to further a compelling governmental interest, such as public health or national security. *Id.* at 783 (Marshall, J., dissenting). Merely legitimate governmental interests did not permit intrusion on constitutional rights. *Id.* at 777. Furthermore, Justice Marshall criticized the Court's good faith standard, suggesting that such complete deference to the executive was unprecedented. *Id.* at 777. Justice Marshall found no justification for a rule that refuses to evaluate the Attorney General's reasoning for denying individuals admission to the United States. *Id.* at 778.

Some courts use the *Kleindienst* standard to allow seemingly limitless government attempts to deny visas. *See, e.g.,* NGO Comm. on Disarmament v. Haig, No. 82 Civ. 3636 (S.D.N.Y. June 10, 1982), *aff'd mem.*, 697 F.2d 294 (2d Cir. 1982). In *NGO*, the Secretary of State recommended a waiver under the McGovern Amendment for 320 Japanese aliens affiliated with the World Peace Council, an organization the United States government perceived as affiliated with communism. *Id.* The district court upheld the Attorney General's rationale as a valid reason for denial of a waiver. *Id.*

87. *Kleindienst v. Mandel*, 408 U.S. 753, 768 (1972). The Court noted that although few aliens are influential or popular as Mandel, the first amendment extends to all aliens. *Id.* at 768.

88. *Id.* at 769.

89. *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) (per curiam).

90. *Id.* at 1048-49. The plaintiffs had invited the excluded individuals to the United States to attend meetings and present lectures. *Id.* at 1047.

91. *Id.* at 1052. Although the plaintiffs did have the right to challenge the constitutional basis of the State Department's application of § 1182(a)(27), the Court's ruling never reached the constitutional question. *Id.* at 1051-52.

failure to properly interpret and implement the existing statutes.⁹²

First, the court noted that although Congress intended foreign policy concerns to fall within the legitimate authority of section 212(a)(27),⁹³ the trial court failed to elaborate whether the prohibition applied only to an alien's mere presence in the United States or to an alien's activities.⁹⁴ The court proceeded to evaluate Congressional intent through an examination of the legislative history of the McCarran-Walter Act and the McGovern Amendment.⁹⁵ Next, the court ruled that the government's use of section 212(a)(27) instead of section 212(a)(28) to exclude individuals effectively avoided the limitations of the McGovern Amendment.⁹⁶ Finally, the court criticized the lower district court for its heavy reliance on *in camera* evidence because this type of evaluation harms the openness and fairness of judicial proceedings.⁹⁷

The dissenting opinion in the circuit court in *Abourezk*, by Judge Robert Bork, concluded that the statute permitted the government's actions.⁹⁸ The dissent, in recognizing the constitutional challenge, concluded that the foreign policy interest of the government outweighed the liberty rights of those denied the right to hear the aliens' message.⁹⁹ Furthermore, the dissent disagreed with the circuit court's decision to remand the case to the district court.¹⁰⁰ The dissent found ample support in the legislative history of the McCarran-Walter Act, the Internal

92. *Id.* at 1053-60.

93. *Id.* at 1053.

94. *Id.* at 1053-54. The Court remanded the case and recommended that the government present more substantive evidence that section 212(a)(27) permits the exclusion of aliens based on presence alone and allow plaintiffs to challenge such evidence. *Id.* at 1056.

95. *Id.* at 1054-56.

96. *Id.* at 1056-57. The intent of Congress in passing the McGovern Amendment was to encourage the Secretary of State to recommend a waiver of ineligibility. *Id.* at 1057; see *supra* notes 68-71 and accompanying text (discussing the McGovern Amendment).

97. *Id.* at 1060-61. Although the court in *Abourezk* criticized the lower court's use of *in camera* evidence, such evidence was relied upon in earlier cases. *El-Werfalli v. Smith*, 547 F. Supp. 152, 154 (S.D.N.Y. 1982). In *El-Werfalli*, the court upheld a Libyan student's exclusion after examining classified documents, applying the *Kleindienst* standard, and concluding that the government's decision was facially legitimate and bona fide. *Id.* at 154. The court in *El-Werfalli* reasoned that the government's belief, that petitioner's employment at an aeronautics school was threatening to the United States security, was a valid premise for exclusion. *Id.* at 154. The court noted the government's authority to employ all legal means to further national politics. *Id.* But see *NGO Committee v. Haig*, No. 82 Civ. 3636 (S.D.N.Y. June 10, 1982) (ruling that it was unnecessary to examine the *in camera* classified evidence), *aff'd mem.*, 697 F.2d 294 (2d Cir. 1982).

98. *Abourezk v. Reagan*, 785 F.2d 1043, 1063 (D.C. Cir. 1986) (Bork, J., dissenting), *aff'd*, 484 U.S. 1 (1987) (per curiam).

99. *Id.*

100. *Id.* at 1064.

Security Act of 1950, and the McGovern Amendment of 1977, to render the judiciary's role in considering foreign relations virtually unnecessary.¹⁰¹ Finally, the dissent suggested that the executive branch may exclude aliens for any reasons it desires, including political reasons, if it finds that the admission of these aliens would be dangerous.¹⁰²

The Court of Appeals for the First Circuit applied the *Kleindienst* standard in *Allende v. Shultz*¹⁰³ but the court found that the government failed to advance a sound basis for exclusion.¹⁰⁴ In *Allende*, United States citizens who had extended speaking invitations to the widow of the former Chilean president brought an action to contest the denial to her of a non-immigrant visa.¹⁰⁵ The government denied her a visa on the grounds that her entry violated section 212(a)(27) of the McCarran-Walter Act.¹⁰⁶ The district court granted the plaintiffs' motion for summary judgment on the grounds that the government failed to advance a sound basis for exclusion under the section.¹⁰⁷ In affirming this ruling, the court of appeals expanded on the lower court judgment, clarifying the notion that the intent of Congress was to prohibit only

101. *Id.* at 1064-73. Judge Bork stated that there is a heavy presumption that Congress meant the same thing in the McCarran-Walter Act as it did in the Internal Security Act when it incorporated the latter law into the former. *Id.* at 1064. Judge Bork pointed to the House and Senate reports on the respective bills, that state that excludable aliens are those who seek to enter the United States for injurious purposes. *Id.*

102. *Id.* at 1068-69. The dissent chastised the plaintiffs for inaccurately categorizing the government's conduct as content-based censorship. *Id.* It argued instead that the government based its prohibition on the individual views because these individuals had associations with a particular foreign government. *Id.*

103. *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1986).

104. *Id.* at 1116.

105. *Id.* at 1113-14. The government barred Mrs. Allende under section 212(a)(27) because of her affiliation with the World Peace Council (WPC) and the Women's International Democratic Federation (WDF), organizations that the State Department treats as international fronts for the Communist party of the Soviet Union. *Id.* at 1113.

106. *Id.* at 1113-14. In a memo detailing the two reasons for Mrs. Allende's ineligibility, Undersecretary of State Lawrence Eagleburger referred to her membership in, and attendance at, a conference of the World Peace Council, as well as his official determination that Allende's entry was potentially harmful to the United States foreign policy interests. *Id.* at 1114.

107. *Allende v. Shultz*, No. 83-3984-C (D. Mass. Mar. 31, 1987) (WESTLAW, DCT database, 1987 WL 9764), *aff'd* 845 F.2d 1111 (1st Cir. 1986). The Massachusetts District Court, applying the *Kleindienst* standard, found that the purely conclusory rationale of the government was not valid. *Id.* The court found that the government did not meet its burden of proof because it failed to advance a facially legitimate and bona fide reason for exclusion, as required by *Kleindienst*. *Id.* at 7-8. The court refused to review *in camera* evidence submitted to the court and not for publication. *Id.* at 6-7. See *supra* notes 79-88 and accompanying text (describing the *Kleindienst* decision).

action and not entry.¹⁰⁸ Furthermore, the court made a special ruling that the case was not moot, thus recognizing the need to decide the issue in the case even though the government had already issued a visa to Mrs. Allende after the court action had begun.¹⁰⁹

In *Harvard Law School Forum v. Shultz*,¹¹⁰ the Massachusetts District Court addressed many of the same issues of speech, foreign policy, and potential danger from visiting aliens that were raised in *Allende*. This court, however, departed from the application of the *Kleindienst* standard,¹¹¹ adding a balancing test to its determination.¹¹² In *Harvard Forum*, the government refused to permit Zuhdi Labib Terzi, the United Nations representative to the observer mission of the Palestine Liberation Organization (PLO), to attend a debate on Middle Eastern policy at Harvard Law School.¹¹³ The district court granted an injunc-

108. *Allende v. Shultz*, 845 F.2d 1111, 1119-20 (1st Cir. 1986). The court pointed out that each section of the law had its own purpose, and the Government had effectively merged sections 212(a)(27) and (28). *Id.* at 1118. The court differed with the *Abourezk* decision, finding an examination of the Act's legislative history unnecessary. *Id.* at 1119.

109. *Allende v. Shultz*, 624 F. Supp. 1063, 1066 (D. Mass. 1985) (holding that because it is the government's policy of applying the particular exclusionary category to Mrs. Allende, and not simply the denial of her visa in this instance, the case is not moot); see *Allende v. Shultz*, 845 F.2d 1111, 1115 n.7 (1st Cir. 1986) (raising the mootness issue *sua sponte*).

110. *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525 (D. Mass. 1986).

111. See *id.* at 531-32 (noting the court's use of a test balancing the public interest in preserving free speech against the adverse effect that preventing a PLO representative a forum will have on the public).

112. *Id.*

113. *Id.* at 526. The parties agreed that the representative, Zuhdi Labib Terzi, as a member of the PLO, is an excludable alien under section 212(a)(28)(F) of the McCarran-Walter Act, which prohibits the issuance of visas to those who advocate sabotage, the unlawful destruction of property, or the justification of assaulting or killing any officer of an organized government because of his official character. 8 U.S.C. § 1182 (a)(28)(f)(ii-v)(1 & 87). Furthermore, the United States will not recognize or negotiate with the PLO until that group recognizes Israel's right to exist and endorses United Nations Resolutions 242 and 338. United States Memorandum of Agreement with Israel (1975), SUBCOMMITTEE ON EUROPE AND THE MIDDLE EAST, THE SEARCH FOR PEACE IN THE MIDDLE EAST, DOCUMENTS AND STATEMENTS, 1967-79 H.R. Doc. No. CP-957. 99th Cong., 1st Sess. 15 (1979). This policy was reaffirmed six years later. International Security and Cooperation Development Act of 1985, Pub. L. 99-83, § 1302(b), 99 Stat. 280, Codified at 22 U.S.C. § 2151 (Supp. IV. 1986). This relationship is currently in transition following United States approval of PLO statements purportedly recognizing Israel and agreeing to United Nations Resolutions 242 and 338. Pear, *U.S. Agrees to Talks with PLO Saying Arafat Accepts Israel and Renounces Terrorism*, N.Y. Times, Dec. 15, 1988, at A1.

Notwithstanding United States policy regarding the PLO, United Nations personnel are allowed access to the headquarters in New York. United Nations Headquarters Agreement, June 26, 1947, art. iv, 17 U.S.T. 74, T.I.A.S. No. 5961, 11 U.N.T.S. 147. The United States has complied with this agreement by restricting travel of members of the PLO's observer mission to the United Nations to a 25 mile geographic limitation from the center of Manhattan. *Harvard Law School Forum v. Shultz*, 633 F. Supp.

tion in favor of Harvard Law School, finding that the debate's organizers would suffer irreparable harm if the debate could not take place, that the potential harm of allowing the speech outweighed the harm to the government, and that there would be no adverse effect to the public interest in allowing the debate to proceed.¹¹⁴ While the court adopted the "legitimate and *bona fide*" standard of *Kleindienst*, it found that the government had met only half of its burden of proof.¹¹⁵ The court reasoned that although the Secretary of State's rationale for not issuing the visa to Terzi was *bona fide*, it was not facially legitimate.¹¹⁶ It found that the decision to deny the travel request was based solely on the content of Terzi's speech.¹¹⁷

A case currently pending before the courts, *Randall v. Meese*,¹¹⁸ reveals the subjectivity of the exclusionary determination, even when the official rendering the decision to exclude applies the *Kleindienst* standard. In *Randall*, the government denied Margaret J. Randall, a professor and writer, a change in her visa status from temporary to permanent resident.¹¹⁹ Randall challenged the denial of her status ad-

525, 527 (D. Mass. 1986). In *Harvard Forum*, the Assistant Secretary of State argued that the specific decision at issue was a discretionary political matter, and that, as the highest ranking official of the PLO in this country, the denial of Terzi's right to travel was not subject to judicial review. *Id.* at 527.

114. *Id.* at 530-32.

115. *Id.* at 531.

116. *Id.* at 531-32.

117. *Id.* The court ruled that because the government previously allowed Terzi to go beyond the 25 mile radius required under the United Nations Headquarters Agreement for vacations, his travel could not be restricted to stop him from speaking at the forum. *Id.* at 527.

118. *Randall v. Meese*, No. 85-3415 (D.D.C. June 5, 1987) (WESTLAW DCT database, 1987 WL 12570), *aff'd*, 854 F.2d 472 (D.C. Cir. 1988).

119. *Id.* Randall's change of status was prohibited under the section of the McCarran-Walter Act that includes advocacy to organized government or affiliation with the Communist party. 8 U.S.C. § 1182 (a)(28)(G) (1987). Randall was born an American citizen but in 1967 lost her citizenship when she declared her allegiance to Mexico. *Randall v. Meese*, No. 85-3415 (D.D.C. June 5, 1987), *aff'd*, 854 F.2d 472 (D.C. Cir. 1988). In 1984, she entered the United States on a visitor's visa and joined her family in Albuquerque, New Mexico, where she took residence. *Id.* She married a United States citizen, began to teach at the University of New Mexico, and sought an adjustment of her immigration status to that of a permanent resident to regain her United States citizenship. *Id.* In the initial deportation proceeding, the district director found Randall excludable because of the ideas and opinions expressed in her writings, and ordered her to leave the United States. *Id.* Following the expiration of this order, the Immigration and Naturalization Services (INS) issued an order for her to show cause why it should not deport her. *Id.* The immigration judge surveyed Randall's activities and writings abroad and pointed to her glorification of the North Vietnamese victory and her active backing of the Castro Communist revolution as reasons for denying her the change of visa status. *Randall v. Meese*, 854 F.2d 472, 474 (D.C. Cir. 1988). The judge noted that even though the applicant appeared to be statutorily eligible for a status change under 8 U.S.C. § 1255, he denied the change. *Id.* at 478; see also Cole,

justment on the grounds that she suffered irreparable harm, including infringement of her first and fifth amendment freedoms.¹²⁰ The district court denied her application for preliminary relief¹²¹ and the Court of Appeals declined to review Randall's challenge, stating that she had not yet exhausted her administrative remedies.¹²² Furthermore, the court noted that if Randall followed the proper procedures for appeal she could then qualify for permanent status because of a temporary amendment to the Immigration Act.¹²³

A recent decision by a California district court addressed the deportation provisions of the McCarran-Walter Act, concluding that the government could not deport members of the Popular Front for the Liberation of Palestine (PFLP) simply because that organization advocated the economic, international, and governmental doctrines of world communism or published material about their goals.¹²⁴ The court found that aliens within the United States are protected by the first amendment and not subject to the same congressional plenary power in the immigration area as those foreigners attempting to enter the country.¹²⁵

Deportation of a Poet, THE NATION, 892 (June 25, 1988) (describing the case of Margaret Randall).

120. *Randall v. Meese*, 854 F.2d 472, 477 (D.C. Cir. 1988). Randall sought declaratory and injunctive relief that 8 U.S.C. § 1182(a)(28)(G) and (C) were unconstitutional. *Id.*

121. *Id.* Although alleged abuses by a district director may be reviewable in district court, the Supreme Court, in *Kleindienst v. Mandel*, upheld the constitutionality of section 212(a)(28) that relates to exclusion on the basis of individuals' political beliefs. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

122. *Randall v. Meese*, 854 F.2d 472, 477 (D.C. Cir. 1988). The court stated that if Randall was correct that the district director did definitively find her "not excludable under either 8 U.S.C. § 1182(a)(28)(G) or (C), the rest of her argument would be more forceful." *Id.* at 479. The court found this determination by the district director to be unclear. *Id.*

123. *Id.* at 481; see *infra* notes 185-91 and accompanying text (describing the temporary statutory change allowing Randall and others excluded under sections 212(a)(27)-(29) to enter or remain in the United States). The court suggested, but did not endorse, the argument that the temporary change in the law should apply retroactively. *Randall v. Meese*, 854 F.2d 472, 481 (D.C. Cir. 1988).

124. *American-Arab Anti-Discrimination Comm. v. Meese*, No. CV 87-02107-SVW slip op. at 45 (C.D. Cal. Jan. 26, 1989). In January of 1987 the INS commenced deportation proceedings against eight individuals who it charged with being members of or affiliated with the Popular Front for the Liberation of Palestine (PFLP). *Id.* at 5-6. Although the initial charges were dropped, new charges were brought against two of the individuals under Section 241(a)(6)(F)(iii) of the McCarran-Walter Act, while the others were charged with non-ideological immigration violations under 8 U.S.C. § 1251(a)(2) and (a)(9). *Id.* at 6. The court held that the plaintiffs had standing on the grounds that they faced a real and immediate threat of deportation. *Id.* at 30-31.

125. *Id.* at 33-37. The court stressed that while the government has certain plenary powers to control immigration, aliens within the borders of the United States who the government is attempting to deport are entitled to the protection of the Bill of Rights, thus limiting the government's power. *Id.* at 33-37, 42-49. The court refused to differ-

Moreover, the court applied these first amendment principles and found the McCarran-Walter deportation provisions to be substantially overbroad in violation of the first amendment.¹²⁶

III. LEGAL ANALYSIS

The judicial branch of the government has exercised a narrow standard of review on cases involving immigration law.¹²⁷ A court's determination may involve application of a previously determined standard, like the one adopted by the Supreme Court in *Kleindienst*,¹²⁸ or it may utilize an examination of a statute's legislative history.¹²⁹ As the previous cases indicate, however, courts have great difficulty in strictly or consistently following either of these methods.¹³⁰ Furthermore, courts

entiate between nonimmigrant aliens and permanent resident aliens; see *id.* at 32-33 n. 11 (following *Plyler v. Doe*, 457 U.S. 202 (1982), in which the Court held that a statute denying state funds for school districts who allow illegal aliens to attend their schools is a violation of the Equal Protection clause); *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1222 (9th Cir. 1988) (holding that the protection of the fourth amendment extends to the government's search of a Mexican national's United States residence); see also *supra* note 75 (discussing alien rights).

126. *American-Arab Anti-Discrimination Comm. v. Meese*, No. CV 87-02107-SVW slip op. at 49-53 (C.D. Cal. Jan. 26, 1989). The court applied the prevailing first amendment test, adopted in *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969), which allows the government to only prohibit advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Id.* at 51. Under this standard, the court found all of the deportation provisions dealing with ideology to be overbroad; see *id.* at 52-53 (finding sections 241(a)(6)(G)(v), (H), (D), and (F)(iii) unconstitutional because they punish mere publication, teaching, advocacy, and affiliation).

127. See *supra* notes 7 and 74-78 and accompanying text (examining the history of judicial review in immigration law).

128. *Kleindienst v. Mandel*, 408 U.S. 753, 768 (1972); see *supra* note 86 and accompanying text (describing the "facially legitimate and bona fide" standard).

129. *Abourezk v. Reagan*, 785 F.2d 1043, 1048 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1988) (per curiam); see Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 526, 533 (1947) (examining theories of statutory interpretation).

130. Exclusion Hearings, *supra* note 13, at 63. One subject of the debate in the hearings to reform the McCarran-Walter Act addressed the growing tendency of courts to exercise judicial review. *Id.* Representative Barney Frank suggested that the court held in the *Allende* decision that American citizens who invite aliens into the United States to address public audiences have standing to challenge an exclusion. *Id.* In addressing this point, Frank noted the potential danger when a court decides whether a legitimate foreign policy argument exists. *Id.*

There is a mixture of opinion on whether courts should be more or less active in setting policy in this area. Compare Gibney, *supra* note 78, at 366-74 (arguing for increased judicial activism in immigration matters) and *Immigration and the First Amendment*, *supra* note 12, at 1928 (arguing that the Supreme Court should abandon the special rule it adopted for immigration cases and apply first amendment principles as it does in other areas of the law) with Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 211 (1983) (arguing that immigration matters have political consequences with which

in numerous circumstances have held that the executive branch exceeded its power to exclude aliens for foreign policy or national security reasons.¹³¹ In other decisions, however, courts have upheld the executive branch and departed from the standard defined by the Supreme Court.¹³²

The source of many of these problems is the standard set in *Kleindienst*. The "facially legitimate and *bona fide*" standard is difficult for lower courts to apply consistently when evaluating clashes between immigration restrictions and first amendment freedoms.¹³³ In *Kleindienst*, the Supreme Court applied the principles articulated in *Turner v. Williams*¹³⁴ and those in other cases that address only the issue of alien rights.¹³⁵ This eliminated guidance for lower courts on the first amendment question and also provided an anachronistic rationale for allowing the government to exclude individuals in general.¹³⁶ Furthermore, the

courts should not or cannot deal).

The deportation of Iranian students from the United States, in response to the taking of American hostages by Iran, raises similar questions on the political use of exclusions and deportations. Compare *id.* (suggesting that courts should not make policy on immigration matters) with *Iranian Student Cases*, *supra* note 78, at 1010 (suggesting that courts not succumb to a less rigorous review of immigration policy which might infringe upon constitutional rights).

131. See *supra* notes 89-117 and accompanying text (discussing *Abourezk*, *Allende* and *Harvard Law Forum*). One commentator has suggested that the United States government's foreign policy goals result in a lack of objective fact-finding by the courts. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 MICH. J. L. REFORM 243, 253-54 (1984).

132. See *supra* notes 118-24 and accompanying text (describing *Randall v. Meese*).

133. See *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972) (setting the standard for the government's authority to exclude aliens without addressing first amendment questions directly). Several commentators have noted the ambiguity of *Kleindienst*. See Shapiro, *supra* note 12, at 936 (exploring different interpretations of *Kleindienst* and their effect on the first amendment); *Visa Denials*, *supra* note 12, at 263 (charging that *Kleindienst* does not resolve the first amendment issues); *First Amendment Limitations*, *supra* note 8, at 163 (noting that *Kleindienst* leaves unanswered many questions in this area of law).

134. *Turner v. Williams*, 194 U.S. 279 (1904).

135. *Kleindienst v. Mandel*, 408 U.S. 753, 763-69 (1972).

136. *Id.* With the judicial expansion of first amendment rights, the *Turner* standard is outdated. *First Amendment Limitations*, *supra* note 8, at 161 n.89. This idea follows from Justice Marshall's dissenting argument in *Kleindienst* stating that overruling earlier cases is not necessary to strike down *Kleindienst's* exclusion, because none of the earlier exclusion cases were concerned with American citizens' expanded right to receive information. *Kleindienst v. Mandel*, 408 U.S. 753, 782 (1972) (Marshall, J., dissenting). One historian has suggested that because *Turner* was treated not as a resident alien, but rather as one trying to get in, the situation might not even arise today because of the existence of the visa system. KONVITZ, *supra* note 11, at 38. Another writer has suggested that the Court's reliance in *Kleindienst* on cases like the *Chinese Exclusion* case is equivalent to reliance on the *Dred Scott* decision (in that it represents a case so dated as to be obsolete). Shapiro, *supra* note 12, at 942.

Court failed to establish guidelines for the government to follow when restricting first amendment rights.¹³⁷ Restricting this right is necessary only when furthering a compelling governmental interest.¹³⁸ Finally, the Court in *Kleindienst* failed to address the broader underlying conflict between the first amendment and the ideological exclusion provision of the Immigration Act.¹³⁹

Recent lower court decisions point to the failure of the *Kleindienst* standard to strike the balance between the first amendment and national security.¹⁴⁰ These courts have adapted or rejected entirely this "standard," a conclusion that undermines congressional intent and the spirit of Supreme Court decisions. The appeals court in *Reagan v. Abourezk*, like the Supreme Court in *Kleindienst*, failed to resolve the first amendment question, leaving no clear standard for determining the balance between free speech and foreign policy.¹⁴¹ It declined to formulate any test, preferring to interpret the case through statutory intent and legislative history,¹⁴² an approach that is troublesome and helps to continue the confusion that stems from the *Kleindienst* opinion. Furthermore, the court's reliance on the *in camera* evidentiary privilege¹⁴³ furthers the potential for a closed legal system, eliminating both the appearance and reality of fairness in adjudications in the United States.

The *Abourezk* opinion was equally revealing in its discussion and conflicting interpretations of a legislative history that dates back more than thirty-five years.¹⁴⁴ The McGovern Amendment was an attempt to eliminate some of the unilateral decision-making power of the executive branch.¹⁴⁵ But the dissent in *Abourezk* provides a vivid example of the

137. *Kleindienst v. Mandel*, 408 U.S. 753, 777 (1972) (Marshall, J., dissenting).

138. See *id.* at 777 (Marshall, J., dissenting) (noting that merely "legitimate" governmental interest cannot override constitutional rights).

139. *Id.* at 779. Justice Marshall distinguished section 212(a)(28) allowing exclusions from membership in the Communist party, from sections 212(a)(27) and (29), exclusions on the basis of activities prejudicial to the public interest and which Marshall said addressed subversive action and not ideas. *Id.* at 780.

140. See *supra* notes 89-124 and accompanying text (examining the *Abourezk*, *Alende*, *Randall*, and *Harvard Forum* cases in detail).

141. *Abourezk v. Reagan*, 785 F.2d 1043, 1062 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) (per curiam).

142. *Id.* at 1054-55. The Court stressed that a statutory interpretation rather than a constitutional confrontation was mandated if at all possible. *Id.* at 1052.

143. *Id.* at 1061-62.

144. See *supra* notes 91-102 and accompanying text (examining judicial interpretations of the legislative intent of the McCarran-Walter Act).

145. McGovern Amendment, Aug. 17, 1977, Pub. L. No. 95-105, tit. I, § 112, 91 Stat. 844, 848 (1977) (codified as amended at 22 U.S.C. § 2691 (1982)); see *supra* notes 68-71 and accompanying text (describing the rationale behind the passage of the McGovern Amendment).

difficulty courts have in consistently interpreting this legislative history.¹⁴⁶ Judge Bork's opinion points out, from both a political as well as a legal analysis, many of the potential misconceptions and misinterpretations of the McCarran-Walter Act that come from interpreting such a vaguely worded and misinterpreted legislative history.¹⁴⁷ It further demonstrates the need for a standard that clearly differentiates from the fervently anti-immigration standard of forty years ago.¹⁴⁸ Thus, even if courts today addressed the first amendment question, as Judge Bork did in his dissent in *Abourezk*¹⁴⁹ they would do so in error, through application of these archaic standards.

The district court in *Harvard Forum* further interpreted the holding of the Supreme Court in *Kleindienst* through the addition of a balancing test to the simple "facially legitimate and *bona fide*" standard.¹⁵⁰

146. *Abourezk v. Reagan*, 785 F.2d 1043, 1062 (D.C. Cir. 1986) (Bork, J., dissenting), *aff'd*, 484 U.S. 1 (1987) (per curiam). Although the statutory interpretation is understood to be a part of most courts' legal analyses, determining legislative intent is often subjective, and rarely resolves specific issues. See K. LLEWELLYN, *THE COMMON LAW TRADITION DECIDING APPEALS* 522-33 (1960) (reproducing several different interpretations of the same statutes to demonstrate the contradictory meanings statutes may have); Neuborne, *Observations on Weber*, 54 N.Y.U. L. REV. 546, 553 (1979) (examining *United Steelworker v. Weber*, 443 U.S. 193 (1979), and the Court's statutory analysis). The author suggests that the concept of legislative intent is not discernible except by "the judges who claim to have deciphered it." *Id.*

147. *Abourezk v. Reagan*, 785 F.2d 1043, 1054-55 n.11, 1058-59 n.19-22 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) (per curiam) (noting the discussion of the errors in the dissent's analysis).

148. *Id.* The *Abourezk* case raised two major issues: first, the lack of evidence by the government and second, the avoidance of the waiver provision of the McGovern Amendment. *Id.* at 1056-59. The later issue arises when the government excludes an individual under the category of "prejudicial to the public interest" instead of the category allowing exclusions based on membership in the Communist Party. *Id.* at 1056-59. The dissent would allow the government to prevail on both issues based on legislative intent authorizing the executive's discretion. *Id.* at 1064-66, 1068-74 (Bork, J., dissenting). The legislative documents accompanying the McCarran-Walter Act and the McGovern Amendment indicate, however, an alternative interpretation: first, through taking into account the mood of the period in which Congress created these laws, and second by examining different documents of the same period, that indicate that section 212(a)(27) applies only to the prohibition of activities and not to simple expression. See *First Amendment Limitations*, *supra* note 8, at 172 (comparing Senate and Conference Committee Reports and evaluating the statements of Senator McCarran to find that there is sufficient evidence to conclude that the section applies only to activities). This interpretation comports with other decisions of that time. See *supra* notes 47-50 and accompanying text (discussing the *Yates* decision and its impact).

149. See *Abourezk v. Reagan*, 785 F.2d 1043, 1074-76 (D.C. Cir. 1986) (Bork, J., dissenting), *aff'd*, 484 U.S. 1 (per curiam) (describing the problematic nature of applying outdated legislative history). One commentator argues that courts should allow limited judicial review of exclusion decisions, suggesting that application of this standard would not hamper important governmental interests. *Immigration and the First Amendment*, *supra* note 12, at 1925.

150. *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525, 531-32 (D. Mass. 1986).

Such an expansion indicates the potential willingness of courts to increase the weight given to first amendment rights, particularly as these rights expand in other areas of the law.¹⁵¹ At the same time, however, this approach further defines the problems of intertwining the vague standard articulated in the McCarran-Walter Act, the Supreme Court's interpretation of it in *Kleindienst*, and the importance of governmental and national security interests.¹⁵²

The need for a clearer standard for interpreting the McCarran-Walter Act in the light of first amendment questions also was evident in the ruling in *Allende v. Shultz*.¹⁵³ In this case, the court criticized the court in *Abourezk* for examining the legislative history of the statute and the administrative agency practice.¹⁵⁴ Instead, in *Allende*, the court's determination was made solely from an interpretation of the statute; a determination that the language of the statute conclusively differentiates between status-based and conduct-based ineligibility.¹⁵⁵ Moreover, in criticizing the government's use of the McCarran-Walter Act, the court noted that anticipation of post-entry activity, as the government claimed, would render superfluous the language of the section permitting exclusion on the grounds that entry would be prejudicial to the public interest.¹⁵⁶

Finally, the court's raising of the issue on its own initiative demonstrates its importance.¹⁵⁷ Although Mrs. Allende had already received her visa to enter the United States, the court decided to hear the case in order to have the opportunity to define a clearer standard for settling

151. *Id.*; see *supra* note 4, 8-9 and accompanying text (describing Supreme Court decisions that have expanded first amendment freedoms).

152. See *First Amendment Limitations*, *supra* note 8, at 168 (examining the differences between the *Harvard Forum* and *Allende* cases).

153. *Allende v. Shultz*, 845 F.2d 1111, 1113 (1st Cir. 1988).

154. *Id.* at 1119.

155. *Id.* at 1120-21.

156. *Id.* at 1117. The court noted that it failed to understand how an alien can enter the country to engage in the act of entry. *Id.*

157. *Id.* at 1115 n.7. The court stated that although Mrs. Allende received a visa after the consideration of the motion to dismiss for mootness by the court below, the validity of the policy in general remains controversial. *Id.*

A similar debate with different results occurred in the Supreme Court more than twenty years earlier. *Veterans of Abraham Lincoln Brigade v. Subversive Activities Control Bd.*, 380 U.S. 513, 513 (1965). In *Veterans of Abraham Lincoln Brigade*, the Court found that the record relating to events from a 1950 prosecution under the Internal Security Act was stale, and dismissed the case without ruling on the issue. *Id.* at 513-14. The dissent in that case suggested, however, that the court should address the issue, noting that the controversy is a real one and the present record includes all of the factors necessary to resolve the constitutional question. *Id.* at 514 (Douglas, J., dissenting).

future cases.¹⁵⁸ Different analyses among courts that presumably try to measure government action by the same law and judicial standard point to the misunderstanding and lack of clarity of both the McCarran-Walter Act and the *Kleindienst* ruling.

IV. CONGRESSIONAL PROPOSALS TO REFORM THE MCCARRAN-WALTER ACT

Critics of the McCarran-Walter Act have issued numerous calls for its reform or abolishment since the Act's passage.¹⁵⁹ The enactment of the McGovern Amendment in 1977 remedied some of the weaknesses of the immigration law.¹⁶⁰ This change, however, also accentuated many of the remaining problems and the need for further reform.¹⁶¹

A. THE FRANK BILL

In response to the clamor for change in the exclusionary provisions of the Immigration Act, Representative Barney Frank introduced H.R. 4427.¹⁶² The bill reduced the number of exclusionary provisions and clarified language in many areas.¹⁶³ These changes included, among others, the creation of a specific health-related section,¹⁶⁴ and the abolition of the exclusionary provisions for retarded or insane individuals.¹⁶⁵ More importantly, however, the legislation proposed to abolish sections

158. *Allende v. Shultz*, 845 F.2d 1111, 1113 (1st Cir. 1988).

159. See *supra* notes 11-12 and accompanying text (describing criticism of the McCarran-Walter Act).

160. See *supra* notes 68-71 and accompanying text (examining the McGovern Amendment).

161. JOINT COMM. PRINT, No. 8, 97th Cong., 1st Sess. 333-48 (1981). The report of the Select Commission on Immigration and Refugee Policy examined a variety of possible changes in United States immigration policy, including revising the current exclusionary grounds of the Immigration and Nationality Act. *Id.* Several of the commissioners criticized the recommendation as incomplete. See *id.* at 348-423 (including supplemental statements of Commissioners Hesburgh, Holtzman, Kennedy, Ochi and Simpson). One commission member offered a detailed proposal to change the ideological exclusions law. See *id.* at 348-56 (including statement of Representative Elizabeth Holtzman); see also *Visa Denials*, *supra* note 12, at 261-62 (calling for legislative redress); Shapiro, *supra* note 12, at 931 (calling for a revision of the outdated structure of the McCarran-Walter Act).

162. Immigration Exclusion and Deportation Amendments of 1988, H.R. 4427, [hereinafter H.R. 4427] 100th Cong., 1st Sess., 184 CONG. REC. 34,540 (1987). The bill was originally introduced in 1987 as H.R. 1119, however, it was amended in the Subcommittee on Immigration, Refugees, and International Law and given a new bill number. *Id.* The bill was substantially revised in the full Judiciary Committee. See *infra* notes 192-210 and accompanying text (describing and analyzing the revised bill).

163. H.R. 4427, *supra* note 162.

164. *Id.* § 2(a)(1).

165. Compare *id.* with 8 U.S.C. § 1182(a)(1)-(8) (1982) (noting the absence of certain restrictions in H.R. 4427).

of the McCarran-Walter Act that allow exclusions solely for ideological reasons.¹⁶⁶ The bill sought to replace lengthy, confusing, and often redundant language with more concise sections entitled "Security and Related Grounds"¹⁶⁷ and "Terrorist Activities."¹⁶⁸ It also contemplated adding a section entitled "Review of Exclusion Lists"¹⁶⁹ that would create guidelines to ensure that the Attorney General would review the applications of those aliens excluded. Moreover, a corresponding section making all changes applicable to deportation proceedings was added.¹⁷⁰

The original Frank Bill eliminated the confusing and repetitive portions of the exclusionary sections of the McCarran-Walter Act,¹⁷¹ but retained provisions preventing former Nazis from entering the country¹⁷² and the broad anti-terrorist provision allowing the government discretionary power to stop terrorists from entering the United States.¹⁷³ Most importantly, the bill eliminated all language relating to ideology or association.¹⁷⁴ Those who had called for reform of the Act were pleased with the original Frank Bill,¹⁷⁵ although there was criticism from both conservatives and liberals regarding the proposed legislation.¹⁷⁶

166. H.R. 4427, *supra* note 162, § 2.

167. H.R. 4427, *supra* note 162, § 2(a)(3)(A). This section would give the consular officer or Attorney General the power to exclude any individual that he has reasonable grounds to believe is likely after entry, to engage in espionage, sabotage, or any other activity that has the purpose of controlling or overthrowing the government of the United States through the use of force, violence, or any other unconstitutional means. *Id.*

168. *Id.* § 2(a)(3)(B)-(C). This section stated that the consular officer or the Attorney General may exclude any alien who has engaged in a terrorist activity, or is likely after entry to engage in any terrorist activity. *Id.* These activities include organizing, abetting, raising funds for, or participating in an activity wantonly or with extreme indifference to the risk of causing death or serious bodily injury to individuals not taking part in armed hostilities. *Id.*

169. *Id.* § 2(c).

170. *Id.* § 3.

171. *Id.*

172. *Id.* § 2(a)(3)(D).

173. *Id.* § 2(a)(3)(B).

174. Compare *id.* with 8 U.S.C. § 1182(a)(27)-(29) (1982) (noting the difference in quantity and simplicity of the provisions).

175. See EXCLUSION HEARINGS, *supra* note 13, at 79-148 (including testimony from public interest groups).

176. See *id.* at 153-93 (including statements of members of conservative groups appearing at the hearing); *Visa Denials*, *supra* note 12, at 265 (criticizing the bill for not going far enough to protect those applying for visas from denials based solely on the applicant's alleged political beliefs or affiliations); Shapiro, *supra* note 12, at 937 (identifying constitutional problems with parts of the legislation). One commentator criticizes the bill for failing, as does current law, to define the term "activity." Tilner, *supra* note 12, at 494. Other critics were disturbed that the bill did not include a

Representatives of both the State Department¹⁷⁷ and the Justice Department¹⁷⁸ expressed concern over the extensive changes in the exclusionary provisions of the McCarran-Walter Act.¹⁷⁹ Judge Abraham Sofaer, the State Department's legal advisor, indicated, however, that the department could accept the substantive changes in section 212(a)(28), including the repeal of the general exclusion of aliens based solely on membership or affiliation with proscribed organizations or their belief in certain doctrines.¹⁸⁰ He cautioned that there should remain executive latitude to protect national security interests, particularly regarding the prevention of terrorism.¹⁸¹

The Frank Bill was approved by the House Judiciary Subcommittee on Immigration, but opposition from conservatives in Congress and among Reagan administration officials pressured Representative Frank to offer a compromise bill.¹⁸² Many of the provisions from the earlier version of the bill and many of the safeguards the administration desired were included in this compromise bill.¹⁸³ The substitute bill was adopted by the Committee.¹⁸⁴ Prior to the action by the Judiciary Committee, however, legislation was passed that temporarily alleviated some of the inequities of the McCarran-Walter Act.¹⁸⁵

remedy for exclusions based on confidential information and for an alleged lack of due process. See *id.* at 495 (summarizing the argument of a need for a hearing for aliens); Helton, *Legislative Proposals*, *supra* note 12, at 492-500 (examining possible changes in the legislation to make it conform to due process standards); see also *infra* note 217 and accompanying text (addressing criticisms based on alleged due process deprivation and examining Senator Daniel Moynihan's bill that purports to address these complaints).

177. EXCLUSION HEARINGS, *supra* note 13, at 28-45.

178. *Id.* at 46-52.

179. *Id.* at 35. As the Department of State noted in testimony before the Subcommittee, virtually all cases of exclusion of aliens based solely on membership or affiliation with proscribed organizations are waived under the McGovern Amendment. *Id.*

180. *Id.* at 28. Sofaer indicated that the State Department was dedicated to assuring the free flow of all political ideas. *Id.*

181. *Id.* at 29.

182. Immigration Exclusion and Deportation Amendments, H.R. 4427, [hereinafter H.R. 4427 substitute], 100th Cong., 1st Sess., reprinted as amended in IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 1-15 (1988). Facing opposition from conservatives on the Judiciary Committee, the House of Representatives, and the State Department, Congressman Frank offered a substitute bill during the debate of H.R. 4427. Michaelson, *supra* note 62, at 173.

183. H.R. 4427 substitute, *supra* note 182. The report language describes the intent of the bill as to limit, but not eliminate, the executive's foreign policy exclusionary ability. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882 100th Cong., 2d Sess. 15 (1988).

184. *Id.*

185. Foreign Relations Authorization Act of 1988, § 901, Pub. L. No. 100-204, 101 Stat. 1331, reprinted in 8 U.S.C.A. § 1182, at 122-23 (West Supp. 1988). Repre-

B. A TEMPORARY REMEDY

As a temporary alternative to legislation designed to repeal the McCarran-Walter Act's exclusionary provisions, Congress passed a one year provision to amend the Foreign Relations Authorization bill.¹⁸⁶ This legislation temporarily eliminated the denial of visas by the executive branch for reasons of belief as well as for previous statements made or for associations, if such a statement or belief is protected under the United States Constitution when applied to a United States citizen.¹⁸⁷ Congress did not intend for this temporary provision to become a comprehensive solution.¹⁸⁸ Thus, the bill did not address many of the thirty-three exclusionary provisions of the McCarran-Walter Act and did not repeal any part of the Act.¹⁸⁹ As the conference report on the Authorization bill indicates, however, the intent of the amendment was to protect first amendment freedoms,¹⁹⁰ with the expectation that Congress would soon consider and possibly enact comprehensive legislation.¹⁹¹ With legislation of this nature under consideration, Congress has extended a narrower version of the temporary provision.¹⁹²

sentative Barney Frank and Senator Patrick Moynihan combined their efforts to write the amendment, and Senator Moynihan was responsible for introducing legislation in the Senate to repeal the exclusionary sections of the McCarran-Walter Act. *See infra* note 214 and accompanying text (describing this legislation).

186. Foreign Relations Authorization Act of 1988, 8 U.S.C.A. § 1182, at 122-23 (West Supp. 1988).

187. *Id.* § 901(b). The provision originally extended until March 1, 1989. *Id.* § 901(c).

188. *Id.* As the conference report on the Foreign Relations Authorization Act indicated, its purpose was purely temporary and its scope was limited only to ideological exclusions, thereby ignoring the rest of the McCarran-Walter Act's exclusionary provisions. H.R. Rep. No. 475, 100th Cong., 1st Sess. 163-65 (1987).

189. Foreign Relations Authorization Act of 1988, 8 U.S.C.A. § 1182, at 122-23 (West Supp. 1988). The provision retains all of the Attorney General's decision-making latitude from the McCarran-Walter Act to exclude aliens for reasons of foreign policy, national security interests, threats of terrorism, or those who seek to enter as a representative of a purported labor organization in a country where such organizations are instruments of a totalitarian state. *Id.* § 901(b)(1)-(3).

190. H.R. CONF. REP. NO. 475, 100th Cong., 1st Sess. 162, 163 (1987), *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2370, 2426. The conference substitute continues to permit the denial of visas or the deportation of aliens when it is in the interests of the United States, but makes it clear that it is not in the interests of the United States to establish one standard of ideology for citizens and another for foreigners who wish to visit the United States. *Id.*

191. *Id.* at 165, 1987 U.S. CODE CONG. & ADMIN. NEWS 2374.

192. Foreign Operations, Export Financing, and Related Programs Appropriations Act, § 503, Pub. L. No. 100-461, 102 Stat. 2268 (1988). The largest change in the law as amended is that the extension applies only to non-immigrant aliens. *Id.* § (a). This change applies immediately, superceding the former conditions, that were scheduled originally to last until the end of 1988. *Id.* The new law prohibits deportations based on activities occurring before January 1, 1991, or for those which deportation proceedings,

C. THE SUBSTITUTE FRANK BILL

H.R. 4427, as it emerged from the Judiciary Committee, is a vastly different bill from the one which Congress initially considered.¹⁹³ The revised bill simplifies and amends the many exclusionary categories of the McCarran-Walter Act into seven areas: health related grounds;¹⁹⁴ criminal and related grounds;¹⁹⁵ public charge;¹⁹⁶ labor certification;¹⁹⁷ illegal entrants and immigration violators;¹⁹⁸ documentation grounds;¹⁹⁹ and those ineligible for citizenship.²⁰⁰ The bill also replaces sections that address activities prejudicial to the public interest or security of the United States, membership in proscribed organizations, espionage, and participation in Nazi persecution, with a more comprehensive and

including judicial review proceedings, are pending between December 31, 1987 and January 1, 1991. *Id.* § (d)(3).

Some commentators suggest that the temporary extension will aid those previously excluded for ideological reasons such as Margaret Randall. *Congress Extends § 901 Ban on Ideological Exclusions for Two Years*, Interpreter Release, Oct. 7, 1988, at 1036. Others, however, are less optimistic about her future. *Randall Case, (Con't.)*, N.Y. Times, Nov. 23, 1988, at B5.

193. H.R. 4427 substitute, *supra* note 182.

194. *Id.* § 2(a)(1). This is comparable to paragraphs 212(a)(1) through 212(a)(6) of the Immigration and Nationality Act, which relate to mental retardation, insanity, psychopathic personalities, sexual deviation, drug and alcohol abuse, and dangerous contagious diseases. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 25 (1988).

195. H.R. 4427 substitute, *supra* note 182, § 2(a)(2). If enacted, this provision would replace paragraphs 212(a)(9) through (13) and (23), which relate to conviction of crimes of moral turpitude, polygamy, prostitution, immoral sexual acts, and narcotics offenses. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess., 25 (1988).

196. H.R. 4427 substitute, *supra* note 182, § 12(a)(4). This section represents a merging of 212(a) (7), (8), (15) and (25), incorporating health problems that prevent an alien from earning a living, paupers, public charge, and illiteracy, respectively. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 25 (1988).

197. H.R. 4427 substitute, *supra* note 182, § 2(a)(5). This category would replace 212(a)(14) and (32), which relate to labor certification and foreign physicians. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 25 (1988).

198. H.R. 4427 substitute, *supra* note 182, § 2(a)(6). This section would consolidate 212(a)(16)-(19) and (31), covering aliens seeking reentry, deported aliens seeking reentry, stowaways, fraud and misrepresentation, as well as smuggling. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 26 (1988).

199. H.R. 4427 substitute, *supra* note 182, § 2(a)(7). This category would consolidate 212(a)(20), (21), and (26), relating to passport and visa violations. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 26 (1988).

200. H.R. 4427 substitute, *supra* note 182, § 2(a)(8). This section is comparable to the current 212(a)(22). IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 26 (1988).

less confusing section entitled "Security and Related Grounds."²⁰¹

The H.R. 4427 substitute adopts almost verbatim the wording of the earlier version of the Frank bill regarding national security.²⁰² It also adds an entirely new and highly specific subsection with regard to the definition of terrorist activities.²⁰³ Furthermore, the bill adds a new section on foreign policy that incorporates the language prohibiting former Nazis from entering the country and also clarifies the grounds for restricting an individual's entry.²⁰⁴ The section, however, places limitations on these restrictions.²⁰⁵ Finally, with regard to ideological exclusions, the new bill adds a section permitting the exclusion of "certain trade union officers, officials and employees" in circumstances where the organization is actually an instrument of the government.²⁰⁶

201. H.R. 4427 substitute, *supra* note 182, § 2(a)(3). This section is comparable to the current 212(a)(27)-(29) and (33). IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 26 (1988).

202. H.R. 4427 substitute, *supra* note 182, § 2(a)(3).

203. H.R. 4427 substitute, *supra* note 182, § 2(a)(3)(ii). The bill defines numerous specific individual activities that are unlawful, including the highjacking or sabotage of any conveyance, hostage taking, the seizing or detaining and threatening to kill, injure, or continue to detain another individual in order to compel a third person to do something. *Id.* It also includes assassination, the use of any explosive, biological agent, chemical agent, nuclear weapon or device, firearm, or any other weapon with the intent to endanger, directly or indirectly, the safety of one or more individuals, or to cause substantial damage to property. *Id.* Additionally, a threat, attempt, or conspiracy to do any of the foregoing activities is also incorporated in the bill. *Id.*

The bill defines a terrorist as one who, in an individual capacity or as a member of an organization, participates in a terrorist attack or affords material support to any individual, organization, or government in conducting a terrorist activity at any time. *Id.* It also includes one who assists in the preparation or planning of a terrorist activity, "gathers information on potential targets for terrorist activity," provides "any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit an act of terrorist activity." *Id.* It also includes one who solicits funds or other things of value to terrorist activity. *Id.*

204. *Id.* § 2(a)(3)(D).

205. *Id.* § 2(a)(3)(C). The section on foreign policy gives the Secretary of State the power to exclude those individuals who could have potentially serious adverse foreign policy consequences for the United States because such entry or activities would be likely to result in imminent harm to the lives or property of United States persons abroad or to property of the United States Government abroad. *Id.* Such activity or entry is excludable if it would violate, or conflict with, an international obligation or undertaking of the United States that would have a serious negative effect on the diplomatic relations or if it would convey the impression that the United States recognizes or supports any government or group that the United States does not recognize or support. *Id.*

Balancing this power, and vital to the legislation, is the section that prohibits and limits exclusions because of any past, current, or expected beliefs, statements, or associations which would be lawful within the United States. *Id.* § (i)(IV). The bill also carries over from the earlier version of the bill a section which mandates the Secretary of State to provide written notice to Congress of any denials under this section. *Id.*

206. *Id.* § 2(a)(3)(E)(i). This section is meant to differentiate between delegations

Whereas critics of the earlier version of the bill, such as the State²⁰⁷ and Justice Departments,²⁰⁸ believed it would hamper the government's effectiveness in preventing terrorists from infiltrating the United States, the new legislation effectively incorporates many of these recommendations. The report of the Judiciary Committee noted that the bill's definition of terrorism is broad enough to cover a wide variety of illegal acts that contribute to the commission of terrorist attacks.²⁰⁹ On the other hand, the report specifically recognized that the bill does not intend to penalize an alien for mere membership in any organization.²¹⁰ The bill also includes specific prohibitions against the Palestinian Liberation Organization, a concern of many members of Congress and the State Department.²¹¹

V. ANALYSIS OF LEGISLATIVE PROPOSALS

While the original Frank proposal to reform the McCarran-Walter Act was extensive, many viewed it as too drastic, and no consensus for change was formed.²¹² The more pragmatic Frank substitute merges these earlier reforms with the protections of national security interests desired by the State and Justice Departments.²¹³ The foreign policy section of the revised bill, while granting the executive branch the freedom necessary to exclude individuals, insures cautious use of this au-

of trade union officials, primarily from Eastern bloc nations, who are representatives of a totalitarian government and labor unions such as Solidarity, that represent the interests of Polish workers. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 30-31 (1988).

207. *Exclusion Hearings*, *supra* note 13, at 36-37.

208. *Id.* at 46-47.

209. HOUSE COMMITTEE ON THE JUDICIARY, IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 29-30 (1988).

210. *Id.* at 25-26.

211. H.R. 4427 substitute, *supra* note 182, § 2(a)(3)(B)(iii) & (IV). The language on the PLO was added to the section on terrorism through an amendment offered by Congressman Larry Smith. Michaelson, *supra* note 62, at 1731. The amendment would allow the exclusion of any Palestine Liberation Organization official or representative. *Id.* Smith's original proposal, although defeated, would have applied to all members of the PLO. *Id.* In cases where the individual is not an officer, official, representative or spokesman for the PLO the Government must apply the definitions of "terrorist activity" and "engages in terrorist activity" on a case by case basis. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 29-30 (1988).

212. *See Exclusion Hearings*, *supra* note 13 at 153-93 (including statements from individuals opposing the legislation).

213. *Compare supra* notes 163-85 and accompanying text (describing early congressional legislation to reform the McCarran-Walter Act) *with supra* notes 208-20 and accompanying text (describing the interests of the State and Justice Departments).

thority and thus represents a vast improvement over current law.²¹⁴ Furthermore, although the Frank substitute continues to grant extensive power to the executive over the exclusion of aliens,²¹⁵ the bill checks this power by disallowing exclusion on the basis of past, current, or expected beliefs, statements or associations that are considered lawful within the United States.²¹⁶

Some have criticized the proposed legislation because it does not grant extensive due process rights to aliens who are rejected for admission.²¹⁷ This type of hearing, however, is in contrast to the history of differentiation between governmental exclusion of aliens who are trying to enter this country and those who already have entered and are trying to become citizens.²¹⁸ Notwithstanding this absence, the substitute Frank Bill is designed to make the system more open and

214. See H.R. 4427 substitute, *supra* note 182, § 2(a)(3)(C)(i) (allowing restrictions on aliens if their presence in the United States has a detrimental effect on United States foreign policy). *Id.* This section limits the restrictions on individuals whose government the United States does not recognize or support. *Id.* § 2(a)(3)(c)(i)(II). The limitations are divided into two classes: those where the alien is a candidate for high government office, and those where the alien purports to be a representative of the government or group. *Id.* § 2(a)(3)(c)(i)(II).

215. *Id.* § 2(a)(3)(C)(i)(IV).

216. *Id.* § 2(a)(3)(C)(ii)(I). A similar provision is included in the section on deportation of aliens. *Id.* § 3(a)(7)(B).

217. See *supra* notes 76-77 and accompanying text (noting comments calling for due process improvements in the law). Some commentators believe that such hearings and due process requirements are necessary in any legislative reform. *Id.* One expert in this area suggests that the procedural distinction among aliens excluded under the different provisions of the Act is one that should be eliminated in order to protect against arbitrary agency action. Helton, *supra* note 12, at 485. One reason President Truman vetoed the McCarran-Walter Act was because it gave lower level consular and immigration officials an unreviewable power to exclude. President's Message to Congress Vetoing the Immigration and Nationality Act, 1952-53 PUB. PAPERS 441 (June 25, 1952). The denial of a due process hearing for those aliens whose entrance the government feels would be "prejudicial to the interests of the United States" has been held constitutional. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 n.8 (1952).

Senator Daniel Patrick Moynihan introduced legislation designed to address both the overly broad exclusionary policies of section 212(a)(28) and what he considers the failure of current provisions for reviewing claims under sections 212(a)(27) and (29). S. 28, 100th Cong. (1987). The first part of his proposed legislation would eliminate section 212(a)(28), and the second part would create a formal process of review allowing United States citizens to bring a civil action against any official of the United States Government. *Id.* This legislation would create a right of appeal for aliens excluded on the basis of confidential information under sections 212(a)(27)-(29), equivalent to other sections of the Immigration Act. *Id.* The Moynihan bill has other problems, however, including its failure to repeal sections 212(a)(27) and (28). *Id.* In retaining those provisions that are the source of most of the confusion surrounding this part of the immigration law, the legislation still leaves considerable room for prejudicial and ideological exclusions. See Helton, *supra* note 12, at 480-91 (examining in detail Senator Moynihan's proposal).

218. *TRIBE*, *supra* note 74, § 5-16 at 359-60.

accountable.²¹⁹

Equally indicative of the intent of the drafters of this legislation, and important to how the courts will make their determinations,²²⁰ is the language of the report of the Judiciary Committee on this bill. This language notes that the goal of the legislation is to prevent the exclusion of aliens on the basis of their beliefs or membership in organizations, while simultaneously allowing under limited circumstances exclusions to protect United States citizens, property, or vital foreign policy interests.²²¹ In clearly establishing this intent, and more specifically reserving certain first amendment rights, the Committee has begun to clarify thirty-five years of struggle over an antiquated legislative history and misinterpreted court decisions. Courts are equally eager to embrace a new standard, whether judicially created, as the court in *Harvard Forum* did or legislatively mandated, as the temporary measure that was passed as an amendment to the Foreign Relations Authorization Act.²²²

The effect of these changes is dramatic, a power already acknowledged by several courts. In *Randall*, the circuit court noted that the

219. See H.R. 4427 substitute, *supra* note 182, § 2(a)(3)(O)(ii)(II) (dealing with the responsibility of the Secretary of State to make a report within 30 days). This Section mandates that the Secretary of State provide written notice of why he has denied an alien a visa or entry under clause (i)(IV). *Id.* The bill also makes changes in the procedure for challenging exclusions. *Id.* § 4(a)(13)-(15). Under current law, an alien is entitled to appeal an immigration judge's order to the Attorney General, except when the exclusion is made on the "political" grounds of sections 212(a)(27)-(29). 8 U.S.C. § 1182(a)(27)-(29) (1982). The spirit of this was affirmed in *Abourezk v. Reagan*, 785 F.2d 1043, 1050 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) (per curiam).

The original Frank bill proposed to codify this principle, yet the Department of Justice strongly objected to it on the grounds that it would create endless litigation. EXCLUSION HEARINGS, *supra* note 13, at 49. This bill expanded the standard of judicial review from the "facially legitimate and bona fide reasons" suggested by the court in *Kleindienst*, to the one used for reviewing administrative decisions generally, presumably a much higher standard. Tilner, *supra* note 12, at 83, n.594.

The substitute Frank bill also revises the summary exclusion provisions of the McCarran-Walter Act. H.R. 4427 substitute, *supra* note 182, § 4(a)(13)-(15). Under these provisions, aliens who are allegedly excludable on the basis of espionage, sabotage, technology transfer, violent or unlawful overthrow of the government, and terrorist activity will be provided limited due process procedures before an immigration judge. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882 100th Cong., 2d Sess. 25 (1988). While the information may be reviewed *in camera*, the Committee noted that whenever possible classified information should be publicly disclosed. *Id.* at 39.

220. See *Abourezk v. Reagan*, 785 F.2d 1043, 1058-59 (D.C. Cir. 1986) (discussing the differing opinions after examinations of the legislative history of the law), *aff'd*, 484 U.S. 1 (1987) (per curiam).

221. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 27 (1988).

222. Foreign Relations Authorization Act of 1988, § 901, 8 U.S.C.A. § 1182, at 122-23 (West Supp. 1988).

temporary change in the law created a new standard preventing deportations based solely on ideological reasons.²²³ The court in this case mooted an earlier Immigration and Naturalization Service official's deportation order.²²⁴ Similarly, in *Allende*, the Court of Appeals recognized the important change in policy and its effect on the lower court's decision.²²⁵ The revised Frank Bill incorporates the intent of the temporary provision as well as protecting the governmental interests expressed in litigation on this matter, and further expands it to cover the entire range of exclusionary categories.²²⁶

VI. RECOMMENDATIONS

The temporary amendment of the exclusionary provisions²²⁷ and the limited extension of that amendment²²⁸ demonstrate that there exists the potential for creating a fairer standard through which the courts can more accurately weigh national security considerations against the first amendment right to receive information of American citizens. This potential can only be realized if complete reform of the McCarran-Walter Act occurs.²²⁹

The most appropriate remedy for this change is H.R. 4427, the current proposal of Representative Barney Frank, as reported out by the House Judiciary Committee. The adoption of this legislation would solve the two major problems with the current law and with courts' interpretation of it: the outdated nature of the current statute,²³⁰ and

223. *Randall v. Meese*, 854 F.2d 472, 473 (D.C. Cir. 1988). See Foreign Relations Authorization Act of 1988 § 901(a), 8 U.S.C.A. § 1182, at 132-33 (West Supp. 1988) (stating that, under the amendment, an alien cannot be denied a visa on the basis of his or her beliefs, statements, or associations, if an American citizen could not be prosecuted for the same beliefs, statements, or associations).

224. *Randall v. Meese*, 854 F.2d 472, 473 (D.C. Cir. 1988).

225. *Allende v. Shultz*, 845 F.2d 1111, 1121 (1st Cir. 1986).

226. See generally IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 882, 100th Cong., 2d Sess. (1988) (incorporating the sunset provisions into the revised bill).

227. Foreign Relations Authorization Act of 1988, § 901, 8 U.S.C.A. § 1182, at 122-23 (West Supp. 1988).

228. Foreign Operations, Export Financing, and Related Programs Appropriations Act, § 503, Pub. L. No. 100-461, 102 Stat. 2268 (1988).

229. *Id.* Section 901 is incomplete in that it does not in any way repeal the exclusionary sections of the McCarran-Walter Act. *Id.* It ignores refinement of regulations of exclusions based on health reasons, reasons of retardation, insanity, and homosexuality. *Id.*

230. See CRS REPORT, *supra* note 53, at 1 (illustrating that the Act was a product of the Cold War). Congress passed the McCarran-Walter Act during a period when the United States was in the grips of anti-Communist fervor that had grown out of the end of World War II and fear of foreigners and scapegoating was at its zenith. W. ISAACSON & E. THOMAS, *THE WISE MEN, SIX FRIENDS AND THE WORLD THEY MADE*

the need for a new legal standard to determine the reach of the government's exclusionary power.

Monitoring entrance into the United States is a valid precaution for the government to take when it is based on national security interests. Nevertheless, this power must be balanced with rights and privileges possessed by American citizens, notably the right to receive information.²³¹ In an attempt to balance these interests, the Supreme Court developed a standard to regulate the government's power.²³² Unfortunately, this standard is inadequate because it fails to address critical first amendment issues. As a result, lower courts have frequently departed from the Supreme Court's standard and have created case-by-case remedies.²³³ Were it not for the importance of the conflict between the first amendment and national security, these makeshift remedies might be appropriate. Instead, they compound the problem due to their reliance on legislative history that is more than thirty-five years old.²³⁴

The Frank bill addresses the problem adequately because it replaces old, vaguely worded law with more efficient up-to-date language.²³⁵ In general, it removes the government's virtually absolute power to exclude individuals, and provides specific language to define the scope of the government's ability to prohibit individuals from entering the United States.²³⁶ Specifically, it removes the unfounded prohibitions on "mental defectives," "paupers," and those with "sexual deviations."²³⁷

373-76 (1986). Our former Soviet ally became our most feared enemy, and many of the laws passed at that time, including the McCarran-Walter Act, focused on preventing the spread of Communism. *Id.* at 268-69. *See supra* notes 51-55 and accompanying text (describing the legislation leading up to the omnibus 1952 Immigration and Nationality Act). This conversion to the new realism of anti-bolshevism existed even in the executive office with the ascension of President Truman. ISAACSON & THOMAS, *supra* at 253-87.

As a result, a greater number of aliens trying to enter this country were unfairly denied rights because of fear gripping this country. Many famous scientists, politicians, and cultural leaders were prohibited, detained, or deported because of prior associations or governmental suspicion of their past. *See supra* note 72 and accompanying text (describing some of the exclusions from the United States that occurred as a result of the McCarran-Walter Act).

231. *Stanley v. Georgia*, 394 U.S. 557, 569 (1969).

232. *See supra* notes 79-88 and accompanying text (discussing the standard adopted by the Court in *Kleindienst* to regulate government behavior).

233. *See supra* notes 110-17 and accompanying text (examining the Court's departure from the *Kleindienst* standard in the *Harvard Forum* case).

234. *See Abourezk v. Reagan*, 785 F.2d 1043, 1054-73 n. 11, 20-27 (1986) *aff'd*, 484 U.S. 1 (1987) (per curiam) (noting the differing interpretations of the legislative history and the problematic nature of this scenario).

235. *See supra* notes 193-206 and accompanying text (describing section-by-section differences between the Frank bill and current law).

236. *See id.* (describing the Frank substitute legislation).

237. *See supra* notes 194-96 and accompanying text (noting the elimination of

Those categories of persons were excludable under the McCarran-Walter Act because of the fearful and frequently ignorant populace of nearly half a century ago.²³⁸ Moreover, it proposes to remove the vague language of section 212(a)(28) that allows for prohibitions on political grounds with a standard that more closely conforms to the Bill of Rights.²³⁹

In addition, the Frank bill retains important legislative tools so that the government may prevent what is one of today's greatest fears — international terrorism.²⁴⁰ Unlike the heavy-handed McCarran-Walter Act, however, the bill is specific about which people, groups, and activities fall into the category of terrorists.²⁴¹ A pragmatic legislative proposal, which has a legitimate chance of receiving support from the executive branch, as well as from both liberals and conservatives in Congress, must retain at least some of these powers.

Nevertheless, there are some areas where the Frank bill could be further refined to comport with individual liberties. The intent of the bill is to ensure that law-abiding individuals are not denied entry to the United States simply because their political ideology is not shared by most Americans.²⁴² The bill does not acknowledge, however, that some of the government's security needs could be met through existing measures, such as international anti-terrorism agreements.²⁴³

prohibitions of "mental defectives," "paupers," and "sexual deviates" within the Frank substitute legislation).

238. See *supra* note 194 and accompanying text (describing proposed changes in this section of the law).

239. H.R. 4427 substitute, *supra* note 182, § 2(a)(3)(C)(ii). "This section states that an alien is not excludable . . . or subject to restrictions or conditions on entry into the United States, because of any past, current, or expected beliefs, statements, or associations which would be lawful within the United States." *Id.*

240. H.R. 4427 substitute, *supra* note 182, § 2(a)(3)(B). See Comment, *The Use of Force in Combatting Terrorism*, 25 COLUM. J. TRANSNAT'L L. 377, 377 (1987) (noting an annual increase in international terrorist incidents of 12-15% and examining methods of response).

241. *Id.*; see IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 29-30 (noting that officers, officials, representatives and spokesmen for the PLO are considered as engaged in terrorist activity). The bill also provides a definition of terrorist activity for persons not included within a recognized terrorist group. *Id.*

242. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess., 15.

243. Convention on the Physical Protection of Nuclear Material, *opened for signature*, Mar. 3, 1980, *reprinted in* 18 I.L.M. 1419, 1431 (1979); International Convention Against the Taking of Hostages, Dec. 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1980); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1977, T.I.A.S. No. 8532, 1033 U.N.T.S. 167; The Convention for the Suppression of Unlawful Acts Against the Safety of Civilian Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No.

The recent extension of the temporary change in the law was also a step backward,²⁴⁴ indicative of the continuing legislative difficulties of

7570, 10 I.L.M. 1151 (1971); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 10 I.L.M. 133 (1971); Convention on Aviation: Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219. The United States is also a party to the regional agreement on the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, 27 U.S.T. 3949, T.I.A.S. No. 8413. In 1984 the United States joined with other industrialized nations in a Declaration on International Terrorism. See Intocchia, *International Legal and Policy Implications of an American Counter-Terrorist Strategy*, 14 DEN. J. INT'L L. & POL'Y 121, 124 n. 19 (1986) (examining the international agreements to stop international terrorism).

Some commentators acknowledge the difficulty of enforcing anti-terrorism agreements, including extradition treaties. See Comment, *Legislative Responses to International Terrorism: International and National Efforts to Deter and Punish Terrorists*, 9 B.C. INT'L & COMP. L. REV. 323, 352-59 (1986) (examining gaps in international and national legislation but concluding that the international community can create effective legal controls to combat terrorism); Comment, *Combatting International Terrorism: Limiting the Political Exception Doctrine in Order to Prevent "One Man's Terrorism from Becoming Another Man's Heroism,"* 31 VILL. L. REV. 1495, 1499 (1986) (noting that even though states have been largely unable to stop terrorist acts, they have the duty under *aut dedere, aut judicare* to bring the perpetrators to justice); Note, *Extradition in An Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U.L. REV. 654, 665 (1986) (noting that the United States has refused to extradite persons accused, and even convicted, of terrorist activities by other nations). One reason these treaties are often ineffective is the inability of nations to universally define "terrorism." *Id.* at 654 n.1.

Other writers have noted additional problems in enforcing anti-terrorism agreements. See Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217, 278 (1977) (examining the difficulty of states anticipating terrorist attacks and the contribution of this factor to preventing their occurrence).

Furthermore, the appeals court in *Abourezk v. Reagan* noted that even with its somewhat limiting statutory analysis, the State Department would still be able to restrict individuals' entry by virtue of groups' affiliation with terrorist groups or organized crime syndicates. *Abourezk v. Reagan*, 785 F.2d 1043, 1058 n.18 (D.C. Cir. 1986), *aff'd*, 108 S.Ct. 252 (1987) (per curiam). The restriction on the basis of membership in organized crime probably would remain in the law, since it was not addressed by the proposed legislation, and the restrictions on members of terrorist organizations are more specific, but equally effective in the new legislation. See *supra* note 206 and accompanying text (describing the provisions allowing the exclusion of individuals categorized as "terrorist").

As recently demonstrated by a California district court, the government's plenary authority to enforce "anti-terrorism" is much more limited in the deportation context. See *American-Arab Anti-Discrimination Comm. v. Meese*, No. CV 87-02107-SVW, slip op. at 33-37 (C.D. Cal. Jan. 26, 1989) (finding the deportation provisions unconstitutional overbroad as to violate the first amendment because they prosecute mere association and advocacy).

244. See Foreign Operations Export Financing, and Related Programs Appropriation Act, § 503, Pub. L. No. 100-461, 102 Stat. 2268 (1988) (including a change from the previous temporary change in the law to extend the ban on ideological exclusions and deportations only to nonimmigrants). *Id.* Congress has the power to regulate citizenship. U.S. CONST. art. I sec. 8, cl. 4. The change in this temporary law is therefore

reform in this area of law. Any permanent and comprehensive legislation that Congress passes to reform the McCarran-Walter Act should consider changing this to insure that both the law relating to exclusion and deportation comport with the intent of the proposed legislation, which is that the exclusion or deportation is based on speech instead of activities.

The Frank bill, on the other hand, adequately addresses the potential foreign policy dangers to the government that occur whenever there is an entry into this country of representatives from non-friendly foreign governments.²⁴⁵ The bill provides, in part, specific timetables about when a visiting candidate for foreign office can enter the United States and when individuals associated with certain political groups may enter the United States if that association will have a negative effect on diplomatic relations.²⁴⁶

Other potential defects of the proposed legislation are negligible. As already noted, the lack of an additional due process standard to the Frank bill, for instance, for which some have criticized it, is not a fatal flaw.²⁴⁷ Furthermore, the addition of such a standard would change the intrinsic nature of the relationship between the government and those aliens attempting to enter the country.²⁴⁸ On the other hand, the intent of this legislation is to reaffirm basic American commitments to speech and association that are already constitutional standards.²⁴⁹ Moreover, because of the possibility that the executive or his representatives at the Justice Department and the Immigration and Nationalization Service might abuse their discretion, there is a need for checks on the government's power. The proposed bill addresses this in a united manner, through the inclusion of a monitoring system requiring the Attorney General to constantly review and report to Congress on the actions he

consistent with current law as it relates to aliens attempting to enter the United States and those who already reside here. See *supra* note 75 (discussing the differences in stature of resident and entering aliens).

245. H.R. 4427 substitute, *supra* note 182, § 2(a)(3)(C).

246. *Id.* § 2(a)(3)(C)(i)(II), (III) (IV).

247. See *supra* notes 76, 217 and accompanying text (discussing the due process criticisms of the Frank bill and the failures of the Moynihan provision).

248. See *TRIBE*, *supra* note 74, § 5-16 at 355-58 (noting the differing standards adopted for resident and nonresident aliens). But see *Arab-American Anti-Discrimination Comm. v. Meese*, No. CV 87-02107-SVW, slip op. at 32-33 (holding that there is no difference between non-immigrant aliens and permanent resident aliens and finding that both have the first amendment rights afforded American citizens; see also *supra* note 75 and accompanying text (noting cases establishing the distinction between resident and nonresident aliens)).

249. IMMIGRATION EXCLUSION AND DEPORTATION AMENDMENTS OF 1988, H.R. REP. No. 100-882, 100th Cong., 2d Sess., 15-16.

or other executive branch officials take.²⁵⁰

Chief executives and their administrations have interpreted the McCarran-Walter Act in different ways. The adoption of the Frank legislation is necessary because any political party that controls the immigration mechanisms can abuse them.²⁵¹ As the courts flounder with outdated and vague judicial precedent, the executive branch continues to exert its power whenever and wherever it can. The need for legislation, geared not toward eliminating the ability of the executive to maintain the nation's borders for security reasons, but rather toward minimizing exclusion decisions based solely on ideology, is vital.

CONCLUSION

The United States was founded as a haven for dissenters. To exclude those who now seek refuge, or to refuse them a forum to express their views infringes on American citizens' freedoms of speech, association, and the ability to receive information, no matter how controversial.

The deference to the executive branch, defined through congressional mandate, may be appropriate. Such a mandate, however, must be consistent with the ideals and standards of a modern nation. Americans can not achieve the proper execution of their constitutional system if they use a standard that is outdated, vague and difficult to interpret.

There is always the possibility that new legislation will create faulty judicial interpretation through either a misunderstanding of legislative history or a reaction to political events of the times. Congress, however, must establish a standard for modern times, and depart from the earlier xenophobic period. The potential danger to the stability of the United States from exposure to the most dissident of ideas is far outweighed by the cost of their suppression.

250. H.R. 4427 substitute, *supra* note 182, § 2(a)(3)(C)(ii)(II).

251. See Abrams, *The New Effort to Control Information*, N.Y. TIMES MAGAZINE, Sept. 25, 1983, at 20, 23 (examining the Reagan administration's uses of immigration law to control the dissemination of information); Shapiro, *supra* note 12, at 934-35 (questioning the partisan nature of exclusions); *Visa Denials*, *supra* note 12, at 249, 259 (noting potential political motivation of the Reagan Administration for exclusions); see also Note, *Immigration Law: The Role of the Supreme Court in Policy Development*, 22 NEW ENG. L. REV. 131, 162 (1987) (suggesting that the government has not been responsive to an increasing opposition to its "restrictive politically biased attitude").