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Abourezk v. Reagan: Curbing Recent Abuses of the Executive Immigration Power

Abourezk v. Reagan\(^1\) concerned the State Department's denial of visas to several aliens pursuant to the "public interest provision" of the McCarran-Walter Act\(^2\) (the "McCarran Act"). The McCarran Act is America's basic immigration law and, inter alia, sets out thirty-three categories of aliens ineligible for admission to the United States.\(^3\) Abourezk v. Reagan involved two of these categories: subsection (27), excluding aliens who seek to enter the United States to engage in activities prejudicial to the public interest (the "public interest provision"), and subsection (28), excluding aliens who are or have been anarchists or communists (the "anti-communist provision").

The plaintiffs in Abourezk, citizens and residents who invited the aliens to come to the United States to speak, made three arguments to the district court, two statutory and one constitutional. First, the plaintiffs argued that the McCarran Act's public interest provision applied only to aliens whose "activities" would threaten the welfare, safety, or security of the United States and did not reach aliens whose mere presence or entry constituted a threat (the "activities/entry" issue).\(^4\) Second, the plaintiffs contended that visa denials under the public interest section can only be made on national security or safety grounds and not for reasons of foreign policy.\(^5\) Finally, the plaintiffs claimed that the visa denials violated their first amendment rights of association and speech, which included their right to receive information and ideas.\(^6\)

The District Court for the District of Columbia granted the State Department's motion for summary judgment.\(^7\) The court of appeals vacated the district court's decision and remanded for additional consid-

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5. Id. at 885.
6. Id. at 886.
7. Id. at 888.

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eration of the activities/entry issue. The United States Supreme Court affirmed the court of appeals by a 3-3 vote without issuing an opinion.

The court of appeals decision (Ginsburg, J., with Bork, J., dissenting) focused on two aspects of the case. First, regarding the activities/entry issue, the court of appeals held that the district court erred by dismissing the case in light of the ambiguous legislative history and inadequate record of agency construction. The court also considered the plaintiffs' claim, not raised before the district court, that the State Department improperly used subsection (27) to exclude the aliens, rather than subsection (28) (the anti-communist provision). The plaintiffs charged that the use of subsection (27) circumvented the McGovern Amendment to the McCarran Act, which limits administrative discretion to exclude aliens solely because they are communists. The court found that the government classified the aliens as threats to the public interest at least partly on the basis of statutory misinterpretation. Concerned that the improper usage of the subsection (27) public interest provision would render subsection (28) superfluous and nullify the Congressional will expressed in the McGovern Amendment, the court held that the government may use the public interest provision only if the reason for exclusion is independent of, not in addition to, the alien's communist affiliation.

This Note contends that the court of appeals decision is unsatisfactory. The traditional deference of the courts to the Executive in the immigration area is less appropriate when the immigration laws implicate the first amendment interests of citizens. In resolving the statutory construction issue, the court of appeals should have considered the plaintiffs' constitutional interests in meeting with and hearing the excluded aliens. This Note suggests that the doctrine of clear statement and the rule against standardless delegations mandate a narrow construction of the subsection (27) public interest exclusion, thereby avoiding the serious constitutional issues raised by an expansive reading.

Section I of this Note explains the statutory framework of the ideological exclusion provisions of the McCarran Act. Section II examines the Supreme Court's deferential standard of judicial review in the immigration area. Section III presents the facts of Abourezk and examines the opinions of the district court and court of appeals. Section IV critiques the court of appeals' analysis and suggests how the court could have

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10. Abourezk, 785 F.2d at 1061-62.
11. Id. at 1056-57.
13. Abourezk, 785 F.2d at 1060.
14. Id. at 1057.
15. Id. at 1058.
resolved the plaintiffs' claim. Section V proposes that, while the Judicial branch usually defers to the Executive branch on matters of immigration law, accepted rules of statutory construction require courts to narrowly construe the vague public interest provision of the McCarran Act in order to avoid any encroachment on first amendment interests.

I. The Statutory Framework of the McCarran-Walter Act

In 1952 Congress passed the McCarran-Walter Act, which codified the existing body of immigration law into one comprehensive statute. The McCarran Act sets out the division of administrative responsibilities for immigration, the criteria governing both immigrant and nonimmigrant entry and exclusion, and the procedures governing waivers of inadmissibility.

A. Administrative Division of Responsibilities

The McCarran Act divides responsibilities for issuing visas between the State Department and the Justice Department. The State Department, through its consular offices abroad, initially determines the admissibility of visa applicants. The Justice Department, however, may review and reverse State Department determinations.

B. The Ideological Exclusion Provisions

The McCarran Act lists thirty-three classes of aliens ineligible to receive U.S. visas. Aliens may be denied admission on ideological grounds under either subsection 212(a)(27) or (28). Subsection (27), the “public interest” provision, authorizes the exclusion of “[a]liens who the consular official or Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States . . . .” Subsection (28), the “anti-communist” provision, requires the exclusion of any alien who is or has been an adherent of anarchism or communism.
C. The Waiver Provisions

Section 212(d)(3) of the McCarran Act provides for a waiver of inadmissibility, thereby allowing the issuance of temporary visas to many aliens otherwise inadmissible. This section gives the Secretary of State and

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(28) Aliens who are, or at any time have been, members of any of the following classes:

(A) Aliens who are anarchists;

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

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist Party or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may have been, or may hereafter adopt . . . ;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship . . . ;

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

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching [the doctrines described in subsection (F)(i)-(iv) of this paragraph]; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that engages in the conduct described in subsection (G) of this paragraph). . . .


25. Id. § 1182(d)(3). The subsection reads in relevant part:

(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) of this section (other than paragraphs (27), (29), and (33)) may, after approval of the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien may be admitted temporarily despite his inadmissibility, be granted such a visa and be admitted
the Attorney General wide discretion to issue waivers for humanitarian or public interest reasons.\textsuperscript{26} The waiver does not apply to aliens inadmissible under the subsection (27) public interest provision; such aliens are statutorily ineligible for a waiver.\textsuperscript{27} Aliens excludable under the subsection (28) anti-communist provision, however, are eligible for waivers, which the State Department routinely grants.\textsuperscript{28} Adverse decisions on waiver applications, however, are unappealable.\textsuperscript{29}

D. The McGovern Amendment

The “McGovern Amendment” of 1977\textsuperscript{30} significantly altered the McCarran Act’s ideological exclusion scheme. Prior to the McGovern Amendment, any applicant “denominated by subsection (28) . . . [was] automatically excluded unless the Secretary of State and the Attorney General affirmatively decided otherwise.”\textsuperscript{31} Under this system, however, the State Department received wide criticism for failing to grant waivers to alien communists seeking to attend conferences in the United States.\textsuperscript{32} In 1977, Congress decided that such refusals violated the recently adopted Helsinki Accords,\textsuperscript{33} which committed signatories to promote the free movement of people and ideas across national borders.\textsuperscript{34} Congress designed the McGovern Amendment to curtail the Secretary of State’s discretion to refuse to make waiver recommendations for political reasons.\textsuperscript{35} The Amendment requires that the “Secretary of State should, within 30 days of receiving an application for a nonimmigrant visa by any alien who is excludable . . . [pursuant to

\begin{itemize}
\item Section 1182(a)(29) authorizes the exclusion of aliens who the consular official has reason to believe would engage in espionage, sabotage, or attempts to overthrow the government by force or violence. \textit{Id.} § 1182(a)(29).
\item Section 1182(a)(33) authorizes the exclusion of aliens who were former members of the Nazi party. \textit{Id.} § 1182(a)(33).
\item See \textit{H.R. REP. No. 1365, 82d Cong., 2d Sess., reprinted in 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1706}. If consular officials find a waiver appropriate, they will forward a favorable recommendation to the Immigration and Naturalization Service or the Attorney General.
\item 8 U.S.C. § 1182(d)(3)(A) (1982). Aliens who fall under the subsection (29) national security exclusion provision and the subsection (33) Nazi provision are also statutorily ineligible for a waiver. \textit{Id.}
\item See \textit{Kleindienst v. Mandel, 408 U.S. 753, 768 n.7} (1972).
\item 8 C.F.R. § 212.4 (1986).
\item See \textit{supra} note 12.
\item Abourezk v. Reagan, 785 F.2d 1043, 1069 (D.C. Cir. 1986) (Bork, J., dissenting).
\item \textit{GORDON & ROSENFIELD, supra note 17, § 2.53b, at 2-366} (1987 Cum. Supp.).
\item The Amendment deprived the Secretary of State of the discretion to deny a § 212(d)(3)(A) waiver to a subsection (28) communist alien, even if he found that admission of that alien would be contrary to the public interest. 22 U.S.C. § 2691 (1982).
\end{itemize}
§ 212(a)(28)] but who is otherwise admissible . . ., recommend that the Attorney General grant the approval necessary for the issuance of a visa . . .". The Secretary of State may decline to issue a favorable recommendation only after determining that a waiver applicant constitutes a threat to national security and reporting the denial to both Houses of Congress.

II. Judicial Review of Immigration Decisions

A. Judicial Deference to Congress in the Immigration Area

Courts have long recognized the virtually unlimited power of Congress in the area of immigration. The Supreme Court infers this authority from Congress' power to regulate commerce, make treaties, declare war, and prescribe uniform rules of naturalization. Generally, the Court describes the power to regulate immigration as an inherent attribute of national sovereignty. The Court has also characterized a

36. Id.
37. Id. Congress recently refused to adopt a proposal by the State Department which would permit the Secretary to consider "foreign policy factors" as well as national security interests in making waiver decisions under the McGovern Amendment. See Abourezk v. Reagan, 785 F.2d 1043, 1057 (D.C. Cir. 1986) (citing Brief for Plaintiff-Appellants, app. B at 2 (letter from Alvin Paul Drischler, Acting Assistant Secretary of State, to George Bush, President of the United States Senate (Oct. 18, 1983)).

38. See I GORDON & ROSENFIELD, supra note 17, § 2.2a, at 2-15 to -18.
39. "The Congress shall have the Power . . . [t]o regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. CONST. art. I, § 8, cl. 3; see also The Head Money Cases, 112 U.S. 580 (1884) (Congress has the power to pass a law regulating immigration as part of commerce of this country with foreign nations).
40. "[The President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ." U.S. CONST. art. II, § 2, cl. 2.
41. "The Congress shall have the Power . . . [t]o declare War . . ." U.S. CONST. art. I, § 8, cl. 11.
42. "The Congress shall have the Power . . . [t]o establish an Uniform Rule of Naturalization . . ." U.S. CONST. art. I, § 8, cl. 4; see also Lem Moon Sing v. United States, 158 U.S. 538, 543 (1895) (". . . every sovereign nation has the power, inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its domains. . . ."); Chae Chan Ping v. United States (Chinese Exclusion Cases), 130 U.S. 581, 604-09 (1892) (the government has the power to exclude foreigners from the country whenever, in its judgment, the public interest requires such exclusion).
43. See generally Fiallo v. Bell, 430 U.S. 787, 792 (1977) (the Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute") (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953)); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (the exclusion of aliens is a fundamental act of sovereignty, inherent in the executive power to control the foreign affairs of the nation); United States ex rel. Turner v. Williams, 194 U.S. 279, 290 (1909) (it is an accepted principle of international law that every sovereign nation has the power, inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions); Wong Wing v. United States, 163 U.S. 228, 231 (1896) (the right to exclude aliens is an inherent and inalienable right of every sovereign).
nation's right to control alien entry as a fundamental tenet of international law.\textsuperscript{44} Congress, not the courts, defines the limits of the immigration power.\textsuperscript{45} The Supreme Court has stated that "over no conceivable subject is the legislative power of Congress more complete than it is over [immigration]."\textsuperscript{46} Thus the Court regularly approves facially discriminatory and arbitrary procedures governing aliens which, if applied to citizens, would be grossly unconstitutional.\textsuperscript{47}

\textsuperscript{44} See generally Harisiades v. Shaughnessy, 342 U.S. 580, 587-88 (1952) (that aliens are vulnerable to expulsion after long residence may seem severe, but it is a weapon of defense and reprisal that international law confirms as part of a sovereign's inherent powers); Nishimura Ekiu v. United States, 192 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power . . . to forbid the entrance of foreigners within its dominions . . . ").

\textsuperscript{45} Indeed, in Galvan v. Press, 347 U.S. 522 (1954), Justice Frankfurter noted that

\begin{quote}
[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.
\end{quote}

\textit{Id.} at 531; see also Fiallo, 430 U.S. at 792 (the Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political department largely immune from judicial control") (quoting \textit{Shaughnessy}, 345 U.S. at 210); Harisiades, 342 U.S. at 589-90 (policies towards aliens are so exclusively entrusted to the political branches, as to be largely immune from judicial inquiry); \textit{United States ex rel. Knauff}, 338 U.S. at 543 (it is not within the province of any court, unless authorized by law, to review a determination by the political branch to exclude an alien); \textit{Lem Moon Sing}, 158 U.S. at 547 (Congress's power to exclude aliens or to prescribe the conditions upon which they may enter this country is well settled to be beyond judicial intervention); Fong Yue Ting v. United States, 149 U.S. 698, 731 (1892) (on the question of whether and upon what conditions an alien may be permitted to remain within the United States, the courts cannot properly express an opinion upon the wisdom, policy or justice of congressional measures); \textit{Nishimura Ekiu}, 142 U.S. at 660 (it is not within the province of the judiciary to order that foreigners should be permitted to enter the United States. As to aliens, the decisions of executive or administrative officers are due process of law); \textit{Chae Chan Ping}, 130 U.S. at 606 (in war or in peace, legislative determinations regarding the admissibility of aliens are conclusive upon the judiciary).


\textsuperscript{47} See \textit{Chae Chan Ping}, 130 U.S. at 606 ("If . . . the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country . . . to be dangerous to its peace and security" it may lawfully exclude them); see also M. \textit{Konvitz}, \textit{CIVIL RIGHTS IN IMMIGRATION} 39-46 (1953) (The Supreme Court has held that immigration statutes which explicitly mandate discriminatory treatment for certain aliens solely on the basis of race are constitutional). Conversely, statutes in the domestic area which facially discriminate against any persons solely on account of race are presumed to violate the equal protection clause of the fourteenth amendment. Such laws survive constitutional scrutiny only if supported by the most compelling governmental interests. See \textit{generally L. Tribe, CONSTITUTIONAL LAW} § 16-6, at 1000 (1984).

The Court continues to recognize the validity of a constitutional distinction between aliens and citizens. In Matthews v. Diaz, 426 U.S. 67 (1976), the Court upheld 42 U.S.C. § 1395o(2), which barred aliens from receiving medicare benefits unless they had been admitted for permanent residence and had lived in the country for at least five years. The Court noted that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." \textit{Id.} at 79-80; accord Fiallo v. Bell, 430 U.S. 787 (1976)
B. Constitutional Interests and Congress' Power Over Immigration

The Supreme Court reaffirmed Congress' plenary power over immigration most recently in *Kleindienst v. Mandel*. In *Kleindienst*, a group of university professors invited the Belgian Marxist scholar Ernst Mandel to the United States to speak. The State Department, however, excluded Mandel pursuant to section 212(a)(28) of the McCarran Act as an alien who espoused the international doctrines of world communism. The plaintiffs in *Kleindienst* contended that the denial to Mandel of a section 212(d)(3)(a) waiver was "arbitrary and capricious" and that the subsection (28) anti-communist provision violated their first and fifth amendment rights.

A three judge district court held that, although Mandel had no personal right to entry, the ideological exclusion provisions of the McCarran Act violated the plaintiffs' first amendment right to hear him. The Supreme Court, in a 5-3 decision, reversed.

The *Kleindienst* Court recognized that the exclusion of Mandel implicated first amendment rights, but held that Congress' interest in regulating immigration outweighed the plaintiffs' first amendment interests. The majority stated that when the Executive exercises [the immigration] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Courts have subsequently applied the *Kleindienst* "facially legitimate and bona fide" test to dispose of constitutional challenges to McCarran Act visa denials. These cases suggest that plaintiffs have found this

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(Court upheld §§ 101(b)(1)(d) and 101(b)(2) of the McCarran Act, which denied parental immigration preference to fathers of illegitimate children).

49. See supra note 24 and accompanying text.
50. *Kleindienst*, 408 U.S. at 760. The Court decided *Kleindienst* before Congress passed the McGovern Amendment; therefore, it was still within the Secretary of State's statutory authority to refuse to grant a § 212(d)(3)(A) waiver to a subsection (28) communist alien whose presence would not threaten the national security. See supra notes 25-37 and accompanying text.
53. Id. at 768-69. The majority, however, rejected the government's argument that other alternatives (writings, recordings, phone hookups) might suffice. The Court reasoned that no substitute exists for face-to-face contact. Id. at 765.
54. Id. at 770.
55. See NGO Committee on Disarmament v. Haig, No. 82 Civ. 3635 (S.D.N.Y. June 10, 1982), aff'd mem., No. 82-6147 (2d Cir. June 18, 1982) (district court sustained the subsection (28) anti-communist exclusion of 320 Japanese peace activists, whose McGovern Amendment waivers had been denied by the Attorney General, on the bare assertion by counsel that "national security" was involved); El-Werfalli v. Shultz, 547 F. Supp. 152 (S.D.N.Y. 1982) (district court found that a subsection (27) public interest visa denial to a Libyan national studying aircraft maintenance in the United States was justified on national security grounds). *But cf.* Allende v. Shultz,
test a difficult obstacle to overcome.  

III. The Case: Abourezk v. Reagan

Abourezk v. Reagan\(^5\) consolidated the challenges to three unrelated visa denials. The State Department denied the visa applications of Nino Pasti,\(^6\) Olga Finlay and Leonor Lezcano,\(^6\) and Nicaraguan Interior Minister Tomas Borge.\(^6\) Borge, for example, had planned speaking engagements with journalists, religious groups, and at universities.\(^6\) In an official statement explaining the denial, State Department spokesman John Hughes said "[t]he thinking might well [have been] that [Borge] would use those particular occasions as platforms for the same kind of rhetoric we have seen before."\(^6\) Although each of the excluded aliens

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605 F. Supp. 1220 (D.Mass. 1985) (district court denied summary judgment for State Department because the Department failed to provide any fact supporting a "facially legitimate and bona fide reason" for the exclusion).

56. See supra note 55.


58. In Cronin v. Shultz, No. 83-3895, plaintiff disarmament groups challenged the State Department's refusal to issue a visa to Nino Pasti. Pasti, a former NATO General and a former member of the Italian Senate, actively opposed the deployment of Cruise and Pershing II missiles in Europe. He was also affiliated with the World Peace Council, which the State Department claimed was an instrumentality of Soviet foreign policy. After receiving invitations to speak at several disarmament rallies in the United States, Pasti applied to the American Consulate in Rome for a visa. The consular officer found him ineligible pursuant to the § 212(a)(28) anti-communist provisions of the McCarran Act and requested an advisory opinion from the State Department as to the possibility of a § 212(d)(3) waiver. The State Department instructed the consulate to deny Pasti a visa on § 212(a)(27) public interest grounds. Aliens excluded pursuant to subsection (27) are statutorily ineligible for waivers. Abourezk, 592 F. Supp. at 882; AMERICAN CIVIL LIBERTIES UNION, FREE TRADE IN IDEAS: A CONSTITUTIONAL IMPERATIVE 6 (1984) [hereinafter AMERICAN CIVIL LIBERTIES UNION].

59. In City of New York v. Shultz, No. 83-3741, the New York City Council challenged the State Department's refusal to issue visas to Olga Finlay and Leonor Rodriguez Lezcano. Finlay and Lezcano, Cuban nationals, are experts in the area of family law and the status of women. Finlay is the Cuban representative to the United Nations Commission on the Status of Women. Lezcano has served as the Secretary of Foreign Relations for the Federation of Cuban Women. Both women were invited to visit the United States to speak before the New York City Commission on the Status of Women as well as various religious, university, and women's groups. The State Department denied their applications for visas on § 212(a)(27) public interest grounds, based on their affiliation with the Federation of Cuban Women, which the State Department deemed a "mass organization" of the Cuban Communist Party. AMERICAN CIVIL LIBERTIES UNION, supra note 58, at 5. "The Director of the Office of Cuban Affairs at the State Department explained that their visit would have been prejudicial to the public interest by providing these two officials with forums for propagating Cuban policies before U.S. audiences." Id. (citing a letter, dated Oct. 21, 1983, from Kenneth N. Skoug, Jr., Director, Office of Cuban Affairs, to Thomas H. Holloway, Director, Cornell University, Latin American Studies Program).


were affiliated with organizations proscribed under the section 212(a)(28) anti-communist exclusion, the State Department barred their entry under the broader public interest provision of section 212(a)(27).  

A. The District Court Decision

The plaintiffs in Abourezk, citizens and residents who invited the aliens to come to the United States to speak, initially made three arguments to the district court, two statutory and one constitutional. First, the plaintiffs contended that by using the term “activities” as opposed to “entry” in the subsection (27) public interest exclusion, Congress demonstrated an intent to bar only those aliens whose conduct, rather than mere presence, would prejudice the public interest. Second, the plaintiffs argued that Congress intended subsection (27) denials only for threats to national security or safety grounds and not for “foreign policy” reasons. Finally, the plaintiffs claimed that the exclusions violated their first amendment rights. They charged that the State Department excluded the aliens because of the content of their expected speech. The exclusions, therefore, constituted an impermissible, content-based burden on the plaintiffs’ first amendment right to meet and speak with the excluded aliens.

The district court granted the government’s summary judgment motion. It rejected plaintiffs' activities/entry argument, holding that the distinction is one without a difference. The district court also

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63. If an excluded alien is denied a visa pursuant to the § 212(a)(28) anti-communist exclusion of the McCarran Act, the McGovern Amendment requires the Secretary of State to recommend to the Attorney General that a § 212(d)(3)(A) waiver of inadmissibility be granted. See supra notes 30-37 and accompanying text.

64. Aliens excluded pursuant to subsection (27) are not protected by the McGovern Amendment because they are statutorily ineligible for § 212(d)(3)(A) waivers. See supra notes 23-37 and accompanying text.


67. Id. at 886.

68. Id.

69. Id. at 880.

70. Id. at 884. The court reasoned as follows:

On a strictly textual basis, that contention is not unpersuasive, for the statutory provision mentions only “activities.” However, in this context at least, the distinction between an alien’s activities and his presence in the United States is one without a difference. The best proof of that proposition is the case of the former Shah of Iran. The mere entry of the Shah into the United States and his presence in this country had the most serious consequences for the United States, including the seizure of American hostages in Tehran and all that flowed from that episode, including ultimately the loss of life in connection with the abortive rescue operation. It is thus not surprising that the Executive, in construing subsection (27), has not made the distinction plaintiffs ask the Court to draw.

Id. (citations omitted).
rejected the plaintiffs' claim that visa denials could be based only on national security grounds as inconsistent with the language and prior agency interpretation of the statute.\textsuperscript{71} The court held that Kleindienst's "facially legitimate and bona fide" standard governed the plaintiffs' constitutional claims.\textsuperscript{72} After reviewing the State Department's affidavits \textit{in camera}, the court concluded that facially legitimate reasons supported the exclusions.\textsuperscript{73}

B. The Court of Appeals Opinion

Plaintiffs appealed to the Court of Appeals for the District of Columbia.\textsuperscript{74} The court of appeals reviewed the district court's decision and also considered the plaintiffs' additional claim that the State Department used the subsection (27) public interest provision to circumvent the McGovern Amendment's restrictions on the anti-communist exclusion.\textsuperscript{75} Judge Ginsburg, writing for the majority, concluded that the district court dismissed the case on an insufficient record and remanded for additional evidence.\textsuperscript{76} Judge Bork, in dissent, argued that the record was complete and that the court should have deferred to the government's reading of the statute.\textsuperscript{77} Judge Bork would have also dismissed the plaintiffs' constitutional claims as meritless.\textsuperscript{78}

In assessing the plaintiffs' statutory arguments, both the majority and dissent used the guidelines of \textit{Chevron v. Natural Resources Defense Council}.\textsuperscript{79} Under \textit{Chevron}, a court must examine a statutory provision to determine whether Congress had a specific intent regarding the issue in question. The court considers the language of the statute, the legislative history, and past administrative practice to ascertain specific congressional intent.\textsuperscript{80} If the court finds a specific congressional intent, it enforces that intent without regard to the agency's interpretation; if the court cannot find specific congressional intent, it accords greater deference to the agency's interpretation.\textsuperscript{81}

\begin{itemize}
\item \textsuperscript{71} \textit{Id.} at 885-86.
\item \textsuperscript{72} \textit{Id.;} see supra notes 48-56 and accompanying text.
\item \textsuperscript{73} \textit{Abourezk,} 592 F. Supp. at 887-88.
\item \textsuperscript{74} 785 F.2d 1043 (D.C.Cir. 1986). The panel consisted of Judges R. Ginsburg, Edwards, and Bork.
\item \textsuperscript{75} \textit{Id.} at 1056-57. Plaintiffs failed to raise this claim before the district court, but briefed and argued it before the court of appeals. After the district court's decision in \textit{Abourezk}, but before the case was briefed and argued before the court of appeals, the District Court for the District of Massachusetts decided a similar case. \textit{Allende v. Shultz,} 605 F. Supp. 1220 (D.Mass. 1985); see supra note 55; see also supra notes 30-37 and accompanying text. In \textit{Allende}, the district court held that an alien's affiliation with a subsection (28) organization is not, in itself, a "facially legitimate and bona fide" reason for exclusion under subsection (27). \textit{Id.} at 1225.
\item \textsuperscript{76} \textit{Abourezk,} 785 F.2d at 1056-57.
\item \textsuperscript{77} \textit{Id.} at 1064-68.
\item \textsuperscript{78} \textit{Id.} at 1074-76.
\item \textsuperscript{79} 467 U.S. 837 (1984); see \textit{Abourezk,} 785 F.2d at 1053, 1063.
\item \textsuperscript{80} \textit{Chevron,} 467 U.S. at 842-45; \textit{Abourezk,} 785 F.2d at 1053.
\item \textsuperscript{81} \textit{Chevron,} 467 U.S. at 842-45.
\end{itemize}
1. The Majority Opinion

The court of appeals affirmed the district court's rejection of the plaintiffs' claim that subsection (27) can only be used for reasons of domestic security, not for reasons of foreign policy. The court noted that the statute's broad language and the legislative history suggest no such congressional intent. The court of appeals held, however, that the district court erred on the activities/entry issue. The court noted that, although the language of the statute standing alone supported the plaintiffs' claims, the legislative history was ambiguous and "tugs in more than one direction." Following Chevron, the majority then examined previous agency construction of the statute, consisting of four model examples of subsection (27) exclusions obtained from the Foreign Affairs Manual and three actual examples of past exclusions. The court found these examples insufficient to constitute a clear pattern of administrative practice. The court of appeals, therefore, vacated the dismissal and remanded the case for further evidence of past interpretations of subsection (27).

The court of appeals accepted plaintiffs' argument, not put before the district court, that the State Department unlawfully circumvented the McGovern Amendment by using subsection (27) to exclude aliens who were members of subsection (28) organizations. The State Department argued that it denied the applicants admission for reasons in addition to their membership in subsection (28) organizations. The court rejected this argument, holding that such an interpretation would rob subsection (27) of its independent scope and meaning, effectively nullifying the McGovern Amendment. The court held that the reasons for subsection (27) must be independent of the alien's subsection (28) affiliations and remanded to the district court to reconsider the visa denials in light of its holding. Because the court resolved the case on statutory grounds, it did not reach and expressed no opinion on the

82. Abourezk, 785 F.2d at 1053.
83. Id.
84. Id. at 1053-54.
86. Abourezk, 785 F.2d at 1054-56.
87. Id. at 1056. The court also ordered that the plaintiffs be permitted sufficient discovery to contest the State Department's evidence. Id.
88. Id. at 1056-57; see supra notes 30-37 and accompanying text.
89. Abourezk, 785 F.2d at 1057.
90. Id.
91. Id. at 1058-60. The court stated that when an alien is a member of a proscribed organization, so that subsection (28) applies, the government may bypass that provision and proceed under subsection (27) only if the reason for the threat to the 'public interest[...]
plaintiffs' constitutional claims.  

2. The Dissenting Opinion

Judge Bork dissented, contending that because the language and legislative history of a 1941 predecessor to subsection (27) makes several references to prejudicial "entry" as opposed to "activities," Congress must have meant for "activities" to encompass the act of "entry." While acknowledging the ambiguous nature of the legislative history, Judge Bork argued that the court, in following *Chevron*, ought to defer to the State Department's reasonable interpretation of the statute and concluded that a remand would probably not lead to any evidence more dispositive of the question.

Judge Bork also argued that the court, by requiring that the reason for a subsection (27) exclusion be independent of an alien's subsection (28) affiliations, grossly misread the McGovern Amendment. He contended that if an alien's affiliation with a subsection (28) organization raises concerns "in addition to" that membership, a subsection (27) exclusion is appropriate. These additional concerns would include an alien's affiliation with a government adversarial to the United States.

Judge Bork argued that this formulation would maintain the independent scope and meaning of subsections (27) and (28) while preserving the Executive's power in foreign affairs.

After resolving the statutory arguments, Judge Bork reached and rejected the plaintiffs' constitutional claims. He dismissed the plaintiffs' suggestion that the first amendment prohibits basing visa decisions on the content of an alien's anticipated speech as a question answered by *Kleindienst*. Judge Bork noted that such an argument is also irrelevant because the State Department excluded the applicants for their welfare, safety, or security is independent of the fact of membership in or affiliation with the proscribed organization.

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92. *Abourezk*, 785 F.2d at 1058. (emphasis in original).
93. *Abourezk*, 785 F.2d at 1060 n.24.
94. *Id.* at 1064-65. The statute to which Judge Bork referred is the Act of June 20, 1941, ch. 209, 55 Stat. 252. The Act reads in relevant part: That whenever any American diplomatic or consular official knows or has reason to believe that any alien seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States, he shall refuse to issue to any such alien [a visa]... entitling such alien to present himself for admission into the United States. *Abourezk*, 785 F.2d at 1065; see S. Rep. No. 386, 77th Cong., 1st Sess. 1 (1941); see also 87 CONG. REc. 4757 (1941). Judge Bork noted that § 22(I) of The Internal Security Act of 1950, ch. 1024, 64 Stat. 987, which incorporated the 1941 law, was seen by its drafters as broadening rather than constricting the grounds for exclusion. *Abourezk*, 785 F.2d at 1064-66.
95. *Abourezk*, 785 F.2d at 1066-68.
96. *Id.* at 1071.
97. *Id.*
98. *Id.* at 1074.
99. *Id.* at 1074-76.
100. *Id.* at 1074-75; see supra notes 48-56 and accompanying text.
governmental affiliations rather than their expected speech.\footnote{101}

IV. Analysis

This Note contends that the majority's opinion in Abourezk is unsatisfying and result-oriented. The court attempted to forge a tenable balance between two compelling yet contradictory imperatives: the Administration's constitutionally suspect use of the immigration laws as a means of silencing alien critics,\footnote{102} and the tradition of judicial deference to the coordinate branches in cases involving immigration, foreign policy, and national security.\footnote{103} The decision reflects a belief in the need to preserve Executive flexibility in foreign policy areas,\footnote{104} coupled with an attempt to reach a palatable result. In doing so, however, the majority distorted the rules of statutory interpretation to avoid the case's thorny constitutional issues.

A. The Activities/Entry Issue

1. Chevron: Use by the Majority and Dissent

The majority's analysis of the activities/entry issue is seriously flawed. The legislative history indicates that Congress never considered the issue of exclusion based on "entry" as opposed to "activities."\footnote{105} Consequently, Judge Bork has the better view, concluding that Chevron compels deference to a reasonable agency interpretation when faced with two plausible statutory readings and an inconclusive legislative history.\footnote{106} The majority agreed that Chevron requires consideration of agency interpretation in determining congressional intent behind an ambiguous statute. The majority concluded, however, that the existing record was inadequate to demonstrate congressional acquiescence to prior agency construction of the statute.\footnote{107} As the dissent points out, however, additional evidence would be unlikely to yield significant new insights about congressional intent.\footnote{108} Also, any argument based on inferences drawn from congressional inaction will necessarily be ancillary.\footnote{109} Thus, it seems that an aversion to the outcome mandated by

\footnotesize
101. \textit{Id.} at 1075.
102. \textit{See supra} notes 1-6, 57-64 and accompanying text.
103. \textit{See supra} notes 38-56 and accompanying text.
104. \textit{See Abourezk, 785 F.2d} at 1049 n.2.
105. Indeed, the majority seems to concede as much. \textit{Id.} at 1054 n.11. Judge Ginsburg deduced from this observation that the Court ought to focus instead on the statutory language rather than the committee reports, but noted that the language might be the result of sheer inadvertence. \textit{Id.}
106. \textit{Id.} at 1066.
107. \textit{Id.} at 1054-55.
108. \textit{Id.} at 1067-68. The majority believed that a decision regarding the probative weight of evidence uncovered on remand should await the results of further discovery. \textit{Id.} at 1056 n.14. This position begs the question of whether, considering the probable usefulness of additional evidence, a remand is warranted in resolving the issues before the court.
109. \textit{Id.} at 1054-55. A presumption of Congressional acquiescence is far stronger if Congress recodifies and reenacts the law at issue after administrative interpretation
Chevron motivated the majority's decision to remand for additional evidence.

2. Chevron Inapplicable When Constitutional Rights Implicated

The Chevron analysis was probably not applicable to the State Department's interpretation of the McCarran Act. In Chevron, the court of appeals found that the language and the legislative history of the Clean Air Act Amendments of 1977 were ambiguous.\textsuperscript{110} The court disagreed with the Environmental Protection Agency's interpretation of the Amendments and substituted its own interpretation for the agency's.\textsuperscript{111} The Supreme Court reversed, holding that "if [a] statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . ."\textsuperscript{112} The Chevron court concluded that if Congress implicitly leaves to an administrative agency the task of filling gaps in a statute, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."\textsuperscript{113}

An administrative agency cannot answer constitutional questions.\textsuperscript{114} Deference under Chevron is therefore unwarranted when an agency's interpretation of a statute implicates constitutional rights. Such a construction of a statute cannot be the "reasonable interpretation" of which Chevron speaks.\textsuperscript{115} Because the State Department's construction of subsection (27) raises constitutional questions, the courts in Abourezk should have independently decided the scope and meaning of the statute using established principles of statutory construction.\textsuperscript{116}

\begin{footnotes}
\item[110.] Chevron, 467 U.S. at 842-45. The Clean Air Act Amendments of 1977 are located at Pub. L. No. 95-95, 91 Stat. 685.
\item[111.] Chevron, 467 U.S. at 842-45.
\item[112.] Id. at 843.
\item[113.] Id. The Court stated that
\begin{quote}
if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
\end{quote}

\textit{Id.} at 843-44.
\item[115.] Chevron, 467 U.S. at 844.
\item[116.] See Abourezk v. Reagan, 592 F. Supp. 880, 886 (D.D.C. 1984) ("There are, of course, significant First Amendment implications to the statute.").
\end{footnotes}
B. The Circumvention Issue

The majority's resolution of the circumvention issue does not derive from a faithful reading of the McCarran Act or the McGovern Amendment. Neither the majority nor the dissent suggests an interpretation of the McCarran Act and the McGovern Amendment which would adequately address the problem of political manipulation of visa decisions. The majority held that the State Department may exclude aliens affiliated with particular foreign governments pursuant to subsection (27). It is highly unlikely that, in enacting either the McCarran Act or the McGovern Amendment, Congress intended to have the arbitrary distinction between a communist alien's official or non-official status be the deciding factor in visa decisions. The court of appeals decision conceivably would cause the exclusion of Borge and Finlay pursuant to subsection (27) due to their positions with the Nicaraguan and Cuban governments, while Pasti and Lezcano would be admitted under the McGovern Amendment. Neither the language nor the legislative history of these enactments suggest such a distinction.

The majority, by permitting the exclusion of those aliens who would make the most important contributions to an informed and uninhibited foreign policy debate, forges a troubling compromise. The protection of speech concerning governmental affairs is a central purpose of the first amendment. Visiting foreign officials offer a first-hand perspective on the impact of United States foreign policies abroad. The right to meet and speak with such officials should receive greater protection than Abourezk provides.

V. Constitutional Doctrines of Statutory Construction as a Means of Curbing Abuses of the Immigration Power

The court in Abourezk avoided reaching the plaintiffs' constitutional claims by disposing of the case on statutory grounds; however, constitutional interests are relevant in choosing between alternative interpretations of a vague and ambiguous statute. Part V of this Note argues that the doctrines of clear statement and standardless delegation require a

117. See Abourezk, 785 F.2d 1043, 1057-59 (D.C. Cir. 1986). “We do not reject affiliation with a particular foreign government as beyond the pale of subsection (27).” Id. at 1059.
118. See supra notes 59-64 and accompanying text.
119. See supra notes 58-59 and accompanying text.
120. Mills v. Alabama, 384 U.S. 214 (1966) (invalidating Alabama statute prohibiting political campaigning on election day). In Stromberg v. California, 283 U.S. 359 (1931), the Supreme Court invalidated a California statute prohibiting the public display of a red flag. The Court noted that “[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be made by lawful means . . . is a fundamental principle of our constitutional system.” Id. at 369. See generally A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 25 (1948) (arguing that the speech most worthy of first amendment protection is speech relating to the political conduct of government); L. TRIBE, supra note 47, § 12-1, at 577-79.
narrow construction of subsection (27) in order to avoid the possible constitutional conflict created by a more expansive reading.

A. Constitutional Considerations in the Construction of Subsection (27)

1. Subsection (27) Not Necessarily a Full Exercise of the Congressional Immigration Power

Congressional power to regulate immigration is plenary and unqualified. Accordingly, courts subject congressional judgments to exclude certain categories of aliens to only the most limited judicial review. Kleindienst unequivocally affirmed this principle by holding that Congress's power over immigration expressly outweighed the first amendment rights of citizens.

The Abourezk courts assumed that the Kleindienst analysis disposes of all constitutional challenges to the ideological exclusion provisions of the McCarran Act. Abourezk, however, differs from Kleindienst in a fundamental respect. Kleindienst involved a facial challenge to the constitutionality of the McCarran Act's subsection (28) anti-communist provision. Subsection (28) exhaustively describes the affiliations and actions which render a communist alien excludable from the United States. In that subsection, Congress's assertion of the full extent of its legislative power is unambiguous. In contrast, subsection (27) of the McCarran Act, the "public interest" provision, is a general, catch-all provision. Because of the vagueness of its language, it is not clear how far Congress intended the provision to reach. It is unclear that Congress meant in subsection (27) to exercise the full extent of its Constitutional power over immigration. The courts, therefore, should employ the traditional tools of statutory construction to determine the true scope and meaning of subsection (27).

2. The Constitutional Interest: The Citizens' Constitutional Right to Receive Information and Ideas

The first amendment protects the right to receive information and ideas. The right to receive information correlates to the right to

121. See supra notes 38-47 and accompanying text.
122. Id.
123. See supra notes 48-56 and accompanying text.
126. See supra note 24.
127. See supra note 23 and accompanying text.
speak—a restriction of one necessarily curtails the other. As Justice Brennan noted, concurring in Lamont v. Postmaster General, "[t]he dissemination of ideas can accomplish nothing if otherwise willing [persons] are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

The Supreme Court has upheld the right to receive information and ideas in contexts where the speaker enjoyed no first amendment protection. In Lamont, the Court struck down section 305 of the Postal Service and Federal Employees Salary Act of 1962. Section 305 mandated postal interception of foreign "communist political propaganda" and allowed the addressee to receive such information only if he returned a card indicating his affirmative desire to receive it. Although, as Justice Brennan pointed out in a concurrence, foreign governments and political groups enjoy no first amendment right to use the U.S. mails to disseminate political propaganda, the Court held that the return card requirement constituted an "unconstitutional abridgement of the addressee's first amendment rights."

The Court has also recognized the right of citizens to receive information and ideas in the immigration context. In Kleindienst, the Court held that an unadmitted and nonresident alien has no constitutional right to enter this country. The Court recognized, however, that the citizens who invited the alien to the United States have a first amendment interest in meeting with him. Although Kleindienst ultimately held that Congress's expressed interest in excluding certain classes of aliens outweighed the citizens' first amendment interest, the citizens' interest in exchanging ideas with aliens did rise to constitutional magnitude. Thus, a court should consider the first amendment interest in receiving information whenever construing a vague and ambiguous statute.

in a prison); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not... of the broadcasters, which is paramount."); Lamont v. Postmaster General, 381 U.S. 301 (1965) (holding unconstitutional a law requiring the Postmaster General to deliver foreign mailing of unsealed "communist propaganda" only upon addressee's request).

129. See Procunier, 416 U.S. at 409.
130. 381 U.S. 301 (1965).
131. Id. at 308; see also A. MEIKLEJOHN, supra note 120, at 25 ("... the point of ultimate interest [of speech] is not the words of the speakers, but the minds of the hearers.").
132. Lamont, 381 U.S. at 302-04.
133. Id. at 302-06. In his concurrence, Justice Brennan acknowledged that the first amendment does not protect "political propaganda prepared or printed by or on behalf of a foreign government." Id. at 308.
134. Id. at 307.
135. Id. (emphasis added). The Court has also rejected the claim that prison inmates' mail may be censored because they enjoy narrower first amendment rights than do free citizens, reasoning that this argument "fails to recognize that the first amendment rights of free citizens are implicated in the censorship of prisoner mail." Procunier v. Martinez, 416 U.S. 396, 409 (1974).
137. Id. at 762-65.
B. Doctrine of Clear Statement

1. The Clear Statement Rule

An important principle of constitutional jurisprudence is that, where fairly possible, statutes should be construed to avoid serious questioning of their constitutionality. Courts traditionally construe statutes narrowly to avoid infringing fundamental liberties. Although Congress may exercise the full extent of its constitutional powers, implicating even fundamental liberties, it may do so only by a clear statement of this intent. If narrow construction is an obstacle to Congress exercising the full extent of its powers, clear statement is the means Congress must use to overcome this obstacle.

The Court followed this doctrine of clear statement in Kent v. Dulles. In Kent, the Court avoided a serious constitutional question by narrowly construing a statute. The Court found that section 211a of the Passport Act of 1926 did not give the Executive the authority to deny a passport to a U.S. citizen based on his alleged Communist affiliations. The Court stated that where activities or enjoyment, natural and often necessary to the well-being of an American citizen are involved, we will construe narrowly all delegated powers that curtail or dilute them. We hesitate to find in this broad, generalized [provision] an authority to trench so heavily on the rights of the citizen.

Importantly, the Court did not find the statute itself unconstitutional, but merely found that an expansive interpretation of the statute would raise serious constitutional questions avoided by a more narrow reading.

Similarly, in Greene v. McElroy, the Court stated that, before it

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139. L. Tribe, supra note 47, § 5-17, at 288-89.

140. Id.; see also id. § 5-8, at 243.


142. The Passport Act of 1926, ch. 772, § 1, 44 Stat. 887 (codified at 22 U.S.C. § 211a (1982)) (stating in relevant part that "[t]he Secretary of State may grant and issue passports, and cause passports to be issued and verified ... under such rules as the President may designate and prescribe.

143. Kent, 357 U.S. at 129-30.

144. Id. at 129.

145. Id. at 130. The Court stated that

[w]e would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary [of State] authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizen's right of free movement.

Id.

146. 360 U.S. 474 (1959). Greene involved several statutes directing the Department of Defense to develop military procurement procedures. The Court ruled that
interprets a statute to authorize government actions infringing on constitutionally protected interests,

it must be made clear that the President or Congress specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. ... Without explicit action by lawmakers decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not empowered to decide them.\textsuperscript{147}

The Court further noted that this doctrine applied "even to areas where it is possible that the Constitution presents no inhibition."\textsuperscript{148}

2. Applying the Clear Statement Doctrine in the Immigration Area

Despite the Supreme Court's declarations that Congress possesses plenary and unrestricted power over immigration, aliens, and foreign relations,\textsuperscript{149} the Court on numerous occasions has narrowly construed immigration statutes. For example, in \textit{Kessler v. Strecher},\textsuperscript{150} the government attempted to deport a resident alien who, in his application for citizenship, admitted to brief membership in the Communist Party after his entry into the United States.\textsuperscript{151} The Court narrowly construed the deportation statute under which the government was proceeding,\textsuperscript{152} holding that "[i]f Congress meant that past membership, of no matter how short duration or how far in the past, was to be a cause of present deportation the purpose could have been clearly stated."\textsuperscript{153} In \textit{Bridges v.}}
the Court narrowly interpreted the term "affiliation" in the Alien Registration Act of 1940 as not authorizing the deportation of an alien trade unionist who had participated only in the lawful activities of the Communist Party. In Rosenberg v. Fleuti, the Court interpreted the term "entry" in the McCarran Act as not encompassing a permanent resident's return from brief excursions outside the country. Similarly, in Delgadillo v. Carmichael, the Court narrowly construed the term "entry" in a statute to apply only where "the alien plainly expected or planned to enter a foreign port or place." Finally, in Fong Haw Tan v. Phelan, an alien convicted of multiple counts of murder in a single proceeding was ordered deported as an alien convicted "more than once" of a crime involving moral turpitude.

155. Act of June 28, 1940, ch. 439, § 23(a), 54 Stat. 670, 673. The Act also provided for deportation of any alien who was "at the time of entering the United States, or has been at any time thereafter a member of any one of the classes of aliens enumerated in section 1 of the [Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012]. Id. § 23(b) (emphasis added). This explicitly brought within reach of the Act past members of proscribed groups, such as was held outside the ambit of the Act in Kessler.
156. Bridges, 326 U.S. at 143.
158. The McCarran Act defines "entry" as "... any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise. ..." 8 U.S.C. § 1101(a)(13) (1982). In Rosenberg, the United States sought to deport a long time resident alien following his five hour visit to Mexico, on the grounds that his homosexuality rendered him a "psychopathic personality" excludable from the United States under § 212(a)(4) of the McCarran Act. Rosenberg, 374 U.S. at 450-51.
159. Id. at 461. By disposing of the case on statutory grounds, the Court avoided the petitioner's constitutional claim. The petitioner challenged the government's application of the § 212(a)(4) exclusion of aliens "afflicted with psychopathic personality" to homosexuals, which the Ninth Circuit Court of Appeals concluded was "unconstitutionally vague in that homosexuality was not sufficiently encompassed within the term 'psychopathic personality.'" Id. at 451.
160. 332 U.S. 388 (1947). In Delgadillo, an alien, lawfully residing in the United States since 1923, was working aboard a merchant freighter torpedoed in 1942. The alien's rescuers initially brought him to Cuba to recuperate. The alien then returned to the United States. In 1944, he was convicted of second degree robbery and was subsequently deported for having committed a crime within five years of entry into the United States pursuant to the Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889, as amended by Act of June 28, 1940, ch. 438, § 20, 54 Stat. 667, 671 (codified at 8 U.S.C. § 1251(a) (1982)).
161. Delgadillo, 332 U.S. at 390. Justice Douglas, writing for the Court, stated that "[w]e will not attribute to Congress a purpose to make [an alien's] right to remain here depend on circumstances so fortuitous and capricious as those upon which the immigration service has seized." Id. at 391.
162. 333 U.S. 6 (1948)
163. Id. at 8. Petitioner was ordered deported pursuant to the Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889, as amended by Act of June 28, 1940, ch. 458, § 20, 54 Stat. 667, 671 (codified at 8 U.S.C. § 1251(a) (1982)), which provides in relevant part that

... any alien ... who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving
The Court explained that "we will not assume that Congress meant to trench on his [the alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used."  

3. Applying the Clear Statement Doctrine in Ideological Exclusion Cases

The Court has narrowly construed the ideological exclusion provisions of both the McCarran Act and its prior enactments so as to minimize the chill on domestic political association of aliens. For example, section 22 of the Internal Security Act of 1950 provided that "any alien who was at the time of entering the United States, or has been at any time thereafter a member of the [Communist Party of the United States] . . . shall be taken into custody and deported. . . ."  

In *Rowoldt v. Perfetto*, the Court interpreted the seemingly unequivocal terms of this act narrowly, authorizing deportation of only those aliens proven to have a "meaningful association" with the Party. The Court stated that "[t]here must be a substantial basis for finding that an alien committed himself to the Communist Party in consciousness that he was 'joining an organization known as the Communist Party which operates as a distinct and active political organization. . . .'"  

Similarly, in *Bonetti v. Rogers*, where a resident alien had lived in moral turpitude, committed at any time after entry . . . shall, upon the warrant of the Attorney General, be taken into custody and deported.  

*Id.*  

165. *Id.* at 10.  
168. *Id.*  
169. *Id.* at 120.  
170. *Id.* (quoting Galvan v. Press, 347 U.S. 522, 528 (1954)). The Court subsequently used the *Perfetto* standard to enjoin deportations where the Government failed to sustain its burden of establishing that an alien's association with the Communist Party was meaningful. In *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963), the testimony of two witnesses that petitioner had been a dues paying member of the Los Angeles Communist Party, attended meetings, and attended the Party convention was insufficient to support his order of deportation absent proof of his awareness of the party's political program. *Id.* at 474-80. *Gastelum-Quinones* involved § 241(a)(6)(C) of the Immigration and Nationality Act of 1952, 66 Stat 163, 205 (codified at 8 U.S.C. § 1251 (1982)). This provision was the direct recodified successor to § 22 of the Internal Security Act and incorporated its language almost identically. *See Gastelum-Quinones*, 374 U.S. at 470-71.  
171. *356 U.S. 691* (1958). In *Bonetti*, petitioner, a resident alien first admitted into the United States in 1923, was a member of the Communist Party from 1932 to 1936. *Id.* In 1937 he left the United States to fight with the Spanish Republican Army. *Id.* Petitioner was readmitted for permanent residence in 1938 as a quota immigrant. *Id.* at 692-95. In 1951 he was ordered deported pursuant to § 22 of the Internal Security Act for his Communist affiliations between 1932 and 1936.
the United States for two non-contiguous periods, and had been a Communist Party member during his initial residency, the Court held that the statutory phrase “at the time of entering the United States, or at any time thereafter” referred only to the alien’s most recent lawful admission into the United States. The Court noted that “when Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of leniency.” These cases aptly illustrate the Court’s attitude towards the immigration power. Rhetorically, the Court manifests a strong respect for Congress’s power over immigration. In practice, however, the Court applies principles of statutory construction to overturn unduly harsh or intrusive immigration laws.

C. Doctrine of Standardless Delegation

1. The Traditional Standardless Delegation Doctrine

Courts scrutinize broad delegations of legislative power to the Executive to see if they compromise the principle of separation of powers. Although statutory delegations of legislative power are unconstitutional when lacking meaningful standards to guide the discretion of administrators, modern courts generally uphold legislative delegations. A legislative delegation passes constitutional scrutiny if Congress “lay[s] down by legislative act an intelligible principle to which the person or body . . . [authorized to exercise delegated powers] is directed to conform.”

172. Id. at 696-97.
173. Id. at 699 (quoting Bell v. United States, 349 U.S. 81, 83 (1955)).
174. This type of narrowing construction would be particularly appropriate in the case of § 212(a)(27) of the McCarran Act. This is especially true when viewed in light of its statutory predecessor, § 22 of the Internal Security Act of 1950. The McCarran Act incorporated the language of the Internal Security Act almost exactly.

Title I, § 1(b) of the Internal Security Act of 1950 states that “[n]othing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States...” The Internal Security Act of 1950, ch. 1024, § 1, 64 Stat. 987.

Judge Bork noted in his dissent in Abourezk that “[w]hen Congress enacts a new statute that repeats the language contained in an older statute, there is a heavy presumption that Congress meant the same thing in each, particularly when the new statute is in part a codification of existing law.” Abourezk v. Reagan, 785 F.2d 1043, 1064 (D.C. Cir. 1986) (Bork, J., dissenting) (citations omitted).

175. See Field v. Clark, 143 U.S. 649 (1892). “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.” Id. at 692.

176. See Federal Radio Commission v. Nelson Brothers Bond & Mortgage, 289 U.S. 266 (1933) (Congress has power to delegate authority to Radio Commission to eliminate stations and licenses); J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928) (Congress’s delegation of power authorizing the President to regulate import duties is not unconstitutional); United States v. Grimaud, 220 U.S. 506 (1911) (authority to make administrative rule is not unconstitutional delegation of legislative power).

177. J.W. Hampton, 276 U.S. at 409.
In the early 1930s, the Supreme Court used the standardless delegation doctrine to strike down certain sections of the National Industrial Recovery Act.\(^{178}\) In *A.L.A. Schechter Poultry Co. v. United States*,\(^ {179}\) the Court held that provisions of the Act giving the President the power to prescribe mandatory "Codes of Fair Competition" governing any trade or industry were unconstitutional because they failed to "prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure."\(^ {180}\) Similarly, in *Panama Refining Co. v. Ryan*,\(^ {181}\) the Court struck down a section of the Act because "[t]he Congress left the matter to the President without standard or rule, to be dealt with as he pleased."\(^ {182}\)

*Schechter Poultry* and *Panama Refining* are the only two cases declaring a statute unconstitutional because of excessive delegation.\(^ {183}\) Since the 1930s, the Court has upheld extremely broad delegations of legislative authority,\(^ {184}\) reasoning that an increasingly complex and technical society requires that Congress have the ability to delegate broad fact-finding powers to subordinate bodies.\(^ {185}\) The Court will now overturn a delegation of legislative authority only if it can be shown that "there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible, in a proper proceeding to ascertain whether the will of Congress has been obeyed. . . ."\(^ {186}\) This has proven to be a highly deferential standard,\(^ {187}\) prompting one justice to dismiss uncon-
stitutional delegation as a "moribund doctrine."  

2. The Modern Standardless Delegation Doctrine

Recently, some judges and commentators have called for a resurrection of the standardless delegation doctrine, contending that Congress has increasingly failed to prescribe specific standards in statutory delegations of legislative powers. Indeed, the Court has resuscitated the doctrine recently, but as a method of statutory construction, not as a way of overturning legislation.

In two recent cases, problems of unconstitutional delegation led the Court to narrowly construe excessively broad delegations of legislative
authority. In *National Cable Television Ass’n v. United States*, the Court narrowly interpreted the language of the Independent Offices Appropriations Act of 1952 to avoid the constitutional questions raised by a delegation of the general taxing power to an administrative agency. Similarly, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, a plurality of the Court construed the language of the Occupational Health and Safety Act of 1970 narrowly and noted that the Government’s interpretation of the statute “make[s] such a ‘sweeping delegation of legislative power’ that it might be unconstitutional under *A.L.A. Schechter Poultry Corp. v. United States* . . . and *Panama Refining Co. v. Ryan*. . . . A construction of the statute that avoids that kind of open-ended grant should certainly be favored.”

3. Standardless Delegation in the Foreign Policy Area

The Supreme Court has consistently recognized that the Executive possesses, in addition to those powers delegated by Congress, inherent power over foreign affairs. This inherent foreign affairs power follows as an inevitable incident of national sovereignty. Although the Court traditionally uses a more lenient standard to review broad foreign policy delegations to the Executive, the Court has construed such

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192. *National Cable Television Ass’n*, 415 U.S. at 340-43. The statute authorized administrative agencies to charge various fees to the industries they regulated to offset operations costs. The agency could consider the “public interest” in setting fees under this statute. Finding that such discretionary rate-setting constituted a tax upon the industries, the Court construed the statute strictly to permit the agency to charge fees based solely on the services they rendered to a particular fee-payer. Justice Douglas, writing for the Court, noted that “Schechter and Hampton lead us to read the Act narrowly to avoid constitutional problems.” *Id.* at 342.
194. 84 Stat. 1590, 1594 (codified as amended at 29 U.S.C. § 655(b)(5) (1982)). The section requires the Secretary of Labor to “set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity.” *Id.* The Secretary interpreted “to the extent feasible” to mean that any standard would be acceptable provided it did not materially impair the viability of the industry. *Industrial Union*, 448 U.S. at 639.
195. *Industrial Union*, 448 U.S. at 644-46. Justice Stevens, writing for the plurality, adopted a sort of clear statement rule with respect to standardless delegations in this case. “In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government’s view of §§ 3(8) and 6(b)(5).” *Id.* at 645.
196. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1949) (“The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power, but is inherent in the executive power to control the foreign affairs of the nation.”).
198. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Court noted that

[practically every volume of the United States Statutes contains one or more Acts or joint resolutions of Congress authorizing action by the President in]
delegations narrowly when fundamental rights are implicated. For example, in both Greene v. McElroy and Kent v. Dulles, the Court narrowly construed statutory language to avoid a standardless delegation of legislative authority which would unduly burden a constitutional interest. Similarly, on two separate occasions the Court found an impermissible lack of statutory standards or guidelines governing penalties for delinquency under the draft law. The court construed the Selective Service Act narrowly, holding the local draft boards' to be unauthorized.

respect of subjects affecting foreign relations which either leave the exercise of power to his unrestricted judgment, or provide a standard far more general than that which has been considered requisite with regard to domestic affairs.

Id. at 324; see Dames & Moore v. Reagan, 453 U.S. 654, 678-83 (1981) (upholding Executive's power to extinguish citizen's property rights in Iranian-American agreement to free American hostages in Iran); Zemel v. Rusk, 381 U.S. 1, 17-18 (1965) (The Passport Act of 1926 validly grants authority to President to refuse validation of passports for Cuban travel); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (the Act of June 21, 1941, which authorized the President to set necessary regulations on entry into and departure from the United States, was not an unconstitutional delegation of legislative power).


The Court reasoned in both cases that, without express statutory guidelines, it would not infer that Congress delegated unrestricted authority to manipulate the induction process so as to penalize registrants engaging in constitutionally protected speech. The Court noted that

[i]t is a broad, roving authority, a type of administrative absolutism not congenial to our law making traditions. . . . [In order for the practice to be upheld] standards would be needed by which the legality of a declaration of "delinquency" could be judged.

Gutknecht, 396 U.S. at 306; see also United States v. Robel, 389 U.S. 258 (1967) (invalidating federal statute which provided that when a communist organization is under a final order to register it shall be unlawful for any member of such organization to work in a defense facility). Justice Brennan, concurring, argued that

[b]ecause the statute contains no meaningful standard by which the Secretary [of Defense] is to govern his designations, and no procedure to contest or review his designations, the "defense facility" formulation is constitutionally insufficient to mark the "field within which the [Secretary] is to act so that it
Thus, even in the foreign policy area the Court will not construe statutes as conferring on the Executive unrestricted discretion to encroach on protected liberties.

4. Standardless Delegation in the First Amendment Area

The standardless delegation doctrine is particularly relevant in the first amendment area. The Supreme Court has held licensing systems vesting unrestricted discretion in government officials to deny the right to speak or assemble in public to be unconstitutional. Licensing schemes pass constitutional muster only if they provide "narrowly drawn, reasonable, and definite standards for officials to follow." The absence of standards permits government officials to practice "covert forms of discrimination" based on the content of the speakers' views. Because the right to receive information correlates to the right to speak, using the visa issuance process to exclude disfavored speakers produces results analogous to the ones prohibited by these cases. The Supreme Court, therefore, should not read the public inter...

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Id. at 273 (quoting in part Yakus v. United States, 321 U.S. 414, 425 (1943)).

203. See, e.g., Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) (statute which sets imprecise restrictions on charitable solicitation, a form of protected speech, is unconstitutionally overbroad); Shuttlesworth v. Birmingham, 394 U.S. 147 (1968) (law subjecting free expression in publicly owned place to the prior restraint of a license, without narrow and definite standards is unconstitutional); Kunz v. State of New York, 340 U.S. 290 (1951) (city ordinance prescribing no appropriate standard for action and giving official discretion in advance to control the right to speak on religious matters, is invalid); Saia v. State of New York, 334 U.S. 558 (1948) (city ordinance forbidding sound device except with official permission, but providing no standards for such permission is unconstitutional); Thornhill v. Alabama, 310 U.S. 88 (1940) (statute regulating picketing and other expression by labor is overbroad and therefore unconstitutional); Hague v. CIO, 307 U.S. 496 (1939) (ordinance forbidding public assembly in streets without a permit from official, who may refuse such permit based on mere opinion that assembly will cause riots, is invalid); Lovell v. City of Griffith, 303 U.S. 444 (1938) (law prohibiting distribution of literature without permission held unconstitutional as its coverage was overbroad and granted too much discretion to officials).

204. Niemotko v. State of Maryland, 340 U.S. 268, 271 (1951) (lack of standards in license-issuing practice constituted a prior restraint in violation of first and fourteenth amendments); accord Cantwell v. Connecticut, 310 U.S. 296 (1940) (state statute forbidding solicitation for any alleged religious cause without a permit, found unconstitutional as a prior restraint on free exercise of religion); see also Smith v. Goguen, 415 U.S. 566 (1974) (flag misuse statute found unconstitutionally void for vagueness, as it did not provide standards for defining impermissible conduct).


206. See Shuttlesworth, 394 U.S. at 68 (breach of peace statute prohibiting speech which arouses or disquiets is unconstitutionally vague and overbroad); Cox v. Louisiana, 379 U.S. 556, 557-58 (1965) (statute which gave local authorities "completely uncontrolled discretion" to permit or prohibit parades or street meetings unconstitutional); L. Tribe, supra note 47, at 733.

207. See supra notes 128-37 and accompanying text.
est exclusion of the McCarran Act as giving the Secretary of State unfettered power to encroach on the first amendment interests of U.S. citizens.

D. The Court's Retreat from Narrow Construction

1. The Court’s Ambivalent Approach to Statutory Construction

As previously discussed, the Court has used the clear statement and standardless delegation doctrines to protect constitutional interests even in the traditional areas of extreme deference: foreign affairs, national security, and immigration. Recent cases, however, suggest that the Court might be returning to a more deferential posture in these areas. This Note argues, however, that the policy reasons underlying the clear statement and standardless delegation doctrine are especially compelling in the Abourezk setting.

2. Return to Deference

The Court has retreated during the last twenty years from the practice of narrowly construing statutes to protect constitutional interests in the immigration, national security, and foreign policy areas. The Court has now returned to giving nearly complete deference to the coordinate branches. For example, in Haig v. Agee, an American ex-CIA agent contended that the revocation of his passport was beyond the statutory authority granted the President by Congress, and violated his first amendment right to criticize the government and his fifth amendment right to travel. The Court read the Passport Act of 1926 broadly to authorize the revocation of passports for national security reasons. Similarly, in Regan v. Wald, the Court upheld a Treasury Department regulation prohibiting Americans from spending hard currency in Cuba. American citizens challenged the regulation as lacking statu-

208. See supra notes 38-56 and accompanying text.
210. Id. at 287. Agee, the ex-CIA agent, engaged in a campaign of public exposure of intelligence operations abroad. His activities included revealing the identities of CIA agents employed in foreign countries. On several occasions these disclosures led to assassination attempts. See id. at 283-87.
211. Passport Act of 1926, ch. 772, § 1, 44 Stat. 887 (codified at 22 U.S.C. § 211a (1982)). The Act provides in pertinent part: "The Secretary of State may grant and issue passports... under such rules as the president shall designate and prescribe... ." 22 U.S.C. § 211a (1982).
214. Id. at 224-25. The regulation effectively prohibited all citizens from traveling to Cuba unless they secured a license from the Treasury Department. The Treasury, however, retained complete regulatory discretion in issuing licenses. See 31 C.F.R. § 515.503 (1986). The right to travel is guaranteed by the due process clause of the fifth amendment. This right was first recognized in Kent v. Dulles, 357 U.S. 116 (1957); see supra note 141. Although first amendment rights are implicated by a citizen's right to gather information about foreign countries (see Aptheker v. Secretary of State, 378 U.S. 500, 520 (1964) (Douglas, J., concurring)), the Wald court found that the restriction did not impermissibly burden first amendment rights because the
tory authority and as violating their first and fifth amendment rights to travel. The Court of Appeals for the First Circuit agreed that the regulation lacked statutory authority. The Supreme Court reversed, holding that the International Emergency Economic Powers Act authorized the regulation and that the regulation's foreign policy justifications supported the restriction on the right to travel.

Perhaps the most striking recent example of the Supreme Court's deference to a coordinate branch is Dames & Moore v. Regan. The Dames & Moore Court upheld the power of the Executive to extinguish citizen's property rights, relying on an implied congressional acquiescence. The Court could not find any direct congressional authorization for the Executive branch's action, but rather inferred such power from legislation enacted by Congress and from Congress's historical acquiescence to a continued Executive practice.

One may plausibly argue that the Court's statutory interpretation in Wald, Agee, and Dames & Moore may not constitute renewed deference by the Court, but rather reflects the weak constitutional challenges of particular cases. In Agee, the court indicated that the exposure of intelligence agents was not constitutionally protected speech. In Wald, the Court distinguished the general ban on travel to Cuba from earlier restrictions on travel found to be unconstitutional because they were issued on the basis of political belief or affiliation. In Dames & Moore, the unconstitutional taking claim was premature pending a demonstration that the proceedings outlined in the Iranian-American Agreement were inadequate. Despite the weakness of these constitutional

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216. 708 F.2d 754 (1st Cir. 1983). The court of appeals did not reach the constitutional challenge. Id. at 795.
218. Wald, 468 U.S. at 235-238, 240-43. Because the Supreme Court held that the regulation was authorized, it went on to answer the constitutional challenge. Id. at 240.
220. See id. at 675-88. Dames & Moore involved the Iranian-American agreement to free the American hostages held in Teheran. Id. at 662-65. The property right at issue was Dames & Moore's legal claim against Iranian banks and judgment against the Government of Iran and the Atomic Energy Organization. Id. at 667.
221. See id. at 675-88. The Court looked at the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 (1983 & Supp. 1985), and the Hostage Act of 1868, 22 U.S.C. § 1732 (1982), and concluded that neither constituted specific authorization for the Executive's action. Dames & Moore, 453 U.S. at 675-77. The Court said, however, that "We cannot ignore the general tenor of Congress' legislation in this area," id. at 678, which, when combined with congressional acquiescence to the practice of claim settlement by executive agreement, caused the Court to find sufficient authority for the Executive action. Id. at 678-88.
claims, it is undeniable that the Court is more deferential to Executive actions in the foreign policy area than it has previously been. The paucity of successful constitutional challenges in the last twenty years illustrates this change.

E. The Use of Narrow Construction to Curb Abuses of the Executive Immigration Power

1. Potential for Manipulation and Abuse of the Executive’s Immigration Powers

Administrative abuse of discretion in the immigration area largely escapes meaningful review. Consular visa decisions, for instance, are not subject to judicial review. Decisions by the Secretary of State on waivers of inadmissibility are similarly unreviewable. As Kleindienst demonstrates, visa decisions violating protected constitutional interests of citizens are subjected to only minimal scrutiny. Congress has explicitly stated that aliens, possessing neither constitutional nor statutory rights to admission, should not be permitted to burden the visa issuance process with appeals. However, unreviewable discretion in the immigration area presents the opportunity for abuse and conflicts sharply with traditional notions of judicial oversight of administrative action.

227. See supra notes 48-56 and accompanying text.
229. See Abbott Laboratories v. Gardiner, 387 U.S. 136, 140-41 (1967) (access to judicial review should be restricted only upon a showing of “clear and convincing evidence” of a contrary legislative intent); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108 (1902) (courts generally have jurisdiction to grant relief if an individual suffers injury caused by the violation of a law by government officers).

The unreviewability of consular visa decisions has been widely criticized for establishing a form of administrative absolutism. In a statement submitted to the President’s Commission on Immigration and Naturalization, Professors Louis J. Jaffee and Henry Hart noted that

[i]t has become a fundamental premise of our jurisprudence that the decision of weighty matters should almost never be placed in the power of a single individual free from the control of a superior reviewing body. We search in vain for any parallel in our institutions for this despotic consular absolutism.

2. The Clear Statement and Standardless Delegation Doctrine As Processual Restraints

The clear statement and the standardless delegation doctrines are processual in nature. They do not impose substantive constitutional limits on the scope of Executive action, but merely prescribe processes to which the coordinate branches must adhere to achieve substantive ends. These processes maintain the structural and political integrity of administrative action. Both doctrines assure that unelected and unaccountable bureaucrats will not make important political decisions. Application of these doctrines prevents legislators from avoiding responsibility for unpopular actions by delegating power to administrators pursuant to broad and vague grants of authority. They also force the legislature to carefully weigh the consequences and implications of their actions rather than delegate that function to others.\^250

3. Narrow Construction of Section 212(a)(27)

Because of their processual nature, the clear statement and standardless delegation doctrines do not force courts to evaluate the substantive merits of agency actions in the immigration area, but rather require courts to assess whether the Executive has acted in conformity with the expressed will of the Legislature. If a narrow construction of an enabling statute restricts the Executive's action, the Executive need only seek an explicit legislative mandate for its activities in order to continue.

A narrow construction of the section 212(a)(27) public interest provision of the McCarran Act would force the Executive to ask for amendments to section 212(a). If the Administration wishes to exclude aliens such as Borge, Pasti, Lezcano and Finlay, a narrow construction would force the Administrator either to ask Congress to add to the list of thirty-three classes of excludable aliens those "who are officials in governments or organizations deemed adversarial to the United States"\^291 or to repeal the McGovern amendment. Thus, narrow construction of section 212(a) would prevent abdication of responsibility by Congress and the Court.

The Court should interpret the subsection (27) public interest exclusion provision as authorizing only the exclusion of those aliens whose activities in the United States can be shown to constitute a threat to national security or safety.\^232 Under this interpretation, the Execu-

\^250. See generally supra notes 189-95 and accompanying text. See also L. Tribe, supra note 47, § 17-2, at 1140-44 (discussion of Tribe's theory of structural due process).

\^291. In 1982, for example, Congress expanded from thirty-one to thirty-two the classes of excludable aliens, by providing that former members of the Nazi party would henceforth be ineligible for admission to the United States. See 8 U.S.C. § 1182(a)(33) (1982).

\^232. Such activities might include the otherwise legal research of sensitive military technologies or receiving specialized training in skills which have obvious military application. See El-Werfalli v. Shultz, 547 F.Supp. 152 (S.D.N.Y. 1982) (district court upheld the subsection (27) visa denial to a Libyan national studying aircraft maintenance in the United States, finding national security implicated).
tive would lack the authority to bar aliens it disapproves of politically or whose entry or presence would create embarrassment, forcing it to employ other methods of expressing its disapproval.

IV. Conclusion
In Abourezk v. Reagan, the court of appeals attempted to limit the constitutionally suspect abuse of the ideological exclusion provisions of the McCarran-Walter Act by creatively interpreting the statute. In so doing, however, the court failed to consider the importance of the plaintiffs' constitutional claims to the issue of statutory construction. The clear statement rule and the doctrine of standardless delegation require the court to construe the vague and ambiguous provisions of Section 212(a)(27) of the McCarran Act narrowly, to avoid encroachment on the first amendment interests of citizens. The citizens' freedom to speak and associate with foreign visitors is not adequately protected if it can be quashed by the talismanic invocation of the government’s immigration power.

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