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## The McCarran-Walter Act and Ideological Exclusion: A Call for Reform

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# The McCarran-Walter Act and Ideological Exclusion: A Call for Reform

|  |      |
|--|------|
| I. INTRODUCTION .....                                  | 1141 |
| II. LEGISLATIVE BACKGROUND .....                       | 1143 |
| III. JUDICIAL RESPONSE .....                           | 1147 |
| A. <i>Justiciability Issues</i> .....                  | 1148 |
| 1. STANDING .....                                      | 1149 |
| 2. MOOTNESS .....                                      | 1151 |
| 3. RIPENESS .....                                      | 1154 |
| B. <i>Substantive Issues</i> .....                     | 1157 |
| 1. APPLICANTS PREJUDICIAL TO THE PUBLIC INTEREST ..... | 1159 |
| 2. APPLICANTS WHO ARE COMMUNIST OR SUBVERSIVE .....    | 1160 |
| 3. APPLICANTS SUBJECT TO SUMMARY EXCLUSION .....       | 1162 |
| 4. APPLICANTS SUBJECT TO SECTION 901 .....             | 1164 |
| IV. CONCLUSION .....                                   | 1167 |

## I. INTRODUCTION

In October, 1985, Margaret Randall, an American-born poet and feminist writer who had become a Mexican citizen, was denied permanent residency in the United States and subsequently was ordered deported<sup>1</sup> by the district director of the Immigration and Naturalization Service (INS) in El Paso, Texas, because "her writings go far beyond mere dissent."<sup>2</sup> The Immigration and Nationality (McCarran-Walter) Act of 1952<sup>3</sup> authorized the district director to exercise discretion to prevent this internationally known author from remaining with her family in America<sup>4</sup> and from participating in the national political dialogue. The McCarran-Walter Act, a product of the anti-communist fervor of the McCarthy era,<sup>5</sup> provides for the exclusion or deportation of noncitizens whom the Attorney General or consular

1. See *Randall v. Meese*, 854 F.2d 472, 472 (D.C. Cir. 1988). Although Margaret Randall was born in the United States, she subsequently gave up United States citizenship in 1966 when she became a resident and citizen of Mexico. See *id.*

2. *Id.* at 487. The assertion that an author's writings go "beyond mere dissent" fallaciously suggests that dissent must be mild or moderate in order to be acceptable.

3. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 414, 66 Stat. 163 (1952) (current version at 8 U.S.C §§ 1101-1503 (1982 & Supp. V 1987)).

4. See *Randall*, 854 F.2d at 476.

5. An example of the paranoia that characterized the McCarthy era is the Emergency Detention Act of 1950, 50 U.S.C. § 811 (1950) (repealed 1971)—one of the precursors to the McCarran-Walter Act—which declared:

There exists a world Communist movement which in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed

officer determines to be Communists or subversives, and whose presence in the United States therefore may be contrary to the public interest.<sup>6</sup>

In promulgating the McCarran-Walter Act, Congress exercised its plenary power under the Constitution to regulate the admission and deportation of aliens in the interest of international relations and defense.<sup>7</sup> Because Congress implements this plenary power through the executive branch, the judiciary has been reluctant to intervene, not only in congressional policymaking, but also in executive implementation of that policy.<sup>8</sup> Therefore, the judiciary has been unwilling to address fully the negative impact on free association and the free flow of ideas inherent in the McCarran-Walter Act, a law designed to close the borders and to forbid entry to persons on the basis of their affiliations and ideology. Although Congress subsequently has attempted to moderate the restrictive effects on personal freedoms engendered by the McCarran-Walter Act, this effort has met with limited success.<sup>9</sup> Because Congress has failed to provide legislation that would protect the national borders without infringing on individ-

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necessary, to establish a Communist totalitarian dictatorship in all the countries of the world through the medium of a world-wide Communist organization.

*Id.*

6. 8 U.S.C. § 1182(a)(27)-(29) (1982). In order to be granted relief from exclusion, the alien must prove "to the satisfaction of the consular officer" that he should not be excluded. *Id.* § 1182(a)(28)(I). This delegation of authority is both extensive without definitive outline.

7. Congress declared:

The power and authority of the United States, as an attribute of sovereignty, either to prohibit or regulate immigration of aliens are plenary and Congress may choose such agencies as it pleases to carry out whatever policy or rule of exclusion it may adopt, and, so long as such agencies do not transcend limits of authority or abuse discretion reposed in them, their judgement is not open to challenge or review by courts.

H.R. REP. NO. 1365, 82d Cong., 2d Sess. 5 (1952), reprinted in 1952 U.S. CODE CONG. & ADMIN. NEWS 1635, 1654.

8. See, e.g., *Galvan v. Press*, 347 U.S. 522 (1954) (upholding the broad power of Congress to exclude members of the Communist Party); *The Chinese Exclusion Case*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (exclusion of all Chinese laborers from the United States deemed an appropriate exercise of the plenary power of Congress in immigration). In *Galvan*, however, Justice Frankfurter suggested that some limitations on congressional power might be appropriate. *Galvan*, 347 U.S. at 526-27. He wrote, however:

[T]he 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 . . . [T]he formulation of these policies is entrusted exclusively to Congress [and] has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.

*Id.* at 531 (citations omitted).

9. See *infra* notes 16-47 and accompanying text.

ual rights, the judiciary has begun to take a more active role in interpreting and defining existing immigration laws.

This Comment examines the roles that Congress and the judiciary have assumed in the exclusion of noncitizens whose ideological beliefs and associations are thought to pose a threat to United States security. Section II surveys legislation enacted by Congress which regulates the entry of aliens into the United States.<sup>10</sup> Section III then analyzes how the judiciary has begun to review this legislation and to examine the particular rights affected by the ideological exclusion of aliens.<sup>11</sup> Finally, Section IV concludes that the judiciary should pursue more vigorously its role in reviewing immigration policy.<sup>12</sup> In order to prevent arbitrary government action, judges should narrowly define and clarify the applicable law and limit exclusion to those persons who pose a demonstrable threat to United States security.

## II. LEGISLATIVE BACKGROUND

Congress enacted the McCarran-Walter Act of 1952 over the veto of President Truman,<sup>13</sup> who said that the "whole statute breathes prejudice against the foreign born-alien and naturalized citizens alike."<sup>14</sup> Congress declared its right to "provide for the elimination of undesirable aliens" and the power to "exclude any alien for any reason whatsoever, such as the Government's dislike of the alien's political or social ideas, or because he belongs to groups which are likely to become public charges, or for other similar reasons."<sup>15</sup>

The most broadly written exclusion provision of the McCarran-Walter Act is Section 1182(a)(27),<sup>16</sup> which allows exclusion of "[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

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10. See *infra* notes 13-43 and accompanying text.

11. See *infra* notes 44-200 and accompanying text.

12. See *infra* notes 201-203 and accompanying text.

13. The Senate voted fifty-seven to twenty-six to override the veto, only two votes more than the two-thirds majority needed to override the President. See 98 CONG. REC. S8267-68 (daily ed. June 27, 1952).

14. Wasserman, *The Immigration and Nationality Act of 1952—Our New Alien and Sedition Law*, 27 TEMP. L.Q. 62, 62 n.5 (1953) (citing statements from a speech given by President Harry S. Truman on October 8, 1952, in Buffalo, New York). Then Senator Richard M. Nixon, who voted for the Act, later said that the "laws must be rewritten without bigotry." *Id.*

15. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 6, reprinted in 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1654.

16. 8 U.S.C. § 1182(a)(27) (1982).

of the United States.”<sup>17</sup> Although it is an important function of the executive branch to ensure national security through regulation of the borders,<sup>18</sup> under Section 1182(a)(27), the consular officer and the Attorney General are given the power to exclude noncitizens on the basis of virtually any foreign policy concern, without restrictions as to the “kinds of governmental concerns that would qualify.”<sup>19</sup> Moreover, a determination that a person is excludable under Section 1182(a)(27) is final and cannot be waived by immigration officials.<sup>20</sup>

In Section 1182(a)(28), Congress established grounds for exclusion based on status or affiliation rather than activities proscribed in Section 1182(a)(27).<sup>21</sup> Section 1182(a)(28) excludes anarchists and those who are affiliated with the Communist Party.<sup>22</sup> Congress did provide for exceptions, however, if the noncitizen could prove that such affiliations were involuntary or had been renounced.<sup>23</sup>

17. *Id.*

18. In the legislative history of the McCarran-Walter Act, Congress noted:

[The right to control immigration] is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare; that this power to exclude and to expel aliens, being a power affecting international relations, is vested in the political departments of the Government, and is to be regulated by treaty or act of Congress and to be executed by the executive authority according to the regulations so established.

H.R. REP. NO. 1365, 82d Cong., 2d Sess. 6, reprinted in 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1654.

19. *Abourezk v. Reagan*, 785 F.2d 1043, 1053 (D.C. Cir. 1986) (upholding the use of foreign policy to determine excludability under Section 1182(a)(27) because of its importance to the public interest and national welfare), *aff'd*, 108 S. Ct. 252 (1987).

20. 8 U.S.C. § 1182(d)(3) (1982). A waiver provision would be unnecessary in a more carefully drawn statute. Hypothetically, deportations would not be necessary because someone who is a proven security threat would never be allowed to enter the United States. Yet the definition of security threat changes over time because policy and public interest are not static and call for constant revision. Thus there is an inherent defect in the structure of a piece of legislation that purports to define an absolute test, but bases that test on a theory that requires flexibility and discretion.

21. 8 U.S.C. § 1182(a)(28) (1982) (Examples of excludable aliens include anarchists, members of any organization opposed to all forms of organized government, and anyone affiliated with the Communist Party.). Legislative classifications based on status, when a more specific prohibited activity can be identified, often prove to be both overinclusive and underinclusive. Under this legislation, there is a high probability that innocent aliens will be unnecessarily detained and immigration resources wasted, and an equally high probability that an alien who poses a potential security risk but does not fit the label will get through.

22. See 8 U.S.C. § 1182(a)(28) (1982). A similar provision governs the deportation of aliens. *Id.* § 1251(a)(6)(D)-(H) (1982).

23. *Id.* § 1182(a)(28)(I). Section 1182(a)(28) amends the Subversive Activities Control Act of 1950, 50 U.S.C. 781 (1950), to allow for the entry of aliens whose affiliation with the Communist Party was involuntary, was solely when the alien was under sixteen years of age, was necessary to obtain “employment, food rations, or other essentials of living”, or was renounced over five years prior to entry. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 49, reprinted in 1952 U.S. CODE CONG. & ADMIN. NEWS 1703.

Two inherent difficulties in the application of Section 1182(a)(28) gradually became evident to Congress.<sup>24</sup> First, the presumption of inadmissibility under Section (28) created the need for a case-by-case evaluation of all nonimmigrant visas in order to determine the precise nature of their affiliations.<sup>25</sup> This process allowed the Executive unilaterally to make "politically difficult individual decisions which might imply an overall change in U.S. policy toward Communism."<sup>26</sup> Second, Congress recognized that Section 28, by closing the borders to noncitizens who might advocate controversial or unorthodox political views, violated United States commitments under the Helsinki Accords<sup>27</sup> to promote "the free movement of people and ideas."<sup>28</sup>

In an effort to alleviate these difficulties, Congress passed the McGovern Amendment in 1972.<sup>29</sup> This amendment requires the Secretary of State to recommend to the Attorney General that a nonimmigrant visa be issued to "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,"<sup>30</sup> unless the Secretary certifies that "the admission of such alien would be contrary to the security interests of the United States."<sup>31</sup>

Moreover, in 1987, Congress acknowledged that the executive branch had used the McCarran-Walter Act, not simply to insure national security, but to exclude certain noncitizens solely on the basis of their political beliefs and affiliations.<sup>32</sup> According to Congress,

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24. See S. REP. NO. 194, 95th Cong., 1st Sess. 12-13, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 1625, 1634-35.

25. S. REP. NO. 194, 95th Cong., 1st Sess. 13, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 1635.

26. *Id.*

27. Conference on Security and Cooperation in Europe, 37 DEP'T ST. BULL. 323 (1975), *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 470.1 (R. Lillich ed. 1986). The United States, as a signatory to the Accords, promised to "[m]ake it their aim to facilitate freer movement and contacts, individually and collectively, . . . among persons, institutions and organizations of the participating States, and to contribute to the solution of humanitarian problems that arise in that connexion." *Id.* at 470.7. See generally Miranda, *Rethinking the Role of Politics in United States Immigration Law: The Helsinki Accords and Ideological Exclusion of Aliens*, 25 SAN DIEGO L. REV. 301 (1988) (analysis of the Helsinki Accords and the importance of United States compliance with agreements to open up borders).

28. S. REP. NO. 194, 95th Cong., 1st Sess. 13 (1977), *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 1625, 1635.

29. 22 U.S.C. § 2691 (1982 & Supp. V 1987).

30. *Id.* § 2691(a)

31. *Id.* The McGovern Amendment requires the Secretary of State to certify to the chairmen of the foreign affairs committee that an applicant for a nonimmigrant visa presents a potential threat to United States security before he can be excluded. *Id.* § 2691(d).

32. H.R. CONF. REP. NO. 475, 100th Cong., 1st Sess. 163, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2370, 2424 [hereinafter CONFERENCE REPORT].

these exclusions resulted in United States citizens being denied "access to the full spectrum of international opinion."<sup>33</sup> In order to remedy this situation, Congress passed Section 901 of the Foreign Relations Authorization Act,<sup>34</sup> which prohibited the exclusion or deportation of noncitizens "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."<sup>35</sup> Congress expressed concern that, as a consequence of politically motivated exclusion, "the reputation of the United States as an open society, tolerant of divergent ideas, has suffered."<sup>36</sup> Notwithstanding this general prohibition of ideological exclusions, Congress noted a legitimate interest in excluding those aliens who pose an immediate, tangible threat to the safety of the country and its citizens, when it provided for the exclusion, not only of terrorists, but also of those who plan, recruit, finance, or otherwise aid and abet terrorist activities.<sup>37</sup>

In October, 1988, however, Congress amended Section 901 and limited its application to nonimmigrant aliens.<sup>38</sup> Ironically, this amendment grants first amendment rights to transient visitors, while restoring the restrictions of the McCarran-Walter Act upon those who wish to make the United States their permanent residence.

Furthermore, Section 1225(c)<sup>39</sup> of the Act continues to provide that the government may summarily exclude an alien "without any inquiry" under Sections 1182(a)(27), (28) or (29), on the basis of "information of a confidential nature."<sup>40</sup> The Attorney General, under Section 1225(c), has the discretion to determine that a noncitizen's entry would be "prejudicial to the public interest, safety, or security" of the United States and to exclude that person without a hearing.<sup>41</sup> This continued delegation of unrestricted executive discretion demonstrates the degree to which the legislative branch has been

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33. *Id.*

34. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 901, 101 Stat. 1331 (1987). This legislation was passed with a sunset provision, which limited its application to those admissions sought after December 31, 1987 and before March 1, 1989.

35. *Id.*

36. CONFERENCE REPORT, *supra* note 32, at 163.

37. *Id.* at 164. The terrorist exception also provides for the exclusion of persons who are representatives of labor organizations that are instruments of a totalitarian government, participants in Nazi persecutions, or affiliates of the Palestine Liberation Organization. *Id.* at 164, 165.

38. 134 CONG. REC. S13,800 (daily ed. Sept. 30, 1988).

39. 8 U.S.C. § 1225(c) (1986) (original version enacted in 1952).

40. *Id.*

41. *Id.*

unable to conform the law to meet the requirements of basic political freedoms. Despite various attempts at legislative revision,<sup>42</sup> Congress has failed to modify any of the major provisions of the McCarran-Walter Act itself.<sup>43</sup> For thirty-seven years, a law that attempts to govern the volatile and changing field of immigration and foreign relations has remained substantially unchanged, while the political and social climate among nations has developed in a manner that makes that legislation impracticable.

### III. JUDICIAL RESPONSE

The judiciary must consider three important constitutional principles when deciding an ideological exclusion case: (1) the sovereign power of Congress to control the borders,<sup>44</sup> (2) the alien's right to due process,<sup>45</sup> and (3) the United States citizen's first amendment right to receive information and ideas.<sup>46</sup> When the political process fails to produce an appropriate balance of these principles, the judiciary must ensure that each is properly considered.

In *United States v. Robel*,<sup>47</sup> the Supreme Court stated that "[w]hen Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated."<sup>48</sup> Implicit in this statement is the

42. See *infra* notes 24-38 and accompanying text.

43. Representative Barney Frank introduced legislation to amend the McCarran-Walter Act in 1987. Section 1182(a)(3) of the proposed bill reads:

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 . . . is excludable.

H.R. 1119, 100th Cong., 1st Sess. 5 (1987).

44. See *Galvan v. Press*, 347 U.S. 522, 530-31 (1954).

45. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (noting that "a continuously present resident alien is entitled to a fair hearing when threatened with deportation"); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953) (stating that there is no distinction between aliens and residents for due process purposes).

46. See *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (the first case to interpret the first amendment as protecting the right to receive information, as well as the right to distribute it).

47. 389 U.S. 258 (1967).

48. *Id.* at 264.



notion that, because the judiciary is the final arbiter of constitutional rights, an affirmative duty is imposed on the courts to ensure that these rights survive the failure of the political process. The judiciary has begun to hear ideological exclusion cases more frequently and to define more precisely the scope of executive power under the McCarran-Walter Act.<sup>49</sup> In order to fully protect the constitutional interests at stake, however, the judiciary must balance these interests with national security interests and interpret the substantive immigration law in a manner consistent with constitutional principles.

### A. *Justiciability Issues*

In order for the judiciary to retain its proper constitutional role as a check on the political branches of government, the threshold question of justiciability is critical.<sup>50</sup> It is important that the judiciary, in the protection of individual rights, follow the principle set forth by the Supreme Court in *Buckley v. Valeo*:<sup>51</sup> "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction . . . so long as the exercise of that authority does not offend some other constitutional restriction."<sup>52</sup> Because of the virtually unchecked power of the political branches under the McCarran-Walter Act, the question of justiciability is particularly important. When a challenge to the constitutionality of the McCarran-Walter Act or its application arises, the judiciary is in a position less susceptible to the changing political climate and can better afford the plaintiffs an adjudication free from popular pressures.<sup>53</sup>

The Supreme Court has traditionally viewed the process by which noncitizens enter this country and are naturalized as a plenary

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49. See *infra* notes 50-124 and accompanying text.

50. See *Cooper v. Aaron*, 358 U.S. 1 (1958). In *Cooper*, the Supreme Court reiterated its constitutional role as the supreme interpreter of the Constitution, despite the political fallout that such an interpretation could entail: "[*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Id.* at 18.

51. 424 U.S. 1 (1976).

52. *Id.* at 6.

53. Judicial objectivism does not always occur. For example, the Supreme Court, in *Debs v. United States*, 249 U.S. 211 (1919), upheld the conviction of socialist Eugene V. Debs under the Espionage Act of 1917, just one week after the Court's enunciation of the "clear and present danger" test in *Schenck v. United States*, 249 U.S. 47, 52 (1919). *Debs*, 249 U.S. at 216. *Debs* is widely recognized as a low point in the Court's protection of civil liberties and its ability to insulate itself from the fervent anti-socialist bias of the times. See Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1352 (1983) (describing the inability of the Supreme Court to insulate itself from the political climate of the fifties and its failure to adequately protect free speech in times of crisis).

power of Congress "inherent in sovereignty."<sup>54</sup> Implicit in this view is the concept that executive and legislative policies regarding immigration are inevitably political and therefore warrant only limited judicial review.<sup>55</sup> The application of this notion of judicial deference, however, appears to be discretionary because the courts have routinely reviewed cases involving politics or immigration.<sup>56</sup> Judicial invocation of foreign relations as a talisman to ward off review violates the notion of separation of powers which underlies the political question doctrine.<sup>57</sup> In *Baker v. Carr*,<sup>58</sup> the Court noted that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."<sup>59</sup> In the following Section, this Comment analyzes the judicial treatment of standing, mootness, and ripeness issues in several ideological exclusion cases.

### 1. STANDING

The question of justiciability directly impacts the ability of an alien not yet in the United States to challenge governmental action under the McCarran-Walter Act.<sup>60</sup> The doctrine of standing requires an individual to have a legally recognizable interest in the outcome of

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54. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). See also *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118 (1967) (prohibition on the naturalization of homosexuals held to be a valid act of Congress); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909) (holding that it is within congressional power to penalize a ship owner for the transport of an alien with a contagious disease).

55. See, e.g., *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1894) (deferring to the power of Congress to exclude aliens and to define the terms for entry in upholding the application of the Chinese Exclusion Act to a Chinese merchant on a brief business trip).

56. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (holding that "no Act of Congress [in the immigration context] can authorize a violation of the Constitution"); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (upholding the deportation of former member of the Communist Party); *Carlson v. Landon*, 342 U.S. 524, 537 (1952) (stating that the power to exclude aliens "is, of course, subject to judicial intervention under the 'paramount law of the Constitution'") (citation omitted).

57. Justice Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Thus when one branch abdicates its constitutional role, the balance of power is struck in favor of the other two branches.

58. 369 U.S. 186 (1962).

59. *Id.* at 211. The Court in *Baker* determined that when the justiciability of a political question is at issue, the Court should look at the historical treatment of the issue by the political branches and the practicality of judicial review. See *id.* at 211-12.

60. See *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). The Court allowed Mandel to be a party because "he [was] symbolic of the problem." *Id.* (citing transcript of oral argument); see also *Allende v. Shultz*, 845 F.2d 1111, 1114 (1st Cir. 1988) (acknowledged Allende's status as a symbolic party).

the litigation.<sup>61</sup> Therefore, because excludable aliens are not citizens, they have no constitutional right to object to their exclusion.<sup>62</sup>

In *Kleindienst v. Mandel*,<sup>63</sup> the Supreme Court agreed for the first time, to hear a case involving the parameters of exclusion under Section 1182(a)(28) of the McCarran-Walter Act. In *Kleindienst*, Mandel, a Belgian Marxist economist, had twice applied for and been granted a nonimmigrant visa in order to attend speaking engagements in the United States.<sup>64</sup> On both occasions, the federal government imposed specific restrictions on permissible activities as a condition to granting his visa.<sup>65</sup> In 1969, he was invited to a conference at Stanford University and was denied a nonimmigrant visa.<sup>66</sup> Mandel and the United States citizens who invited him to speak filed suit in the United States District Court for the Eastern District of New York.<sup>67</sup> The United States citizens claimed that the government violated their first amendment right to receive information and ideas.<sup>68</sup>

Over government objections, the district court determined that the United States citizens who invited Mandel to speak had standing to bring their claim.<sup>69</sup> The government then sought review in the Supreme Court,<sup>70</sup> and the Court affirmed the grant of standing by proceeding to the merits of the case.<sup>71</sup> It is ironic that *Kleindienst*, a decision which grants standing with no explanation, has become the

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61. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (holding that the plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

62. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."). The Supreme Court, in *United States v. Macintosh*, (283 U.S. 605, 615 (1931)), held that "[n]aturalization is a privilege, to be given, qualified or withheld as Congress may determine." The idea that an excludable alien has no constitutional rights reflects the positivist notion that, because government exists before the individual, he is entitled only to those rights that the government defines for him.

63. 408 U.S. 753 (1972).

64. See *id.* at 756.

65. See *id.* at 758.

66. See *id.* at 756-57.

67. See *Mandel v. Mitchell*, 325 F. Supp. 620 (E.D.N.Y. 1971), *rev'd*, *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

68. See *id.* at 622; see also *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 390 (1969) (holding that the first amendment requires an uninhibited market place of ideas and that it is the public's right to receive social, political, and moral ideas); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (protecting the right of the citizen to receive information concerning governmental affairs and important public issues).

69. See *Mitchell*, 325 F. Supp. at 632.

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

71. *Id.* at 761.

foundation for claims of standing in ideological exclusion cases.<sup>72</sup> The Court's willingness to proceed with the case has opened the way for lower courts to hear exclusion cases on the merits.<sup>73</sup>

The issue of standing is somewhat different in the context of deportation. It is established law that aliens already in the United States are protected by the first amendment.<sup>74</sup> Therefore, deportable aliens can attempt to show a chilling effect on their own recognized first amendment rights.

## 2. MOOTNESS

The Supreme Court has determined that a case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."<sup>75</sup> A case becomes moot when "(1) 'there is no reasonable expectation . . . ' that the alleged violation will recur, . . . and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."<sup>76</sup>

There are, however, equitable exceptions which allow an otherwise moot case to be heard. In *Allende v. Shultz*,<sup>77</sup> the United States Court of Appeals for the First Circuit refused to declare moot a challenge to the McCarran-Walter Act because the exclusion was "capable of repetition yet evading review."<sup>78</sup> In *Allende*, a group of American scholars, politicians, and religious leaders had invited Hortensia Allende,<sup>79</sup> the wife of former Chilean president Salvador Allende, to speak in the United States.<sup>80</sup> The State Department initially denied her application for a nonimmigrant visa under Section 1182(a)(28) because of her membership in the World Peace Council and the Women's International Democratic Federation, organizations that the State Department considered to be fronts for the Communist Party of the Soviet Union.<sup>81</sup> Instead of pursuing exclusion under Section 1182(a)(28), the State Department set aside the question of

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72. See *Allende v. Shultz*, 845 F.2d 1111, 1114 n.4 (1st Cir. 1988) (relying on *Kleindienst* in holding that a potential deprivation of a United States citizen's first amendment right to receive information is a cognizable interest).

73. See, e.g., *Allende v. Shultz*, 605 F. Supp. 1220, 1223 (D. Mass. 1985), *aff'd*, 845 F.2d 1111 (1st Cir. 1988).

74. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953); *Bridges v. Wixon* 326 U.S. 135, 148 (1945); *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1222 (9th Cir. 1988).

75. *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

76. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citations omitted).

77. 845 F.2d 1111 (1st Cir. 1988).

78. *Id.* at 1115.

79. Allende was a symbolic party only. See *id.* at 1114.

80. See *id.* at 1112-13. Allende was invited to speak on the political and social situation in Latin America, particularly as it concerned women. See *id.* at 1113.

81. See *id.* at 1113.

waiver required under that section and issued an advisory opinion barring her entrance as "prejudicial to the foreign policy interests of the United States" under Section 1182(a)(27).<sup>82</sup>

Allende challenged the government's power to exclude her under Section 1182(a)(27).<sup>83</sup> She claimed that her exclusion infringed on the first amendment rights of the citizens who invited her to speak to receive information, as recognized in *Kleindienst*.<sup>84</sup> While the case was pending, the government issued a nonimmigrant visa, but refused to disavow the policy of applying Section 1182(a)(27) to others similarly situated.<sup>85</sup> The First Circuit concluded that the case must be heard because the government could continue to carry out the policy in question and avoid judicial review by granting an individual visa when its actions were challenged.<sup>86</sup>

The courts' renewed willingness to hear ideological exclusion cases was also apparent in *Abourezk v. Reagan*.<sup>87</sup> In *Abourezk*, Thomas Borge, Interior Minister of Nicaragua, Olga Finlay and Leonore Rodriguez Lezcano, members of The Federation of Cuban Women, and Nino Pasti, former Italian General and an active participant in the World Peace Council, were denied non-immigrant visas under Section 1182(a)(27).<sup>88</sup> The United States Court of Appeals for the District of Columbia determined that mootness would not bar an adjudication on the merits.<sup>89</sup> The United States Court of Appeals for the District of Columbia rejected the government's contention that no possibility of repetition existed because every visa application is considered on an individual basis.<sup>90</sup> The court concluded that the potential for similar denials in the future was real and not merely a " 'theoretical possibility.' "<sup>91</sup>

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82. *Id.* at 1113-14 (citing the affidavit of Undersecretary of State Lawrence Eagleburger, which declared Allende ineligible for a nonimmigrant visa because of her membership in the World Peace Council, and Eagleburger's official determination that her entrance would be contrary to foreign policy interests).

83. *Id.* at 1112.

84. *See id.* at 1114.

85. *See id.* at 1115 & n.7.

86. *See id.* at 1115 n.7. The court further rejected the contention that the passage of Section 901 of the Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1339 (1987), made the action moot. *Allende*, 845 F.2d at 1115 n.7. The court reasoned that, although Section 901 limits the power of the government to exclude an alien for speech and association, it does not address the parameters of the government's power to exclude under Section 1182(a)(28) of the McCarran-Walter Act. *Id.*

87. 785 F.2d 1043 (D.C. Cir. 1986).

88. *See id.* at 1048-49. Three cases were originally filed, which were subsequently consolidated into one action. *Id.* at 1048.

89. *See id.* at 1052.

90. *See id.*

91. *Id.* (citing *Murphy v. Hunt*, 455 U.S. 478 (1982)).

In both *Allende* and *Abourezk*, the courts looked behind the mootness theory proffered by the government and made a decision based on the realistic impact that a dismissal would have on the substantive issues in question. This type of searching inquiry is the standard of review required to strike the proper balance between the executive interest in unfettered control of the borders and the protection of individual constitutional rights under the McCarran-Walter Act.

The judiciary, however, has recently applied mootness principles to avoid substantive review of administrative hearings. In *Randall v. Meese*,<sup>92</sup> Margaret Randall, a well-known poet, professor, and author, challenged the denial of her status adjustment application by the district director of the Immigration and Naturalization Service (INS).<sup>93</sup> Randall was joined by writers and professors who claimed that the district director had violated their constitutional right to receive information when he denied Randall's application for adjustment of status as a matter of discretion, based solely on the political content of her writings.<sup>94</sup> Soon after this denial, the district director initiated deportation proceedings and asked Randall to show cause why she should not be deported.<sup>95</sup> After reading Randall's work,<sup>96</sup> the immigration judge presiding at the deportation hearing decided that, although her "non-proscribed written political opinions"<sup>97</sup> should be given neutral evidentiary weight in a discretionary determination, she was statutorily ineligible for an adjustment of status because "her various writings advocate the economic, international, and governmental doctrines of world communism."<sup>98</sup>

Randall subsequently petitioned the United States District Court for the District of Columbia for a preliminary injunction to halt her

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92. 1987 Westlaw 12570 (D.D.C.), *aff'd*, 854 F.2d 472 (D.C. Cir. 1988).

93. *Id.* at 2.

94. *Id.* at 1. When an alien in the United States applies for permanent residency, the immigration officer's power to adjust the alien's status is viewed by the court as "a matter of administrative grace not a mere statutory eligibility." *Id.* at 12.

95. *Id.* at 2.

96. See *Randall v. Meese*, 854 F.2d 472, 477 (D.C. Cir. 1988). The fact that the judge must read the work in order to make a decision shows that his determination of excludability cannot be content-neutral.

97. *Id.* at 477 (quoting the immigration judge).

98. *Id.* Based on an extensive review of Randall's work, the immigration judge concluded that "portions of her various writing advocate the economic, international and governmental doctrines of world communism," and therefore, she was ineligible for adjustment of status under the statute. *Id.* This kind of interpretation of a writer's work ignores its metaphorical or symbolic aspects and arbitrarily assigns literal meanings to words or passages that may be purely figurative. See Cole, *Deportation of a Poet*, THE NATION, June 25, 1988, at 892, 893.

deportation.<sup>99</sup> The district court refused to grant Randall's motion for a preliminary injunction and dismissed the case.<sup>100</sup> The court held that there was no longer a need to remand the case to the district director because Randall had "received the review she seeks."<sup>101</sup> Apparently the court relied on a mootness theory in holding that, because Randall sought review of the district director's use of discretion and the immigration judge had already reviewed this use of discretion, she had been given all the "fair consideration she warrants."<sup>102</sup>

In this holding, the district court found that Randall had received sufficient redress in the immigration judge's decision that the district director's use of discretion was inappropriate.<sup>103</sup> This holding is in conflict with the fact that the immigration judge did not have jurisdiction to review a decision made by the district director; the *Code of Federal Regulations* states that "[n]o [administrative] appeal lies from the denial of an application by the district director."<sup>104</sup>

When the applicable statutory framework suggests that the judiciary has jurisdiction, a court's refusal to hear an allegation of constitutional violation contradicts both congressional intent and the judicial duty to decide "what the law is."<sup>105</sup> Absent judicial intervention at the instruction of Congress, the executive branch assumes virtually plenary power in derogation of the intent of Congress and the role of the court.

### 3. RIPENESS

Article III of the Constitution and separation of power principles require that a dispute be sufficiently concrete and well-developed before the judiciary can properly hear the case.<sup>106</sup> On appeal, the

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99. See *Randall*, 1987 Westlaw 12570, at 2.

100. See *id.* at 15.

101. *Id.* at 11. The court's refusal to allow a remand completely ignores the fact that the relief Randall sought was adjustment of status, relief that the immigration judge in the deportation proceeding did not in fact afford her. See *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (noting that a case should be held moot only if the "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation").

102. *Randall*, 1987 Westlaw 12570, at 13.

103. *Id.* Despite this holding, the court recognized that Randall sustained cognizable injury to her first amendment rights and a chilling effect on her efforts to teach and to speak freely. *Id.* at 5-6.

104. 8 C.F.R. § 245.2(a)(5)(ii) (1988); see also *Fleurinor v. Immigration & Naturalization Serv.*, 585 F.2d 129, 135 (5th Cir. 1978) (declaring an immigration judge was without jurisdiction to review an INS district director's decision).

105. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

106. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

D.C. Circuit avoided the substantive issues raised in the *Randall*<sup>107</sup> case by applying principles of ripeness and administrative exhaustion.<sup>108</sup> The court required that Randall take the "normal appeal route,"<sup>109</sup> on the grounds that a remand to the district director would be "confusion-breeding" and "conflict-generating."<sup>110</sup> The court viewed Randall's attempt at remand as an "attempt to turn a preliminary . . . administrative procedure intended as a convenience for the alien into a fulcrum to leverage judicial review."<sup>111</sup>

The effect of the D.C. Circuit's decision in *Randall* is to place the district director's judgment beyond appeal. As the dissent noted, "[a] person threatened with deportation cannot be denied the right to challenge the constitutional validity of the process which led to his status merely on the basis of speculation over the availability of other forms of relief."<sup>112</sup> Nonetheless, in the aftermath of the decisions of both the district court and the D.C. Circuit, Randall remains in limbo because the judiciary initially told her that she was too late, and later told her that she was too early, to receive a review of her constitutional claims.

At approximately the same time, in *Rafeedie v. Immigration & Naturalization Service*,<sup>113</sup> the United States District Court for the District of Columbia held that principles of ripeness and exhaustion did not bar a suit that challenged the summary exclusion proceedings on constitutional and statutory grounds.<sup>114</sup> Rafeedie was a resident alien who had lived in the United States for thirteen years, had extensive family in this country, and was politically active in Arab-American

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

108. See *id.* at 474.

109. *Id.* at 482. The normal appeal route involves a return to the deportation proceeding and an appeal to the Board of Immigration Appeals before a proceeding in the appropriate circuit court. *Id.* at 481.

110. *Id.* at 481. One of the important factors to be considered in deciding a ripeness issue is the harm the plaintiff will suffer from a delay. See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Since 1984, Randall's first amendment right to speak, write, and teach had been severely curtailed. Brief for Appellant at 11, *Randall v. Meese*, 854 F.2d 472 (D.C. Cir. 1988) (No. 87-5230). She was also the victim of stigmatization because of her Communist label. *Id.* Finally, she was unable to travel abroad where her three children reside. *Id.* at 12. The harm Margaret Randall continued to suffer would seem to far outweigh the confusion with which the court seemed so concerned.

111. *Randall*, 854 F.2d at 482. But see *Jaa v. Immigration & Naturalization Serv.*, 779 F.2d 569, 571 (9th Cir. 1986) (holding that the district court has jurisdiction over a district director's denial of adjustment of status).

112. *Randall*, 854 F.2d at 487 (Mikva, J., dissenting) (quoting *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 937 (1983)).

113. 688 F. Supp. 729 (D.D.C. 1988).

114. See *id.* at 739.



causes.<sup>115</sup> Upon his return from a two-week trip out of the country, he was "paroled for deferred inspection" by the INS, which allowed him to enter the country but remain subject to exclusion proceedings.<sup>116</sup> Ten months later, the INS classified him as excludable under Sections 1182(a)(27) and (28) and began ordinary exclusion proceedings.<sup>117</sup> Rafeedie requested a bill of particulars regarding the charges against him.<sup>118</sup> One day before the expiration of the time given the INS to comply with this request, the INS issued a summary exclusion order under Section 1225(c), which allows for governmental exclusion without explanation.<sup>119</sup>

Rafeedie challenged his exclusion by raising a "wholesale attack" on the constitutional adequacy of Section 1225(c).<sup>120</sup> The district court determined that it was the appropriate forum for review of Rafeedie's deportation order and the constitutionality of Section 1225(c).<sup>121</sup> The district court examined the purposes underlying the doctrine of administrative exhaustion and concluded that the administrative factual record would be of little use,<sup>122</sup> that interruption of the administrative process was insignificant,<sup>123</sup> and that the INS did

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115. *Id.* at 731-32. Rafeedie had written newspaper articles, appeared on local radio talk shows, and participated in the activities of several Arab and Palestinian social and political organizations. *See id.*

116. *See id.* at 733. The INS will allow an incoming alien to enter the United States temporarily and defer inspection, if it is determined that he is not likely to "abscond or pose a security risk." 8 C.F.R. § 1225.3(c) (1988).

117. *See Rafeedie*, 688 F. Supp. at 733 & n.9. Because Rafeedie was given deferred inspection, he remained subject to exclusion rather than deportation hearings. *Id.* at 733. Despite the fact that the government considered Rafeedie to be a security risk, the INS allowed him to remain in the United States, undisturbed, for ten months. *Id.* The disparate treatment of permanent resident aliens who attempt to reenter the country illustrates the difficulty with the legal fiction that allows aliens to enter the country but remain excludable. *See, e.g., Jean v. Nelson*, 727 F.2d 957, 970 (11th Cir. 1984) (holding that Haitian aliens detained in South Florida have not "entered" the United States for immigration purposes and therefore cannot claim equal protection under the fifth amendment). *See generally Note, Jean v. Nelson: Expansion of the "Entry Doctrine" Fiction*, 15 Sw. U.L. REV. 576 (1985) (describing the judiciary's role in creating the entry doctrine fiction, which requires more than physical presence in the United States in order to receive constitutional protection).

118. *Rafeedie*, 688 F. Supp. at 734. Rafeedie filed a motion for a bill of particulars in order to obtain more detailed information concerning the grounds for his exclusion because the government only cited the statutory language of Sections 1182(a)(27) and (28)(F) without explanation. *See id.* at 733-34 & n.10.

119. *See id.* at 734. The INS acted under the summary exclusion provisions of the Immigration and Naturalization Act, 8 U.S.C. § 1225(c) (1986).

120. *See Rafeedie*, 688 F. Supp. at 737.

121. *See id.*

122. *See id.* at 738 & n.23. The court concluded that the administrative factual record would not be useful because summary exclusion proceedings do not require the INS to provide any reason for the exclusion, no hearing or evidentiary record is kept, and confidential information is not disclosed in the record. *See id.*

123. *See id.* The court reasoned that, because it took the INS more than one year to bring

not have the expertise required to adjudicate the important constitutional issues involved.<sup>124</sup>

Most of these principles could have been applied to the *Randall* case as well. Both cases involved constitutional claims which the district court was statutorily and practically capable of adjudicating. Given the emerging trend of extending review to cases involving constitutional attacks against the McCarran-Walter Act, *Randall* is an anomaly.

### B. Substantive Issues

One of the most important substantive issues affecting the alien seeking entry into the United States is whether he is excludable or deportable. The entry doctrine is a legal fiction which is used to categorize an alien as either deportable or excludable and is often determinative of the alien's constitutional rights.<sup>125</sup>

The difficulty with the entry doctrine is its lack of definition and its misapplication. The Supreme Court, in *Shaughnessy v. United States ex rel. Mezei*,<sup>126</sup> defined excludable aliens as those who have not, legally or illegally, crossed the "threshold of initial entry."<sup>127</sup> Although *Mezei* makes it clear that physical presence is insufficient to constitute entry, it does not provide much insight into what is required for entry. In *Rosenberg v. Fleuti*,<sup>128</sup> the Court held that a "brief, casual and innocent" trip is not sufficient to trigger an entry proceeding.<sup>129</sup> Despite their attempt to clarify the requirements for entry, the guidelines remain unclear.

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summary exclusion proceedings against Rafeedie and that these proceedings interrupted the ordinary exclusion process, the INS was only minimally disturbed by this intrusion. *See id.*

124. *See id.* The court further held the statutory provision requiring administrative exhaustion, 8 U.S.C. § 1105a(b) (1982), did not apply because Rafeedie raised a constitutional challenge. *Rafeedie*, 688 F. Supp. at 738-39.

125. *See Leng May Ma v. Barber*, 357 U.S. 185 (1958). The Supreme Court noted in *Barber*:

[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry."

*Id.* at 187 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)).

126. 345 U.S. 206 (1953).

127. *Id.* at 212. When aliens who illegally gain access to this country are considered deportable, the law rewards illegal activity with constitutional rights and punishes those who attempt to enter the country legally. *See Note, Jean v. Nelson: Expansion of the "Entry Doctrine" Fiction*, 15 Sw. U.L. REV. 576, 584 (1985) (describing the legal constructs which deny constitutional protection to those aliens who attempt to enter the United States legally).

128. 374 U.S. 449 (1962).

129. *Id.* at 461.

The importance of the distinction can be seen in *American-Arab Anti-Discrimination Committee v. Meese*,<sup>130</sup> which declared the ideological deportation provisions of the McCarran-Walter Act<sup>131</sup> unconstitutional.<sup>132</sup> In order to reach this conclusion, the United States District Court for the Central District of California recognized that a resident alien has full first amendment rights in the deportation process.<sup>133</sup> Although the court acknowledged that Congress and the Executive have plenary power in the exclusion of aliens, the court rejected the government's argument that this power extends to deportation of aliens within the United States who have been recognized as having constitutional rights.<sup>134</sup> The court noted that *Harisiades v. Shaughnessy*<sup>135</sup> was the only Supreme Court case involving the first amendment rights of an alien in a deportation hearing.<sup>136</sup> In order to determine these rights, the Court in *Harisiades* applied the first amendment test from *Dennis v. United States*,<sup>137</sup> the same test used to determine the first amendment rights of United States citizens.<sup>138</sup> The *American-Arab* court, therefore, held that the use of this standard indicates that the rights of an alien in the deportation context are the same as a United States citizen.<sup>139</sup>

Furthermore, the district court relied on the principle that the first amendment not only protects our right to speak, but also protects the arena of divergent ideas by allowing all persons to speak regardless of the source.<sup>140</sup> Therefore, the right of an alien to speak should be as fully protected as a corporation<sup>141</sup> or a United States citizen. Although the issue in *American-Arab* is the first amendment rights of aliens in the deportation context, the first amendment principles would seem applicable to all aliens, both excludable and deportable. If speech has an inherent value in the market place which goes beyond

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130. 714 F. Supp. 1060 (C.D. Cal. 1989).

131. 8 U.S.C. § 1251(a)(6)(D), (F), (G), (H) (1982) (providing for the deportation of subversive aliens including those who advocate Communism, those affiliated with Communist organizations, and those who teach or write about Communist theory).

132. See *American-Arab*, 714 F. Supp. at 1084.

133. See *id.* at 1082.

134. See *id.* at 1077.

135. 342 U.S. 580 (1952).

136. *American-Arab*, 714 F. Supp. at 1075.

137. 341 U.S. 494 (1951).

138. *American-Arab*, 714 F. Supp. at 1077.

139. *Id.*

140. *Id.* at 1078. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Supreme Court held that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.* at 777.

141. *Bellotti*, 435 U.S. at 777.

the individual speaker's status, all persons should be given the right to speak.<sup>142</sup>

The following analysis of substantive issues exemplifies the treatment of excludable aliens who retain virtually no constitutional rights and have been systematically abused by the exclusion provisions of the McCarran-Walter Act.

#### 1. APPLICANTS PREJUDICIAL TO THE PUBLIC INTEREST

Of the recent developments in the area of law concerning the exclusion of aliens under the McCarran-Walter Act, one of the most significant is the judiciary's attempt to narrow the broad contours of Section 1182(a)(27) and to define its proper relationship to Section 1182(a)(28). In *Allende v. Shultz*,<sup>143</sup> the United States Court of Appeals for the First Circuit determined that the proscribed activity that would be "prejudicial to the public interest, or endanger the welfare, safety, or security of the United States," under Section 1182(a)(27), must be something other than mere entry or presence in this country.<sup>144</sup> The *Allende* court examined the plain language of Section 1182(a)(27) and concluded that Congress intentionally distinguished between classifications that require a prohibited activity as a basis for exclusion and classifications that allow for exclusion based on the alien's status.<sup>145</sup> The court concluded that, if the government was permitted to exclude aliens under Section 1182(a)(27) on the basis of their status, the distinction between Sections (27) and (28) would be rendered meaningless, and the possibility of a waiver of exclusion under Section (28), which does not exist under Section (27), would be anomalous.<sup>146</sup> Furthermore, the court refused to allow the government to circumvent the McGovern Amendment provision for waiver of Section 1182(a)(28), by misclassifying *Allende* as a noncitizen, excludable under Section 1182(a)(27).<sup>147</sup>

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142. The district court in *American-Arab* declared the deportation provisions of the McCarran-Walter Act overbroad in violation of the first amendment. *American-Arab*, 714 F. Supp. at 1084. Because of the similarity between the exclusion and the deportation provisions, many of the same arguments apply.

143. 845 F.2d 1111 (1st Cir. 1988).

144. *Id.* at 1116.

145. *See id.* at 1117. For a provision permitting exclusion based on status, see 8 U.S.C. § 1182(a)(28) (1982). Section 1182(a)(27) allows the government to exclude those aliens who "seek to enter the United States solely . . . to engage in activities" that would threaten the national safety. *Id.* § 1182(a)(27). The court pointed out that the government's contention that an alien's entrance in itself qualifies as an activity is absurd because it is impossible for an alien to enter to engage in the act of entry. *Allende*, 845 F.2d at 1117.

146. *See Allende*, 845 F.2d at 1118.

147. *See id.* at 1113, 1118; *see also* *Abourezk v. Reagan*, 785 F.2d 1043, 1057 (D.C. Cir. 1986), *on remand*, Nos. 83-3739, 83-374, 83-3895 (D.D.C. June 7 1988) (LEXIS, Genfed

The narrow, precise, and literal interpretation of the language of the McCarran-Walter Act by the First Circuit is essential to ensuring that both governmental and individual interests are protected. Requiring the government to provide objective proof that someone presents a tangible threat to national security gives meaning and effect to the Act, while ensuring that a balance is struck between national security interests and interests in open communication and the free flow of ideas. The *Allende* court based its decision on the rational interaction between the rules, and not on a judicial interest in prohibiting unsubstantiated exclusion by the Executive. This rational relation between the rules is a more stable, enduring basis for judicial review than the view of one circuit court judge that executive discretion should be limited.

## 2. APPLICANTS WHO ARE COMMUNIST OR SUBVERSIVE

*Kleindienst v. Mandel*<sup>148</sup> provides a standard of review for cases involving exclusion under Section 1182(a)(28).<sup>149</sup> In *Kleindienst*, the Supreme Court deferred to the authority of the political branches in immigration matters and held that exclusion under Section 1182(a)(28) was justified by a "facially legitimate and bona fide" reason.<sup>150</sup> The Court held that, if the Executive is able to establish such a reason, it is not the role of the judiciary to inquire further.<sup>151</sup> This standard of minimal scrutiny appears inadequate to ensure that the government's reasons for exclusion are genuine and substantial rather than pretextual.<sup>152</sup>

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library, Dist. file). In accord with *Allende*, the Court of Appeals for the District of Columbia in *Abourezk* defined activity in Section 1182(a)(27) to be a conduct-based classification. *Id.* at 1054. The court allowed the government the opportunity to demonstrate congressional acquiescence to such classifications by demonstrating an administrative practice of excluding aliens under Section 1182(a)(27), because their entry or presence was deemed prejudicial to the public interest. *See id.* at 1054-56. The government, however, could show only what the court of appeals described as "meager evidence" of administrative practice. *Id.* at 1056. The district court, on remand, found the evidence to be only "imperceptibly more weighty" than that initially presented before the court of appeals. *See Abourezk*, 1988 Lexis 5203, at 14-15.

148. 408 U.S. 753 (1972).

149. *See id.* at 754.

150. *Kleindienst*, 408 U.S. at 769-70. The "facially legitimate and bona fide reason" standard is unique in constitutional doctrine. In applying it, the courts do not look behind the reason or balance its justification against the first amendment interests of those who wish to hear the alien speak. In no other context is legislation that impinges on a protected right given only rational scrutiny. It is open to question whether the government could demonstrate a compelling federal interest in denying entrance to an alien solely on the basis of ideological beliefs. *See id.* at 779 (Marshall, J., dissenting).

151. *See id.* at 770.

152. In fact, the government in *Kleindienst* conceded that Mandel was apparently unaware of the previous visa restrictions. *Id.* at 778 (Marshall, J., dissenting). It was not clear,

Under the language of the McCarran-Walter Act, it is difficult to determine what might be a facially legitimate reason for exclusion under Section 1182(a)(28). Terms such as anarchist and subversive are labels that require a subjective determination of their meaning before they can be applied. Therefore, any subjective determination of inadmissibility that can be justified by a facially legitimate reason turns the test from an objective to a subjective one.

The waiver for temporary admission under the McGovern Amendment has limited the application of Section 1182(a)(28) and has provided some safeguards against mass exclusion by the Executive.<sup>153</sup> There is an inherent flaw, however, with a classification system that penalizes someone for political beliefs without regard to any demonstrable benefit or governmental security interest. As Justice Douglas pointed out in his dissent in *Kleindienst*: "Thought control is not within the competence of any branch of government."<sup>154</sup>

Furthermore, one of the fundamental purposes of the first amendment is to encourage the interchange of ideas, especially those ideas that comment on the government.<sup>155</sup> Because the Court recognized that United States citizens have a first amendment right to receive information and exchange ideas, this right must be protected by a safeguard more rigorous than a mere rationality test. The legitimate and bona fide reason standard is inapposite to any other first amendment standard.

*Brandenburg v. Ohio*<sup>156</sup> requires that in order to override a first amendment interest, the government must demonstrate that the speech is an incitement to immediate lawless action, not simply that it advocates a doctrine that promotes violent change.<sup>157</sup> This require-

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therefore, whether or not he actually committed the alleged abuse of his previous visa restrictions, which led to his exclusion. *Id.*

153. See Neuborne & Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 751 (1985) (pointing out that the certification requirement of the McGovern Amendment reduces the number of exclusions under Section (28) because it is politically undesirable for the State Department to certify to Congress that an alien was a security threat solely on the basis of his membership in a Communist organization).

154. *Kleindienst*, 408 U.S. at 772 (Douglas, J., dissenting).

155. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (denouncing the early alien and sedition acts, which prohibited criticism of the government as violative of first amendment right to free speech).

156. 395 U.S. 444, 447-48 (1969) (per curiam) (reversing the conviction of a member of the Ku Klux Klan under Ohio's Criminal Syndicalism statute, and declaring the legislation unconstitutional because it provides for punishment of speech that advocates the use of force without a showing that it will produce imminent lawless action).

157. See *id.* at 447-48; *Noto v. United States*, 367 U.S. 290, 297-98 (1961) ("[T]he mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action.").

ment reflects the democratic principle that the proper focus of restriction is not on thought or speech, but on specific actions that pose a threat to the public safety and welfare.<sup>158</sup> In order to prevent the political use of Section 1182(a)(28) to limit free political discourse, the courts must apply a form of the clear and present danger test that was set out by the Court in *Brandenburg* to protect political messages of all kinds.<sup>159</sup>

### 3. APPLICANTS SUBJECT TO SUMMARY EXCLUSION

An ordinary exclusion proceeding involves notice,<sup>160</sup> an open hearing with an immigration judge, the right to introduce evidence, and the right to an appeal.<sup>161</sup> In contrast, the summary exclusion provision of Section 1225(c) of the McCarran-Walter Act,<sup>162</sup> provides that any alien who appears to be excludable under Sections 1182(a)(27) or 1182(a)(28) on the basis of confidential information will be temporarily excluded.<sup>163</sup> The alien is to be provided with the opportunity to prepare and submit a "written statement and accompanying information" in his defense.<sup>164</sup> If the Attorney General determines that the alien would endanger the public interest, safety, or security of the United States, exclusion results without additional inquiry.<sup>165</sup>

*Rafeedie v. Immigration & Naturalization Service*<sup>166</sup> was the first case in which the INS used Section 1225(c) to exclude a permanent resident alien who was returning to the United States after traveling abroad.<sup>167</sup> Rafeedie challenged his exclusion on both statutory and constitutional grounds.<sup>168</sup> The United States District Court for the District of Columbia rejected Rafeedie's statutory reading of "aliens"

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158. *Brandenburg*, 395 U.S. at 447-49.

159. *See id.* at 447-48. The *Brandenburg* decision was a response to *Dennis v. United States*, 341 U.S. 494 (1951), and the failure of the courts to adequately protect individuals from statutory restrictions on politically unpopular political speech. *Brandenburg*, 395 U.S. at 448.

160. The Supreme Court defined adequate notice in the exclusion context as giving the alien enough time so that he has "a realistic opportunity to prepare [his] case for effective presentation in . . . [a] hearing." *Landon v. Plasencia*, 459 U.S. 21, 25 (1982). In *Rafeedie*, the noncitizen was told only that the government had confidential information which would require his exclusion. 688 F. Supp. 729, 734 (D.D.C. 1988). However adequate this notice was, it provided no basis for the preparation of Rafeedie's legal defense, making his opportunity to respond meaningless.

161. *See* 8 U.S.C. § 1226 (1982).

162. *See* 8 U.S.C. § 1225(c) (1982).

163. *See id.*

164. *Id.*

165. *See id.*

166. 688 F. Supp. 729 (D.D.C. 1988). *See supra* notes 114-125 and accompanying text.

167. *Rafeedie*, 688 F. Supp. at 731.

168. *See id.* at 742-43. Rafeedie challenged the authority of the INS to exclude summarily a

in Section 1225(c), as not applying to permanent resident aliens, and held that, "[a]bsent a clearly expressed intention to the contrary, that language must be given its ordinary meaning," which includes all aliens.<sup>169</sup> The court further held that the fact that the INS had never applied this section to resident aliens before was not in itself compelling.<sup>170</sup> Rafeedie claimed that the statute, as applied, was unconstitutional because of his status as a permanent resident alien.<sup>171</sup> Although the court agreed that it would be a violation of due process to apply Section 1225(c) to a lawful resident alien who "remains physically present" in this country,<sup>172</sup> the court held that a reentering alien would only be given due process rights "depending on the circumstances of that alien's trip abroad."<sup>173</sup> The district court arrived at this narrow interpretation, despite broad language in the Supreme Court's decision in *Kwong Hai Chew v. Colding*,<sup>174</sup> which held:

[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinctions between citizens and resident aliens.<sup>175</sup>

The district court noted that *Colding* determined that an alien is entitled to due process upon reentering the country only if his status can be "'assimilate[d] . . . to that of an alien continuously resident and physically present in the United States.'"<sup>176</sup>

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permanent resident alien under Section 1225(c) and, in the alternative, challenged the application as violative of his procedural due process rights. *See id.*

169. *Id.* at 743.

170. *See id.* The fact that the INS never summarily excluded a resident alien should be given greater weight when a deprivation of due process rights is involved.

171. *Id.* at 744. The summary exclusion of nonresident aliens was upheld in United States *ex rel.* Kasel de Pagliera v. Savoretti, 139 F. Supp. 143 (S.D. Fla. 1956). Because Rafeedie's exclusion proceeding was the first time the INS attempted to exclude a permanent resident alien, there was no precedent for such a holding.

172. *Rafeedie*, 688 F. Supp. at 744.

173. *Id.*

174. 344 U.S. 590 (1953). Chew, a permanent resident alien, joined the Coast Guard in 1950 as a seaman on a merchant vessel, which sailed out of New York City and stopped at several ports in the Far East. *Id.* at 594. After a four month voyage, Chew was ordered temporarily excluded, based on 8 C.F.R. § 175.57(b) (1988), the predecessor to Section 1225(c). *Id.* at 595. Chew was not permitted to land, nor was he told the reasons for his exclusion. *Id.* The Court determined that this action violated Chew's procedural due process rights. *Id.* at 600.

175. *Colding*, 344 U.S. at 596 n.5 (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945)).

176. *Rafeedie*, 688 F. Supp. at 745 (quoting *Colding*, 344 U.S. at 596). The requirement that a returning resident alien's due process rights depend on the circumstances of his trip abroad seems to contradict directly the Supreme Court's determination in *Colding* that any alien who legally crosses the border is "invested" with due process rights. *Colding*, 344 U.S. at



The district court then relied on *Rosenberg v. Fleuti*,<sup>177</sup> finding that the proper test for determining the due process rights of a permanent resident alien returning to the United States is whether his trip can be characterized as "innocent, casual, and brief."<sup>178</sup> This reliance is misplaced, however, because the Supreme Court developed the *Fleuti* test to establish whether such an alien should be subjected to exclusion or deportation proceedings,<sup>179</sup> not to determine whether a returning resident alien is entitled to any procedural due process rights. In *Fleuti*, the Supreme Court reiterated its holding in *Colding*: "[T]he returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him, a holding which supports the general proposition that a resident alien who leaves this country is to be regarded as retaining certain basic rights."<sup>180</sup>

Moreover, the district court's decision seems impracticable because an accurate determination of the circumstances of an alien's departure requires a finding of fact involving more liberal procedural due process than Section 1225(c) permits. The judiciary must preserve procedural safeguards in order to protect the constitutional rights of resident aliens and to insure national security by allowing the courts to develop a full and truthful factual record.

#### 4. APPLICANTS SUBJECT TO SECTION 901

Since its enactment, Section 901 of the Foreign Relations Authorization Act (FRAA),<sup>181</sup> has been used by the judiciary to protect aliens from exclusion, under Sections 1182(a)(27) and 1182(a)(28) based on their beliefs, associations, and speech,<sup>182</sup> without the necessity of balancing interests or conducting in-depth personal inquir-

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596 n.5. See also *Greene v. McElroy*, 360 U.S. 474, 507 (1959) (holding that "[w]here administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process").

177. 374 U.S. 449 (1963).

178. *Rafeedie*, 688 F. Supp. at 748 (quoting *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963)). The *Fleuti* test requires that the court review both the duration and purpose of the trip. *Fleuti*, 374 U.S. at 462. The district court also interpreted *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), as requiring the court to examine the circumstances of the departure, in order to determine an alien's due process right. See *Rafeedie*, 688 F. Supp. at 746. It would be a cumbersome task, however, to look into the detailed circumstances of an alien's trip abroad, when the alien has been summarily excluded and little or no factual record has been developed.

179. *Fleuti*, 374 U.S. at 451-52.

180. *Id.* at 460.

181. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1339 (1987).

182. See *id.* at 1400.

ies.<sup>183</sup> Under Section 901, the judiciary has begun to place on the government the burden of showing that, in order to exclude an alien, the alien poses a specific risk to national security, rather than a general perceived threat arising from constitutionally protected divergent ideas and political associations.<sup>184</sup> In order to provide the protection intended by Congress in Section 901,<sup>185</sup> however, the courts must read the exceptions set forth in Section 901 very narrowly.<sup>186</sup>

In *Rafeedie*, two exceptions to Section 901 were at issue.<sup>187</sup> The first exception excludes anyone who is a member, officer, representative, or spokesman of the Palestine Liberation Organization (PLO),<sup>188</sup> and the second excludes those who engage in "a terrorist activity or [are] likely to engage after entry in a terrorist activity."<sup>189</sup> The district court found this first exception to be applicable only to members of the PLO and not to any of its affiliated groups.<sup>190</sup> The district court followed fundamental rules of statutory construction and reasoned that, because Congress included the allies and affiliates of the PLO in other sections of the FRAA, but did not include them in Section 901, Congress must have intended to leave them out of that sec-

183. See CONFERENCE REPORT, *supra* note 32, at 163.

184. See *Allende v. Shultz*, 845 F.2d 1111, 1120-21 (1st Cir. 1988).

185. For a description of the intent of Congress in Section 901, see CONFERENCE REPORT, *supra* note 32, at 162-65.

186. The court in *Lennon v. Immigration & Naturalization Service*, 527 F.2d 187 (2d Cir. 1975), stated:

It is settled doctrine that deportation statutes must be construed in favor of the alien. "[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

*Id.* at 193 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

187. 688 F. Supp. 729, 751 (D.D.C. 1988). There are three exceptions to Section 901 which allow the government to continue to exclude an alien who: 1) presents a natural security threat determined on grounds other than belief, statement, or association that would be protected if engaged in by a citizen; 2) is a terrorist or is likely to engage in terrorist activity; or 3) represents, in an official capacity, a labor organization from a country where the organizations are actually instruments of a totalitarian state. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1400 (1987). The 1988 revision, limiting the application of Section 901 to nonimmigrant aliens, does not affect these exceptions. 134 CONG. REC. S13,800 (daily ed. Sept. 30, 1988).

188. Section 901(b) incorporates the State Department Basic Authorities Act of 1956, section 21(c), 22 U.S.C. 2691(c) (1986), which provides for the exclusion of members of the Palestine Liberation Organization.

189. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 901(b)(2), 101 Stat. 1331, 1400 (1987).

190. See *Rafeedie*, 688 F. Supp. at 753. The PLO has been the specific target of legislation on several occasions, most notably in The Anti-Terrorist Act of 1987, which makes it illegal for anyone to "establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups." 22 U.S.C. § 5202 (1987).

tion.<sup>191</sup> Therefore, because the government did not allege that Rafeedie was a member of the PLO, the district court held this exception to be inapplicable.<sup>192</sup>

As to the terrorist-activities exception, however, the court defined an admittedly broad<sup>193</sup> category of those likely to engage in terrorist activities.<sup>194</sup> The court relied upon legislative intent to include activities such as fundraising and recruiting as impermissible activities which are not protected under Section 901(a).<sup>195</sup> Although the government did not allege that Rafeedie was involved in organizing, abetting, or participating in terrorist activities, the court held that there was a general issue of material fact regarding the nature of his alleged participation in recruiting and fundraising activities for the Popular Front for the Liberation of Palestine.<sup>196</sup> The court acknowledged that the alleged fundraising and recruitment efforts must be intended to "facilitate terrorist activities, not just generally to further the purposes of a terrorist organization."<sup>197</sup> In addition, the court acknowledged that, if these efforts can be characterized as "passive, innocent, or in furtherance of advocacy or speech,"<sup>198</sup> they are presumably acceptable.

The difficulty, however, lies in the court's suggestion that the burden may be on the alien to show that his activities are passive, nonterrorist, and innocent, and that the alien has assumed the risk by joining the organization.<sup>199</sup> In placing the burden of proof on the alien, the court contravenes the policy underlying Section 901, which places the burden of proof on the government to show a specific threat in order to prevent exclusions based on anything less than that.<sup>200</sup>

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191. See *Rafeedie*, 688 F. Supp. at 752-53 ("[W]here Congress 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)).

192. See *id.* at 753.

193. See *id.*

194. See *id.*

195. See *id.*

196. See *id.*

197. See *id.* The court recognized that Congress intended this as an activity-oriented rather than a status-oriented exception. See *id.* See also *Healy v. James*, 408 U.S. 169, 186 (1972) (holding that the government must show that the alien had a "specific intent to further [the organization's] illegal aims").

198. *Rafeedie*, 688 F. Supp. at 753.

199. See *id.*

200. See CONFERENCE REPORT, *supra* note 32, at 164.

## IV. CONCLUSION

Congress has attempted formally to revise the McCarran-Walter Act to address national security needs, while also promoting the free exchange of ideas and safeguarding constitutional principles. Successful revision has yet to take place, largely because of the political nature of the problems involved. The legislative debate has led only to a temporary compromise, represented by the enactment of Section 901. The best solution the political process has been able to develop so far is an extension of Section 901 through 1991.

It is essential that the judiciary assume the responsibility for narrowly defining the groups of persons who can and should be excluded from this country, and that these groups must first be shown to be a direct threat to the security of the United States.<sup>201</sup> If the courts fail to set out clear constitutional guidelines for the Executive, the judiciary will have abdicated its proper role as the final arbiter of the Constitution.

It has never been more clear that "[t]he First Amendment simply cannot stand on the shifting foundation of ad hoc evaluations of specific threat."<sup>202</sup> When the right involved is freedom of expression, what might appear in one political context to be a reasonable restriction might later be found unconstitutional.<sup>203</sup> The consistent application by the courts of a formal test based on a predetermined and

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201. The necessity for the judicial and not the legislative or executive branch to define the constitutional parameters of immigration law is premised on a traditional distinction between the courts and legislatures: legislatures are products of political will and the courts are ostensibly instruments of reason. See Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 246-47 (1973). Because the politics of the person to be excluded is what is involved in so many of these cases, the relative insulation from political pressures, which the judiciary can afford, is of particular importance.

202. J. ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* 109 (1980). Ely further states:

Allowing people to assault our eardrums with outrageous and overdrawn denunciations of institutions we treasure will inconvenience, annoy, and infuriate us on occasion, even set us to wondering about the stability of our society: that's exactly what such messages are meant to do, and exactly the price we shouldn't think twice about paying. By silencing such people we may be protecting something, but we certainly won't be protecting the "American way." In 1980 most people who have thought about the issue appreciate this. The hard part will be to sustain that appreciation through our future periods of actual or perceived crisis. Maybe we won't be able to, but we increase the chances by using today to build protective barriers around free expression as secure as words can make them.

*Id.* at 116.

203. See *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court refused to classify the restriction placed on the symbolic burning of a draft card as content-based, and therefore it was able to balance the right of the government with a merely incidental infringement of the first amendment. *Id.* at 375.

carefully defined set of unprotected activities is the best way to protect fully the rights of noncitizens and to preserve the freedoms essential to democracy.

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