RECENT DECISIONS

CONSTITUTIONAL LAW—RESTRICTION OF AMERICAN CITIZENS' RIGHT OF ACCESS TO INFORMATION AND IDEAS IN THE COURSE OF GOVERNMENT CONTROL OF IMMIGRATION IS NOT UNCONSTITUTIONAL WHEN SUPPORTED BY A FACIALLY LEGITIMATE REASON.

In 1969 Ernest Mandel, a professional journalist and editor-in-chief of a Belgium Left Socialist weekly, was denied a temporary non-immigrant visa to the United States and consequently was unable to attend a prearranged series of academic conferences and discussions in this country.[1] The American Consul at Brussels found Mandel ineligible for the visa under the Immigration and Nationality Act [of 1952].[2] The Immigration and Naturalization Service, acting for the Attorney General, refused to waive the ineligibility as permitted by

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[1]Mandel was invited to a conference on "Technology and the Third World" at Stanford University, to serve as a speaker and panelist with Professor John Kenneth Galbraith of Harvard. Several other university and college faculties also invited him to speak or participate in conferences during his visit. These invitations were issued largely because of the success of Mandel's two previous trips to the United States. In 1962 he was admitted for a period of time as a working journalist, and in 1968 he lectured at over thirty colleges.

[2]Immigration and Nationality Act [of 1952] § 212 (a) (28) (D) & (G) (v), 8 U.S.C. § 1182 (a) (28) (D) & (G) (v) (1970) [hereinafter cited as § 1182 (a) (28) (D) & (G) (v)]:

> Section 212(a). Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
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> . . . .
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> (28) Aliens who are, or at any time have been, members of any of the following classes:
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> (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. . . .
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> (G) Aliens who *write or publish* . . . (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship: . . . . [emphasis added]

Mandel's ineligibility was based on his admitted advocation of economic, governmental and international doctrines of world communism. He was not then, and never has been, a member of the Communist Party, but rather classified himself as a revolutionary Marxist.

On September 8, 1969, Mandel applied to the American Consul in Brussels for a six day nonimmigrant visa to enable him to accept Stanford University's invitation to participate in their conference. Due to the additional invitations to appear at other lectures and conferences, Mandel filed a second visa application specifying his expanded itinerary. On October 23, 1969, the Consul orally informed Mandel of the denial of his first application and a week later sent a written confirmation of the denial. The Consul also stated that he had forwarded his request for a waiver along with Mandel's second visa application to Washington. On November 6, the Department of State informed Mandel's attorney of the reasons for the denial of the first application and added that it was recommending a waiver of ineligibility for the second application. Mandel learned on December 1, 1969, that his second visa application also had been denied. At no point did plaintiffs contest the American Consul's finding of ineligibility. Instead, they attacked the refusal by the Attorney General to issue a waiver as he is authorized to do under 8 U.S.C. § 1182 (d)(3)(A). (*See* note 3 *infra*). Only the dissent by Mr. Justice Marshall raised the question of the original finding of ineligibility.

that Act.[3] Mandel and six American citizens[4] instituted an action for an injunction and declaratory relief, contending that denial of the waiver of ineligibility violated American citizens' first amendment right to hear Mandel's ideas in open discussion. A three-judge district court found for plaintiffs.[5] On appeal,

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[3]Immigration and Nationality Act [of 1952] § 212 (d)(3)(A), 8 U.S.C. § 1182 (d)(3)(A) (1970) [hereinafter cited as § 1182 (d)(3)(A)].

(d) . . .

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

Mandel had been found ineligible for admission as a nonimmigrant alien upon making applications for visas for his two earlier trips to the United States. However, on the previous occasions his ineligiblity had been waived. Mandel first learned of the manner in which his earlier visas had been issued from the American Consul's October 30 letter. In that letter he also was informed of the Consul's finding of inadmissibility for his current trip and the denial of waiver of ineligibility.

The Department of State's letter of November 6 explained that the earlier waivers had been issued with the limitation that Mandel must conform to his itinerary and restrict his activities to the stated purposes of his trip. (Mandel was not informed of these conditions at the time the waivers were issued.) It was further stated that the present waiver denial was based on Mandel's participation in activities beyond the stated purposes of his 1968 visit. Acknowledging Mandel's ignorance of the travel restrictions on his earlier trips and accepting his assurances of conformity to his proposed itinerary on this trip, the Department of State recommended a waiver of Mandel's ineligibility. However, the recommendation was rejected. The Immigration Service stated in a February 13, 1970, letter to Mandel's counsel that Mandel's activities during his 1968 United States trip "went far beyond the stated purposes of his trip, on the basis of which his admission had been authorized, and represented a flagrant abuse of the opportunities afforded him to express his views in this country." Kleindienst v. Mandel, 408 U.S. 753, 759 (1972).

The asserted "flagrant abuse" apparently consisted of Mandel's acceptance of more speaking engagements than his visa application indicated. Also, Mandel had addressed a cocktail reception in New York City on October 19, 1968, at which funds were raised to provide legal defense for students arrested after participation in demonstrations in France the preceeding summer. Unknown to Mandel, one of the restrictions upon which the waiver of his ineligibility was based was that he not appear at any political fund raising activity. *Id.* at 758.

[4]The other plaintiffs were citizens of the United States who had issued invitations to Mandel, or were to participate in programs in which Mandel was invited to participate. Since the denial of the waiver had made it impossible for plaintiffs to establish dates for their planned activities, they sought to enjoin enforcement of the exclusionary provision against Mandel. Mandel v. Mitchell, 325 F. Supp. 620, 622 (E.D.N.Y. 1971).

[5]The court found that the other plaintiffs had standing to challenge the exclusionary provisions of the statute, and Mandel's standing as an alien was based on the ground that his exclusion denied the American citizens their right to discuss and debate with him about his particular field of interest. The court found that prevention of teaching and advocacy, which is not in itself incitement or conspiracy to initiate presently programmed violence, is not a legitimate legislative function. The first amendment peremptorily forbids equating the implied power to exclude aliens in the interest of national security with a power to abridge the freedoms of speech, press, and peaceful assembly. The court declared the plaintiffs were entitled to an injunction against the defendant's denial of Mandel's entry into the United States as a nonimmigrant visitor through the implementa-

held, reversed. The United States has the inherent sovereign power to exclude aliens; interference with American citizens' first amendment rights is incidental to the exercise of this power and does not constitute sufficient grounds for judicial intervention when such exercise is predicated upon a facially legitimate reason. *Kleindienst v. Mandel,* 408 U.S. 753 (1972).

While the executive power to exclude aliens dates from 1798,[6] the United States Government did not begin immigration control until 1875 when convicts and prostitutes were denied entry.[7] The immigration laws were expanded in 1882[8] to include racial and social standards and revised in 1903[9] with the introduction of ideological restrictions. Advocates of anarchy were the first to be excluded, but the list was broadened in 1918 to include all subversive aliens.[10]

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tion and enforcement of 8 U.S.C. § 1182 (a)(28) and (d)(3)(A). The court also issued a declaratory judgment that 8 U.S.C. § 1182(a)(28) is invalid and that 8 U.S.C. § 1182 (d)(3)(A) is inoperative insofar as they had been invoked to deny Mandel admission to the United States. Mandel v. Mitchell, 325 F. Supp. 620 (E.D.N.Y. 1971).

[6]Act of June 25, 1798, 1 Stat. 570. The President was given the power to exclude aliens dangerous to the security of the country.

[7]Act of March 3, 1875, 18 Stat. 477. Under this Act, upon arrival in a United States port, a ship bearing immigrants would be inspected under the direction of the collector of the port and any "obnoxious" person found thereon would be reported to the master of the ship. The master was thenceforth forbidden to allow the alien to land in the United States, unless bond was posted conditioned upon the return of such alien within six months to the country of emigration. The Act also provided for a judicial review of the port collector's determination of the "obnoxious" classification.

[8]Act of August 3, 1882, ch. 376, 22 Stat. 214. In Section two the Secretary of the Treasury was charged with "the duty of executing the provisions of this act and with supervision over the business of immigration to the United States. . . ." The Act provided for a duty on all non-American citizens arriving in the United States and excluded any "[nonpolitical] convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge. . . ."

Section four provided that the Secretary of the Treasury was authorized to prescribe regulations for the return of excluded persons to the country whence they came. There was no provision for contesting the determination by the Secretary of the Treasury's agent that an immigrant would not be allowed to enter the United States.

[9]Act of March 3, 1903, ch. 1012, 32 Stat. 1213.

. . . .

> Sec. 2. That the following classes of aliens shall be excluded from admission into the United States:. . .anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law, or the assassination of public officials; . . . .
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> Sec. 38. That no person who disbelieves in or who is opposed to all organized government . . . shall be permitted to enter the United States or any Territory or place subject to the jurisdiction thereof. This section shall be enforced by the Secretary of the Treasury under such rules and regulations as he shall prescribe.

[10]Act of October 16, 1918, ch. 186, 40 Stat. 1012.

> That aliens who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law; aliens who disbelieve in or are opposed to all organized government; aliens who advocate or teach the assassination of public officials; aliens who advocate or teach the unlawful destruction of property; aliens who are members of or affiliated with any organization

The Alien Registration Act of 1940[11] denied admission to aliens who, either personally or through organizations of which they were members, advocated the violent overthrow of the United States Government. Through the Internal Security Act of 1950[12] Congress legislatively concluded that the Communist Party did in fact advocate the violent overthrow of the United States Government. This conclusion was carried over into the Immigration and Nationality Act [of 1952][13] which likewise excluded Communist Party members and other subversives.[14] Sections 212 (a) (28) (D) & (G) (v) of the 1952 Act also excluded those who, while not Communist Party members, professed a belief in the doctrines of world communism.[15]

The expansion of governmental control of immigration was accompanied by the emergence of the judicial belief that the executive, empowered by congressional authority, had plenary powers in controlling immigration, and that judi-

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that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law . . . shall be excluded from admission into the United States.

[11]Alien Registration Act, 1940, § 23 (a), 54 Stat. 670. This Act amended the Act of October 16, 1918, to read: "That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States." For the "classes" included in the Amendment, *see* note 10 *supra*.

[12]Internal Security Act of 1950, ch. 1024, 64 Stat. 987. Although section 1(b) declared the Act did not limit constitutionally guaranteed free speech, a later section declared:

Sec. 2(1). There exists a world Communist movement which, in its origins, its development, and its present practice, is a worldwide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental or otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a worldwide Communist organization.

. . . .

6. The Communist action organizations . . . endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary. . . .

[13]8 U.S.C. § 1182 (1970).

[14]*Id.* § 1182 (a)(27), (a) (28), & (a) (29).

Section 27 excludes aliens who sought entry "solely, principally, or incidentally to engage in activities which would be prejudicial to public interest, or endanger the welfare, safety, or security of the United States."

Section 28 excludes anarchists, members or affiliates of the Communist Party or any other totalitarian party, and advocates of economic, international, and governmental doctrines of world communistm. *See* note 2 *supra*.

Section 29 allows exclusion of those who would:

(A) engage in activities which would be prohibited by laws of the United States relating to espionage, sabotage, public disorder, or in any 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 § 786 of Title 50.

[15]*Id.* § 1182 (a)(28)(D) & (G) (v).

cial intervention in the exercise of those powers was forbidden.[16] This attitude of nonintervention appears to have arisen from a recognition by the judiciary of the inherent sovereign power of nations to exclude or expel aliens and of the necessarily political nature of this power.[17] Subsequent decisions have accepted these earlier cases as controlling.[18] However, in all of these cases, the dispute was between the United States Government and an alien or group of aliens; in none were individual American citizens involved as parties.

In the instant case, however, American citizens were co-plaintiffs with Mandel, and were asserting their first amendment rights. These constitutionally protected freedoms of speech and press traditionally have occupied a paramount position in American judicial deliberations.[19] Courts have recognized that these freedoms are not beyond all governmental control,[20] but their status as fundamental personal rights[21] requires that a compelling reason be present

[16]The Court refused to overrule an order of the Attorney General who, while acting for the President, refused permanent entry to the United States to the alien wife of an American citizen. "The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of the court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

[17]"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions; or to admit them only in such cases and upon such conditions as it may see fit to prescribe." Nishimura Ekin v. United States, 142 U.S. 651, 659 (1892).

The Court strongly reaffirmed this position the following year. "The power to exclude or expel aliens, being a power affecting international relations, is vested in the political departments of governments, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene." Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).

An additional source of the attitude of judicial nonintervention may be the doctrine that aliens have no constitutionally protected rights. The Court has refused to declare as unconstitutional a statute excluding all alien anarchists from the United States. "To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise." United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904).

[18]Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123 (1967). [Congress has power to forbid admission of alien homosexual.] Galvin v. Press, 347 U.S. 522, 531 (1954).

[19]*See* New York Times Co. v. Sullivan, 376 U.S. 254, 273-77 (1964) (The Court reviewed the controversy over the Sedition Act, 1 Stat. 596 (1798), which first crystallized a national awareness of the central meaning of the first amendment, and concluded that for the first amendment rights to maintain their primacy, society must allow a forum for free and vigorous debate.); Cahn, *The Firstness of the First Amendment*, 65 YALE L. J. 464, 473 (1956).

[20]Kovaks v. Cooper, 336 U.S. 77, 88 (1949) [Court upheld prohibition of sound trucks.]. *See generally* Schenck v. United States, 249 U.S. 47 (1919).

[21]Schneider v. State, 308 U.S. 147, 161 (1939); *See* Grosjean v. American Press. Co., 297 U.S. 233, 243-44 (1936).

if they are to be restricted.[22] Even when such a compelling reason supports a statutory restriction, the statute has been given close judicial scrutiny to assure it is not overbroad in its proscriptions.[23] The statutory goal is upheld if it accomplishes legitimate legislative aims in a manner which least affects the protected rights.[24]

The courts have held that first amendment protections encompass more than the specific enumerations in the first amendment.[25] Personal rights which are fundamental in giving the express guarantees full meaning have also been recognized and afforded constitutional protection.[26] While some writers have

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[22]*Compare* American Communications Ass'n v. Douds, 339 U.S. 382, 415 (1950) (The Court upheld the validity of an act requiring union officers to sign an oath swearing that they were not advocates of the violent overthrow of the United States) *with* Speiser v. Randall, 357 U.S. 513, 528-29 (1958) (Voiding a state statute requiring veterans to sign a loyalty oath in order to receive certain tax benefits) *and* Schneider v. State, 308 U.S. 147, 162 (1939) (The Court in striking down several city ordinances which prevented persons from exercising their first amendment rights, said "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.").

[23]The Court refused to uphold the Subversive Activities Control Act of 1950 § 5 (a)(1)(D), 50 U.S.C. 784 (a) (1) (D) (1970), which makes it unlawful for a member of a communist action group to be employed in any section of a defense facility. The Court declared the section unconstitutional by virtue of its overreaching nature. "It is precisely because that statute sweeps indiscriminately across all types of associations with Communist-action groups without regard to the quality and degree of membership, that it runs afoul of the first amendment." United States v. Robel, 389 U.S. 258, 262 (1967).

In *NAACP v. Button,* the Court prescribed a judicial attitude requiring scrutiny of legislation because of its "vagueness," "overbreadth" and the potential "sweeping and improper application." NAACP v. Button, 371 U.S. 415, 432-33 (1963). This attitude was later declared the proper one in Aptheker v. Secretary of State, 378 U.S. 500, 516 (1963).

[24]"Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected first amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of first amendment freedoms. . . . The Constitution and the basic position of first amendment rights in our democratic fabric demand nothing less." United States v. Robel, 389 U.S. 258, 267 (1967).

[25]In his concurring opinion in Lamont v. Postmaster General, 381 U.S. 301, 308 (1965), Mr. Justice Brennan stated:

> It is true that the first amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful.

[Statute requiring addressees of foreign communist literature to sign a request form before the mail would be delivered held to be an unconstitutional restriction of the right to receive information and ideas.]

[26]The Court held as unconstitutional a city ordinance which forbade persons from distributing pamphlets by canvassing door to door and ringing doorbells or knocking. In so doing the Court upheld the distributor's rights under the first amendment to distribute the literature. "The dangers of distribution can so easily be controlled by traditional legal methods leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." Martin v. Struthers, 319 U.S. 141, 147 (1943).

questioned the existence of a full judicial acceptance of the right of access to ideas and information as a recognized first amendment right,[27] the United States Supreme Court has held that "it is now well established that the Constitution protects the right to receive information and ideas."[28]

However, the Court has also recognized that the Constitution does not prohibit restraint of this right,[29] and several tests have been suggested as means of deciding when this right or other first amendment rights may be so restrained.[30] The most stringent test requires that the Government show a "clear and present danger" to national security.[31] A more lenient test is suggested in *United States ex rel. Turner v. Williams*,[32] where the Court recognized the

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[27]47 NOTRE DAME LAW. 341 (1971). "Just as the rights and freedoms enumerated in the first amendment have been proscribed for various reasons, so too have the rights to receive and acquire information. Within the context of a particular fact pattern, they have been ignored, refused recognition, and ultimately rejected." *Id.* at 345. "Tracing the historical development from *Martin v. City of Struthers* through *Zemel*, it appears that courts have recognized the right to receive information, either through publication or speech, but in the passive sense. They have shown unwillingness to include within this right 'acquisitive activities, such as foreign travel, which may entail "undesirable" consequences.' " *Id.* at 346.

[28]Stanley v. Georgia, 394 U.S. 557, 564 (1969). Defendant was convicted of knowingly possessing obscene matter in violation of Georgia law. The obscene matter was found in defendant's bedroom during an authorized search for evidence of bookmaking activities. The Court held the Constitution prohibits making the possession of obscene material a crime and stated, "This right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *See also* Winters v. New York, 333 U.S. 507 (1948); Comment, *Freedom to Hear: A Political Justification*, 46 WASH. L. REV. 311 (1971).

[29]The Court has upheld the constitutionality of the Passport Act of 1926, 22 U.S.C. 211(a)(1970), which embodies a grant of authority to the Executive to refuse to validate the passports of United States citizens for travel to Cuba. The Court refused to accept the contention that such a restriction on appellant is a violation of his first amendment rights. "The right to speak and publish does not carry with it the unrestrained right to gather information." Zemel v. Rusk, 381 U.S. 1, 17)1965).

[30]47 NOTRE DAME LAW. 341 (1971). The courts, in order to determine whether the particular infringement was constitutional have employed a number of different tests. In all of the cases the basis of the decision is the recognition of the preferred position of the first amendment interests. The first of these cases involved a direct restriction upon free speech and the "clear and present danger" test was applied. A second test in cases involving restrictions on speech is the balancing of interests test. The courts weigh the statute's effects on first amendment interests against the congressional determination that such restrictions are necessary to protect the government's interests. A third test employed by the courts requires examination of whether the restrictions are overbroad in their limitations on first amendment rights. The courts require that the statutes employ the "less drastic" means of implementing statutory goals.

[31]"The rule we deduce from these cases is that where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crime. . . ." Dennis v. United States, 341 U.S. 494, 505 (1951). The important distinction between *Dennis* and *Mandel* is that Dennis had been convicted of a crime, while Mandel performed no criminal act and the Government was not punishing him on criminal charges. The Court in Speiser v. Randall, 357 U.S. 513 (1958), restricted the *Dennis* standard to ascertaining conditions which would justify punishing speech as a crime. *See generally* Schenck v. United States, 249 U.S. 47, 52 (1919).

[32]194 U.S. 279, 294 (1904). "The flaming brand which guards the realm where no human

presence of a compelling governmental interest in protecting the national security, which did not require proof of a clear and present danger. The most frequently discussed test is that which involves the balancing of the American citizens' interest in their first amendment rights against the Government's interest in accomplishing a legitimate legislative function.[33]

Kleindienst v. Mandel considers for the first time the consequences of a dispute between the United States Government and an excluded alien upon the constitutionally protected rights of American citizens.[34] Mr. Justice Blackmun, speaking for the majority, resolved this question by the application of a line of cases sustaining the plenary power of Congress to make rules for admission of aliens.[35] The Court refused to reconsider this body of precedent despite the novel situation presented by this case in which the exercise of this congressional power affected American citizens' first amendment rights.[36] The majority expressed the fear that lack of a statutory standard would necessitate a choice between two unacceptable alternatives: either all aliens who, like Mandel, are in demand by American audiences must be admitted, or the courts will

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government is needed still bars the entrance; and as long as human governments endure they cannot be denied the power of self-preservation, as that question is presented here."

[33]The Court in Mandel v. Mitchell, 325 F. Supp. 620, 627 (E.D.N.Y. 1971) paraphrased the "balancing test" as used in American Communications Ass'n v. Douds, 339 U.S. 382, 392-400 (1950): "Where a distinct governmental interest of importance is sought to be subserved and effective pursuit of it involves a calculated sacrifice of first amendment interests that could not otherwise be found valid, the importance of the governmental interest weighed against the degree of first amendment loss may, it has been thought, be found on balance to justify a limited sacrifice of the first amendment interest."

[34]Kleindienst v. Mandel, 408 U.S. 753, 783 (1972) (Marshall, J., dissenting). ("There were no rights of Americans involved in any of the old alien exclusion cases, and therefore their broad counsel about deference to the political branches is inapplicable.") 47 NOTRE DAME LAW. 341, 351 (1971) ("In no other case has the exclusion of an alien been contested on the grounds that it resulted in an infringement upon the first amendment rights of American citizens. Regardless of its pervasiveness and the long line of cases which have adhered to the principle of judicial nonintervention, it is obvious that whenever the valid exercise of the exclusion power results in a burden on interests protected by the Constitution the Government should justify its decision and the courts should intervene, 'for deference rests on reason not on habit.' ").

[35]"Recognition that first amendment rights are implicated, however, is not dispositive of our inquiry here. . . . The Court has without exception sustained Congress's 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.' [Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123 (1967)]." Kleindienst v. Mandel, 408 U.S. 753, 765-67 (1972).

[36]Kleindienst v. Mandel, 408 U.S. 753, 767 (1972).

Mr. Justice Marshall in his dissent questioned the majority's styling of the case. "The majority suggests that appellees 'concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by § 212 (a) (28)(D) and (G) (v) and that first amendment rights could not override that decision.' This was certainly not the view of the court below, whose judgment the *Appellants* alone have challenged here and appellees have moved to affirm. It is true that appellees have argued to this Court a ground of decision alternative to that argued and adopted below; but they have hardly *conceded* the incorrectness of what they successfully argued below." *Id.* at 779-80 n.4.

in each case have to weigh the interest of the American audiences in admitting the alien against the Government's interest in excluding him.[37] Mr. Justice Blackmun asserted that Congress has resolved this dilemma by delegating the decision making authority to the Executive Branch,[38] whose decisions, when based upon a "facially legitimate reason," will not be subjected to judicial scrutiny.[39] The justification given to Mandel's counsel by the Immigration and Naturalization Service, was that Mandel was not granted a waiver due to his "flagrant abuse of the opportunities afforded him to express his views" on his earlier visit.[40]

The dissenting opinion of Mr. Justice Marshall squarely confronted the first amendment issue in *Mandel*. While the majority and Mr. Justice Douglas concerned themselves only with the immediate problem of the denial of the exclusion waiver,[41] Mr. Justice Marshall looked beyond this issue to the basic question of whether the initial finding of ineligibility was a violation of first amendment rights[42] and concluded the denial of a visa was a restriction of the

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[37]"Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under 1182 (a)(28), one of two unsatisfactory results would necessarily ensue. 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." *Id.* at 768-69.

[38]"The dangers and the undesirability of . . . [weighing the interests of the audiences against those of the Government] on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious. Indeed, it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive." *Id.* at 769.

[39]"We hold that when the Executive exercises this power [to make policies and rules for exclusion of aliens] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing the justification against the first amendment interests of those who seek personal communication with the applicant." *Id.* at 770. In the district court the Government contended that the Attorney General did not have to support or justify its refusal to waive the finding of ineligibility because the waiver of exclusion is purely a matter of grace. 325 F. Supp. 620, 623 (1967).

[40]Kleindienst v. Mandel, 408 U.S. 753, 759 (1972). *But see id.* at 778, Marshall, J., dissenting. "Even the briefest peek behind the Attorney General's reason for refusing a waiver in this case would reveal that it is a sham . . . . There is no basis in the present record for concluding that Mandel's behavior on his previous visit was a 'flagrant abuse' . . . ."

[41]Mr. Justice Douglas based his dissent on what he considered an unauthorized decision by the Attorney General to deny Mandel's waiver. Once the State Department recommended the waiver, the Attorney General was restricted to considering such matters as Mandel's criminal record in issuing or denying the waiver. "As a matter of statutory construction, I conclude that Congress never undertook to entrust the Attorney General with the discretion to pick and choose among the ideological offerings which alien lecturers tender from our platforms, allowing those palatable to him and disallowing others. The discretion entrusted to him concerns matters commonly within the competence of the Department of Justice—national security, importation of drugs, and the like." Kleindienst v. Mandel, 408 U.S. 753, 774 (1972) (Douglas, J., dissenting).

[42]"Thus, whether or not the Attorney General had a good reason for refusing a waiver, this Court, I think, must still face the question it tries to avoid: under our Constitution, may Mandel be declared ineligible under (a) (28)?" *Id.* at 779 (Marshall, J., dissenting).

free interchange of ideas guaranteed by the first amendment.[43]

Applying the criterion of compelling governmental interest,[44] Mr. Justice Marshall conceded that there will be occasions when the Government may exclude aliens,[45] but this was not such an occasion since the sole basis of Mandel's exclusion was his ideas.[46] The Act of 1952 provides for the exclusion of aliens who are, or may become, dangerous to the national security,[47] yet Mandel was excluded because of his belief in communist doctrines, and not because he constituted a physical threat to the United States Government.[48] The disfavor in which certain political doctrines are held presents at best a questionable basis for their exclusion by the Government.

> [Section 1182] (a) (28) excludes aliens solely because they have advocated a communist doctrine. Our cases make clear, however, that Government has no legitimate interest in stopping the flow of ideas. It has no power to restrict the mere advocacy of communist doctrine, divorced from incitement to imminent lawless action.[49]

The Court has forbidden governmental interference with the flow of disfavored ideas into this country,[50] and it appears inconsistent, barring some risk to national security, to allow governmental interference with personal delivery of those disfavored ideas to any American who wishes to receive them.

Judicial review of the Executive Branch's decision to exclude certain aliens was provided in the Immigration Control Acts of 1875 and 1903.[51] The Act of

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[43] *Id.* at 776.

[44] *Id.* at 777.

[45] "I do not mean to suggest that simply because some Americans wish to hear an alien speak, they can automatically compel even his temporary admission to our country. Government may prohibit aliens from even temporary admission if exclusion is necessary to protect a compelling governmental interest. Actual threats to the national security, public health needs, and genuine requirements of law enforcement are the most apparent interests that would surely be compelling." *Id.* at 783-84.

Mr. Justice Marshall asserted that neither the Court nor the Executive should inquire into the "probity of the speaker's ideas," and that the crucial question is whether the Government's interest in excluding the alien is compelling.

[46] "The only governmental interest embodied in that section [§ 1182 (a)(28)] is the Government's desire to keep certain ideas out of circulation in this country. This is hardly a compelling governmental interest. Section (a)(28) may not be the basis for excluding an alien when Americans wish to hear him." *Id.* at 784.

[47] § 1182 (a)(28) [subversive activities]. Subsections (a)(27) & (a) (29) deal with "activities." *See* note 14 *supra*. *See* Mandel v. Mitchell, 325 F. Supp. 620, 626 (E.D.N.Y. 1971).

[48] "In the context in which section [§ 1182] (a)(28) functions it operates to exclude only aliens who by every other statutory standard of admissibility are not excludable; it excludes them not for any reason related to their alienage but solely for their present or former political associations or doctrines, or advocacies, or teachings. The sole and selective affect of the statute is to operate as a means of restraining the entry of disfavored political doctrines, and it is a forbidden enactment." *Mandel v. Mitchell* at 626.

[49] Kleindienst v. Mandel, 408 U.S. 753, 780 (1972) (Marshall, J., dissenting).

[50] Lamont v. Postmaster General, 381 U.S. 301, 305 (1965). [Postal Service & Federal Employee Salary Act of 1962 held unconstitutional when applied to limit receipt of ideas]. *See* note 25 *supra*.

[51] *See* notes 7 & 9 *supra*.

March 3, 1903, specifically gave district and circuit courts concurrent jurisdiction over all cases arising under the Act.[52] The Internal Security Act of 1950, from which Section 1182 was derived,[53] includes a section stating that nothing in the Act should be construed to limit or infringe upon the freedom of press or speech as guaranteed by the first amendment.[54] In addition to this statutory precedent, the Court has long recognized a constitutionally imposed duty to review congressional enactments in order to protect the rights of American citizens.[55] In *Mandel*, the opportunity was presented to exercise this constitutional duty by reviewing the congressional enactment which gave the Executive Branch plenary authority over the management of immigration. Seizure of the opportunity would have led to a detailed examination of Section 212(a)(28) whose only goal is to prevent persons with certain beliefs from entering the United States. Certainly a statute with such a goal should be the subject of judicial review when it interacts with the first amendment rights of American citizens.

The United States Government has the obligation of protecting national security, and one means of accomplishing this goal is through immigration control. However, national concern in 1952, fanned by the McCarthy Hearings, produced a statute designed to prevent not only the entrance of persons who constituted a physical threat, but also the entrance of anyone who merely professed a belief in communist doctrine.[57] The national goals of 1972 are radically different from those of the past. In an era of increased political, social and economic intercourse among nations of varied governmental systems, the application of standards formulated two decades ago ignores present realities. Exclusion of an individual because of his beliefs in an era of intercontinental person-to-person communications merely eliminates his person, not his ideas. The Government is only restricting the rights of the American citizens who wish to discuss and debate personally with the excluded alien.[58] Without proof

[52]Portions of the Act are set out in note 9 *supra*.

[53]Kleindienst v. Mandel, 408 U.S. 753, 759 (1972).

[54]*See* note 12 *supra*.

[55]Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[56]New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[57]The inclusion of persons advocating communist doctrines into the acts of 1950 and 1952 was during the era of Senator Joseph McCarthy when "[a] spirit of fear and dread blanketed the nation." G. MEYERS, HISTORY OF BIGOTRY IN THE UNITED STATES 448 (1960). Congress, against this background, felt compelled to strengthen the visa laws against even the mildest advocates of Communism. J. BRUCE, THE GOLDEN DOOR: THE IRONY OF OUR IMMIGRATION POLICY 154 (1954).

[58]The Court recognized the possibility of Mandel's ideas entering the United States even if his person were excluded. However, the plaintiffs alleged their first amendment rights were violated by the Government action which prevented their *personal* communication with Mandel in this country. The Court rejected the Government contention that such "technological developments" as telephone hook-ups and tapes supplant Mandel's physical presence. If the balancing test advocated by Mr. Justice Marshall were employed, alternative methods of access to Mandel's ideas would have to be weighed. Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).

of any physical threat to national security or other legitimate governmental concern, the American citizens' right of access to information and ideas should not be violated under the guise of an exercise of the Government's plenary immigration control power.[59] Nor should the Court continue to apply the judicial nonintervention doctrine in cases involving constitutionally protected rights.[60] The Court should balance the interests of American citizens in obtaining the admission of an alien into this country against the interest of the Government in excluding him. Under such a balancing test, a governmental interest supported only by a "facially legitimate reason" would not be accorded much weight.

W. Paul Bishop
Joseph C. Vanzant

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[59]*See* Note, *Possible Limitations on the Discretionary Powers of the Immigration & Naturalization Service to Order Deportation*, 4 N.Y.U.J. INT'L L. & POL. 459 (1971).

[60]"At least when the rights of Americans are involved, there is no basis for concluding that the power to exclude aliens is absolute." Kleindienst v. Mandel, 408 U.S. 753, 782 (1972) (Marshall, J., dissenting).