COMMENTS

CHECKING IDEAS AT THE BORDER: EVALUATING THE POSSIBLE RENEWAL OF IDEOLOGICAL EXCLUSION

INTRODUCTION

The United States' war on terrorism has generated fear among some scholars and civil libertarians that "ideological exclusion" is being "resurrected."[1] Ideological exclusion is an unofficial term that describes the practice of denying aliens entry into the country based solely upon their political/ideological speech or beliefs.[2] "Resurrected" arguably describes the status of the practice because ideological exclusions seemed to have ended with the Cold War.[3] Section 411 of the Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act (PATRIOT Act) raised the specter that the U.S. government was resuming its use of ideological criteria in admissibility decisions.[4] The recently enacted REAL ID Act of 2005 has replaced and expanded the above provisions of the PATRIOT Act to authorize an even wider use of ideological criteria in admissibility decisions.[5]

A. *Recent Events*

Apprehensiveness about the use of the PATRIOT Act, and now the REAL ID Act, to exclude foreigners for purely ideological reasons is not entirely unfounded. The first inkling of a return to this policy came in mid-2004 when

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1 David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 969 (2002); *see also Testimony of Professor David Cole Before the United States S. Comm. on the Judiciary on the USA PATRIOT Act*, May 10, 2005, *available at* http://www.fcnl.org/issues/item.php?item_id=1376&issue_id=68 [hereinafter *Cole's Testimony*]; Alexandra Marks, *When US Bars its Doors to Foreign Scholars*, CHRISTIAN SCI. MONITOR, Nov. 23, 2005, at 2.

2 Cole, *supra* note 1, at 969. The Immigration and Nationality Act (INA) categorizes certain classes of aliens as "inadmissible," also known as "excludable," which makes them "ineligible to receive visas and ineligible to be admitted to the United States." INA § 212(a), 8 U.S.C. § 1182(a) (2005).

3 *See Doug Cassel*, *Government Thinks We Have Nothing to Fear But . . . Ideas*, CHI. TRIB., Oct. 10, 2004, § 2, at 4; *see infra* notes 37–56 and accompanying text.

4 PATRIOT Act § 411, 8 U.S.C.S. § 1182(a)(3)(B)(VI) (2005).

5 REAL ID Act, 8 U.S.C.S. § 1182 (2005)).

the State Department, in conjunction with the Department of Homeland Security, revoked the visa of Tariq Ramadan, a European Muslim scholar and professor from Geneva whom Notre Dame University had invited to teach as a professor of religion.[6] The details of what the State Department called a "prudential revocation"[7] have remained confidential, with the government refusing to disclose its reasons.[8] However, a Homeland Security Department spokesman's statement cited section 411 of the PATRIOT Act as a basis for the denial.[9] Thus, while the exact legal basis for Ramadan's exclusion is unclear,[10] and despite an anonymous Homeland Security official's assurances that Ramadan was excluded strictly because of his prior actions, [11] many in the media speculated that Ramadan was denied entry because of his views.[12]

In fact, speculation that Ramadan actually was excluded for ideological reasons has become so widespread that the American Civil Liberties Union (ACLU), the American Association of University Professors (AAUP), and the PEN American Center recently filed a lawsuit on the matter against the Departments of State and Homeland Security.[13] The plaintiffs seek an injunction to enforce a Freedom of Information Act (FOIA) request that the

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[6] Stephen Kinzer, *Muslim Scholar Loses U.S. Visa As Query Is Raised*, N.Y. TIMES, Aug. 26, 2004, at A14. Ramadan is a best-selling author and lecturer in Europe. *Time* magazine selected him as one of the world's one hundred leading thinkers and scientists. Cassel, *supra* note 3.

[7] Peter Slevin, *Lacking Visa, Islamic Scholar Resigns Post at Notre Dame*, WASH. POST, Dec. 15, 2004, at A6.

[8] Deborah Sontag, *Mystery of the Islamic Scholar Who Was Barred by the U.S.*, N.Y. TIMES, Oct. 6, 2004, at A1. Ramadan is a highly controversial figure and there seems to be some evidence that he has ties to terrorist organizations, which he vehemently denies. *Id.* As of this publication, the government continues to refuse to disclose the basis of Ramadan's exclusion even in the face of Freedom of Information Act (FOIA) requests. *See infra* notes 13–15 and accompanying text.

[9] *Nation in Brief: U.S. Revokes Work Visa of Muslim Scholar*, WASH. POST, Aug. 25, 2004, at A18.

[10] A spokeswoman for the State Department said that Ramadan's visa was revoked "under a legal provision that bans espionage agents, saboteurs and anyone the United States 'knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity.'" Kinzer, *supra* note 6.

[11] A Department of Homeland Security official has maintained that the revocation was "based not on Mr. Ramadan's beliefs, but on his actions." However the official did not elaborate. Sontag, *supra* note 8.

[12] *See* Cassel, *supra* note 3 (arguing that Ramadan's denial amounted to a resurrection of ideological exclusion); *see also* Daniel Pipes, *Why Revoke Tariq Ramadan's U.S. Visa*, N.Y. SUN, Aug. 27, 2004, *available at* http://www.danielpipes.org/article/2043. Among others, Pipes cites the following reasons for denying Ramadan's visa: "Along with nearly all Islamists, Mr. Ramadan has denied that there is 'any certain proof' that Bin Laden was behind 9/11. He publicly refers to the Islamist atrocities of 9/11, Bali, and Madrid as 'interventions,' minimizing them to the point of near-endorsement." *Id.*

[13] ACLU, *Government Refusing to Turn Over Records on Exclusion of Foreign Scholars, Lawsuit Charges*, Nov. 10, 2005, http://www.aclu.org/natsec/emergpowers/21214prs20051110.html.

ACLU had previously filed with those departments to determine why the government denied Ramadan's visa.[14]

The ACLU is also seeking information about other scholars whose visas may have been denied for ideological reasons.[15] For instance, the suit seeks information about the government's denial of Dora Maria Tellez's visa in January of 2005.[16] Ms. Tellez, a historian, professor, and former figure in the Nicaraguan government, participated in the Sandinista overthrow of the brutal Somoza regime in Nicaragua during the late 1970s.[17] She had visited the United States many times and she was scheduled to teach at Harvard University as a Robert F. Kennedy Visiting Professor of Latin American Studies before her visa was denied.[18] Apparently, the government maintained that Ms. Tellez's participation in Nicaragua's political violence over twenty-five years ago constituted "terrorist acts";[19] therefore, the government considered her subsequent teaching and speaking about her activities to be endorsements of terrorism.[20] The suit also seeks information about other prominent individuals whose visas were denied for possibly ideological reasons; those individuals include Fernando Rodriguez, a well-known Bolivian human rights lawyer, and approximately sixty scholars and academics from Cuba.[21]

The ACLU alleges that "the exclusion of Professors Ramadan and Tellez is part of a broader practice of using immigration laws to exclude and stigmatize critics of U.S. foreign policies."[22] Civil libertarians like Professor Cole agree that section 411 of the PATRIOT Act and the examples of Ramadan and Tellez signify a return to a policy of ideological exclusion.[23] These civil liberties advocates worry about the practice's effect on, among other things, First

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[14] *Id.*

[15] *Id.*; *see also* Complaint for Injunctive Relief at 1, ACLU v. Dep't of State (S.D.N.Y. filed Nov. 10, 2005) [hereinafter ACLU Complaint], *available at* www.aclu.org/images/general/asset_upload_file448_21800 .pdf .

[16] ACLU Complaint, *supra* note 15, at 8–9.

[17] *Id.*

[18] *Id.*; *see also* Duncan Campbell, *U.S. Bars Sandinista Academic*, GUARDIAN, Mar. 31, 2005, *available at* http://www.guardian.co.uk/usa/story/0,12271,1448658,00.html.

[19] ACLU Complaint, *supra* note 15, at 8–9.

[20] Anne Hendershott, *No Terrorists Left Behind*, WASH. TIMES, Apr. 8, 2005, *available at* http://www.washtimes.com/op-ed/20050407-095611-9030r.htm. "In denying the visa, the U.S. general consul in Nicaragua, Luis Espada-Platet, indicated in a letter to Ms. Tellez that the Immigration and Nationality Act prevents persons who allegedly endorse or espouse terrorist activity from entering the country." *Id.*

[21] ACLU Complaint, *supra* note 15, at 9–11.

[22] *Id.* at 10.

[23] *See Cole's Testimony*, *supra* note 1.

Amendment freedoms. "This is about free speech, the purpose of colleges and universities," says a representative of the American Association of University Professors.[24] Similarly, a member of the ACLU legal department said, "[w]e have a right to know about how our government is using various immigration laws to censure ideas that Americans have a right to hear."[25]

Those at the opposite end of the spectrum of American politics frame the issue solely in terms of security. They point out that, although the facts are not completely known, Ramadan may have had ties to actual terrorists and terrorist groups; therefore, he was not excluded simply for ideological reasons.[26] Tellez, similarly, was once active in the Sandinista revolution and had even personally participated in the violent takeover of the Nicaraguan Parliament in which over two thousand people were held hostage.[27] Thus, according to some, she too was not excluded simply for her beliefs.[28]

Moreover, some of these commentators go so far as to advocate a full-blown return to ideological exclusion as a means of keeping extremists out of the country.[29]

The question today in light of section 411 of the PATRIOT Act and now, sections 103 through 105 of the REAL ID Act, is whether ideological discrimination against the politically unpopular, such as that that occurred in the most egregious cases during the Cold War, is becoming more prevalent. Will the United States use ideological exclusions only against those persons who pose an actual threat to the country, or will it use provisions of the INA enacted to deny admission to dangerous proponents of terrorism as pretext for excluding individuals based on their speech and beliefs? Is it that today, in 2006, the U.S. government can deliberately and transparently bar admission to noted novelists, professors, poets, musicians, scientists, politicians, journalists, human rights lawyers, religious leaders, and others simply because it does not approve of their ideas?[30] If so, may the government legitimize its decisions

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[24] *See* Marks, *supra* note 1, at 2.

[25] *Id.*

[26] *See, e.g.*, Hendershott, *supra* note 20.

[27] *Id.*

[28] *Id.*

[29] *See generally* James R. Edwards, Jr., Ctr. for Immigration Studies, *Keeping Extremists Out: The History of Ideological Exclusion and the Need for Its Revival* (Sept. 2005), http://www.cis.org/articles/2005/back1005.html.

[30] *See supra* notes 3–6 and accompanying text.

simply by painting excluded individuals' ideas with the brush of "terrorism"? Can the government do all of this under the guise of fighting terrorism?[31]

As this Comment will show, the government took a step toward renewing ideological exclusions with passage of section 411 of the PATRIOT Act. The recently enacted REAL ID Act brings the country even closer to a resumption of the worst kinds of ideological exclusions effected during the Cold War under the McCarran-Walter Act. Whether the government has actually resumed ideological exclusions is another question, however. The new statutory framework for excluding aliens who allegedly advocate terrorism also could allow the government to exclude aliens arbitrarily and capriciously merely because their speech is unpopular. Given this possibility, this Comment will explore judicial, legislative, and executive solutions for preventing and limiting the worst and most blatant ideological exclusions like those seen in the past.

Part I of this Comment will trace the history of ideological exclusion in the United States. Part II will present a constitutional analysis of ideological exclusion, asserting first that ideological exclusion offends citizens' First Amendment right to receive information, then arguing that legitimate reasons exist for continuing judicial deference to Congress and the executive branch on the issue.[32] Part III will briefly describe the limited role of the lower courts in guarding against blatant ideological exclusions. Part IV will more closely examine the statutory bases of renewed ideological exclusions—section 411 of the PATRIOT Act and section 103 of the REAL ID Act—and will propose a possible legislative response to the executive branch's potential abuse of its discretion to exclude aliens for ideological reasons. Part V will conclude with a summary and a warning that this issue should be carefully monitored in the future to prevent a return to the discredited practices of the past.

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[31] This Comment will focus only on the exclusion, or inadmissibility, of aliens for ideological reasons and will not cover deportation for ideology. The term "exclusion" refers to denying admission to aliens seeking to enter at the border; "deportation" refers to the removal from the country of an alien; each practice has historically raised unique constitutional and other legal issues. *See generally* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 92–101. The dividing line between inadmissibility and deportability under the current statute is "lawful admission." 8 U.S.C.S. § 1101(a)(13) (2005).

[32] This Comment will not explore the topic of ideological exclusion from the perspective of aliens' rights, which raises an entirely different set of constitutional, legal, and moral questions. For the difference between citizens' and aliens' rights, see generally Martin, *supra* note 31, at 92–101.

I. A BRIEF HISTORY OF IDEOLOGICAL EXCLUSION IN THE UNITED STATES

Throughout its history, the United States has suppressed the speech of both aliens and citizens during times of national crisis. The Alien and Sedition Acts of the eighteenth century represent the first and most notorious examples.[33] During World War I, the Supreme Court's famous decision in *Schenck v. United States* cleared the way for the government to curtail U.S. citizens' ability to protest government policy under the "clear and present danger" test.[34]

Restrictions on the speech of aliens were especially acute in the early and middle twentieth century, and most commonly took the form of exclusion and deportation based on ideological criteria. Ideological criteria in immigration policy first targeted "anarchists."[35] The Alien Immigration Act of 1903 made ineligible for admission, among other groups, "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law."[36]

A. *The McCarran-Walter Act*

With the onset of the Cold War, United States immigration law primarily targeted those with communist affiliations and views. The Immigration and Nationality Act of 1952 (the McCarran-Walter Act) provided the statutory basis.[37] Two major provisions of the Act were employed for ideological exclusions. First, § 1182(a)(28) extended the prohibition to aliens who had at any time been members or were affiliated with the Communist party who "advocate[d] the economic, international, and governmental doctrines of world communism,"[38] "who wr[o]te or publish[ed] . . . the doctrines of world communism,"[39] or who had written or published the doctrines of world communism.[40] The Attorney General, in his discretion and upon

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33 *See generally* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 159–76 (1956).

34 249 U.S. 47, 52 (1919).

35 Act of March 3, 1903, Pub. L. No. 57-162, 32 Stat. 1213, § 2.

36 *Id.* In a challenge, the Court stated in dicta that this prohibition could apply to even those espousing anarchy in the philosophical or purely abstract sense. U.S. *ex rel.* Turner v. Williams, 194 U.S. 279, 294 (1904).

37 Immigration and Nationality Act ch. 477, 66 Stat. 182 (1952) (codified at 8 U.S.C. § 1182 (1953)).

38 8 U.S.C. § 1182(a)(28)(D) (1953).

39 § 1182(a)(28)(G).

40 § 1182(a)(28)(G)(v).

recommendation by the Secretary of State, had authority to exercise a waiver of inadmissibility under subsection 28.

Second, § 1182(a)(27) made inadmissible aliens seeking to enter the United States "solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."[41] The vague wording of subsection 27 provided the executive branch with broad discretion to exclude aliens of whose speech the administration disapproved.[42] In addition, no waiver scheme applied to subsection 27.

The McCarran-Walter Act was enacted over the veto of President Truman, who announced grave reservations about it: "Seldom has a bill exhibited the distrust evidenced here for citizens and aliens alike—at a time when we need unity at home and the confidence of our friends abroad."[43] Over the years, the Act provided the government leeway to exclude a wide range of political dissidents. Between 1951 and 1960, the United States excluded 1,098 noncitizens for being "subversive or anarchist."[44] Moreover, thousands more aliens found excludable were subject to the delay of the waiver process.[45]

B. McCarran-Walter's Repeal

During its existence, intense scholarly criticism was levied at the McCarran-Walter Act,[46] and gradually the harsh use of ideological controls on immigration gave way as the Cold War waned. In 1979, Congress passed the "McGovern Amendment" which altered subsection 28, the provision that barred admission of aliens affiliated with communism.[47] The McGovern Amendment required that the Secretary of State recommend a waiver of inadmissibility to the Attorney General for any alien denied a visa due to subsection 28 organizational affiliation unless the Secretary certified to

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[41] § 1182(a)(27).

[42] *See infra* notes 196–205 and accompanying text.

[43] H.R. DOC. NO. 82-520, at 5 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 921, 924.

[44] CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 63.04, 63–51 (Matthew Bender & Co., Inc. 2003) (1956) (citing U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 226 (2000)).

[45] *Exclusion and Deportation Amendments: Hearings on H.R. 4509 and H.R. 5527 Before the Subcomm. on Immigration, Refugees and International Law of the H. Comm. on the Judiciary*, 98th Cong. 145 (1984) (statement of Jeri Laber, Executive Director, Helsinki Watch).

[46] *See generally* Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930, 933–45 (1987).

[47] 22 U.S.C. § 2691 (1982) (repealed 1990).

Congress that a waiver would be detrimental to the security interests of the United States.[48] The McGovern amendment effectively ended the worst abuses of subsection 28 for ideological purposes. By the period from 1971 to 1980, the number of actual subversive/anarchist exclusions fell to thirty-two.[49]

The Reagan Administration, however, attempted to resume ideological exclusions in the 1980s under the guise of subsection 27 of the McCarran-Walter Act, to which the McGovern Amendment did not apply.[50] These subsection 27 exclusions were committed under the pretext that admittance would be "prejudicial" to the United States' "foreign policy interests." Exemplifying subsection 27's abuse for ideological reasons, the administration refused to grant a visa to Nino Pasti, a retired Italian general and former high-ranking NATO officer who planned to give speeches favoring nuclear disarmament and criticizing the United States' deployment of cruise missiles in Western Europe; the administration asserted that his entrance might be "prejudicial to the public interest" under subsection 27.[51]

George Schultz, Reagan's Secretary of State, sought at the time to allay the fears of those in Congress and the courts who worried that the government had gone too far in excluding dissidents who did not pose legitimate security threats. In a 1986 speech, Schultz assured his audience as follows:

> This administration is committed, and I am personally committed, to protecting free expression of all political ideas . . . . I've taken very seriously my Department's role in reviewing proposed visa denials that could affect free expression. It has never been the approved policy of the United States to deny visas merely because the applicant wants to say that he disapproves of the United States or one of its policies.[52]

Despite the Reagan administration's assurances, however, the ideological abuses engendered by the McCarran-Walter Act were obvious. Though the number of aliens actually excluded from the United States for ideological reasons declined in the 1970s and 1980s from the practice's height in the 1950s and 1960s, due largely to the effect of the McGovern Amendment, the State Department continued to maintain an enormous secret list of "political

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[48] *Id.*

[49] GORDON ET AL., *supra* note 44, at 63–51, § 63.04[2].

[50] *See* Carl A. Hanson, *Ideological Exclusion of Aliens During the Reagan Administration, 1981–1987*, 6 GOV'T INFO. Q. 70–71 (1989).

[51] *See infra* notes 204–05 and accompanying text.

[52] H.R. REP. NO. 100-882, at 17 (1988).

undesirables" deemed "ideologically unacceptable" to enter the United States.[53] In addition, the list of those actually excluded over the years included major political and cultural personalities such as Nobel Laureates Gabriela Garcia Marquez and Pablo Neruda, prominent British novelist Graham Greene, French actor Yves Montand, naturalist Farley Mowat, Colombian journalist Patricia Lara, and Daniel Ortega, the former leader of Nicaragua.[54] Pierre Trudeau was removed from the secret list only after he was elected Prime Minister of Canada.[55]

Congress finally responded to these obvious abuses by temporarily nullifying the ideological provisions of the McCarran-Walter Act in 1987 and 1988.[56] In their place, Congress passed a temporary provision prohibiting the exclusion or deportation of aliens "because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States."[57] Finally, in 1990, Congress essentially repealed the McCarran-Walter Act and permanently altered and restructured the immigration code to provide much less leeway for the use of ideological criteria.[58] Congress even ordered the State Department to revise its procedures to safeguard against ideology-based exclusions.[59]

Congress reconfigured the grounds for admissibility to eliminate most of the ideological provisions of the McCarran-Walter Act. No provision analogous to subsection 28 appeared in the new provisions, though the new statute did include a section on "Foreign Policy" exclusions analogous to the old subsection 27.[60] In the new statute, however, officials of foreign governments were no longer inadmissible "solely because of the alien's past,

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53 Martin Tolchin, *Panel Clears Bill to Make U.S. Purge List of Aliens*, N.Y. TIMES, Sept. 25, 1991, at A19. More than half the names on the list were placed there from 1981–1988. *Id.*

54 *Id.*

55 For a timeline of ideological exclusions of prominent individuals from the 1950s to the present, including that of Pierre Trudeau, see ACLU, *Defending the Free Trade in Ideas* (Nov. 10, 2005), www.aclu.org//safefree/general21211prs20051110.html.

56 Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 901(a), 101 Stat. 1331 (1987) (codified at 8 U.S.C. § 1182 (2000)).

57 *Id.*

58 *See* Immigration Act of 1990, Pub. L. No. 101-649, § 601 (codified at 8 U.S.C. § 1182 (2000) (repealing INA § 212(a)(27) and (28) (1952))).

59 *See id.* § 601(c) (codified at 8 U.S.C.S. § 1182(a)(3)(C) (2005)); Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, § 127 (codified at 22 U.S.C. § 2723 (2000)) and § 128 (codified at 8 U.S.C. § 1182 (2000)).

60 8 U.S.C.S. § 1182(a)(3)(C)(i) (2005).

current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States."[61] All other aliens subject to inadmissibility for "Foreign Policy" reasons could not be excluded for speech, beliefs, or associations unless the Secretary of State personally determined that the alien's admission would compromise a "compelling United States foreign policy interest."[62] In the wake of these changes, the State Department's Foreign Affairs Manual was changed to say that advocating terrorism through oral or written statements was usually not a sufficient ground for finding inadmissibility, especially if it was speech that would have been protected in the United States.[63]

The legislative history surrounding the new foreign policy section indicates that Congress specifically intended three things: a) that "exclusions not be based merely on, for example, the possible content of an alien's speech in this country";[64] b) that the authority given to the Secretary of State to personally base an exclusion on an alien's speech if he determines that entry would compromise the foreign policy interests of the United States be used "sparingly and not merely because there is a likelihood that an alien will make critical remarks about the Unites States or its policies";[65] and c) that when the Secretary of State does exercises this authority, the "compelling foreign policy interest" standard be interpreted as a very high standard.[66]

Furthermore, according to the House Judiciary Committee, the House, in replacing the old immigration provisions, "recognizes that it is inappropriate to deny entry to law-abiding individuals simply because their political ideology is not shared by most Americans."[67] Importantly, the House based its actions in part on citizens' right to hear and associate with aliens. The legislation "fosters greater access for Americans to foreigners and their ideas by repealing the grounds for exclusion based on political ideology and affiliation with proscribed organizations."[68] The report called ideological exclusions

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[61] § 1182(a)(3)(C)(ii).

[62] § 1182(a)(3)(C)(iii).

[63] 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 4.32 n.6.7(b) (cited in CHARLES GORDON ET AL., *supra* note 44, § 63.04 n.77).

[64] H.R. REP. NO. 101-955, at 128–31 (1990).

[65] *Id.*

[66] *Id.*

[67] *Id.*

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

"anathema to the principles on which this nation was founded."[69] It went on to state the following principle:

> [T]hat American citizens ought to be able to decide for themselves with whom they will meet and discuss ideas . . . but more importantly to protect the First Amendment association rights of persons in the United States by providing an open forum for debate, and ensuring access to the widest possible variety of foreign citizens and their ideas.[70]

C. Recent Renewal of Ideological Exclusions Provisions

Despite these developments, the type of ideological restrictions prevalent under the McCarran-Walter Act slowly began to creep back into U.S. immigration law as international terrorism began to replace communism as the top national security concern. The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 expanded the class of excludable aliens to include "representatives" and "members" of terrorist organizations, with expanded definitions of those terms.[71] The 1996 legislation generated a small amount of commentary about the possible resurgence of ideological exclusion.[72]

Section 411 of the PATRIOT Act increased the scope of the antiterrorist grounds for exclusion to include, once again, ideological standards. The provision authorized the federal government to deny admission to any alien who had used a "position of prominence within any country to *endorse or espouse* terrorist activity," or to "*persuade others to support* terrorist activity or a terrorist organization."[73] It also excluded aliens who were representatives of "political, social or other group[s]" who endorsed terrorist activity.[74] The above provisions were triggered only upon a determination by the Secretary of State that the alien's endorsement of terrorist activity or terrorist organizations could undermine the country's efforts to combat terrorism.[75] Section 411 was cited by State Department and Homeland Security officials as the legal basis

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69 *Id.*

70 *Id.*

71 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009.

72 *See, e.g.*, David Cole, Op-Ed., *Defending Our Borders Against Dangerous Ideas*, WASH. POST, Jan. 5, 1996, at A21.

73 PATRIOT Act of 2001, § 411, 8 U.S.C.S. § 1182(a)(3)(B)(VI) (2005) (emphasis added).

74 *Id.*

75 *Id.*

for denying visas to Professors Ramadan and Tellez.[76] Critics noted at the time that section 411, in combination with the broad definitions of "terrorist activity" and "terrorist organizations" in the INA allowed the government discretion to exclude the advocates of many groups not normally considered to be "terrorists."[77]

The REAL ID Act has replaced the endorsement of terrorism provisions of section 411 and greatly expanded the use of ideological criteria. The REAL ID Act makes inadmissible *any* alien who espouses or endorses terrorist activity, or persuades others to support terrorist activity or a terrorist organization.[78] In contrast with section 411 of the PATRIOT Act, these provisions apply regardless of whether the alien has a position of prominence and whether his espousal undermines U.S. efforts to reduce terrorism in the opinion of the Secretary of State.[79] The REAL ID Act also makes inadmissible any representative of a political, social, or other similar group that endorses or espouses terrorist activity.[80] Under section 411 of the PATRIOT Act, such representatives were only inadmissible if the organization *publicly endorsed* terrorist activity and the Secretary of State determined that such endorsement undermined U.S. efforts to reduce or eliminate terrorist activities.[81]

Furthermore, the REAL ID Act has redefined and expanded the INA's definition of the terms "engage in terrorist activity" and "terrorist organization," thus vastly increasing the possibility of future ideological exclusions.[82] As the Congressional Research Service has noted, "[g]iven that REAL ID Act § 103(b)–(c) broadens the INA's definitions of 'terrorist organization' and 'engage in terrorist activity'—two phrases frequently used in the INA provisions establishing the terror-related grounds for inadmissibility—the REAL ID Act expands the terror-related grounds for inadmissibility more broadly than might first appear."[83]

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[76] *See supra* notes 10 and 20 and accompanying text.

[77] David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 969 (2002).

[78] REAL ID Act of 2005, § 103(a), 8 U.S.C.S. § 1182(a)(3)(B)(i)(VII) (as of May 11, 2005).

[79] *Id.*; *see also* MICHAEL JOHN GARCIA ET AL., CONG. RES. SERV., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005 (updated May 25, 2005) [hereinafter CRS REPORT], *available at* http://fpc.state.gov/documents/organization/42995.pdf.

[80] REAL ID Act § 103(a).

[81] *See supra* note 75.

[82] REAL ID Act § 103(b)–(c).

[83] CRS REPORT, *supra* note 79, at 17.

"Terrorist activity" is now defined in very broad terms,[84] including any use of an "explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain) with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property."[85] The term "terrorist organization" is defined as a terrorist organization designated by statute or by the Secretary of State or Homeland Security,[86] or any nondesignated "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" terrorist activity as broadly defined in the Act.[87] The REAL ID Act expands the list of activities that can cause a nondesignated organization to be considered a "terrorist organization."[88] Also, the REAL ID Act includes as a "terrorist organization" any nondesignated organization with a subgroup that "engages in terrorist activity," under the expanded definition of "engage in terrorist activity" contained in the REAL ID Act.[89] "The upshot of the inclusion of subgroups may be to further lower the threshold for how substantial, apparent, and immediate a group's support must be for a terrorist activity or organization for the group to be considered 'terrorist' and for its members to potentially fall within the terrorism provisions of the INA."[90]

As a result, the threshold for exclusions based on advocacy of terrorism has been lowered as well. Some scholars have accordingly declared that the REAL ID Act "for all practical purposes revive[s] the McCarran-Walter approach."[91] Under the REAL ID Act, any alien may be found inadmissible who has ever advocated through speech an organization that may have two or more members who have used a firearm or other weapon or dangerous device with intent to endanger the safety of one or more individuals or to cause substantial damage to property (other than for mere monetary gain). The organization need not have ever been designated as a "terrorist organization" by anyone. Furthermore, an alien's endorsement of such an organization could render him inadmissible even if his espousal does *not* undermine U.S. efforts to reduce terrorism in the opinion of the Secretary of State. One law professor pointed out the following in testimony before the Senate Judiciary Committee:

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84 *See* 8 U.S.C.S. § 1182(a)(3)(B)(iii) (2005).
85 § 1182(a)(3)(B)(iii)(V)(b).
86 § 1182(a)(3)(B)(vi).
87 § 1182(a)(3)(B)(vi)(III).
88 CRS REPORT, *supra* note 79, at 17.
89 *Id.*
90 *Id.* at 16.
91 *Cole's Testimony*, *supra* note 1.

> Under this definition, the Israeli military, the Northern Alliance [of Afghanistan], the African National Congress [of South Africa], the Irish Republican Army, the Nicaraguan Contras, the Palestine Authority, and many militant anti-Castro Cuban groups would be "terrorist organizations," even though none has been so designated by the Secretary of State.[92]

II. CONSTITUTIONAL ANALYSIS OF IDEOLOGICAL EXCLUSION

The Supreme Court has squarely faced the issue of ideological exclusion just once, over thirty years ago in *Kleindienst v. Mandel*.[93] *Mandel*, therefore, establishes the framework within which all constitutional analysis of ideological exclusion must be made. Interestingly, the majority's opinion can be divided into two parts. First, the majority explicitly recognizes that ideological exclusion implicates citizens' right to receive information under the First Amendment. Second, though, the majority then established an extremely deferential standard of review for exclusions of this type that does not protect the right by refusing to look behind the government's justification of exclusion when done so on "facially legitimate and bona fide" grounds. This Part will describe the two-part decision in *Mandel*, and then will elaborate upon the constitutional underpinnings of each part.

A. Kleindienst v. Mandel

A group of American plaintiffs brought an action on behalf of Ernest E. Mandel, a Belgian author and self-described "revolutionary Marxist,"[94] to force the Attorney General to grant Mandel a temporary nonimmigrant visa.[95] Stanford University and other universities[96] and civic groups around the country had invited Mandel to come and speak.[97] Mandel could not do so, however, because he was denied a visa under subsection 28 of the McCarran-Walter Act. That Act disallowed the admission of aliens who "advocate the economic, international, and governmental doctrines of world communism or

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92 *Id.*

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

94 *Id.* at 756.

95 A nonimmigrant visa is granted for a temporary, specific purpose, in contrast to an immigrant visa which is granted for the purpose of lawful permanent residence. The immigrant/nonimmigrant distinction can have important Constitutional implications.

96 These universities and colleges included Princeton, Amherst, Columbia, and Vassar. *Kleindienst*, 408 U.S. at 757.

97 *Id.*

the establishment in the United States of a totalitarian dictatorship" and "aliens who write or publish the economic, international, and governmental doctrines of world communism."[98] The citizen-plaintiffs from the universities and civic groups complained that Mandel's exclusion deprived them of "hearing and meeting with Mandel in person for discussion, in contravention of the First Amendment."[99]

First, the Court found that U.S. citizens do have standing to challenge immigration decisions for violation of their own First Amendment rights.[100] Justice Blackmun, writing for the majority, reaffirmed the many decisions establishing "the right to receive information and ideas," citing furtherance of "the uninhibited marketplace of ideas."[101] The Court rejected the Government's argument that the exclusion involved no First Amendment restriction at all because what was restricted was "only action."[102] The First Amendment problem, Blackmun wrote, did not disappear simply because physical movement was being regulated.[103] Neither did the Court accept the Government's argument that the First Amendment was inapplicable because alternative modes of receiving Mandel's views were available. "[W]e are loath to hold on this record," wrote Blackmun, "that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access."[104]

Despite the Court's recognition of standing to bring the First Amendment claim and the long pedigree of cases recognizing the right to receive information, the *Mandel* Court rejected the citizens' First Amendment claim. Justice Blackmun set a very low standard of scrutiny for evaluating these claims. Citing Congress' historic "plenary power"[105] in the area of immigration, he held that when the executive branch excludes aliens according to a Congressional mandate for a "facially legitimate and bona fide reason," the Court will not balance its justification against the First Amendment interests of those citizens who seek communication with the alien.[106] The

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[98] *Id.* at 756.
[99] *Id.* at 760.
[100] *Id.* at 763.
[101] *Id.*
[102] "[W]e cannot realistically say that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement." *Id.* at 764.
[103] *Id.*
[104] *Id.* at 765.
[105] *See infra* Part II.B, discussing the plenary power doctrine.
[106] *Kleindienst*, 408 U.S. at 769–70.

Court, therefore, accepted the Government's assertion that it had excluded Mandel merely for the speech-neutral reason that he had violated the terms of an earlier visa.[107] Emphasizing the "plenary power" doctrine, Blackmun articulated the standard using the following language:

> In the case of an alien excludable under § 212(a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.[108]

Significantly, however, Blackmun left open the possibility of a successful First Amendment challenge to an ideological exclusion when the Government offered no good reason for the exclusion: "What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address or decide in this case."[109]

Justices Marshall, Brennan, and Douglas dissented from the Court's opinion. "I do not understand the source of this unusual standard," Marshall wrote. "Merely 'legitimate' governmental interests cannot override constitutional rights."[110] Moreover, Marshall asserted that even a brief peek behind the Attorney General's reason for denying Mandel's visa would reveal it to be a "sham."[111] Yet, despite the dissenters' arguments to the contrary, *Mandel* is today understood as barring direct judicial application of the First Amendment to inadmissibility decisions when the government bases its decision on "facially legitimate and bona fide" reasons.[112]

B. *Elaboration Upon the First Amendment Implications of Ideological Exclusion*

This section will elaborate upon the First Amendment right to receive information in the ideological exclusion context, which the Court explicitly

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[107] *Id.* The government claimed that it had denied Mandel's visa because he had violated the terms of an earlier visa.

[108] *Id.* at 770.

[109] *Id.*

[110] *Id.* at 777 (Marshall, J., dissenting).

[111] *Id.* at 778.

[112] *See, e.g.*, Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

acknowledged in *Mandel*.[113] This section will also identify other First Amendment values and principles at stake. The purpose is to show that *Mandel's* recognition of the right to receive information was not an anomaly. Although some commentators complain that the First Amendment should not be "twisted" so as to provide aliens the right to free speech under the pretext of citizens' rights,[114] this section will illustrate that the First Amendment is implicated in the context of ideological exclusion not by "twisting," but by simply applying the principles, purposes, and precedents of the First Amendment in a straightforward manner.

1. The Right to Receive Information

For over half a century, the Supreme Court has held that the First Amendment includes a right to receive information. The Court has reaffirmed the right to receive information several times since the *Mandel* decision, which itself was significant for its recognition of the same. Most recently, the Court struck down two provisions of the Communications Decency Act of 1996, enacted to protect minors from indecent and patently offensive communications, because the law effectively suppressed "a large amount of speech that adults have a constitutional right to receive and address to one another."[115]

The theory that the First Amendment protects not only the right to speak, or produce information, but also to receive it was first enunciated in *Martin v. City of Struthers*, a case in which the Court reversed a Jehovah's Witness' conviction for distributing religious leaflets door-to-door in violation of a city ordinance.[116] The Court ruled that the freedom to distribute information must be protected under the First Amendment, and that this freedom "necessarily protects the right to receive it."[117] The Court reasoned that the "right of freedom of speech and press has a broad scope"[118] and that the city's prohibition impermissibly restricted the dissemination of ideas.[119]

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113 *Mandel*, 408 U.S. at 763.

114 *See* James R. Edwards, Jr., *supra* note 29, at 16. "Nor should the First Amendment be twisted to allow aliens a forum for their subversive ideas." *Id.*

115 Reno v. ACLU, 521 U.S. 844, 874 (1997).

116 319 U.S. 141 (1943).

117 *Id.* at 143.

118 *Id.*

119 *Id.* at 147.

Two years later, the Court held in *Thomas v. Collins* that Texas' conviction of a union organizer for making a pro-union speech without first applying for a permit represented a restriction upon the rights of the workers to "hear what he had to say."[120] The Court stated that, along with the right to speak, "[n]ecessarily correlative was the right of the union, its members and officials . . . to discuss with and inform the employees concerning matters involved in their choice."[121] Twenty years after that, in *Lamont v. Postmaster General*, the Court struck down a federal statute requiring the Postmaster General to detain and deliver only upon the addressee's request foreign mail designated "communist political propaganda." [122] The Court reasoned that the act was "unconstitutional because it requires an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the *addressees* [sic] First Amendment rights."[123]

The right to receive information recognized in these early cases has been consistently invoked and upheld in a variety of contexts over the years, including broadcasting,[124] commercial speech,[125] prison correspondence,[126] libraries,[127] the internet,[128] and even the private possession of obscene material.[129] Therefore, that the First Amendment protects the right to receive information is "well-established."[130]

Moreover, it is worth noting that the right to receive information does not necessarily depend on the speaker's right to produce the information. *Mandel* itself establishes that citizens have standing to challenge visa denials on First Amendment grounds even though nonresident aliens themselves possess no

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120 323 U.S. 516, 534 (1945).

121 *Id.*

122 381 U.S. 301 (1965).

123 *Id.* at 305 (emphasis added). Justice Brennan elaborated upon the necessity of including the right to receive information among First Amendment rights in his *Lamont* concurrence:

> [T]he First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. *I think the right to receive publications is such a fundamental right*.

Id. at 308 (Brennan, J., concurring) (citations omitted) (emphasis added).

124 *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

125 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

126 Procunier v. Martinez, 416 U.S. 396 (1974).

127 Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

128 Reno v. ACLU, 521 U.S. 844, 874 (1997).

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

130 Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

right to free speech.[131] This holding is consistent with other First Amendment decisions holding that listeners' rights do not necessarily depend on speakers' free speech rights.[132]

2. *The Free Flow of Ideas*

Recognizing citizens' right to receive information from aliens under the First Amendment also serves to advance the social purposes of that amendment. Conceptualizing the First Amendment guarantee to free speech purely in terms of the individual right to speak, or to confine the discussion strictly to "rights-talk" in general, may ignore an essential characteristic of free speech as the Founders envisioned it. The First Amendment "is not just about a personal right to speak. Instead, what the amendment primarily does is to establish *free speech as a common good*. It identifies speech as a lively thing among us that advances knowledge, politics, and culture to our mutual benefit."[133]

The reason most consistently cited by the Court in listeners' rights cases to justify recognition of a right to receive information has been the fundamental First Amendment purpose of ensuring the "free flow of ideas." Justice Oliver Wendell Holmes first introduced the concept, now revered in First Amendment law, of the "marketplace of ideas":

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[134]

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[131] *Id.*

[132] *See, e.g.*, *Pico*, 457 U.S. at 853. The speaker in this case was the government, which does not possess First Amendment rights.

[133] William Mayton, *"Buying-Up Speech": Active Government and the Terms of the First and Fourteenth Amendments*, 3 WM. & MARY BILL RTS. J. 373, 376–77 (1994).

[134] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The "marketplace of ideas" has been an influential concept in First Amendment law. Recently, the rise of the internet has revealed the growing importance of "information flow" in society. *See generally* Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267 (2003). The Supreme Court has taken pains to protect the flow of information on the internet and "[t]he dramatic expansion of this new marketplace of ideas" partly by using the right to receive information. *See* Reno v. ACLU, 521 U.S. 844, 885 (1997).

To this illustration, Justice Brennan added the crucial role of listeners, or "buyers" in the marketplace of ideas, who receive information: "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[135] Similar sentiments are woven throughout all of the Court's decisions recognizing the right to receive information.[136]

The Court's corporate speech cases have a similar theme. In *First National Bank of Boston v. Bellotti*, Justice Powell, writing for the majority, wrote that the inherent value of speech warrants its protection even when the speaker, in this case a corporation, cannot be said to have a First Amendment "right" to free speech.[137] He asserted that the "Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests."[138]

Moreover, the First Amendment protects citizens' speech the most when "core"[139] political speech is at issue. One of the Framers' major, perhaps dominant, purposes in protecting Free Speech was to prohibit government suppression of critical or embarrassing information through prosecution for "seditious libel."[140] First Amendment jurisprudence reflects this extraordinary regard for core political speech when the government is the object of the speech: "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."[141]

When the government restricts the flow of core political and philosophical information, the principle of "self-governance," one of the social values enshrined in the First Amendment, is compromised.[142] Citizens who do not

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[135] Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

[136] For instance, in *Lamont*, the Court stated its concern that the statute restricted the flow of ideas to the public and that the regime of the Act assailed the "'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment." *Id.* at 307 (majority opinion) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[137] 435 U.S. 765, 771 (1978).

[138] *Id.* at 776.

[139] *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

[140] *Id.* at 723–24 (Douglas, J., concurring).

[141] Mills v. Alabama, 384 U.S. 214, 218 (1966). As a further matter, the First Amendment provides a practically absolute bar against content-based and viewpoint discrimination. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989).

[142] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 27

have access to all available ideas cannot make fully-informed decisions. "It is that mutilation of the thinking process of the community," Alexander Mieklejohn has argued, "against which the First Amendment is directed."[143] Free expression is thus a social good and a sufficient end for society in itself, even apart from the truth-attaining value of any particular piece of speech.[144] Accordingly, when the government acts to exclude aliens on the basis of their speech and ideas alone, it acts against the fundamental social purposes of the First Amendment.

3. Speech in Combination with Action

The *Mandel* Court held that ideological exclusions implicate the First Amendment because they touch both action and speech.[145] That holding comports with the Court's general approach in First Amendment cases concerning "symbolic speech." Like ideological exclusion cases, symbolic speech cases involve speech combined with action. In *O'Brien v. United States*, the Supreme Court laid out a four-part test for evaluating cases in which speech and non-speech elements are combined in a course of conduct.[146] The essence of this "intermediate scrutiny" test is that a sufficiently important governmental interest in regulating non-speech elements can justify incidental

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(1965); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.'" *Bellotti*, 435 U.S. at 777 n.12 (citations omitted).

[143] MEIKLEJOHN, *supra* note 142, at 27 (emphasis omitted). Arguably, the purpose of the First Amendment in protecting socially important political dialogue is heightened in academic settings. There is not a consensus on this idea, but several Supreme Court cases have praised the principle of "academic freedom" as a distinct First Amendment principle. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[144] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 564 (1969). Private ownership of the quintessential "low value" speech, obscenity, was upheld in *Stanley*, where the Court refused to apply a "social value" test for an individual's right to access information. The Court wrote, "[t]his right to receive information and ideas, *regardless of their social worth*, is fundamental to our free society." *Id.* (citation omitted) (emphasis added).

[145] 408 U.S. 753, 764 (1972) ("[W]e cannot realistically say that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement.").

[146] 391 U.S. 367, 377 (1968). The Court articulated the following four-part test:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

limitations on First Amendment freedoms; however, the governmental interest must be "unrelated to the suppression of free expression."[147]

In cases involving both speech and action, the intermediate scrutiny test is usually necessary because "[r]estrictions on free expression are rarely defended on the ground that the state simply didn't like what the defendant was saying."[148] The government will usually refer to:

> some danger beyond the message . . . . The critical question would therefore seem to be whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating . . . or rather would arise even if the defendant's conduct had no communicative significance whatever.[149]

Therefore, ideological exclusion still implicates the First Amendment, even though it involves action in combination with speech.

4. Other First Amendment Principles

Ideological exclusion is also at odds with various other important First Amendment principles. The Executive's extremely broad discretion to bar aliens based on their speech pursuant to section 411 and the REAL ID Act offends the general prohibition against excessive governmental discretion in regulating speech.[150] The sheer breadth of these statutes also contravenes the principle of First Amendment jurisprudence that statutes which are substantially overbroad in the sense that they can be construed as regulating protected speech are unacceptable.[151]

C. Elaboration Upon the Constitutional Reasons for Deference

This section will explain the constitutional arguments in support of the *Mandel* Court's extreme deference to Congress and the executive branch in the ideological exclusion context, even though citizens' First Amendment rights are implicated. The essential problem, as one lower court later stated, is that "*the right to listen, which [Mandel] recognizes, [may] destroy the United*

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147 *Id.*

148 John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496 (1975).

149 *Id.* at 1496–97.

150 Freedman v. Maryland, 380 U.S. 51 (1965).

151 *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973).

States' sovereign power to control entry into its territory."[152] In other words, there are constitutional and practical reasons for allowing the executive and legislative branches to maintain their discretionary power over immigration decisions absent judicial interference. Such reasons remain important and legitimate even when immigration decisions may offend the First Amendment.

1. The Controversial but Valid "Plenary Power" Doctrine

Justice Blackmun, in *Mandel,* justified the Court's extreme deference toward immigration decisions by endorsing the line of cases that have recognized Congress's "plenary power" over immigration and foreign affairs.[153] Since the *Chinese Exclusion Case*[154] of the late nineteenth century, the Court has held that the federal power over immigration "inherent in the notion of sovereignty" allows the federal government great latitude and freedom from judicial scrutiny in this area.[155] The *Chinese Exclusion Case* held that immigration decisions made by the political branches were essentially "conclusive upon the judiciary."[156] In *Fong Yue Ting v. United States*, the Court extended the doctrine to cover the deportation, as well as exclusion, of aliens.[157]

Based on these early decisions, the Court formulated the plenary power doctrine. That doctrine has been used for more than a century to justify remarkably lax judicial review over the exclusion and deportation of aliens. In fact, the Court has gone so far as to declare that "over no conceivable subject is the legislative power more complete."[158] Moreover, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[159]

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[152] Abourezk v. Reagan, 785 F.2d 1043, 1074 (D.C. Cir. 1986) (Bork, J., dissenting) (emphasis added).

[153] *Webster's New Collegiate Dictionary* defines "plenary" as "complete in every respect: absolute, unqualified." WEBSTER'S NEW COLLEGIATE DICTIONARY 882 (1974).

[154] Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[155] *Id.* at 585. *See generally* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 177–205 (1987).

[156] *Chae Chan Ping*, 130 U.S. at 606.

[157] 149 U.S. 698 (1893). "The right of a nation to expel or deport foreigners who have not been naturalized . . . rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit their entrance into the country." *Id.* at 707.

[158] Fiallo v. Bell, 430 U.S. 787, 792 (1977).

[159] Mathews v. Diaz, 426 U.S. 67, 79–80 (1976); *see* Landon v. Plasencia, 459 U.S. 21 (1982).

However, the plenary power doctrine is a judicial doctrine that, while still viable, has been somewhat in decline.[160] It has come under withering scholarly attack[161] and has, according to some, "long been relegated to a sort of constitutional hall of shame."[162] In addition, to a large extent, the *Chinese Exclusion Case,* which gave rise to the doctrine, represents a dark moment in American jurisprudence. As Professor Steven Shapiro explained, "[r]eliance on the *Chinese Exclusion Case* is a bit like reliance on *Dred Scott v. Sandford* or *Plessy v. Ferguson*. Although the Supreme Court has never expressly overruled the *Chinese Exclusion Case*, it represents a discredited page in the country's constitutional history."[163]

While the evolution of the plenary power doctrine is beyond the scope of this Comment, it will suffice to note that, although the doctrine's influence has waned somewhat since its inception in the nineteenth century,[164] it still remains intact, especially in the climate of the war on terrorism.[165] Therefore, despite critics' vociferous arguments to the contrary, it is neither improper nor

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[160] *See generally* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 153–65 (2002).

[161] *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 862 (1987) ("It has no foundation in principle. It is a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects. Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint.").

[162] Peter J. Spiro, *Explaining the End of the Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340 (2002). Spiro describes the plenary power doctrine as "a rights-subverting constitutional anomaly." *Id.* at 341; *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 118–38 (1996). *See generally* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

[163] Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930, 942 (1987).

[164] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678 (2001). The Court struck down the practice of indefinitely detaining deportable aliens who could not be repatriated. While it did so through statutory interpretation, the Court described in noteworthy dicta the plenary power in the immigration context as "subject to important constitutional limitations." *Id.* at 695; *see also* Am.-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989); Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1063 (9th Cir. 1995). In the *American-Arab Anti-Discrimination Committee* case, the district court and the Ninth Circuit Court of Appeals rejected the government's plenary power argument and held, for the first time in American history, that a particular ground for deportation represented an infringement of resident aliens' First Amendment right to free speech. The Ninth Circuit's decision was later overturned on jurisdictional grounds, casting doubt on the substantive decision itself. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999). Still, the trend of these cases suggests a plenary power doctrine that has weakened over time.

[165] *See generally* Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701 (2005).

unexpected that the Court would continue to rely upon the plenary power doctrine as grounds for deferring to Congress in the ideological exclusion context.

2. *The Political Question Doctrine and Executive Power*

Other constitutional justifications for lax judicial scrutiny over ideological exclusions exist as well. Courts have long recognized that many questions related to foreign affairs and national security are nonjusticiable political questions. The Court set out its famous test for political questions in *Baker v. Carr*.[166] In *Baker*, the Court rejected the notion that any issue related to foreign affairs is nonjusticiable.[167] The Court held in the famous *Pentagon Papers* case that the executive branch of government cannot simply ignore the First Amendment's protections on the domestic front in the name of "national security."[168] Moreover, lower courts construing *Mandel* have rejected political question doctrine arguments and held that they do have jurisdiction to hear First Amendment challenges to executive decisions to exclude aliens.[169] Nevertheless, admissibility decisions implicate foreign policy and national security concerns. Thus, while those decisions are not immune from judicial review, they are, perhaps, due less strict judicial review under the political question doctrine.

Moreover, the war on terrorism has generated a remarkable increase in executive assertions of authority over areas that arguably pertain to national security.[170] Certainly, in this time of heightened security concerns, the executive branch is likely to be aggressive as it asserts discretion over the exclusion of suspected terrorism advocates.

3. *Limited Review*

Congress periodically has used its plenary power over immigration to limit judicial review of immigration cases. The AEDPA of 1996[171] and Illegal

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[166] 369 U.S. 186 (1962).

[167] *Id.* at 211.

[168] N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

[169] Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986); Allende v. Schultz, 845 F.2d 1111 (1st Cir. 1988).

[170] *See generally* Jess Bravin, *Judge Alito's View of the Presidency: Expansive Powers*, WALL ST. J., Jan. 5, 2006, at A1 (describing the "Unitary Executive Theory" under which the current Bush Administration has aggressively asserted executive power in the war on terrorism).

[171] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996[172] severely restricted judicial review of removal orders. Some commentators have argued that the lack of judicial review and the use of "secret evidence" in AEDPA and IIRIRA removal cases allowed the government to carry out ideological exclusions even before the recent PATRIOT Act and REAL ID Act provisions became law.[173] In *INS v. St. Cyr*, the Supreme Court refused to uphold all of the 1996 restrictions on judicial review.[174] The Court held that habeus corpus review would be available in the absence of clear congressional intent to the contrary.[175] The Court further held that a congressional limitation on judicial review would be highly suspect under the Constitution if it eliminated habeus review and left no procedure for reviewing constitutional and other questions of law.[176] With the REAL ID Act, Congress responded to the Court's decision in *INS v. St. Cyr* by limiting habeus review of some removal orders.[177] Yet, the REAL ID Act explicitly maintains appellate court review of constitutional claims and other questions of law associated with removal cases.[178]

These congressional limitations on judicial review of certain immigration cases under the AEDPA, IIRIRA, and the REAL ID Act show that Congress continues to maintain its plenary power over immigration and foreign affairs. The *St. Cyr* decision illustrates that Congress' power over immigration is not absolute, especially in relation to constitutional questions. The fact that Congress routinely limits review of immigration decisions, however, shows that the admissibility of aliens is an area in which the courts will likely continue to show great deference to Congress and the executive branch.

D. Summary of the Constitutional Analysis of Ideological Exclusion

The essential problem in the constitutional analysis of ideological exclusion is that, as one lower court stated, "*the right to listen, which [*Mandel*]*

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[172] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 .

[173] *See generally* Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999) (arguing that removal of procedural protections under the AEDPA and the IIRIRA of 1996 has resurrected the plenary power over deportable or excludable aliens and breathed new life into ideological exclusion).

[174] 533 U.S. 289, 314 (2001).

[175] *Id.*

[176] *Id.*

[177] REAL ID Act of 2005, § 106, Pub. L. No. 109-13, Div. B, 119 Stat. 302 (2005).

[178] *Id.*

recognizes, [may] destroy the United States' sovereign power to control entry into its territory."[179] Because of this problem, the *Mandel* Court deferred to Congress and the executive branch on the exclusion issue. It did so despite recognizing that exclusions based on ideological factors clearly implicate citizens' First Amendment right to receive information. As section A of this Part has demonstrated, a straightforward application of First Amendment precedent and principles teaches that government *should not* be in the business of excluding foreign academics and intellectuals based *solely* on ideological reasons. As section B illustrates, however, solid constitutional reasons exist for continuing to defer to the political branches on this issue. Therefore, methods for limiting ideological exclusion that reach beyond First Amendment attacks should be explored.

III. THE LOWER COURTS' LIMITED ROLE IN PREVENTING IDEOLOGICAL EXCLUSIONS

As the constitutional analysis of ideological exclusion in Part II reveals, the courts have a limited role to play in the prevention of ideological exclusions. The lower courts have held that they can hear First Amendment challenges to executive decisions to exclude aliens for ideological reasons,[180] but for the reasons described in the previous Part, any outright constitutional challenge to an ideological exclusion faces an uphill battle. As of this publication, the ACLU lawsuit cited in the introduction, which seeks to enforce its FOIA request for documentation on the exclusion of Tariq Ramadan, Ms. Tellez and others, remains undecided.[181] The lower courts' responses to the ideological exclusions of the 1980s, however, indicate that the lower courts may be able to play a limited role in preventing the executive branch from abusing its discretion to exclude aliens on ideological grounds. The lower courts accomplished this task largely through narrow statutory interpretation.[182]

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[179] Abourezk v. Reagan, 785 F.2d 1043, 1074 (D.C. Cir. 1986).

[180] *See supra* note 170 and accompanying text.

[181] *See supra* notes 13–25 and accompanying text.

[182] Scholars have noted that this type of narrow statutory interpretation is common in plenary power cases. The courts have historically used statutory interpretation to protect the interest of aliens in plenary power cases when protection of their interests on a constitutional level is not possible. *See generally* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). For a recent plenary power case employing constitutional reasoning with a subconstitutional holding, see generally *Zadvydas v. Davis*, 533 U.S. 678 (2001).

A. *Narrow Interpretation of the "Facially Legitimate and Bona Fide" Standard*

In the years following *Mandel* and before the revocation of the ideological provisions of the McCarran-Walter Act in 1990, the lower courts struggled to derive a consistent interpretation of the *Mandel* standard. The courts interpreted *Mandel* as requiring the Government to provide a formal justification for an alien's exclusion when challenged by a citizen asserting constitutional injury.[183] In addition, these courts held that the government's explanation "must be 'facially legitimate and bona fide' not only in the general sense, but also within the context of the specific statutory provision on which the exclusion is based."[184]

Beyond those initial matters, the approaches varied greatly. Some courts interpreted the "facially legitimate and bona fide" standard broadly to justify almost any exercise of executive discretion.[185] *Harvard Law School v. Schultz,* however, represents the opposite extreme and provides a model for possible successful challenges to ideological exclusions.[186] In that case, Professor Alan Dershowitz from Harvard Law School and a Harvard student brought suit to enjoin the Secretary of State from excluding a Palestine Liberation Organization (PLO) member that Harvard had invited to debate Professor Dershowitz on Middle Eastern politics.[187] The Secretary of State admitted that the PLO member was excluded based on his proposed participation in the political debate.[188] Seizing on the Secretary's admission, the court used the "facially legitimate and bona fide standard" to attack the Government's exercise of discretion as a violation of the First Amendment.[189] The court, emphasizing that the Secretary's justification was directly related to the suppression of a political debate with American citizens,[190] held that the

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[183] *See, e.g.*, Burrafato v. United States, 523 F.2d 554, 556 (2d Cir. 1975).

[184] Harvard Law Sch. v. Schultz, 633 F. Supp. 525, 531 (D. Mass. 1986), *vacating as moot*, 852 F.2d 563 (1st Cir. 1986).

[185] *See, e.g.*, NGO Comm. on Disarmament v. Haig, 1982 U.S. Dist. LEXIS 13583 (S.D.N.Y. June 10, 1982). The Court rejected First Amendment objections to the exclusion of 320 people affiliated with the World Peace Council, an organization with ties to the Soviet Union, and refused to question the official's conclusory references to vague foreign policy concerns and the government's assertion that admission "would not be in the public interest of the United States." *Id.* at *7.

[186] 633 F. Supp. 525 (D. Mass. 1986), *vacating as moot*, 852 F.2d 563 (1st Cir. 1986).

[187] *Id.* at 526.

[188] *Id.* at 531.

[189] *Id.*

[190] *Id.*

exclusion was "not facially legitimate because it [was] related to the suppression of protected political discussion."[191]

While the *Schultz* decision represented an ideal outcome for the First Amendment, this approach was highly atypical because it likely conflicted with *Mandel*'s prohibition against looking behind the government's facial justification. *Schultz*, therefore, may have been overturned if it had not been vacated as moot.[192] Then again, *Schultz* may have been upheld; recall that the majority in *Mandel* refused to decide the issue of "[w]hat First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced."[193]

As *Schultz* shows, a court today might at least have the option of treating a justification blatantly and admittedly related to the suppression of speech as not "facially legitimate and bona fide." This approach has the undeniable appeal of being congruous with First Amendment jurisprudence. Probably, however, the government will seldom admit that a denial of admission is directly related to the suppression of speech. Moreover, as the statutory analysis of the PATRIOT Act and the REAL ID Act in the next section reveals, the executive would have no difficulty formulating a facially legitimate and bona fide pretext for exclusion under the current statutory framework because the definition of "terrorist activity" and "terrorist organizations" are overly broad. Even if the Departments of State and Homeland Security had targeted Ms. Tellez because of her speech, for instance, her advocacy of "terrorism" under the current INA definitions would represent a facially legitimate and bona fide pretext under section 411 of the PATRIOT Act, and now, the REAL ID Act. Thus, the *Schultz* approach will most likely be of little use in the current environment.

B. *Other Cases Utilizing Narrow Statutory Interpretation:* Allende *and* Abourezk

The growing consensus at the end of the Cold War that ideological exclusion was unacceptable and probably contrary to the First Amendment emboldened some courts in the 1980s.[194] In *Allende v. Schultz*, for example, the government sought to exclude the widow of former Chilean president

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191 *Id.*

192 CHARLES GORDON ET AL., *supra* note 44, § 9.07.

193 *See supra* note 110.

194 *See supra* notes 57–71 and accompanying text.

Salvador Allende because of her membership in the World Peace Council and other communist-affiliated organizations and, specifically, because of her plan to give certain speeches in the United States.[195] The State Department considered excluding Mrs. Allende based on her association with communist organizations under subsection 28 of the McCarran-Walter Act, but the McGovern Amendment controlled subsection 28, therefore by requiring a waiver of ineligibility or, alternatively, a specific finding that Mrs. Allende's entry would compromise national security.[196] The State Department, therefore, attempted to circumvent the McGovern amendment and exclude Mrs. Allende under subsection 27, which provided the executive with discretion to exclude aliens whom consular officers or the Attorney General had reason to believe sought to enter the United States to engage in activities that would harm the public interest.[197]

The circuit court held that Mrs. Allende could not be excluded under subsection 27 without a showing that the State Department had reason to believe that she intended to engage in specific activities prejudicial to U.S. foreign policy.[198] The court also held that mere entry into the country could not represent a prejudicial activity under subsection 27.[199] Significantly, the court asserted that it was protecting Congress' intent by restricting the executive's discretion to exclude aliens for ideological reasons.[200]

Abourezk v. Reagan achieved a similar outcome.[201] That case involved the attempted exclusion of Tomas Borge, the Interior Minister of Nicaragua, who had been invited by a group of citizens, including U.S. Congressmen, and the attempted exclusion of Nino Pasti, a former Italian general and a proponent of nuclear disarmament.[202] The court held that the McGovern Amendment demanded that, under the statutory scheme, an alien could be excluded only for a reason *independent* of the alien's membership or affiliation with a proscribed organization.[203]

[195] 845 F.2d 1111, 1112 (1st Cir. 1988).
[196] *Id.* at 1113.
[197] *Id.*
[198] *Id.* at 1116.
[199] *Id.*
[200] *Id.* at 1119.
[201] 785 F.2d 1043 (D.C. Cir. 1986).
[202] *Id.* at 1048.
[203] *Id.*

Thus, the courts in the late-1980s, before the repeal of the ideological exclusion provisions, showed a tendency to apply statutory analysis to eliminate at least the more egregious cases of ideological exclusion that were still taking place under the guise of national security or vague foreign policy justifications. These decisions were not inevitable under the *Mandel* standard, but *Mandel* provided the lower courts with enough leeway to protect citizens' rights using statutory analysis.[204] Given the current statutory provisions allowing ideological exclusions to take place, however, it is unlikely that a court will have an opportunity to prevent abuse through the kind of narrow statutory interpretation described above. The next Part will make this truth even more apparent.

IV. Statutory Analysis of Today's Ideological Exclusion Provisions and Suggestions for Legislative Remedies to Prevent Abuses

This Part will more closely analyze the provisions of the PATRIOT Act and the REAL ID Act that give the executive branch the discretion to exclude aliens on ideological grounds. This Part will also suggest a possible legislative remedy that may prevent these provisions from being used as the basis for blatant ideological exclusions.

A. Today's "Foreign Policy" Grounds for Exclusion are Content-Neutral

It is important to note first that, under today's statutory scheme, the executive branch cannot exclude aliens for vague reasons of "foreign policy" as the Reagan administration did under subsection 27 of the McCarran-Walter Act.[205] The old subsection 27 stated that aliens who "the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States were inadmissible.[206] Today's provisions on the "foreign policy" grounds for inadmissibility, which are analogous to the old subsection 27, do not provide the same broad discretion to the executive that resulted in abusive exclusions like that of Nino Pasti. In today's statute, officials of foreign governments are not inadmissible "solely because of the alien's past, current, or expected beliefs, statements, or

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[204] *See supra* notes 101–10 and accompanying text for a discussion of *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

[205] *See supra* notes 196–205 and accompanying text.

[206] 8 U.S.C.S. § 1182(a)(3)(C)(i) (2005).

associations, if such beliefs, statements, or associations would be lawful within the United States."[207] All other aliens subject to inadmissibility for "foreign policy" reasons cannot be excluded for speech, beliefs, or associations unless the Secretary of State personally determines that the alien's admission would compromise a "compelling United States foreign policy interest."[208] Therefore, one method of ideological exclusions utilized under the McCarran-Walter Act, that of "foreign policy" exclusions, has not been restored to the INA by the PATRIOT Act or the REAL ID Act.

B. *Section 411 of the PATRIOT Act Did Not Target Speech for Its Own Sake, But It Provided the Executive the Discretion to Do So*

As explained in Part I, section 411 of the PATRIOT Act authorized exclusion of any alien who has used a "position of prominence within any country to *endorse or espouse* terrorist activity, or to *persuade others to support* terrorist activity or a terrorist organization."[209] It also excluded aliens who were representatives of "political, social, or other similar group[s] whose public endorsement of acts of terrorist activity" the Secretary of State determines, in his discretion, could undermine the country's efforts to combat terrorism.[210] In this sense, section 411 was somewhat analogous to subsection 28 of McCarran-Walter, which excluded proponents of communism.[211] Section 411, however, appears to be more narrowly tailored toward excluding actual security threats than subsection 28 or the REAL ID Act.

The State Department's *Foreign Affairs Manual* (*FAM*) reveals how the policy of excluding advocates of terrorism works in practice. The *FAM* no longer instructs, as it did before the PATRIOT Act, that advocating terrorism through oral or written statements is usually not a sufficient ground for finding inadmissibility, especially if the advocacy at issue is speech that would be protected in the United States.[212] At the time that section 411 was in force, the *FAM* instructed field officers that advocacy of terrorism sometimes, but not always, rendered an alien automatically excludable.[213]

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[207] § 1182(a)(3)(C)(ii).

[208] § 1182(a)(3)(C)(iii).

[209] § 1182(a)(3)(B)(VI) (emphasis added).

[210] § 1182(a)(3)(B)(IV)(bb) (emphasis added).

[211] *See supra* notes 38–40.

[212] 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 40.32 n.6.7(b) (cited in CHARLES GORDON ET AL., *supra* note 45, § 63.04 n.77 (2004)).

[213] 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 40.32 n.6.1 (2005), *available at* http://foia.state.gov/REGS/fams.asp?level=2&id=10&fam=0.

According to the *FAM* (before passage of the REAL ID Act), there were only a few ways in which an individual's advocacy of terrorism could render him inadmissible under the INA as amended by the PATRIOT Act.[214] The first way had to do with "incitement" of terrorist activity.[215] The second involves "public endorsement" of terrorist activity, as per section 411 of the PATRIOT Act.[216] It states that an alien may be excludable if the alien uses his position of prominence within any country to endorse or espouse terrorist activity or to persuade others to support terrorist activity or a terrorist organization "in a way that the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities."[217] The provision does not require a finding of specific intent and is "directed at irresponsible expressions of opinion by prominent aliens who are able to influence the actions of others."[218] The manual offers as an example "a community leader who publicly praised Al Qaida [sic] in the wake of a terrorist attack for which it claimed responsibility, and who urged the community not to cooperate with efforts by law enforcement officials to bring those responsible to justice."[219]

Finally, the *FAM* directed that a field officer cannot find an alien inadmissible under this provision without the necessary determination by the Secretary of State.[220] Accordingly, if an officer believed that an alien in a position of prominence may be inadmissible under this provision, he was to report all of the relevant facts to the State Department and request a determination of whether the alien's activities undermine U.S. efforts to reduce or eliminate terrorist activities.[221] Referral to the State Department in such

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[214] *Id.*

[215] *Id.* at n.6.1(a)–(b). "Incitement" is beyond the scope of this Comment because it involves more than mere speech. "To incite" is defined in the FAM as "to urge to action; to provoke and urge on; or to arouse; it connotes speech that is not merely an expression of views but directs or induces action, typically in a volatile situation." *Id.* The FAM states that, normally, speech will not rise to the level of "inciting" unless there is a clear link between the speech and an actual effort to undertake the terrorist activity. *Id.* Incitement, therefore, does not raise the same First Amendment issues as does mere advocacy. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969). Under the INA, incitement constitutes "engaging in terrorist activity," which is considered to be more directly supportive of terrorism than mere abstract advocacy. INA § 212(a)(3)(B)(i), 8 U.S.C.S. § 1182(a)(3)(B)(i) (2005). The REAL ID Act has not changed the rules covering inadmissibility for incitement. *See* CRS REPORT, *supra* note 80, at 26.

[216] 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 40.32 n.6.2(3) (2005).

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

cases ensured, according to the *FAM*, that "relevant foreign policy and national security concerns are considered."[222]

Thus, a plain reading of the State Department directives implementing section 411 of the PATRIOT Act reveals that section 411 appeared, at least on its face, to have been somewhat well-tailored to exclude only those individuals who posed actual terrorist threats to the United States. The above State Department instructions make clear that (1) the "endorsement" provisions of the PATRIOT Act were aimed at public expressions of opinion by individuals in positions to influence the acts of others; and (2) before excluding such alien individuals for abstract advocacy, the Secretary of State had to determine that their statements would undermine the United States' effort to combat terrorism. That determination would turn on relevant foreign policy and national security concerns. Relevant foreign policy and national security concerns were considered by the Secretary of State in deciding whether or not to actually exclude the individual.

Yet, those provisions regarding advocacy of terrorism became overbroad and dangerous when combined with the broad definitions of "terrorist activity" and "terrorist organizations" under the INA at the time, as explained in Part I.[223] The underlying problem with section 411 of the PATRIOT Act, therefore, was that, in conjunction with the overly broad definitions of terrorist activity and terrorist organizations, it allowed the executive branch to exercise its discretion to exclude advocates of terrorism in an arbitrary, capricious, and discriminatory manner.[224]

C. The REAL ID Act Worsens Problems of Section 411, Possibly Leading to a Resumption of Exclusions Similar to Those under McCarran-Walter.

The REAL ID Act gives the executive branch even greater discretion than it had under the PATRIOT Act to exclude aliens for ideological reasons, and at the same time, it expands the already broad definition of "terrorist organizations."[225] Moreover, the REAL ID Act removes a very important safeguard; it eliminates the Secretary of State's need to determine that an individual's advocacy threatens U.S. efforts to reduce terrorism.[226]

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222 *Id.*
223 *See supra* notes 83–94 and accompanying text.
224 *Id.*
225 REAL ID Act § 103(c); *see also supra* notes 83–93 and accompanying text.
226 REAL ID Act § 103.

The endorsement of terrorism provisions of the PATRIOT Act were aimed at public expressions of opinion by individuals in a position to influence the acts of others, and the Secretary of State had to determine that the alien's statements would undermine U.S. efforts to combat terrorism before the alien could be excluded for abstract advocacy. The endorsement provisions of the REAL ID Act, in contrast, target at any endorsement or espousal of terrorism. It does not matter if the alien is in a position to influence the actions of others, as was necessary under section 411, and most importantly, the Secretary of State need not determine that the alien's expressions would undermine U.S. efforts to combat terrorism. In fact, the Secretary of State could hold the opinion that the alien's speech definitely does not in any way undermine U.S. efforts to combat terrorism, yet the alien would still be inadmissible under the REAL ID Act. In addition, the Secretary of State no longer needs to weigh "relevant foreign policy and national security interests" for the exclusion to take place. An alien found inadmissible for advocating terrorism under the REAL ID Act will be excluded automatically, regardless of the actual danger that his supposed advocacy poses. To prevent the exclusion of a nondangerous individual, the Secretary of State or the Secretary of Homeland Security in consultation with the Attorney General must choose to exercise a voluntary waiver of inadmissibility.[227]

D. One Possible Statutory Remedy: A Waiver Scheme

When combined with the broad definitions of "terrorist activity" in the INA and "terrorist organizations" in the REAL ID Act, the REAL ID Act's endorsement provisions enable the executive branch to exclude aliens in an arbitrary, capricious, and discriminatory manner. Accordingly, the executive branch has the de facto power to exclude aliens based solely on ideology. Congress therefore should consider different options for restricting the executive branch's exclusionary discretion. Of course, any restriction of this discretion would have to be carefully balanced against the executive's need to exclude truly dangerous individuals on the basis of available evidence. As one option, Congress could consider drafting a more accurate definition of terrorism, but crafting a more precise verbal formulation of an elusive concept like "terrorism" may be exceedingly difficult. Moreover, with the REAL ID Act Congress has shown its preference for expanding, rather than contracting the definition of terrorism in the INA, probably for good reasons related to the

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[227] § 104.

need for excluding proponents of legitimate terrorist organizations that have not yet been designated.

A more feasible approach for avoiding unnecessary ideological exclusions would be to reinstate section 411's requirement that the Secretary of State specifically assess an alien's dangerousness. As a further step, Congress could enact a modest waiver scheme for nondangerous individuals modeled on the McGovern Amendment. Of course, this approach flies in the face of Congress' recent elimination of the Secretary of State's need to determine dangerousness. No matter how unlikely the change in the current political climate, the fact remains that some kind of waiver scheme is probably the most effective device for preventing unnecessary and abusive ideological exclusions.

As explained in Part I, Congress' first major attempt to rein in the abusive ideological exclusions taking place under the McCarran-Walter Act was the McGovern Amendment of 1977.[228] The McGovern Amendment turned the voluntary waiver framework which was already in place upside down. Instead of simply allowing the Secretary of State the discretion to issue voluntary waivers for nondangerous individuals found inadmissible, the McGovern Amendment required the Secretary of State to recommend a waiver of ineligibility to the Attorney General for any alien denied a visa due to subsection 28 of the McCarran-Walter Act unless the Secretary certified to Congress that a waiver would be detrimental to the security interests of the United States.[229]

Section 411's requirement of a determination by the Secretary of State that an alien's statements represented a threat to the U.S. war on terrorism operated in a similar, though more modest, manner as the McGovern Amendment did. Both provisions assumed that an alien's statements in favor of certain ideas may or may not indicate a threat to the United States. Thus, aliens were excludable for their speech under both provisions if they represented a threat, but aliens were not excluded simply for speech without some higher threshold showing of danger. The Secretary of State had to certify, under both approaches, that the alien's entry was actually a threat to the United States' interests. Thus, while the McGovern Amendment's verbal formulation

[228] *See supra* notes 47–49 and accompanying text.
[229] *Id.*

established a higher standard—requiring a "detriment" to U.S. "security interests"[230]—than section 411, the premises of the two were similar.

Congress, therefore, should at least consider reinstating section 411's requirement that the Secretary of State determine dangerousness. Congress could also consider a waiver scheme for those who fall under the inadmissibility provisions of the current INA, as amended by the REAL ID Act. Such a waiver framework could be modeled on the McGovern Amendment, but would not necessarily need to set the same high standard to protect against wanton ideological exclusions.

The case of Dora Maria Tellez provides the perfect example of how such a waiver scheme might work. Because she took part in the overthrow of the Somoza regime in the 1970s, Professor Tellez undoubtedly participated in past terrorist activity and has been a member of a terrorist organization under the INA's definition of those terms. She personally participated in the Sandinista takeover of the Nicaraguan parliament in which over two thousand people were held hostage.[231] Moreover, she has endorsed and espoused her activity ever since, which falls under the definition of endorsement of terrorism under section 411 of the PATRIOT Act and the REAL ID Act. Her behavior, however, does not make Ms. Tellez a terrorist threat to the United States today. The civil war between Somoza and the Sandinistas, and later between the Sandinistas and the Contras, involved a great deal of political violence on both sides. But, advocacy of Latin American political violence that took place in the 1970s and 1980s in no sense would make Ms. Tellez a "terrorist" in the common usage of that word today.

Under the hypothetical waiver scheme described above, it is very difficult to imagine that the Secretary of State would certify to Congress that Ms. Tellez's past revolutionary activity in a tiny Central American country over twenty-five years ago makes her a terrorist threat to the United States today. The Secretary of State, if faced with the choice of granting Ms. Tellez a waiver of inadmissibility or certifying to Congress that Ms. Tellez represents a terrorist threat to the United States, would probably choose to waive inadmissibility. In this way, a waiver scheme would prevent the suppression of legitimate political dialogue by making the exclusion of aliens based simply upon their ideas less likely, while still allowing the executive to deny entry to dangerous individuals in its good-faith discretion.

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[230] *Id.*

[231] *See* Hendershott, *supra* note 20, and accompanying text.

CONCLUSION

The question of whether the United States has actually resumed a policy of ideological exclusion is by no means settled. The denial of visas to Tariq Ramadan, Dora Maria Tellez, and other prominent foreign individuals under questionable circumstances certainly raises the possibility that the current administration is using provisions of the INA intended to bar actual terrorists as a pretext for targeting critics of U.S. policy. After all, State and Homeland Security Department officials did cite section 411 of the PATRIOT Act as the legal basis for Ramadan and Tellez's exclusion.[232] Ramadan and Tellez, however, perhaps could have been excluded even without reference to the ideological exclusion provisions of section 411 of the PATRIOT Act. Ramadan may have had ties to actual terrorists.[233] Tellez undoubtedly had participated a long time ago in what can be characterized as "terrorist acts."[234] It is conceivable, therefore, that these professors were excluded more for their actions than for their speech and that the fear of renewed ideological exclusion is overblown.

Still, section 411 of the PATRIOT Act and now the REAL ID Act, in light of the recent exclusion of Ramadan and Tellez among others, raises the real possibility that the executive branch may exercise its broad discretion to exclude aliens on the basis of ideological criteria in an arbitrary, capricious, and discriminatory manner; it could target critics of U.S. policy or other individuals with whom it disagrees. The sheer volume of individuals and organizations falling within the extremely broad definitions of "terrorist organizations" and "terrorist activity"[235] almost certainly must tempt the executive to abuse its discretion.

The exclusion of Dora Maria Tellez is a good example of the danger posed by these new grounds for inadmissibility. Thousands of individuals on both sides of the Nicaraguan conflict of the 1970s and 1980s used and advocated violence then. By what criteria was Ms. Tellez selected and singled out for a visa denial? She likely was selected because of her political ideology and criticism of United States' policies. It does seem a bit coincidental that Ms. Tellez, Fernando Rodriquez, and the Cuban officials excluded by the current administration in Washington are all devotees of left-wing political ideologies.

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232 *See supra* notes 10 and 20 and accompanying text.
233 *See supra* note 10.
234 *See supra* note 20.
235 *See generally supra* notes 83–93 and accompanying text.

As commentators have pointed out, there are many other former guerilla and opposition leaders who have advocated what would easily fall under the definition of "terrorist activity" in the PATRIOT Act that have been welcomed to the United States.[236] For instance, Jalal Talabani, the former guerilla leader of Kurdish resistance groups in Saddam Hussein's Iraq, was recently granted a visa and given a warm welcome in the nation's capital.[237] Talabani's past behavior would probably fall under the definition of "terrorist activity" and his former resistance movement could easily be called a "terrorist organization" within the REAL ID definition. Nelson Mandela is another example of one whose former activities fall under the current definitions of terrorism and terrorism advocacy in the INA, especially as amended by the REAL ID Act.[238]

Part II.B of this Comment demonstrated that targeting individuals based on their political ideology implicates citizens' First Amendment right to receive information and offends the basic principle of the free flow of ideas. Because there are legitimate constitutional and practical reasons for the courts' continued deference to Congress and the executive on this issue, as described in Part II.C, other methods for limiting ideological exclusions must be explored. In the current political environment, perhaps the most that can be hoped for is executive restraint. Congress, however, should consider a waiver scheme for nondangerous individuals as proposed in Part IV.C, or at the very least, should consider reinstating the provision in section 411 of the PATRIOT Act, which required the Secretary of State to determine that an alien's statements posed an actual threat to the United States' efforts to combat terrorism before barring entry based on speech.

Even the most ardent proponents of openly and actively resuming ideological exclusion as U.S. policy, of which there are quite few, admit that "[i]deological exclusion is unlikely ever to be a large category in barring aliens from the United States. Its impact would probably continue to fall mostly on those seeking temporary entry rather than permanent stay."[239] Ideological exclusion provisions tend to be invoked arbitrarily and in a discriminatory

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236 *See* Joanne Mariner, *Playing Politics with Visas*, FINDLAW.COM, Mar. 14, 2005, http://writ.news.findlaw.com/mariner/20050314.html.

237 *Id.*

238 Mandela, in fact, learned from the U.S. government in 2003 that he fell within the definition of "terrorist" but that the government would voluntarily remove him from the State Department's list of political undesirables for a period of ten years. *See* Charlene Smith, *Mandela's Name Comes Off U.S. Terror List*, IOL, Aug. 10, 2003, http://www.int.iol.co.za/index.php?click_id=3&art_id=ct20030810102700522T600578&set_id=1.

239 Edwards, *supra* note 29, at 20.

manner against a small number of nondangerous individuals. Many of these individuals have been applying for a temporary, nonimmigrant visa for a specific purpose, such as teaching a university class or giving a speech, and have been denied. Other INA provisions are usually more than sufficient for denying admission to individuals who truly represent a threat to the United States. Actual terrorists and those who intend to commit terrorist acts,[240] including those who have incited or intend to incite[241] terrorism, are barred without reference to ideological exclusion provisions.

The abusiveness of ideological exclusions under the McCarran-Walter Act, moreover, should not be ignored. Targeted in the cases of ideological exclusion under McCarran-Walter were foreign intellectuals, scholars, authors, and other prominent individuals advocating ideas that were at odds with the sitting U.S. administration. The list of those actually excluded over the years included major cultural personalities such as Nobel Laureates Gabriela Garcia Marquez and Pablo Neruda; the prominent British novelist, Graham Greene; the French actor, Yves Montand; and the Columbian journalist, Patricia Lara.[242] The consensus that developed at the end of the Cold War that ideological exclusion suppressed free speech also should not be ignored.[243] In repealing the ideological exclusion grounds of the McCarran-Walter Act, the House of Representatives stated its belief that ideological exclusion is "anathema to the principles on which this nation was founded."[244] The government's policy in this area of ideological exclusion should therefore be watched carefully to ensure that the abuses of the past are not renewed under the guise of the war on terrorism.

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[240] 8 U.S.C.S. § 1182(a)(3)(B)(iii)–(iv) (2005).

[241] § 1182(a)(3)(B)(iv)(I).

[242] For a timeline of ideological exclusions of prominent individuals from the 1950s to the present, see ACLU, *Defending the Free Trade in Ideas*, http://www.aclu.org/safefree/general/21211prs20051110.html (last visited Feb. 10, 2006).

[243] *See supra* notes 57–71 and accompanying text.

[244] H.R. REP. NO. 101-955, at 128–131 (1990); *see supra* note 71.

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