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Reconciling The Power To Bar Or Expel Aliens on Political Grounds with Fairness and the Freedoms of Speech and Association: An Analysis of Recent Legislative Proposals

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Abstract

This Article specifically analyzes the legislative proposals and makes recommendations to ensure that the bills accomplish their stated objective- limiting the Executive's discretion arbitrarily to bar and to expel foreigners on political grounds.

RECONCILING THE POWER TO BAR OR EXPEL ALIENS ON POLITICAL GROUNDS WITH FAIRNESS AND THE FREEDOMS OF SPEECH AND ASSOCIATION: AN ANALYSIS OF RECENT LEGISLATIVE PROPOSALS

*Arthur C. Helton**

INTRODUCTION

In recent years, the Administration has used political grounds to deny visas, to exclude, or to seek to expel prominent artistic, journalistic, and political figures.¹ Victims of this policy have included Hortensia de Allende, widow of slain Chilean leader Salvador Allende;² Dario Fo, an Italian playwright;³ Nino Pasti, a former member of the Italian Senate and general in the Italian armed forces;⁴ Margaret Randall, an expatriate author and professor at the University of New Mexico;⁵ Choichiro Yatani, a Japanese scholar at the State University of New York at Stony Brook, who was detained in New York for forty-four days after attending an academic conference in Amsterdam;⁶ and Patricia Lara, a Colombian journalist who was detained and excluded without notice of reasons after coming to attend the prestigious Maria Moore Cabot dinner at the Columbia University Graduate School of Journalism.⁷

These and other exercises by the Executive of power under the political exclusion and deportation grounds have in-

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1. LAWYERS COMM. FOR HUMAN RIGHTS & THE WATCH COMMS., *THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1985*, at 152-54 (1986) [hereinafter *HUMAN RIGHTS IN 1985*]; see also Committee on Immigration and Nationality Law of the Ass'n of the Bar of the City of New York, *Visa Denials on Ideological Grounds: An Update*, 8 SETON HALL LEG. J. 249 (1985).

2. *HUMAN RIGHTS IN 1985*, *supra* note 1, at 152-54.

3. *Id.*

4. *Id.*

5. THE WATCH COMMS. & LAWYERS COMM. FOR HUMAN RIGHTS, *THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1986*, at 177-78 (1987).

6. *Id.*

7. *Id.*

spired legal challenges⁸ and legislative proposals for reform.⁹ This Article focuses on recent bills introduced in Congress to curtail the Executive's authority in this area. The current statutory framework is described, as is the tension the statute creates with principles of fairness and the freedoms of speech and association. This Article specifically analyzes the legislative proposals and makes recommendations to ensure that the bills accomplish their stated objective—limiting the Executive's discretion arbitrarily to bar and to expel foreigners on political grounds.

I. THE STATUTORY FRAMEWORK

In 1903, two years after the assassination of President McKinley, Congress enacted a statutory provision prohibiting the entry of anarchists to the United States.¹⁰ In succeeding years, particularly during times of war or national emergency, Congress enacted numerous provisions that mandate exclusion or deportation of aliens considered "subversive" because of political beliefs or activities.¹¹

The current statutory framework, known as the McCarran-Walter Act, ("Act" or "McCarran-Walter Act") dates from 1952.¹² One class of provisions bars aliens from receiving visas or being admitted to the United States when there is evidence that they will engage in activities inimical to the public interest;¹³ have been members of or affiliated with certain groups, held certain beliefs, or engaged in certain advocacy

8. See Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930, 930 n.6 (1987).

9. *Id.* at 937.

10. E. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 423-27 (1981); see Act of Mar. 3, 1903, ch. 1012, § 38, 32 Stat. 1213, 1221 (superseded).

11. See generally W. PRESTON JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933 (1963).

12. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C.A. §§ 1101-1184, 1185-1353a, 1353d-1525, 1552 (West 1970 & Supp. 1988)).

13. The statute provides a bar for [a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States. . . . Immigration and Nationality Act § 212(a)(27), 8 U.S.C. § 1182(a)(27) (1982).

proscribed by law;¹⁴ or will engage in activities threatening to

14. Such political grounds appear in the statute as:

[a]liens who are, or at any time have been, members of any of the following classes:

(A) Aliens who are anarchists;

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

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

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

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

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or pub-

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

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

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

national security.¹⁵ These exclusionary proscriptions apply equally to aliens who wish either to visit temporarily or to immigrate permanently to the United States.¹⁶ Another class of provisions renders aliens who have "entered"¹⁷ the United States amenable to expulsion on similar political grounds.¹⁸

tailed report to the Congress in the case of each alien who is or shall be admitted into the United States under (ii) of this subparagraph;

Id. § 212(a)(28), 8 U.S.C. § 1182(a)(28) (1982). Although the reference is retained in the codification of § 1182(a)(28)(E), 50 U.S.C. § 786 was repealed by Act of Jan. 2, 1968, Pub. L. No. 90-237, sec. 5, 81 Stat. 765, 766.

15. Exclusion on national security grounds applies to:

[a]liens with respect to whom the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security, (B) engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States, by force, violence, or other unconstitutional means, or (C) join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under section 786 of Title 50. . . .

Immigration and Nationality Act § 212(a)(29), 8 U.S.C. § 1182(a)(29) (1982). Although the reference is retained in the codification of § 1182(a)(29), 50 U.S.C. § 786 was repealed by Act of Jan. 2, 1968, Pub. L. No. 90-237, sec. 5, 81 Stat. 765, 766.

16. Immigration and Nationality Act § 221(g), 8 U.S.C. § 1201(g) (1982). *See id.* § 212(a), 8 U.S.C. § 1182(a) (1982 & Supp. IV 1986) (defining classes of aliens ineligible to receive visas); *id.* § 101(a), 8 U.S.C. § 1101(a)(15) (1982 & Supp. IV 1986) (defining the various nonimmigrant classes); *id.* § 245(a)(2), 8 U.S.C. § 1255(a)(2) (1982) (providing that nonimmigrants may adjust their status to that of permanent residents as long as the alien is "eligible to receive an immigrant visa and is admissible to the United States for permanent residence").

17. "Entry" is defined as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." *Id.* § 101(a)(13), 8 U.S.C. § 1101(13) (1982). The concept of "entry" defines which aliens are entitled to "deportation" proceedings before being "expelled" from the United States, in contrast to those entitled to "exclusion" proceedings before being barred from admittance to the United States. *In re Phelisa*, 551 F. Supp. 960 (E.D.N.Y. 1982); *see Landon v. Plasencia*, 459 U.S. 22, 28-29 (1982); *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

18. Any alien is subject to deportation who:

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

- (A) Aliens who are anarchists;
- (B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;
- (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Com-

The criteria for the denial of visas to nonimmigrants and

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

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

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

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of

their exclusion from admission were liberalized in 1977 through the enactment of a procedural device, the McGovern Amendment, which provides for a presumptive waiver of inadmissibility in certain cases based on proscribed affiliation or membership.¹⁹ In 1987, anticipating further reform efforts,

any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

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

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 1182(a) of this title, unless the Attorney General is satisfied, in the case of any alien within category (C) of paragraph (29) of section 1182(a) of this title, that such alien did not have knowledge or reason to believe at the time such alien became a member of, affiliated with, or participated in the activities of the organization (and did not thereafter and prior to the date upon which such organization was registered or required to be registered under section 786 of Title 50, have such knowledge or reason to believe) that such organization was a Communist organization

Immigration and Nationality Act § 241(a), 8 U.S.C. § 1251(a) (1982). Although the reference is retained in the codification of §§ 1251(a)(6)(E) and 1251(a)(7), 50 U.S.C. § 786 was repealed by Act of Jan. 2, 1968, Pub. L. No. 90-237, sec. 5, 81 Stat. 765, 766.

19. The McGovern Amendment as enacted provides:

For purposes of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for purposes of encouraging other signatory countries to comply with those provisions, the Secretary of State should, within 30 days of receiving an application for a nonimmigrant visa by any alien who is excludable from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such alien, unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate. Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludable [sic] for reasons other than membership in or affiliation with a proscribed organization.

Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, sec. 112, § 21, 91 Stat. 844, 848 (1977) (codified as amended at 22 U.S.C. § 2691(a) (1982)).

Congress added a provision that prohibits until March 1, 1989, visa denial, exclusion, or deportation because of "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."²⁰

The McGovern Amendment was added as § 21 to Act of Aug. 1, 1956, ch. 841, 70 Stat. 890. The 1956 act was amended further by the Department of State Authorization Act, Fiscal Years 1980 and 1981, Pub. L. No. 96-60, sec. 109, 93 Stat. 395, 397-98 (1979) (codified at 22 U.S.C. § 2691(b)-(d) (1982)), which provides in pertinent part:

(b) This section does not apply to representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state.

(c) This section does not apply with respect to any alien who is a member, officer, official, representative, or spokesman of the Palestine Liberation Organization.

(d) The Secretary of State may refuse to recommend a waiver for aliens from signatory countries which are not in substantial compliance with the provisions of the Helsinki Final Act, particularly the human rights and humanitarian affairs provisions.

22 U.S.C. § 2691(b)-(d) (1982).

20. Section 901 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, provides:

(a) In General.—Notwithstanding any other provision of law, no alien may be denied a visa or excluded from admission into the United States, subject to restrictions or conditions on entry into the United States, or subject to deportation 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.

(b) Construction Regarding Excludable Aliens.—Nothing in this section shall be construed as affecting the existing authority of the executive branch to deport, to deny issuance of a visa to, or to deny admission to the United States of, any alien—

(1) for reasons of foreign policy or national security, except that such deportation or denial may not be based on past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States;

(2) who a consular official or the Attorney General knows or has reasonable ground to believe has engaged, in an individual capacity or as a member of an organization, in a terrorist activity or is likely to engage after entry in a terrorist activity; or

(3) who seeks to enter in an official capacity as a representative of a purported labor organization in a country where such organizations are in fact instruments of a totalitarian state.

In addition, nothing in subsection (a) shall be construed as applying to an alien who is described in section 212(a)(33) of the Immigration and Nationality Act (relating to those who assisted in the Nazi persecutions), to an alien described in the last sentence of section 101(a)(42) of such Act (relating to

The procedures for exclusion²¹ (as well as the issuance of visas²² or deportation²³) are the same for aliens charged under the political grounds as under the other substantive provisions of the Act, with one important exception. Arriving aliens charged under the political grounds are subject to exclusion without a hearing if the charge is based on "information of a confidential nature, the disclosure of which . . . would be prejudicial to the public interest, safety, or security."²⁴

those assisting in other persecutions) who is seeking the benefits of section 207, 208, 243(h)(1), or 245A of such Act (relating to admission as a refugee, asylum, withholding of deportation, and legalization), or to an alien who is described in section 21(c) of the State Department Basic Authorities Act of 1956. In paragraph (2), the term "terrorist activity" means the organizing, abetting, or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily harm to individuals not taking part in armed hostilities.

(c) Construction Regarding Standing To Sue.—Nothing in this section shall be construed as affecting standing in any Federal court or in any administrative proceeding.

(d) Effective Period.—Subsection (a) shall only apply to—

(1) applications for visas submitted during 1988;

(2) admissions sought after December 31, 1987, and before March 1, 1989; and

(3) deportations based on activities occurring during 1988 or for which deportation proceedings (including judicial review with respect to such a proceeding) are pending at any time during 1988.

Pub. L. No. 100-204, sec. 901, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1331, 1399-1400, *reprinted in* 8 U.S.C.A. § 1182 note, at 122-23 (West Supp. 1988). The one-year sunset provision was included because of the "expected expeditious consideration of comprehensive legislation revising . . . [the political] grounds by the Committees on Judiciary." HOUSE CONF. REP. No. 475, 100th Cong., 1st Sess. 165, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2370, 2426.

21. Immigration and Nationality Act §§ 235-237, 8 U.S.C. §§ 1225-1227 (1982).

22. *Id.* §§ 104(a), 204, 8 U.S.C. §§ 1104(a), 1154 (1982 & Supp. IV 1986).

23. *Id.* § 242, 8 U.S.C. § 1252 (1982 & Supp. IV 1986).

24. *Id.* § 235(c), 8 U.S.C. § 1225(c) (1982). This section provides in its full text

that:

[a]ny alien (including an alien crewman) who may appear to the examining immigration officer or to the special inquiry officer during the examination before either of such officers to be excludable under paragraphs (27), (28), or (29) of section 1182(a) of this title shall be temporarily excluded, and no further inquiry by a special inquiry officer shall be conducted until after the case is reported to the Attorney General together with any such written statement and accompanying information, if any, as the alien or his representative may desire to submit in connection therewith and such an inquiry or further inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation

II. *THE TENSION BETWEEN THE STATUTE AND FREEDOMS OF SPEECH AND ASSOCIATION*

No principle in the immigration area is more trite than the notion that an unadmitted nonresident alien has no right under the Constitution to enter this country. Over ninety years ago, the Supreme Court observed:

The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.²⁵

This history was described eloquently by Justice Frankfurter in *Galvan v. Press*,²⁶ a deportation case that considered, "were we writing on a clean slate," whether due process places some limitation on congressional power in the immigration area.²⁷ He stated:

But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. . . .

We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our

with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer. Nothing in this subsection shall be regarded as requiring an inquiry before a special inquiry officer in the case of an alien crewman.

Id.

25. *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895).

26. *Galvan v. Press*, 347 U.S. 522 (1954).

27. *Id.* at 530-31.

constitutional system recognize congressional power in dealing with aliens. . . .²⁸

However, there is also in American jurisprudence a strong tradition of solicitude for rights under the first amendment, including the rights to receive information and ideas. As the Supreme Court held almost twenty years ago, "[i]t is now well-established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive. . . .' This right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society."²⁹

These fundamental precepts, the deference of the judiciary to congressional immigration criteria, and the solicitude of the courts to first amendment considerations, collided in the case of Ernest Mandel, a Belgian journalist and Marxist.³⁰ Mandel applied to the American Consul in Brussels for a non-immigrant visa to enter the United States for a six-day period, during which he would participate in a conference at Stanford University. Additional invitations to speak were issued by faculty members at Princeton, Amherst, Columbia, and Vassar, as well as from other groups in Massachusetts and New York. The Consul denied the visa application, finding Mandel inadmissible under the provision that excludes aliens who advocate, write, or publish the doctrines of "world communism."³¹ A waiver of that ground of inadmissibility was also denied. Mandel then delivered his speech telephonically.³²

The American citizens who had invited Mandel filed suit, arguing that the immigration statutes in question were unconstitutional on their face and as applied, in that they deprived the plaintiffs of first amendment rights.³³ The immigration authorities responded that the exclusion of Mandel involved no restriction on first amendment rights since what was restricted

28. *Id.* at 531-32.

29. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citations omitted); see Note, *First Amendment Limitations on the Exclusion of Aliens*, 62 N.Y.U. L. REV. 149 (1987).

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

31. Immigration and Nationality Act § 212(a)(28)(D), (G)(v), 8 U.S.C. § 1182(a)(28)(D), (G)(v) (1982).

32. 408 U.S. at 755-59.

33. *Id.* at 760.

was "only action."³⁴ The Court, however, found this contention unpersuasive. "In light of the Court's previous decisions concerning the 'right to receive information,' we cannot realistically say that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement."³⁵

The government next argued that the first amendment was inapplicable because the American plaintiffs had access to Mandel's ideas through "technological developments" such as the telephone hook-up that had been utilized, and that had supplanted his physical presence.³⁶ The Court again disagreed:

This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests . . . we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.³⁷

On the other hand, the Court found plaintiffs' constitutional argument also to be unpersuasive. "Appellees' First Amendment argument would prove too much. In almost every instance of an alien excluded under § 212(a)(28), there are probably those who would wish to meet and speak with him."³⁸ This prospect led the Court into a dilemma:

Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard.³⁹

34. *Id.* at 764.

35. *Id.*

36. *Id.* at 765.

37. *Id.*

38. *Id.* at 768; *see also supra* note 14 (quoting § 212(a)(28), 8 U.S.C. § 1182(a)(28) (1982)).

39. 408 U.S. at 768-69.

The Court avoided the dilemma by holding that the Attorney General had validly exercised his power by denying a waiver of inadmissibility to Mandel for his failure to comply with certain conditions to his prior entries into the United States.⁴⁰ It reserved decision, however, in the situation where no such independent justification for the exclusion was forthcoming.⁴¹

The political grounds for exclusion or deportation also trench on the United States's international obligations. Under the Final Act of the Conference on Security and Co-operation in Europe,⁴² known as the Helsinki Accords, the United States has undertaken "gradually to simplify and to administer flexibly the procedures for exit and entry."⁴³ The stated purpose of this section of the Helsinki Accords is "to facilitate free movement and contacts, individually and collectively, whether privately or officially, among persons, visitations and organization of the participating states, and to contribute to the solution of the humanitarian problems that arise in that connex-

40. *Id.* at 769. The Court observed that the American citizen plaintiffs had "conceded" that Congress could enact a blanket prohibition against entry of all aliens falling into a class defined by the exclusionary provision in question, and that all that was at issue was the propriety of the Executive's denial of a waiver of inadmissibility. *Id.* at 767-68. The basis for the denial evidently was that, by accepting invitations to speak received while in the United States on a previous visit, Mandel had spoken at a greater number of events than had been specified in his original visa application for that tour. *Id.* at 773 n.4 (Douglas, J., dissenting).

41. The Court succinctly stated its position:

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. 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 nor decide in this case.

Id. at 770. The lower court decisions subsequent to the Court's decision in *Mandel* have sought either to delineate the interrelationship between subsections (27) and (28) of § 212(a), 8 U.S.C. § 1182(a), *see* *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd mem. by an equally divided Court*, 108 S. Ct. 252 (1987); *Allende v. Shultz*, 605 F. Supp. 1220 (D. Mass. 1985), or the content of the "facially legitimate and bona fide" criterion, *see* *Allende v. Shultz*, — F.2d —, —, No. 87-1469, slip op. at 20-23, 1988 U.S. App. LEXIS 4677, at 26-29 (1st Cir. Apr. 15, 1988); *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525, 531 (D. Mass. 1986).

42. Final Act of the Conference on Security and Co-operation in Europe, Aug. 1, 1975, Dep't of State Pub. No. 8826 (Gen. For. Pol. Ser. 298), *reprinted in* 14 I.L.M. 1292 (1975) [hereinafter Helsinki Accords].

43. *Id.*, *reprinted in* 14 I.L.M. at 1314.

ion."⁴⁴ The tension between the political exclusion and deportation grounds and the spirit of these Accords is clear. The Congressional Commission on Security and Cooperation in Europe has repeatedly indicated that in its practice and policy of visa denials, the United States has failed to meet its obligations under the terms of the Helsinki Accords.⁴⁵

III. THE LEGISLATIVE PROPOSALS

Three bills were introduced in the last session of Congress in the Senate⁴⁶ and House,⁴⁷ including a bill from the Administration,⁴⁸ to revise the criteria and procedures for exclusions and deportations on political grounds. These legislative proposals seek in different ways to resolve the tension between immigration control and individual rights. The success of the proposals in resolving this basic conflict is discussed below. Where appropriate, recommendations for change are made.

A. S. 28

On January 6, 1987, Senator Moynihan introduced the Revision of Alien Exclusion Act of 1987 ("S. 28"), with the following substantive provisions discussed on a section-by-section basis.

1. Proposed Section 2(a)

Section 2(a)(1) of S. 28 would amend section 212(a) of the McCarran-Walter Act by striking out paragraph (28), the provision allowing exclusion based on an alien's political beliefs, advocacy, or affiliations.⁴⁹ S. 28 would help bring immigration practice in the United States into line with constitutional requirements and international obligations. The legislation

44. *Id.*, reprinted in 14 I.L.M. at 1313.

45. See COMM'N ON SECURITY & COOPERATION IN EUROPE, IMPLEMENTATION OF THE HELSINKI ACCORDS: 1952 McCARRAN-WALTER ACT, 99th Cong., 2d Sess. *passim* (1986); Comm'n on Security & Cooperation in Europe, *Implementation of the Helsinki Accords: Hearings Before the Commission on Security and Cooperation in Europe*, 96th Cong., 1st Sess. *passim* (1979).

46. S. 28, 100th Cong., 1st Sess. (1987).

47. H.R. 1119, 100th Cong., 1st Sess. (1987).

48. H.R. 3293, 100th Cong., 1st Sess. (1987).

49. "Section 212(a) of the Immigration and Nationality Act is amended — (1) by striking out paragraph (28) . . ." S. 28, 100th Cong., 1st Sess. § 2(a). For the text of § 212(a)(28), 8 U.S.C. § 1182(a)(28) (1982), see *supra* note 14.

would also have a minimal impact on the Government's ability to control entry of persons into the United States. Since 1977, the McGovern Amendment has provided a presumptive waiver of inadmissibility for individuals charged under paragraph (28) when applying for nonimmigrant visas.⁵⁰ The Executive would lose little by deletion of paragraph (28), except the power to restrict entry solely on the basis of speech and association,⁵¹ in violation of the first amendment and international obligations.

However, to achieve S. 28's stated goal to "improve the process for excluding aliens from the United States,"⁵² the bill must make substantive changes in the grounds for exclusion in section 212(a) of the Act beyond the deletion of paragraph (28). Unless the bill also restricts other aspects of the government's broad authority to exclude aliens in paragraph (27), which allows exclusion for an alien's anticipated activities deemed "prejudicial to the public interest,"⁵³ and paragraph (29), which permits exclusion on national security grounds,⁵⁴ the procedural improvements contained in section 3 of S. 28 will have limited impact.⁵⁵

The danger that the authorities will be tempted to tailor

50. 22 U.S.C. § 2691(a) (1982); *see supra* note 19.

51. The State Department has determined that members of terrorist organizations are excludable under paragraph (27):

The following type cases are illustrative, but are by no means exclusive, of those involving a determination of the applicability of Section 212(a)(27).

1.1 Aliens who while in the United States might engage in political or conspiratorial activities against the United States or foreign governments.

1.2 Aliens who are known or believed to be members of terrorist organizations engaging in activities such as political kidnapping, hijacking and extortion.

1.3 Aliens who are known or believed to be operatives of underworld criminal organizations.

1.4 Aliens who are notorious for allegedly engaging in excesses, including physical brutality while in political power in their native land, or who were prominently identified with any former regime which did so.

UNITED STATES DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 41.91(a)(27), *reprinted in* 6 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 32-214.18 (1987). Subparagraphs (F) and (G) of paragraph (28) are apparently unnecessary to reach such aliens. In any case, paragraph (27) could be revised to make explicit its applicability to members of terrorist organizations.

52. S. 28, 100th Cong., 1st Sess. preamble.

53. *See supra* note 13 (text of § 212(a)(27), 8 U.S.C. § 1182(a)(27) (1982)).

54. *See supra* note 15 (text of § 212(a)(29), 8 U.S.C. § 1182(a)(29) (1982)).

55. *See infra* notes 72-86 and accompanying text (discussing S. 28, 100th Cong., 1st Sess. § 3).

their stated justifications for barring or expelling aliens to the statutory grounds mandates that any legislative effort to improve respect for individual rights in the process must achieve two objectives: (1) adequate procedural safeguards, including independent review, according to meaningful standards, of the Executive's decision; and (2) a narrowing of the statutory grounds.

Therefore, two changes in paragraph (27) should be considered for S. 28. First, the consular officer or Attorney General should be permitted to rely on paragraph (27) only if he has "substantial evidence" that it is applicable. "Substantial evidence" review gives a court a principled basis for judging the adequacy of the proffered justifications for barring an alien. Second, the other broad statutory grounds should be narrowed. Specifically, the "prejudicial to the public interest" ground for exclusion should be deleted. Notions of the "public interest" ultimately, and unavoidably, are grounded in the subjective views of administering officials, and an exclusion on this ground is too vague to be susceptible of review even if it must be supported with "substantial evidence."⁵⁶ The remaining grounds for exclusion in paragraph (27)—endangering "the welfare, safety, or security of the United States"—may be legitimate reasons for excluding aliens that can be reviewed by a court if they are more completely defined in the statute.

Congress should require that State and Justice Department officials specify in what types of cases they believe paragraph (27) is applicable. The types of cases should be enumerated in paragraph (27) and replace the broad language permitting the government to exclude aliens who will endanger "the welfare, safety, or security of the United States." Alternatively, the legislative history of S. 28 could indicate the appropriate interpretation of that language.⁵⁷

56. See 98 CONG. REC. 8082, 8084 (1952) (President Truman's message to Congress upon vetoing the McCarran-Walter Act stated that the "prejudicial to the public interest" language would "restrict or eliminate judicial review of unlawful administrative action").

57. Another possible approach is the one already taken, at least in part, by Congress—albeit on a temporary basis—to qualify the vague language of paragraph 27 with the proviso that it shall not include activities that when conducted by a U.S. citizen would be protected by the first amendment. See *supra* note 20 and accompanying text. The current temporary proviso does not go this far as it covers only "beliefs, statements or associations," and not "activities." See Foreign Relations Author-

Paragraph (29) should similarly be improved by several changes. First, the Attorney General or consular officer should be permitted to rely on this paragraph only if he has "substantial evidence" that it is applicable to the alien. Second, the clause in subparagraph (A) "or in other activity subversive to the national security" should be deleted. It serves only to duplicate the provisions of paragraph (27). Third, the following clause should be added at the end of subparagraph (B): "provided, however, that this subparagraph (B) shall not cover any speech or activity which, if conducted in the United States by a United States citizen, would be protected by the First Amendment."⁵⁸

2. Section 2(b)

The proposed deletion by S. 28 of section 235(c), which allows review only by and at the discretion of the Attorney General for aliens characterized as inadmissible on political grounds by immigration officers at ports of entry,⁵⁹ would eliminate the disparity in procedural protections available to such aliens. Under current law, an alien who appears to be inadmissible to the examining officer at an entry point to the United States is detained and subjected to further review by an immigration judge, unless the examining officer believes that the alien is excludable under sections 212(a)(27), (28), or (29) of the Act.⁶⁰ In such cases, the alien is temporarily excluded and his case is referred to a delegate of the Attorney General without any review by an immigration judge. The Attorney General's delegate, a Regional Commissioner of the Immigration and Naturalization Service, may then order the alien permanently excluded without seeking further review if he deter-

ization Act, Fiscal Years 1988 and 1989, sec. 901(a), *reprinted in* 8 U.S.C.A. § 1182 note, at 122 (West Supp. 1988).

58. Of course, the deportation criteria should be similarly modified and reduced in scope. *See supra* notes 17-18 and accompanying text. If anything, our legal system and jurisprudence are more solicitous of "deportable" as opposed to "excludable" aliens. *See In re Phelisna*, 551 F. Supp. 960 (E.D.N.Y. 1982).

59. "Section 235(c) of the Immigration and Nationality Act is repealed." S. 28, 100th Cong., 1st Sess. § 2(b). For the text of section 235(c), 8 U.S.C. § 1225(c) (1982), *see supra* note 24.

60. Immigration and Nationality Act § 235(b), 8 U.S.C. § 1225(b) (1982). The provision refers to a "special inquiry officer," but this adjudicator is now denominated an "immigration judge." *See* 1A C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 3.20 (1987).

mines that the alien is excludable on the basis of confidential information the disclosure of which "would be prejudicial to the public interest, safety, or security."⁶¹ Generally, an excluded alien is entitled to appeal an immigration judge's order of exclusion to the Attorney General acting through the Board of Immigration Appeals,⁶² except that an alien excluded on the basis of confidential information under paragraphs (27), (28), or (29) has no such right of appeal.⁶³

Under section 235(c), aliens deemed inadmissible for political reasons have no meaningful opportunity to contest their exclusion. In contrast, aliens deemed excludable on other grounds (such as prostitutes, criminals, or holders of fraudulent visas)⁶⁴ benefit from several safeguards against arbitrary exclusions by immigration officers.⁶⁵ For example, the alien is entitled to a hearing that can be open to the public and held before an immigration judge, who is empowered to subpoena witnesses and documents and to take testimony relevant to the admissibility of the alien.⁶⁶ Also, all of the testimony, orders, exhibits, and motions presented before the immigration judge must be included in the administrative record.⁶⁷ Finally, the alien may obtain a transcript of the immigration judge's decision⁶⁸ and is entitled to an appeal to the Board of Immigration Appeals based on the record created before the immigration judge.⁶⁹

The procedural distinction between aliens excluded under different provisions of the Act is not a principled one.⁷⁰ While

61. Immigration and Nationality Act § 235(c), 8 U.S.C. § 1225(c) (1982); 8 C.F.R. § 235.8 (1988).

62. 8 C.F.R. § 236.7 (1988).

63. Immigration and Nationality Act § 236(b), 8 U.S.C. § 1226(b) (1982).

64. *See id.* § 212(a), 8 U.S.C.A. § 1182(a) (West 1970 & Supp. 1988).

65. *See* 8 C.F.R. pt. 236 (1988).

66. Immigration and Nationality Act § 235(a), 8 U.S.C. § 1225(a) (1982).

67. 8 C.F.R. § 236.2(e) (1988).

68. Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges, 52 Fed. Reg. 2931, 2935 (Dep't of Justice 1987) (minute orders may be used to obtain transcripts of oral decisions).

69. 8 C.F.R. § 236.7 (1988). Under § 106(c) of the Act, 8 U.S.C. § 1105a(c) (1982), habeas corpus review is available in the federal courts for all exclusions under section 212(a) of the Act, including paragraphs (27), (28), and (29). *See infra* note 96 and accompanying text.

70. The enhancement of procedural protections recommended herein with respect to pending legislation in the House of Representatives, *see infra* notes 96-126 and accompanying text, applies as well to S. 28.

the Constitution may not require a due process hearing,⁷¹ the summary exclusion procedure for national security reasons is a Cold War relic that should be eliminated in order to provide protection against arbitrary agency action.

3. Section 3

Section 3 of S. 28⁷² requires the Attorney General to obtain a court order before denying entry or a visa to an alien under new paragraph (27) or (28) of the Act. The forum speci-

71. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 n.8 (1953) (upholding the constitutionality of regulations that deprived aliens of hearings when their entry would be "prejudicial to the interests of the United States" in time of war or national emergency); Proclamation No. 2523, 6 Fed. Reg. 5821, 5822 (1941).

72. The text of S. 28, § 3, is as follows:

(a) Before any alien is denied a visa to the United States or is otherwise excluded from admission to the United States under paragraphs 27 or 28 of the Immigration and Nationality Act, as amended, the Attorney General (in consultation with the Secretary of State) shall apply for an order approving such denial to the court described in section 103(a) of the Foreign Intelligence Surveillance Act of 1978. Such application shall include the factual basis for the Attorney General's knowledge or reasonable grounds for belief that issuing a visa or permitting admission to the United States would violate paragraphs 27 or 28.

(b) An application for an order shall be denied by such court if the court concludes that the Attorney General does not have knowledge or reasonable grounds for belief that issuing a visa or permitting admission to the United States would violate paragraphs 27 or 28 of the Immigration and Nationality Act, as amended.

(c)(1) If any judge designated under section 103(a) of such Act denies an application for an order described in subsection (3)(a), such judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be transmitted, under seal, to the court of review established in section 103(b) of such Act.

(2) If the court of review established in section 103(b) of such Act affirms the denial of the application for an order described in subsection (3)(a), then the Secretary of State shall promptly issue a visa to the alien or the Attorney General shall promptly admit the alien to the United States, as the case may be.

(d) In considering and reviewing applications to deny visas or exclude aliens from admission to the United States, the court and court of review described in section 103(a) and 103(b) of such Act shall conduct those proceedings as expeditiously as possible. The record of such proceedings, including applications made and others granted, shall be maintained under security measures established by the Chief Justice of the United States in consultation with the Attorney General, Secretary of State and the Director of Central Intelligence.

S. 28, 100th Cong., 1st Sess. § 3.

fied in section 3 is the special court made up of federal district court judges designated by the Chief Justice of the United States pursuant to section 103 of the Foreign Intelligence Surveillance Act⁷³ ("FISA") to hear applications for orders approving the use of electronic surveillance in the United States to obtain foreign intelligence information. According to section 3, the FISA court is to grant the Attorney General's application for an order only if it concludes that he has "knowledge or reasonable grounds for belief" that the alien is excludable.⁷⁴ If the Attorney General's application is denied, the government can appeal the denial to the court of review designated by the Chief Justice pursuant to section 103(b) of FISA.

The threshold proceeding to determine whether the government can bar an alien on political grounds serves four purposes: (1) to conform review procedures in border-exclusion and visa-denial cases through a statutory requirement that visa denials by consular officers be reviewed; (2) to reduce the likelihood that this section will be applied in furtherance of political goals unrelated to the individual aliens; (3) to develop a procedure by which the government can present the evidence it possesses against an alien's application for admission without compromising the confidentiality of national security information; and (4) to provide an expeditious means of hearing cases so that applicants for admission or visas for temporary business or travel will not have their travel plans unduly delayed.

The section 3 FISA procedure requiring independent review of visa denials is an improvement over existing law in the visa area for two reasons. First, it provides review of the consular officer's decision to deny a visa on political grounds. Currently, review is available only under State Department regulations.⁷⁵ Second, and more importantly, the review would be conducted by an independent judicial body rather than by an official of the State Department, the agency respon-

73. 50 U.S.C. § 1803 (1982). The FISA is codified as follows: 18 U.S.C. §§ 2511, 2518-2519 (1982 & Supp. IV 1986), 50 U.S.C. §§ 1801-1811 (1982).

74. S. 28, 100th Cong., 1st Sess. § 3(b).

75. 22 C.F.R. § 41.130(b) (1987); *see* *Pena v. Kissinger*, 409 F. Supp. 1182, 1185-88 (S.D.N.Y. 1976) (discussing the limited role of the courts in reviewing consular determinations).

sible for denying the visa.⁷⁶

In addition, the section 3 FISA proceeding would serve as an important safeguard against arbitrary border exclusions of aliens by requiring the Attorney General to obtain an initial exclusion order. S. 28 thus seeks to redress the potential for abuse by providing for a threshold review by an independent judicial body. Section 3 ensures that prior to the commencement of exclusion proceedings and the subjection of the alien to further detention while he awaits administrative adjudication, the Attorney General shall have obtained independent preliminary review by the FISA court of his evidence that the alien is excludable on political grounds.

The FISA court procedure should also satisfy the government's need for special safeguards in dealing with confidential national security information. FISA requires applicants for electronic surveillance in foreign intelligence information cases to provide "a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance,"⁷⁷ except where surveillance is to be obtained from a foreign power on the premises of the foreign power.⁷⁸ Even when the exception applies, the applicant must still provide "a statement of the facts and circumstances relied upon by the applicant to justify his belief" that the electronic surveillance will be obtained from a foreign power or an agent of a foreign power and that the premises at which electronic surveillance will be used are under the control of the foreign power or agent.⁷⁹ Thus, proceedings under section 3 of the legislation would require the government to reveal no more national security information to the FISA court than is currently revealed in FISA proceedings themselves.

Although the section 3 procedure is a significant improve-

76. Another approach to providing independent review would be to create an administrative body to review visa denials. The idea of such an entity was often discussed in Congress at the time the McCarran-Walter Act was enacted. *See, e.g.*, 98 CONG. REC. 5778 (daily ed. May 22, 1952) (remarks of Sen. Moody). The concept was revived in legislation introduced in the House on June 2, 1987, by Representative Henry Gonzalez, H.R. 2567, 100th Cong., 1st Sess. (1987).

77. Foreign Intelligence Surveillance Act, § 104(a)(6), 50 U.S.C. § 1804(a)(6) (1982).

78. *Id.* § 104(b), 50 U.S.C. § 1804(b) (1982).

79. *Id.* § 104(a)(4), 50 U.S.C. § 1804(a)(4) (1982).

ment over the present review of exclusions and visa denials on political grounds, there are two additional major changes that should be made to ensure fair review in these cases: (1) the FISA court should review the Attorney General's application for an exclusion or visa denial order based on a "substantial evidence" rather than a "reasonable grounds for belief" standard; (2) section 3(d) of S. 28 should be amended to require the court to provide the alien with a summary of the evidence if it grants the Attorney General's application for an order.

a. "*Substantial Evidence*" Standard

The "reasonable grounds for belief" standard for review of the Attorney General's application for an order from the FISA court in section 3 of S. 28 is borrowed from FISA itself. Under FISA, the court will grant an electronic surveillance order if it determines "on the basis of the facts submitted by the applicant there is *probable cause* to believe"⁸⁰ that the statutory requirements for permitting surveillance are present. The purpose of FISA is to ensure that foreign intelligence surveillance by the United States government remains consistent with the probable cause requirement mandated by the fourth amendment.⁸¹

In contrast, the section 3 review of the Attorney General's determination that an alien is excludable is at least a preliminary adjudication, and the FISA court should be required to employ a "substantial evidence" standard in its review. Immigration judges who handle exclusion cases will exclude an alien only if there is substantial evidence that the alien is inadmissible.⁸² Therefore, the last sentence of section 3(a) of the bill should be amended to read:

Such application shall include the factual basis for the Attorney General's belief that issuing a visa or permitting admission to the United States would violate paragraphs 27 or 28 as well as a detailed description of the sources consulted in obtaining such factual basis.

In addition, section 3(b) should be amended to read:

80. *Id.* § 105(a)(3), 50 U.S.C. § 1805(a)(3) (1982) (emphasis added).

81. *See* S. REP. NO. 701, 95th Cong., 2d Sess. (1978).

82. *See* 1A C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 3.20(f) (1987).

An application for an order shall be denied by such court if the court concludes that the Attorney General's application does not provide substantial evidence to support his belief that issuing a visa or permitting admission to the United States would violate paragraphs 27 or 28 of the Immigration and Nationality Act, as amended.

b. *Adequate Notice Requirement*

Requiring the Attorney General to provide the FISA court "substantial evidence" that the alien is inadmissible might be claimed to compromise national security. Any such effect, however, is significantly diminished in that the alien, and American citizens interested in the alien's right to visit the United States, are excluded from the section 3 proceeding. The bill states that the record of FISA proceedings

shall be maintained under security measures established by the Chief Justice of the United States in consultation with the Attorney General, the Secretary of State and the Director of Central Intelligence.⁸³

FISA itself permits disclosure of certain portions of "the application, order, and such other materials relating to the surveillance" in the context of a subsequent suppression hearing in criminal proceedings.⁸⁴ Thus, section 3(d) of S. 28 should be deleted and replaced with the following:

If the Attorney General's application for an order excluding an alien or denying a visa to the alien is granted, the granting court shall immediately provide the alien with a summary of the evidence sufficient to give adequate notice of the reasons for the court's decision. If upon receiving notice of the court's decision the Attorney General files an affidavit under oath that disclosure of certain evidence relied upon by the court in making its decision would harm the national security of the United States, the court will determine whether to excise certain portions of its summary on such basis. Thereafter, in notifying the alien of its decision, the court shall nonetheless be obligated to provide notice of the reasons for its decision to grant the Attorney General's application.

83. S. 28, 100th Cong., 1st Sess. § 3(d).

84. Foreign Intelligence Surveillance Act, § 106(f), 50 U.S.C. § 1806(f) (1982).

The proposed notification procedure would promote fairness by ensuring that aliens and interested United States citizens would be aware of which of the alien's activities the government believes supports the threshold bar. A summary of the court's reasoning would assist the alien and his representative to participate fully in the subsequent hearings in border-exclusion cases⁸⁵ as well as enabling any American citizen to determine whether a suit challenging the exclusion or visa denial under section 4 of S. 28 is justified.⁸⁶

4. Section 4

Section 4⁸⁷ is intended to guarantee any United States citizen interested in the travel of an alien to the United States the right to challenge a visa denial on political grounds. The Supreme Court has never specifically addressed the question of whether such a right is provided by the Administrative Procedure Act.⁸⁸ In deciding *Mandel*,⁸⁹ the Court apparently assumed that the right exists.⁹⁰ Section 4, however, would clarify

85. See Immigration and Nationality Act § 236, 8 U.S.C. § 1226 (1982).

86. See, e.g., S. REP. NO. 1137, 82d Cong., 2d Sess. 8-9 (1952) (minority report) (special care should be taken in nonimmigrant cases where American citizens are interested in the alien's visit).

87. The text of § 4 is as follows:

Any citizen of the United States or other person within the jurisdiction thereof who intends to communicate in person with, including attending a function for purposes of listening to, an alien who is denied a visa or excluded from admission into the United States on the basis of paragraphs 27 and 28 of Section 212(a) of the Immigration and Nationality Act, as amended, may bring a civil action on his or her own behalf against any official of the United States Government who is alleged to have wrongfully denied a visa to the alien or wrongfully excluded the alien from the United States. Any civil action under this section may be brought in the district in which the intended communication was to have occurred, in the district of the plaintiff's residence or principal place of business, in the district in which any defendant in the action resides, or in the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to grant legal or equitable relief.

S. 28, 100th Cong., 1st Sess. § 4.

88. Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1982 & Supp. IV 1986), and scattered other sections of 5 U.S.C.).

89. *Kleindienst v. Mandel*, 408 U.S. 753 (1972); see *supra* notes 30-40 and accompanying text.

90. See *Mandel*, 408 U.S. at 783 (Marshall, J., dissenting); see also *Abourezk v. Reagan*, 785 F.2d 1043, 1050 (D.C. Cir. 1986) (court reached the merits of case involving exclusions under Immigration and Nationality Act § 212(a)(27), 8 U.S.C.

the issue by preventing an attack based on the standing of an American citizen challenging an alien's exclusion from the United States.

B. H.R. 1119

On February 18, 1987, Representative Barney Frank and forty-six other members of Congress introduced the Immigration Exclusion and Deportation Amendments of 1987, H.R. 1119, which seeks to revise the exclusion and deportation grounds.⁹¹ The political grounds are specifically reformulated to provide for visa denials or exclusion in the following instances:

Security Grounds.—Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in—

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

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

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

(D) any terrorist activity (as defined in paragraph (2)(D)),

is excludable.⁹²

“Terrorist activity” is defined as: “organizing, abetting, or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily injury to individuals not taking part in armed hostili-

§ 1182(a)(27), stating that the Supreme Court would presumably have raised the standing issue in *Mandel* had it considered its jurisdiction in doubt).

91. On April 12, 1988, the House Judiciary Subcommittee on Immigration met and reported out a substitute to H.R. 1119, now renumbered H.R. 4427.

92. H.R. 1119, 100th Cong., 1st Sess. § 2(a)(3) (1987): Identical language is used to provide grounds for deportation of aliens who have entered the United States. *Id.* § 3(a)(4). In H.R. 4427, the renumbered substitute to H.R. 1119, the phrase “which endangers public safety or national security” was deleted from subdivision (B) and the term “illegal” was substituted for the term “unconstitutional” in subdivision (C).

ties.”⁹³ The exclusion procedure is revised by striking the summary exclusion procedure under section 235(c) of the Act.⁹⁴

The elimination of section 235(c) is justified for the reasons discussed previously with respect to Senator Moynihan’s proposal.⁹⁵ But full reform also requires a revision of the provision in the Act governing review of final deportation and exclusion orders. Aliens excluded on national security grounds are able to seek habeas corpus review of an administrative record that may contain classified information not previously disclosed to the alien.⁹⁶ New language should therefore be added to the review statute based primarily on section 4 of the Classified Information Procedure Act (“CIPA”), which deals with discovery of classified information in federal criminal prosecutions.⁹⁷ The statute should also be amended to provide expedited review of administrative hearings involving border exclusions under section 2(a)(3) of H.R. 1119.⁹⁸

Permitting habeas corpus review as early as four days after the commencement of exclusion proceedings is an important

93. *Id.* § 2(a)(2)(D). In H.R. 4427, the phrase “raising funds for” was added to the list of prohibited terrorist activities.

94. *Id.* § 4(a)(10).

95. *See supra* notes 59-71 and accompanying text.

96. Under current law, final orders of deportation are reviewable by the appropriate Circuit Court of Appeals pursuant to § 106 of the Act, 8 U.S.C. § 1105a (1982). Aliens held in custody pursuant to an order of deportation may obtain judicial review by habeas corpus proceedings. Immigration and Nationality Act § 106(a)(9), 8 U.S.C. § 1105a(a)(9) (1982). Aliens subject to a final order of exclusion are limited to habeas corpus review pursuant to § 106(b) of the Act, 8 U.S.C. § 1105a(b) (1982). The changes proposed herein should be equally applicable to habeas corpus proceedings and review of final orders of deportation.

The procedure for habeas corpus review is codified in 28 U.S.C. §§ 2241-2256 (1982). One significant requirement worth noting here is that habeas corpus is available only to challenge the legality of the government’s “custody” of the alien. *See* 28 U.S.C. § 2241 (1982). While “custody” is liberally construed to include, for example, an alien subject to supervision upon a deportation order, *see, e.g.*, *Marcello v. District Director*, 472 F. Supp. 1199, 1204 (E.D. La. 1979), *rev’d on other grounds*, 634 F.2d 964 (5th Cir. 1981), an alien who has voluntarily left the United States cannot seek habeas review.

97. 18 U.S.C. App. (Classified Information Procedures Act) §§ 1-16 (1982).

98. Following are the revisions this Article proposes to § 106 of the Immigration and Nationality Act, 8 U.S.C. § 1105a (1982):

(c) An alien subject to exclusion under Section 212(a)(3) shall be deemed to have exhausted his administrative remedies if a final order of exclusion under Section 236 has not been entered within three days after the alien has been placed under exclusion proceedings, and such alien sub-

safeguard. Many distinguished would-be visitors to the United States are deterred from their visits as much by the slow process of visa applications as by the Executive's historical use of the political exclusion grounds.⁹⁹ It is not inconceivable that when faced with the narrowing of the political exclusion provisions in section 2(a)(3) of the Amendment, the Executive would consider prolonging the administrative exclusion process in selected cases to discourage visits by its ideological opponents.

The three-day time limit for the administrative exclusion process is the same time period given to respond to an order to show cause for retaining a petitioner in custody in habeas corpus proceedings.¹⁰⁰ Arriving aliens are invariably detained when there is a risk that they pose a danger to security.¹⁰¹

Furthermore, the elimination of the summary procedure under section 235(c) will inevitably result in situations in which the district courts would be faced with the task of reviewing an administrative record in exclusion cases containing classified information. The Executive presumably would seek to exclude such evidence from the record made available to the alien. This situation already occurs in deportation cases based on political grounds.¹⁰²

The statute governing discovery in habeas corpus cases

ject to exclusion shall be entitled to seek review by a writ of habeas corpus in accordance with subsection (b).

(d) [Current subsection (c).]

(e) An alien subject to a final order of exclusion or deportation arising under Section 212(a)(3) or deportability under Section 241(a)(4) shall be entitled to inspect and copy the administrative record, provided, however, that if the court finds upon a sufficient showing by the Attorney General that public safety or national security requires that specified items of classified information in the record should not be disclosed to the alien, the court may review such evidence *in camera* and shall, if feasible, provide to the alien and his authorized legal representatives a summary of the evidence and an opportunity to rebut such summary. Upon motion of the Attorney General, the court shall issue an appropriate order to protect against the public disclosure of any classified information or summary thereof disclosed to the alien and his representatives pursuant to this subsection. For the purposes of this subsection "classified information" shall have the meaning assigned to that term in Section 1 of the Classified Information Procedures Act (18 U.S.C. App. §§ 1-16 (1982)).

99. See *supra* text accompanying notes 1-7.

100. See 28 U.S.C. § 2243 (1982).

101. See, e.g., *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958).

102. 8 C.F.R. § 242.17(a), (c) (1988).

appears to permit the court to provide the alien with access to the full record under review.¹⁰³ Alternatively, if the discovery provisions are deemed not to apply in habeas corpus related to immigration proceedings, then the federal civil discovery rules apply.¹⁰⁴ Because it is not clear whether the federal civil rules authorize the extent of discovery that would be appropriate in habeas corpus proceedings in exclusion and deportation cases, Congress should take the opportunity to deal explicitly with the disclosure of classified information in this context. The proposal made here¹⁰⁵ looks primarily to the Federal Rules of Criminal Procedure ("Fed. R. Crim. P.") and CIPA as a model for handling classified evidence in deportation and exclusion habeas corpus proceedings. In federal criminal cases, defendants are entitled to review classified information relied upon by the government.¹⁰⁶ Proposed section 106(e) would similarly entitle aliens to review classified information relied upon by the government in cases of exclusion and deportation under political grounds, or a summary of such evidence, if feasible.

The proposed revision does not seek automatic disclosure of classified evidence contained in the administrative record

103. See 28 U.S.C. § 2247 (1982).

104. FED. R. CIV. P. 81(a). Because § 235(c) of the Act, 8 U.S.C. § 1225(c) (1982), insulates the Immigration and Naturalization Service ("INS") from conducting exclusion hearings on political grounds where classified information is involved, the INS has not developed regulations to deal with the treatment of such information in the administrative hearings. In the context of an asylum application in an exclusion or deportation proceeding, however, the INS has developed the following procedure to deal with non-record evidence which is defined as evidence classified under a particular Executive Order:

(d) *Disclosure of non-record evidence.* The immigration judge may disclose to the asylum applicant the non-record evidence, or any part thereof, to the extent that he believes he can do so and still safeguard the information and its source. The applicant shall be provided opportunity to rebut any evidence so disclosed. A decision based in whole or in part on non-record evidence shall state that such evidence is material to the decision.

8 C.F.R. § 208.10(d) (1988). Revised proposed asylum regulations continue this disclosure mechanism in asylum cases in the immigration court. See 53 Fed. Reg. 11,303, 11,309-10 (1988) (to be codified at 8 C.F.R. §§ 236.3(c)(4), 242.17(c)(4)(D)) (proposed Mar. 28, 1988).

105. See *supra* note 98, proposed § 106(e).

106. The broad right of a criminal defendant to confront the evidence against him is limited in some respects by FED. R. CRIM. P. 16(d)(1), which provides for the issuance of protective orders by district courts, and by the Classified Information Procedures Act §§ 3-4, 18 U.S.C. App. §§ 3-4 (1982). See *infra* notes 108-25 and accompanying text. See generally 8 J. MOORE, FEDERAL PRACTICE ¶ 16.05[1] (1988).

for two reasons. First, defendants in criminal cases are afforded greater solicitude under the Constitution than are aliens seeking entry to the United States.¹⁰⁷ Second, it is unlikely that anyone would choose to become a criminal defendant in order to gain access to classified information that Fed. R. Crim. P. 16 might require the Government to disclose to him. In contrast, there is at least a possibility that aliens would seek entry to the United States in order to gain access to the classified information that they suspect the Government would rely upon to support their exclusion.

At the same time, proposed section 106(e) is drafted in recognition of two factors entitled to considerable weight in determining the scope of the Government's classified information privilege: first, the alien's compelling need for the evidence to enable him to respond to the case against him, and second, the drastic result of deportation or exclusion faced by the alien if his habeas corpus petition is unsuccessful.¹⁰⁸ Therefore, the proposed language treats the administrative record below like evidence under section 4 of CIPA by preserving the government's right to deny the alien access to classified information if necessary for national security reasons, while requiring the court to provide a summary of such evidence to the alien and to review undisclosed portions of the record fully *in camera*.

In fact, the discovery afforded the alien by proposed section 106(e) would not be as expansive as that afforded the

107. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (full hearing not prerequisite to exclusion); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893) (Congress has exclusive power to determine what, if any, procedural protections are accorded aliens to be excluded or deported). Distinctions are also drawn in the immigration context. In deportation proceedings, the authorities would have to establish deportability by "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276, 292 (1966). In exclusion proceedings, the burden to establish admissibility is on the alien. Immigration and Nationality Act § 291, 8 U.S.C. § 1361 (1982).

108. See *Attorney Gen. v. Irish People, Inc.*, 684 F.2d 928, 951 (D.C. Cir. 1982). In the *Irish People* case, a civil enforcement action under the Foreign Agents Registration Act, 22 U.S.C. §§ 611-621 (1982 & Supp. IV 1986), the defendant claimed a right of discovery of classified materials for its defense of selective prosecution. In finding no colorable grounds to warrant discovery, the court noted that factors affecting disclosure include likelihood that material may serve to exculpate, necessity for defense, and what a defendant stands to lose. 684 F.2d at 951.

criminal defendant under section 4 of CIPA. Section 106(e) entitles the alien only to classified information placed in the administrative record by the Executive, or a summary of such information if the court finds that disclosure of the information is not permitted by public safety or national security. In contrast to a criminal defendant's rights under Rule 16, the alien will in no circumstances receive any classified information, or a summary thereof, that might be material to his case if the Government itself is not relying on such information. It should also be noted that proposed section 106(e) incorporates the provisions for protective orders contained in Rule 16 of the Fed. R. Crim. P. and section 3 of CIPA, preventing the alien or his representatives from disclosing to the public classified information obtained pursuant to that statute.

Proposed section 106(e) vests the court with discretion to determine whether classified information shall be excised from the record and whether the Government's summary of such information is adequate. For an alien's participation to be meaningful in habeas corpus proceedings, Congress should make it clear in legislative history that a court exercising its discretion to deny availability of certain evidence in the record must make an explicit finding that reasons of national security require that result.¹⁰⁹ It should also be clear in the legislative history that the court will permit the "if feasible" language to deny the alien a summary of classified evidence only in compelling circumstances, such as classified physical evidence,¹¹⁰ or lists of

109. Section 1 of CIPA, 18 U.S.C. App. (Classified Information Procedures Act) § 1, as incorporated into proposed section 106(e), defines classified information as items determined pursuant to an Executive Order, statute, or regulation to require protection against unauthorized disclosure for reasons of national security. National security is defined in CIPA § 1(b), 18 U.S.C. App. (Classified Information Procedures Act) § 1(b), as the national defense and foreign relations of the United States. To assert the privilege for any specified classified information, the head of the department will have to consider each piece of evidence and formally assert the privilege. See *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Molerio v. FBI*, 749 F.2d 815, 821 (D.C. Cir. 1984). Section 106(e) includes the limitation that the privilege is available only if the court finds that the properly classified information requires protection from disclosure for reasons of public safety or national security. See *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) ("privilege may not be used to shield any material not strictly necessary to prevent injury to national security"). The responsible agency's determination of this necessity is afforded appropriate deference. *Id.* at 58.

110. See, e.g., *United States v. Porter*, 701 F.2d 1158, 1163 (6th Cir. 1983) (trial court did not abuse its discretion in denying defendant's request for physical inspec-

agents and informants.

Nor should the Government's privilege to excise specified classified information from certain documents permit it to deny the alien access to portions of the document that the court does not rule exempt from disclosure. Section 4 of CIPA authorizes the court to "delete specified items of classified information from documents *to be made available* to the defendant."¹¹¹

Cases involving judicial review of visa denials conducted by federal courts under the Administrative Procedure Act provide further support for this proposal. The proposed language is intended to codify the courts' reluctance in those cases to make findings based on *in camera* review of classified evidence, and to create a discovery mechanism to provide the alien with the classified information governed by an appropriate protective order or a summary of such information.

In the leading case, *Abourezk v. Reagan*,¹¹² the District of Columbia Circuit, in remanding an order granting summary judgment for the Government in a challenge to a political visa denial, expressed serious concern about the district court's reliance on the Government's *ex parte in camera* submissions:

We caution the district court, in the further proceedings this opinion requires, to make certain that plaintiffs are accorded access to the decisive evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests.

It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions [citation omitted].

tion of classified surveillance equipment where defendant was allowed extensive cross-examination of equipment operators).

111. 18 U.S.C. App. (Classified Information Procedures Act) § 4 (emphasis added); see *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) ("sensitive information must be disentangled from nonsensitive information to allow for the release of the latter").

112. 785 F.2d 1043 (D.C. Cir. 1986), *aff'd mem. by an equally divided Court*, 108 S. Ct. 252 (1987).

Exceptions to the main rule are both few and tightly contained. Most notably, inspection of materials by a judge isolated in chambers may occur when a party seeks to *prevent use* of the materials in the litigation. When one side, seeking to block consideration of relevant matter, asserts an evidentiary privilege, the court may inspect the evidence *in camera* and alone for the limited purpose of determining whether the asserted privilege is genuinely applicable [citation omitted]. If the court finds that the claimed privilege does not apply, then the other side must be given access to the information; if the court's finding is that the privilege does apply, then the court may not rely upon the information in reaching its judgment. [Citation omitted.] In either case, no party will be faced—as were the plaintiffs in this case—with a decision against him based on evidence he was never permitted to see and to rebut.¹¹³

The *Abourezk* court concluded that the visa denials could not be upheld on the basis of classified information that the plaintiffs had not been given an opportunity to review or rebut, even though the district court below published an abbreviated summary of the classified information, which informed plaintiffs that the aliens were excluded on the basis of their “personal status as officials of governments or organizations which are hostile to the United States.”¹¹⁴

In *El-Werfalli v. Smith*,¹¹⁵ the district court provided a summary of the contents of classified information sufficiently detailed to permit the alien an opportunity to contest his exclusion.¹¹⁶ Relying on concerns similar to those expressed by the *Abourezk* court regarding the harm caused to the adversarial process by *in camera* review of evidence, and noting the absence

113. *Id.* at 1060-61. The court recognized, however, two other exceptions. The first is where the Government invokes the state secrets privilege and the court finds a “large risk that an unjust result would eventuate if the case proceeded without the privileged material.” *Id.* at 1061 (citing *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984)). The second is where a statute authorizes *in camera* review, giving as an example the Freedom of Information Act, 5 U.S.C. § 552 (1982) (current version at 5 U.S.C. § 552 (1982 & Supp. IV 1986)). 785 F.2d at 1061.

114. *Abourezk v. Reagan*, 592 F. Supp. 880, 888 (D.D.C. 1984), *vacated and remanded*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd mem. by an equally divided Court*, 108 S. Ct. 252 (1987).

115. 547 F. Supp. 152 (S.D.N.Y. 1982).

116. *See id.* at 154; *see also* *Allende v. Shultz*, 605 F. Supp. 1220, 1226 (D. Mass. 1985) (citing with approval the provision of such a summary by the *El-Werfalli* court).

of an *El-Werfalli*-type summary of classified documents, the district court in *Allende v. Schultz*¹¹⁷ refused summary judgment for the Government in a challenge to the denial of a visa to Hortensia Allende. After reviewing the Government's declassified affidavit, the District Court later ruled that the Government could not exclude Allende on the basis of her memberships in the World Peace Council and the Women's International Democratic Federation, her criticism of American foreign policy, and her expressions of support for nuclear disarmament at forums sponsored by those organizations.¹¹⁸

Thus, the proposed language of section 106(e) results from the concern expressed by the courts in *Abourezk* and *Allende* in excluding aliens on national security grounds when the aliens, or those supporting the aliens' applications for admission, have not been afforded the opportunity to review the Government's evidence or, at the very least, a summary of such evidence. Indeed, *Abourezk* and *Allende* would suggest that courts would be inclined to review the Government's claims of exemption from disclosure under section 106(e) carefully, and would review the summaries of undisclosed classified evidence to ensure that the alien has received the greatest measure of information permitted by the requirements of national security and public safety.

Proposed section 106(e) is also not inconsistent with civil cases in which the Government is a party, although the right to discovery of classified information in those cases is not clear. In *Attorney General v. Irish People, Inc.*,¹¹⁹ a civil enforcement action pursuant to the Foreign Agents Registration Act,¹²⁰ the District of Columbia Circuit developed a test for disclosure of classified information that balances the necessity of the information for an effective defense and the stakes at issue for the defendant against the Government's interest in preserving the secrecy of the classified information and in maintaining the action.¹²¹ In developing this test, the court made several obser-

117. 605 F. Supp. 1220, 1226 (D. Mass. 1985).

118. *Allende v. Schultz*, Civ. Action No. 83-3984-C, slip op., 1987 U.S. Dist. LEXIS 2798 (D. Mass. Mar. 31, 1987), *aff'd*, — F.2d —, No. 87-1469, 1988 U.S. App. LEXIS 4677 (1st Cir. Apr. 15, 1988).

119. 684 F.2d 928 (D.C. Cir. 1982).

120. 22 U.S.C. §§ 611-621 (1982 & Supp. IV 1986).

121. *Irish People*, 684 F.2d at 951.

vations relevant to the proposal here. First, it considered whether the Government's refusal to permit discovery of classified information may require the court to dismiss the Government's action.¹²² By analogy, while the Executive does not bring a habeas corpus proceeding to revive an exclusion or deportation order, it is responsible for the order's existence by declaring the alien inadmissible or deportable, rather than choosing to admit the alien, even under conditions that may be imposed by the Attorney General pursuant to section 214(a).¹²³ Second, the court held that the "likelihood of injustice" to the defendant in *Irish People* was small because "no constitutional rights are threatened, only registration is imminent, [and] no jail sentence looms."¹²⁴ In the immigration context, where the alien, ordinarily detained, faces deportation or exclusion, the need for disclosure of classified information is much more compelling. Finally, the court suggested that an alternative to disclosure of the evidence would be to require findings of fact to be made from the undisclosed classified information.¹²⁵ This suggestion supports the approach taken in proposed section 106(e) requiring provision of a summary of the classified information that cannot itself be disclosed without harm to national security.¹²⁶

122. *Id.* at 950-52. The context of the case contemplated a dismissal by the District Court under FED. R. CIV. P. 37.

123. 8 U.S.C. § 1184(a) (Supp. IV 1986).

124. *Irish People*, 684 F.2d at 953.

125. *Id.* at 954-55. For a discussion of closely related issues, though arising from civil litigation, see *In re Attorney Gen.*, 596 F.2d 58 (2d Cir.) (vacating contempt order imposed on Attorney General for failure to disclose information derived from informants, and directing the district court to consider issue-related sanctions authorized by FED. R. CIV. P. 37(b)(2)), *cert. denied*, 444 U.S. 903 (1979).

126. Where the Government is a defendant, courts may be less inclined to compel discovery of classified evidence because the likelihood of harm to the moving party is less apparent. For example, in *United States v. Reynolds*, 345 U.S. 1 (1953), the Supreme Court reversed the Court of Appeals' entry of judgment against the Government in a case brought under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982), after the Government refused to provide the trial court with purportedly classified documents so it could make a ruling on whether the documents would be discoverable by the plaintiffs. The Court held that, in certain circumstances, the trial court must determine whether the Government's privilege is applicable without reviewing the documents themselves. *Id.* at 10. In *Reynolds*, however, plaintiffs had other means of establishing the Government's liability without gaining access to the classified information. *Id.* at 11. The *Reynolds* Court went on to say, "[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted." *Id.* Proposed § 106(e) governs situations where the alien has a

C. H.R. 3293

On September 16, 1987, Representative Peter Rodino, at the Administration's behest, introduced legislation to revise the political grounds for exclusion and deportation.¹²⁷ The Administration's proposed bill adjusts the grounds for exclusion and deportation, respectively sections 212(a) and 241(a) of the Act¹²⁸ and repeals the McGovern Amendment.¹²⁹ But the bill fails to address in a comprehensive way the substantive abuse of the political exclusion and deportation provisions of the 1952 Immigration and Nationality Act, and ignores altogether the need for procedural reform. The impetus for reform would be unappeased by passage of the Administration bill, which would have little practical effect on the Executive's current authority to exclude or deport aliens seeking to visit the United States to engage in political, scientific, and artistic discussions.

While the Administration bill would eliminate the vague "prejudicial to the public interest" and endangering the "welfare" grounds for exclusion under section 212(a)(27),¹³⁰ its proposal to add the equally vague "potentially serious adverse foreign policy consequences" basis for exclusions to paragraph (a)(27)¹³¹ is susceptible to the same type of abuse.

The Administration's proposal that appropriate legislative history be developed, indicating that (a)(27) cannot be used to exclude aliens for reasons of ideology alone,¹³² is inadequate. The Supreme Court has already suggested in *Mandel* that the first amendment rights of American citizens seeking to engage in a dialogue with an alien prohibits visa denial or exclusion on the basis of the alien's speech and ideology.¹³³ The Administration, however, apparently seeks to retain the right to ex-

strong necessity for the classified information and has no alternative means of discovering the Government's case against him.

127. H.R. 3293, 100th Cong., 1st Sess. (1987).

128. H.R. 3293, 100th Cong., 1st Sess. §§ 1-6. Sections 212(a) and 241(a) of the Immigration and Nationality Act are codified, respectively, as 8 U.S.C. §§ 1182(a), 1251(a) (1982 & Supp. IV 1986).

129. H.R. 3293, 100th Cong., 1st Sess. § 7; see *supra* note 19 (text of the McGovern Amendment, 22 U.S.C. § 2691(a) (1982)).

130. 8 U.S.C. § 1182(a)(27) (1982) (quoted *supra* note 13).

131. H.R. 3293, 100th Cong., 1st Sess. § 1.

132. H.R. 3293, 100th Cong., 1st Sess. 6 (section-by-section analysis).

133. *Kleindienst v. Mandel*, 408 U.S. 753, 767-69 (1972).

clude an alien whose coming to the United States may undermine support for the Administration's foreign policy objectives.¹³⁴ But the State Department already uses guidelines¹³⁵ that could be a basis for a much more narrow formulation than the Administration's proposed revision.

The Administration also seeks to add certain portions of paragraph (a)(28) on the basis that it is necessary to retain the Executive's authority to exclude "terrorists".¹³⁶ The Administration's authority in this area should be protected. Its proposed revisions, however, are potentially overbroad. Instead, paragraph (a)(28), with its intolerance of diverse opinions, should be eliminated altogether, and paragraph (a)(27) could be amended to give the Government authority to exclude those aliens currently affiliated with organizations engaging in violent activities that may endanger public safety or national security. More fundamentally, greater procedural protection, such as that discussed above, is needed so that Executive authority to exclude "terrorists" will not preclude inquiry into the cases of wrongfully-charged aliens.

CONCLUSION

The impetus to reform the political exclusion and deportation provisions is strong. Almost everyone who has spoken publicly to the issue, including a Government spokesperson,¹³⁷ has recognized that the substantive exclusion provisions should be narrowed and that aliens should not be barred or deported for engaging in activities or having affiliations or beliefs that, if such aliens were American citizens, would clearly be protected under the first amendment. But a comprehensive

134. See *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd mem. by an equally divided Court*, 108 S. Ct. 252 (1987).

135. UNITED STATES DEPT OF STATE, FOREIGN AFFAIRS MANUAL § 41.91(a)(27), reprinted in 6 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 32-214.18 (1987); see *supra* note 51 and accompanying text.

136. H.R. 3293, 100th Cong., 1st Sess. 8-10 (section-by-section analysis).

137. Ogden, *'Ideological Grounds' Are a Myth*, N.Y. Times, Jan. 10, 1987, at 27, col. 3. Jerome Ogden, Deputy Assistant Secretary of State for Visa Services, described the sole grounds for denying waivers of exclusion under § 212(a)(27)-(29) as "internal security concerns; prevention of a potentially adverse effect upon the conduct of our foreign relations; and an alien's advocacy of violence to achieve political ends." *Id.* He agreed that it would be improper to deny a waiver of exclusion based on "abstract beliefs," but disclaimed any such occurrence. *Id.* at col. 6.

approach is needed in revising the criteria and establishing basic procedural protections for those subject to the provisions. One danger is that Congress will neglect to reform the procedural deficiencies that deprive those subject to visa denials and exclusion of an opportunity to rebut the evidence on which the authorities rely. Without giving such aliens such basic rights, these individuals, Congress, and the American people will be left with invitations to abuse and conclusory assurances by officials when these laws are invoked. Our tradition of fairness and due process demands more.