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MANIPULATING PUBLIC DEBATE: USING THE PATRIOT ACT TO KEEP OUT FOREIGN SCHOLARS

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I. INTRODUCTION: NEW EXCLUSION PROVISION

Tariq Ramadan is a renowned writer and lecturer of the Muslim world.[1] Named one of the hundred most important innovators of the 21st Century,[2] Ramadan's unique vision of an "independent European Islam"[3] resonates with many Muslims living in the west. Although his parents are

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1. Jonathan Knight, *Stop Telling Foreign Scholars to Stay Home*, INSIDE HIGHER ED, Feb. 12, 2007, *available at* http://www.insidehighered.com/views/2007/02/12/knight.

2. Nicholas Le Quesne, *Trying to Bridge a Great Divide*, TIME, Dec. 11, 2000, *available at* http://www.time.com/time/innovators/spirituality/profile_ramadan.html.

3. Am. Acad. of Religion v. Chertoff, 463 F. Supp. 2d 400, 404–05 (S.D.N.Y. 2006); Le Quesne, *supra* note 2.

from Egypt, Ramadan was born and raised in Switzerland.[4] He holds a Masters degree in Philosophy and French Literature and a Ph.D. in Arabic and Islamic Studies from the University of Geneva.[5] Through his writings and lectures, Dr. Ramadan has earned respect and admiration as an influential voice among Europe's Muslims.[6]

Some Western Muslims have turned away from their Islamic values in exchange for a wider acceptance in European communities. Others have rejected assimilation and have chosen to limit themselves to their own traditional enclaves. Dr. Ramadan encourages both groups to "reject both isolation and assimilation" and prescribes a "third path" that would allow European Muslims to embrace their European and Muslim identities equally.[7]

Dr. Ramadan visited the United States over thirty times between 2001 and 2004 to deliver lectures, participate in conferences, and meet with other scholars.[8] Prior to exclusion, he was eligible to travel to the United States without a visa as a Swiss citizen under the Visa Waiver Program.[9] After studying the Muslim experience in Europe, Ramadan hoped to move to the United States at the urging of Muslim leaders and scholars in order to "build bridges between the European and the American experiences."[10]

In January 2004, the University of Notre Dame hired Ramadan as a long-term tenured professor in its Department of Religion.[11] The University filed an H-1B petition on Ramadan's behalf, which was approved by the United States Bureau of Citizenship and Immigration Services (BCIS) in May.[12] Ramadan rented a house in South Bend, shipped his furniture to the United States, and enrolled his children in schools in Indiana.[13] However, in July, one week prior to Ramadan's scheduled departure to the United States, he was informed by the United States Embassy in Switzerland that his visa had been revoked.[14] No

4. Steve Paulson, *The Modern Muslim*, SALON, Feb. 20, 2007, http://www.salon.com/books/int/2007/02/20/ramadan/index.html?source=search&aim=/books/int.

5. Tariq Ramadan, *Biography*, Aug. 22, 2004, *available at* http://www.tariqramadan.com/rubrique.php3?id_rubrique=13.

6. Jim Donnelly, *Muslim Scholar Tackles 'Clash of Perceptions'*, CITY J., Jan. 16. 2007, *available at* http://www.tariqramadan.com/article.php3?id_article=925&lang=en.

7. *Am. Acad. of Religion*, 463 F. Supp. 2d at 405.

8. Paulson, *supra* note 4.

9. *Am Acad. of Religion*, 463 F. Supp. 2d at 404 n.6.

10. Paulson, *supra* note 4.

11. *See* George Packer, *Keep Out*, THE NEW YORKER, Oct. 16, 2006, at 59.

12. *Am. Acad. of Religion*, 463 F. Supp. 2d at 406.

13. Packer, *supra* note 11.

14. *Am. Acad. of Religion*, 463 F. Supp. 2d at 406

explanation was given for the visa revocation until August, when BCIS spokesman Russ Knocke told the *Los Angeles Times* that Ramadan's visa had been revoked pursuant to section 411 of the Patriot Act.[15] Knocke told the *Times* that the revocation was based on "public safety or national security interests."[16]

Many in the media speculate that Ramadan's visa was revoked because he is the grandson of Hasan Al-Banna, founder of the Muslim Brotherhood, an Egyptian opposition movement formed in 1928.[17] The Muslim Brotherhood is notorious for its connections to assassinations and militant activity.[18] Although the organization renounced violence in the 1970's, it is still officially banned in Egypt.[19] Right-wing critics decry the organization's political initiative to use the Koran as a basis for the constitution.[20] Despite his critics' efforts to associate Ramadan with the past violence of the Muslim Brotherhood and taint him as a "radical Islamist," Ramadan has said on many occasions that he is not affiliated with the Muslim Brotherhood and has renounced the violence connected to the organization.[21] Ramadan openly eschews violent activism and has spoken out consistently against terrorism and radicalism.[22] Responding to the question whether suicide bombings are ever justified, he said, "To kill innocent people will never be justified."[23] In fact, Dr. Ramadan's reputation as a leading moderate scholar of Islam led British Prime Minister Tony Blair to recruit him for a task force in 2005, after the London bombings, to explore ways to stop British Muslims from turning to violence.[24]

Despite Dr. Ramadan's well-known stance against terrorism, Ramadan's visa was revoked pursuant to section 411 of the Patriot Act.[25]

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15. *Muslim Scheduled to Teach at Notre Dame Has Visa Revoked*, L.A. TIMES, Aug. 25, 2004, at A23.

16. *Id.*

17. Deborah Sontag, *Mystery of the Islamic Scholar Who Was Barred by the U.S.*, N.Y. TIMES, Oct. 6, 2004, at A1.

18. Nadia Abou El-Magd, *Democrat Meets Banned Muslim Brotherhood*, ABC NEWS, Apr. 7, 2007, http://abcnews.go.com/International/wireStory?id=3019105.

19. *Id.*

20. Morning Edition: Egypt's Muslim Brotherhood Celebrates Founder (NPR broadcast Jan. 2, 2007).

21. Sontag, *supra* note 17.

22. Paulson, *supra* note 4.

23. *Id.*

24. *Vilified Muslim Joins UK Task Force,* THE GUARDIAN, Sept. 1, 2005, at 7.

25. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 272, 346-50 (2001) [hereinafter Patriot Act].

The Patriot Act was enacted in response to the September 11, 2001 terrorist attacks.[26] Although it provided many tools badly needed to fight international terrorism, many of the Patriot Act provisions were drafted to permit abuses by law enforcement of constitutional rights.[27] An amendment to the Immigration and Nationality Act ("INA") is buried in Article IV of the Patriot Act which permits the Department of Homeland Security to bar from the United States any alien that has used a "position of prominence within any country to endorse or espouse terrorist activity."[28]

Although the State Department has had authority since 1996 to exclude "representatives" and "members" of terrorist organizations,[29] the Patriot Act empowers the government to exclude significantly more aliens under vague definitions of "terrorist activity" and "terrorist organization."[30] The State Department's Foreign Affairs Manual eliminates any finding of intent, targeting "irresponsible expressions of opinion by prominent aliens who are able to influence the actions of others."[31] The REAL ID Act of 2005 expanded ideological exclusions to include ordinary foreigners rather than only those who are in a position of prominence.[32] The ideological exclusion provisions in the Patriot Act and the REAL ID Act have been incorporated into the Immigration and Nationality Act[33] and will collectively be referred to as the "new exclusion provision."[34]

II. SUMMARY OF ARGUMENT

This paper will argue that the new exclusion provision violates the First Amendment right to receive information and ideas by "blacklisting" foreigners who express disfavored political views. The Bush Administration has routinely utilized its powers to stifle dissent and to

26. Kevin Bohn, *Patriot Act Report Documents Civil Rights Complaints*, CNN, July 31, 2003, http://www.cnn.com/2003/LAW/07/21/justice.civil.liberties/index.html.

27. *Id.*

28. Patriot Act § 411(a)(1)(A)(VI).

29. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 411, 110 Stat. 1214, 1268-69 (1996) [hereinafter AEDPA].

30. Patriot Act § 411(a)(1)(A)(VI).

31. 9 U.S. Dep't of State Foreign Affairs Manual § 40.32 N6.2(3) (2005) [hereinafter Foreign Affairs Manual].

32. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, §103, 119 Stat. 231, 306-7 (2005) [hereinafter REAL ID Act].

33. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(i)(VI) (2006).

34. *See generally* REAL ID Act, 2005, Pub. L. No. 109-13, §103, 119 Stat. 231, 306-7 (2005); Am. Acad. of Religion v. Chertoff, 463 F. Supp. 2d 400, 400 (S.D.N.Y. 2006).

manipulate the public debate over political issues.[35] This signifies a reemergence of the system of ideological exclusion prevalent during the Cold War.[36] By preventing foreign scholars, poets, artists, musicians, and others with unique talents and perspectives from entering our borders, the government restricts public access to such views and information in contravention of the First Amendment.

First, this paper will set forth a brief history of ideological exclusions. It will then provide a synopsis of recent cases in which foreigners were not permitted to enter the United States to accept university teaching positions. Next, this paper will argue that the new exclusion provision violates the constitutional right to receive information and ideas from foreigners in person. The provision bars protected speech on the basis of its content, in violation of the First Amendment. Government authority to proscribe speech in the name of national security is by no means absolute and is unable to withstand strict scrutiny in this case because lesser restrictive alternatives exist.

This paper will then argue that the new exclusion provision fails the *Mandel* standard articulated by the Supreme Court in *Kleindienst v. Mandel*.[37] Under *Mandel*, courts will defer to the State Department's decision to exclude an alien based on any facially legitimate and bona fide reason.[38] However, excluding an alien solely on the basis of the content of his speech is not a legitimate reason for exclusion.[39]

Later, this paper will argue that the new exclusion provision is unconstitutionally vague because it burdens an extraordinary amount of protected speech. The provision allows the Secretary of State too much discretion to silence dissenting views and could allow the administration to manipulate political debate by barring individuals who espouse certain points of view from entering our borders. As a consequence, the Patriot Act could deter universities from inviting to speak or offering faculty positions to foreign scholars with intriguing and valuable ideas based upon a concern that some statement made by the scholar in the past would be categorized as an "irresponsible expression of opinion."

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35. Zinie Chen Sampson, *Muzzle Winners for Limits to Speech*, CINCINNATI POST, Apr. 11, 2007, at A12.

36. Alexandra Marks, *When US Bars Its Door to Foreign Scholars*, CHRISTIAN SCIENCE MONITOR, Nov. 23, 2005.

37. 408 U.S. 753, 770 (1972); *see infra* notes 145–69.

38. *Mandel*, 408 U.S. at 770.

39. *Am. Acad. of Religion*, 463 F. Supp. 2d at 415.

Finally, this paper will posit that immigration policy in the educational context requires a balancing between two competing aims: (i) facilitating academic freedom and (ii) judicial deference to legislative judgment in immigration decision. This paper will examine the effect on universities where foreign scholars are barred from entry. This paper will conclude that the First Amendment protects the addressees' right to meet face-to-face, discuss, debate, and interact with foreign scholars, and that where no compelling interest exists to exclude such activities or less restrictive alternatives exist, the government should not be allowed to exclude these foreign scholars.

III. THE SYSTEM OF IDEOLOGICAL EXCLUSION

A. GOVERNMENT POWER TO EXCLUDE ALIENS ON THE BASIS OF SPEECH

Ideological exclusion refers to the practice of barring foreigners from entering our borders based on their political or ideological speech or beliefs.[40] The issue we face today is not a new one. From our country's birth, we have given Congress the authority to exclude those who wish to overthrow our government.[41] The State Department has excluded those labeled anarchists,[42] Communists,[43] and terrorists[44] from stepping onto American soil. There is no question that government not only has the authority but also a duty to keep truly dangerous individuals out of the United States. Accordingly, Article I of the United States Constitution authorizes Congress "to establish a uniform Rule of Naturalization" and "to declare War."[45] Article II authorizes the President to "be Commander in Chief."[46] However, government authority is limited by the Bill of Rights. In particular, the First Amendment prohibits the government from "abridging the freedom of speech."[47]

The new exclusion provision is reminiscent of former exclusion provisions used to bar foreigners who were Communists or whose entry would be averse to foreign policy interests. The McCarran-Walter Act

40. Jane Lampman, *Uncle Sam Doesn't Want You*, CHRISTIAN SCIENCE MONITOR, May 11, 2006, at 14.

41. Alien Immigration Act, Pub. L. No. 57-162, § 2, 32 Stat. 1213, 1213-14 (1903).

42. § 2, 32 Stat. at 1214.

43. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(D) (1952) [hereinafter McCarran-Walter Act].

44. AEDPA, Pub. L. No. 104-132, § 411, 110 Stat. 1214, 1268-69 (1996).

45. U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. I, § 8, cl. 11.

46. U.S. CONST. art. II, § 2, cl. 1.

47. U.S. CONST. amend. I.

listed several grounds for excluding aliens from entering the United States.[48] Section 27 excluded aliens who sought 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."[49] This provision authorized the Consular Officer or Attorney General to exclude noncitizens for virtually any foreign policy reason.[50] Section 28 excluded anarchists and Communist affiliates unless the noncitizen could prove such affiliations were involuntary or had been renounced.[51] President Truman vetoed the McCarran-Walter Act because he was concerned that sections 27 and 28 would make it more difficult for foreigners to immigrate to our country.[52] He stated:

> We have adequate and fair provisions in our present law to protect us against the entry of criminals. The changes made by the bill in those provisions would result in empowering minor immigration and consular officials to act as prosecutor, judge and jury in determining whether acts constituting a crime have been committed.[53]

Nevertheless, Congress overrode President Truman's veto and enacted the McCarran-Walter Act.[54] The State Department relied upon sections 27 and 28 during the Cold War to keep foreign scholars, artists, and musicians who they believed advocated Communism out of the country.[55] The McCarran-Walter Act was not without critics who decried the usage of sections 27 and 28 to bar foreigners on the basis of speech.[56] A *New York Times* editorialist wrote: "The Government should bar foreigners only for their deeds, not for their words."[57]

B. REINING IN THE EXECUTIVE

President Ford signaled the movement away from ideological exclusions in 1975 when he signed the Helsinki Agreement.[58] This

48. *See* McCarran-Walter Act § 1182(a).
49. § 1182(a)(27).
50. Abourezk v. Reagan, 785 F.2d 1043 (1986).
51. McCarran-Walter Act § 1182(a)(28).
52. Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, 182 PUB. PAPERS 441 (June 25, 1952).
53. *Id.* at 444.
54. *See generally* McCarran-Walter Act § 1182.
55. Lampman, *supra* note 40.
56. *Id.*
57. Clifford D. May, *Washington Talk; A McCarthy Era Act, Used to Block Visits by Foreigners, Is About to Fall*, N.Y. TIMES, June 1, 1989, at A21.
58. The Final Act of the Conference on Security and Cooperation in Europe (Helsinki Declaration), Aug. 1, 1975, 14 I.L.M. 1292 (1994).

obligated the U.S. and other signatories to respect and promote unhindered passage of persons and information into and out of their respective territories. In 1979, Congress passed the McGovern Amendment to section 28 of the McCarran-Walter Act.[59] The McGovern Amendment required the Attorney General to grant a waiver to allow any member or affiliate of a Communist or anarchist party entry unless the Secretary of State made a finding and certified to Congress and the Attorney General that admitting such alien would jeopardize U.S. security interests.[60]

In 1987, Congress issued a joint conference report acknowledging that the Executive Branch had misused the McCarran-Walter Act to exclude noncitizens based solely on political beliefs and associations.[61] The McCarran-Walter Act was being used to exclude aliens on the basis of First Amendment activities.[62] In response, Congress passed the Moynihan-Frank Amendment of 1990, which prohibited the deportation or exclusion of noncitizens "because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States."[63] Finally, the Immigration Act of 1990 permanently incorporated the Moynihan-Frank language into immigration law.[64]

C. REEMERGENCE OF IDEOLOGICAL EXCLUSIONS

The new exclusion provision reverses the progress made by Congress toward ending ideological exclusion since the Cold War ended. The terms "terrorist activity" and "terrorist organization" are defined so broadly as to allow the executive branch to label foreigners as terrorists based solely on views or beliefs.[65] By denying Americans the right to receive information and ideas from foreign scholars in person, the government imposes a restriction on the First Amendment rights of Americans.[66] The new exclusion provision essentially imposes second-class citizenship on those individuals who wish to meet with scholars, poets, musicians, or authors whose political views are disliked by the government.[67] Ideological

59. 22 U.S.C. § 2691 (1982) (repealed 1990).
60. *Id.*
61. H.R. REP. NO. 100-475, at 162-63 (1987) (Conf. Rep.).
62. *Id.* at 163.
63. Foreign Relations Authorization Act, Pub. L No. 100-204, § 901, 101 Stat. 1399 (1987).
64. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 5067 (1990).
65. Immigration and Nationality Act, 8 U.S.C. § 1182 (2007).
66. Am. Acad. of Religion v. Chertoff, 463 F. Supp. 2d 400, 410 (S.D.N.Y. 2006).
67. *See generally id.* at 400.

exclusion of foreign scholars can only be justified under the most rigorous of scrutiny.[68]

IV. KEEPING FOREIGN SCHOLARS OUT

A. TARIQ RAMADAN

The most publicized modern case involves Swiss-born scholar, Tariq Ramadan, whose employment visa was revoked in 2004.[69] Upon revocation, the university submitted a new visa petition in October and was told in December that no decision would be made in the near future.[70] Consequentially, Ramadan resigned from his teaching position at the university in December, citing the indefinite delay.[71] One week later, the DHS wrote to the university that the approval of Ramadan's petition should be revoked because Ramadan had resigned his position with the university.[72] Once Ramadan's visa was revoked, he could no longer rely on his Swiss citizenship to enter the United States to participate in the conference panels to which he was regularly invited.[73]

Months later, Ramadan applied for a B visa in September 2005 to participate in various conferences in the United States.[74] When he appeared at the United States Embassy in Switzerland in December for an interview, representatives of the State Department and Department of Homeland Security asked him questions about his political views and associations.[75] Despite assurances by the interviewers that he would be notified of whether his visa would be granted, the government failed to act on Ramadan's visa application.[76]

When several non-profit organizations moved for a preliminary injunction to allow Ramadan to enter the United States to attend their annual conferences,[77] the government withdrew its initial explanation that Ramadan's visa was revoked pursuant to section 411 but failed to issue a

68. *Id.* at 415.
69. Anushka Asthana, *Advocates Say U.S. Bars Many Academics*, WASH. POST, Aug. 4, 2006, at A7.
70. *Am. Acad. of Religion*, 463 F. Supp. 2d at 407.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Am. Acad. of Religion*, 463 F. Supp. 2d at 408.
77. *Id.* at 404.

new explanation.[78] The District Court was obliged to follow the *Mandel* standard.[79] In *Mandel*, the Supreme Court held that the government may restrict an alien from entering United States borders for any "facially legitimate and bona fide reason."[80] Since the government had refused to give any reason for Ramadan's visa revocation, the District Court ordered the government to provide an explanation within ninety days.[81]

The government proffered a new explanation for Ramadan's visa revocation in September 2006.[82] The government told Ramadan that his visa was revoked because he donated £ 720 to a Swiss humanitarian organization that provides services for Palestinians in 2002.[83] The organization was blacklisted by the State Department in 2003, a year after Ramadan made his last donation.[84] However, the government's new reason for revoking Ramadan's visa was highly suspect given Ramadan's status as a prominent Muslim scholar who had expressed disagreement with the Bush Administration's policies toward the Middle East. It would seem a fair assumption that the more an excluded foreigner is known for his or her views, the greater the likelihood that the government will bar him or her for those views.

B. OTHER BANNED FOREIGN SCHOLARS

The University of Nebraska offered Dr. Waskar Ari a position as Assistant Professor in its History Department and at the Institute of Ethnic Studies.[85] Dr. Ari is a Bolivian native who received his Ph.D. from Georgetown University and specialized in the field of Latin American history.[86] He planned to visit Bolivia for ten days in 2006 after completing his Ph.D. and before beginning his professorship.[87] However, a U.S. consulate official stamped his passport "cancelled" and no decision was made on his new visa application.[88] A State Department spokesman said

78. *Id.* at 416.
79. *Id.*
80. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).
81. *Am. Acad. of Religion*, 463 F. Supp. 2d at 423.
82. Tariq Ramadan, *No Visas for Voices Critical of the U.S.*, TIMES HIGHER EDUCATION, Oct. 6, 2006, *available at* http://www.tariqramadan.com/article.php3?id_article=808&lang=en.
83. *Id.*
84. *Id.*
85. Burton Bollag, *In Mysterious Case, U.S. Withholds Visa from Bolivian Scholar Hired to Teach at University of Nebraska*, CHRONICLE, Feb. 20, 2006, *available at* http://lawprofessors.typepad.com/immigration/2006/02/the_war_on_acad.html.
86. *Id.*
87. Asthana, *supra* note 69.
88. Bollag, *supra* note 85.

the old visa was cancelled under a terrorism-related section of a U.S. immigration law.[89]

The University of Nebraska had unanimously voted to appoint Dr. Ari because of "the unique perspective on Latin American history and culture that Dr. Ari is able to articulate as a member of the Aymara indigenous people of Bolivia," according to Kenneth Winkle, Chair of the Department of History.[90] The university never received an explanation from the government for Dr. Ari's visa denial. Michael Maggio, Dr. Ari's attorney, speculates that Ari has wrongly been connected to the indigenous movement led by Bolivia's populist president, Evo Morales, who has criticized Washington's policies toward Latin America.[91] Dr. Ari and the University of Nebraska are still waiting on the United States to make a decision on his case.[92]

Yoannis Milios, a Greek professor from the National Technical University of Athens, was scheduled to present a paper at the State University of New York at Stony Brook.[93] He was detained at JFK airport and interrogated about his politics for several hours before his visa was revoked and he was sent back to Athens.[94]

Harvard University offered a Latin American Studies teaching post to historian Dora Maria Téllez, a former Nicaraguan government official.[95] Ms. Téllez participated in the Sandinista overthrow of the Somoza regime in Nicaragua over 25 years ago.[96] Like Dr. Ramadan, she had visited the United States many times.[97] However, the government denied her employment visa on the basis that her participation in the political violence in Nicaragua in the 1980s constituted "terrorist acts" and regarded any subsequent teaching and speaking about her activities to be endorsements of terrorism.[98]

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89. *Id.*

90. Letter from Kenneth J. Winkle, Chair, Department of History, University of Nebraska to Secretary of Homeland Security Michael Chertoff and Secretary of State Condoleezza Rice (Feb. 22, 2006), http://www.history.unl.edu/news/ari/ari.html.

91. Asthana, *supra* note 69.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Duncan Campbell, *U.S. Bars Nicaragua Heroine as 'Terrorist'*, Mar. 4, 2005, http://www.commondreams.org/headlines05/0304-02.htm.

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

The aforementioned cases represent an alarming trend toward blocking foreign scholars on the basis of controversial ideas and beliefs. The natural question is whether foreign scholars who are excluded under terrorism laws for their speech have any legal remedy. The Supreme Court has found no First Amendment rights for foreign aliens in two instances.[99] As early as 1904, the Court upheld the exclusion of an alien who espoused anarchism as a philosophy, even where the alien had no program for action.[100] For the next sixty-eight years, it was unclear whether the exclusion was upheld because the alien had no First Amendment rights or that the government met its burden.

In 1972, the Supreme Court definitively settled that foreign aliens possess no First Amendment rights.[101] However, the Court has limited the denial of First Amendment protection to foreigners.[102] The Court has recognized that resident aliens have a First Amendment right to challenge deportation[103] and American citizens who want to hear a foreign scholar's ideas have a First Amendment right to challenge an exclusion decision.[104]

V. CONSTITUTIONAL ANALYSIS

A. THE FIRST AMENDMENT GUARANTEES AMERICANS THE RIGHT TO RECEIVE INFORMATION AND IDEAS FROM FOREIGNERS IN PERSON

The First Amendment right to free speech is a broad protection covering any governmental restriction on speech. Speech includes the right to speak, distribute, hear, and receive information and ideas.[105] In *Martin v. City of Struthers*,[106] the Supreme Court invalidated a city ordinance on First Amendment grounds that would have barred religious organizations, labor groups, and political campaigns from knocking on peoples' doors and ringing doorbells to distribute information at their homes.[107] A necessary corollary to distributing pamphlets at the householder's door is the right to

99. United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904).

100. *Id.*

101. Kleindienst v. Mandel, 408 U.S. 753, 753 (1972) (holding that aliens cannot claim First Amendment protections).

102. *Id.* at 769.

103. Bridges v. Wixon, 326 U.S. 135, 140 n.3 (1945) (noting that the Regulations of the Immigrations and Naturalization Service provides the alien a chance to file an exception to a determination of deportation).

104. Am. Acad. of Religion v. Chertoff, 463 F. Supp. 2d 400, 414 (S.D.N.Y. 2006).

105. U.S. CONST. amend. I.

106. 319 U.S. 141 (1943).

107. *Id.* at 142.

exchange ideas in person.[108] People are most likely to take notice of the information handed to them at their homes.[109] The ordinance took the decision to interact with a door-to-door pamphleteer out of the hands of the householder and gave it to law enforcement to penalize anyone distributing the information.[110] This violated the First Amendment.[111]

The Supreme Court extended *Martin* to include information and ideas arriving from foreign countries by postal mail. In *Lamont v. Postmaster General*,[112] the Court held that an addressee had a First Amendment right to receive unsealed mail designated "communist political propaganda" from foreign countries.[113] Justice Douglas, writing for the majority, emphasized the deterrent effect the statute would have on the addressee's quest for information.[114] He wrote:

> We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions . . . . Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'[115]

In *Mandel*, the Supreme Court extended *Lamont* to hold that American academics have a right to receive information and ideas from a foreign scholar barred from entering this country's borders despite alternative means of accessing the scholar's ideas.[116] In *Mandel*, a Belgian journalist who was chief editor of a Belgian Left Socialist weekly was denied a visa under section 28 of the McCarran-Walter Act.[117] Although a waiver had been granted to allow prior visits, Mandel was denied a waiver on this visit because on a prior visit he had accepted more invitations to speak than were stated in his itinerary.[118] The Court rejected the government's argument that where Americans could access Mandel's ideas

108. *Id.* at 145.
109. *Id.*
110. *Id.* at 143–44.
111. *Id.* at 149.
112. *See generally* 381 U.S. 301 (1965).
113. *Id.* at 307.
114. *Id.*
115. *Id.*
116. Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).
117. *Id.* at 758.
118. *Id.*

freely through his books, speeches, and technological developments, the First Amendment was inapplicable.[119] No alternative could adequately substitute for physical presence of the speaker.[120]

In *Martin*, householders could receive information on political candidates in the mail or by telephone; however, the mere existence of some alternative means of accessing literature was no substitute for door-to-door campaigning.[121] Similarly, in *Lamont*, the intended recipient could retrieve mail addressed to him from the post office by responding to a notice, but imposing such a duty on the addressee violated his right to receive the mail in an unrestricted fashion.[122]

It can be argued that Americans seeking to hear the ideas of a foreign scholar who is denied entry can move the conference outside the United States or substitute the physical presence of the speaker for a video conferencing hookup. However, relocating the speech to outside the United States carries with it the extraordinary costs of making travel arrangements for the audience. Alternatively, resort to technological modes of communication where physical access to the speaker is impaired by the government is not a viable alternative. The university would incur extraordinary costs in operating a live video conference between the professor and students for several hours on a weekly or bi-weekly basis. The professor would be unavailable to students during office hours. The only viable means of communicating with the professor outside of class would be through email. The Supreme Court has found technological advances to be no meaningful alternative to face-to-face dialogue.[123] In *Mandel*, Justice Blackmun noted: "[t]his argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning."[124]

B. THE NEW EXCLUSION PROVISION IS CONTENT-BASED

Under the Patriot Act, Congress has made certain aliens ineligible to obtain visas, including those who have "use[d] the alien's position of

119. *Id.* at 765.

120. *Id.*

121. Martin v. City of Struthers, 319 U.S. 141, 146 (1943). "Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support . . . . [D]istribution of circulars is essential to the poorly financed causes of little people." *Id.*

122. Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965).

123. *Mandel*, 408 U.S. at 765.

124. *Id.*

prominence within any country to endorse or espouse terrorist activity or to persuade others to support terrorist activity or a terrorist organization, in a way that the Secretary of State has determined undermines United States' efforts to reduce or eliminate terrorist activities."[125] The State Department Foreign Affairs Manual defines "public endorsement" as "directed at irresponsible expressions of opinion by prominent aliens who are able to influence the actions of others."[126]

Generally, government measures, by their words distinguishing favored speech from disfavored speech on the basis of the ideas or views expressed therein, are content-based.[127] Under the new exclusion provision, the Secretary of State must look to the content of the speech to determine whether such opinions expressed by the foreigner are "irresponsible."[128] By looking at the content, the Secretary is permitted under the statute to distinguish favored speech from disfavored speech.[129] Foreign scholars who, for instance, openly criticize U.S. foreign policy toward the Middle East can be excluded under the statute.[130]

Although foreigners barred under the new exclusion provision lack constitutional protection, Americans who wish to engage in face-to-face dialogue with the excluded foreigner do have a First Amendment right to do so.[131] By excluding aliens on the basis of speech, the government denies American academics the right to meet with the scholar and exchange ideas with him or her.[132]

C. THE NEW EXCLUSION PROVISION ABRIDGES PROTECTED SPEECH

Courts do not scrutinize all content-based regulations the same. Some content-based regulations are valued more highly than others.[133] Consequently, these are given greater constitutional protection.[134] Courts give the greatest value to expression of political beliefs or views.[135]

125. Patriot Act, Pub. L. No. 107-56, § 411, 115 Stat. 272, 346-50 (2001).
126. Foreign Affairs Manual § 40.32 N6.2(3).
127. Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 643 (1994).
128. Foreign Affairs Manual § 40.32 N6.2(3).
129. *Id.*
130. *Id.*
131. Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).
132. *Id.*
133. Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 641-42 (1994).
134. *Id.* at 642.
135. *Id.* at 641. *See also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that a school regulation denying a person the opportunity to wear an armband to exhibit his disapproval and views of the Vietnam War was unconstitutional).

Generally, all speech is protected under the First Amendment except that which falls under certain disfavored categories.[136]

By excluding foreigners who possess certain views, the government would need to categorize the foreigner's speech as unprotected.[137] It could be argued that that foreigner's speech criticizing government policy or actions constitutes an unprotected proscription of illegal advocacy. Modern courts use the *Brandenburg* test to determine whether a restriction on advocacy threatens protected speech.[138] The *Brandenburg* test examines whether such advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[139] The State Department Guidelines fail the *Brandenburg* test because they make unnecessary any finding of intent to incite or produce imminent lawless action.

The government would not be out of step in preventing scholars with disfavored views from entering our borders if they posed a serious threat to citizens. However, they provide no safeguard for scholars whose views are disfavored by the government, but pose no threat to the safety and wellbeing of Americans. Congress has essentially given the Administration a free hand to decide whether certain ideas and beliefs are too dangerous to be discussed in the public arena. This amounts to censorship.

D. THE NEW EXCLUSION PROVISION IS PRESUMPTIVELY INVALID UNDER STRICT SCRUTINY

The new exclusion provision is a content-based restriction because it blocks foreigners who express disfavored political views or ideas constituting "irresponsible expressions of opinion."[140] Content-based restrictions are generally subject to strict scrutiny analysis.[141] Content-based restrictions are presumed invalid unless the government shows that the restriction is necessary to achieve a compelling state interest and that no lesser restrictive alternatives exist.[142]

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136. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 384 (1992).

137. Foreign Affairs Manual § 40.32 N6.2(3).

138. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (setting forth the standard for how to determine if speech merits constitutional protection).

139. *Id.* at 447.

140. Foreign Affairs Manual § 40.32 N6.2(3).

141. Texas v. Johnson, 491 U.S. 397, 412 (1989); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 125 (1991).

142. *Simon & Schuster, Inc.*, 502 U.S. at 118.

The Supreme Court will not defer to executive or legislative judgment merely because some official utters the words "national security."[143] In the *Pentagon Papers* case, the Court held that the executive's invocation of national security in support of an injunction with respect to the publication of contents of a classified historical study of the Vietnam War was insufficient to overcome strict scrutiny.[144] In lifting the injunction, Justice Black remarked:

> The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the *First Amendment*, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.[145]

Justice O'Connor recently reemphasized the same principle, stating that: "The state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[146]

Hence, the new exclusion provision is invalid unless no lesser restrictive alternatives exist. First, Congress could tighten the provision to require a showing that the speech was made under circumstances evincing an intent to incite or produce imminent lawless action. Limiting exclusions to those individuals posing an actual risk to national security interests rather than broadly excluding any foreigner whose views may be critical but nonetheless nonviolent is essential to upholding the core rights of the First Amendment.

Second, Congress could pass a modern-day equivalent to the McGovern Amendment requiring the Secretary of State to waive exclusions whenever foreigners pose no threat to national security. The State Department would need to provide a non-speech-based reason for excluding a foreign scholar. Legitimate reasons may be technical (i.e. failure to adhere to travel itinerary) or substantive (i.e. advocate the overthrow of the U.S. government). By limiting the discretion of the State Department in denying visas for purely speech-related reasons, Congress could assure academic institutions their right to hire foreign scholars for teaching positions.

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143. *See generally* N.Y. Times v. United States (Pentagon Papers), 403 U.S. 713 (1971).
144. *Id.* at 719.
145. *Id.*
146. Hamdi v. Rumsfeld, 542 U.S. 507, 547 (2004).

E. THE NEW EXCLUSION PROVISION IS INVALID UNDER THE MANDEL STANDARD

The Supreme Court recognized in *Kleindeinst v. Mandel* that Americans have a right to receive information and ideas from foreigners in person.[147] However, the Court in that case would not compel the Executive Branch to waive the statutory exclusion to allow a foreign scholar invited to the United States entry to address a New York audience.[148] The Court would not attempt to weigh the First Amendment rights of the addressees against the plenary power of the legislature to fashion immigration policy where the Executive Branch denied entry on the basis of some "facially legitimate and bona fide reason."[149] Justice Blackmun reasoned:

> Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard.[150]

The court concluded that Mandel's failure to conform to his itinerary on a prior visit was a legitimate reason and upheld the ban.[151]

The *Mandel* standard is limited only to exclusions and allows the government, in accord with its plenary power, to exclude foreigners for non-speech-based reasons.[152] It is less deferential than rational basis because the Court places the burden on the government, rather than the challenger, to show that the restriction is facially legitimate and bona fide.[153]

In non-immigration contexts, the Court has been less hesitant to apply the compelling governmental interest standard where the government restricts the passage of speech in violation of First Amendment rights.[154] For instance, the Supreme Court held that schoolchildren have a right to receive books disliked by the local school board at the school library[155] and

147. Kleindienst v. Mandel, 408 U.S. 753, 753 (1972).
148. *Id.* at 769–70.
149. *Id.* at 770.
150. *Id.* at 768–69.
151. *Id.* at 757–59.
152. *Id.* at 769–70.
153. *Mandel,* 408 U.S. at 769–70.
154. *See infra* notes 155–56 and accompanying text.
155. *See* Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

that citizens have a right to receive information regarding the government's handling of the Vietnam War.[156]

On the other hand, the Court applied a deferential rational basis test where it found Congress had plenary authority over the matter.[157] For example, Congress provided discounts to public libraries to provide Internet access but then restricted federal funds to libraries that failed to install software which would block images that constitute obscenity or child pornography.[158] In *American Library Ass'n, Inc*, the Court found no speech violation where the statute was passed pursuant to the spending clause and the restriction was rationally based on the protection of minors.[159]

In *American Academy*, the Southern District of New York felt constrained under principles of *stare decisis* to follow the standard articulated in *Mandel*.[160] The District Court was willing to defer to Congress provided the government articulated a legitimate and bona fide reason.[161] However, "the government offered no explanation for its exclusion of Ramadan"; therefore, the Court could not determine the "Plaintiff's likelihood of success on the merits of their First Amendment claim."[162] The Court noted that exclusion based on section 411 of the Patriot Act is not a legitimate reason for revocation because it is solely based on speech.[163] In *Mandel*, the Court held that failure to conform to an itinerary on a prior visit is a legitimate reason for exclusion.[164] In *American Academy*, by contrast, the government failed to articulate a legitimate reason for excluding Ramadan.[165]

The government knew about Ramadan's ancestral ties to the Egyptian Muslim Brotherhood but was unable to provide a shred of evidence of any terrorist connection between Ramadan and the Muslim Brotherhood.[166] Reverend Edward A. Malloy, President of the University of Notre Dame, interviewed Ramadan for the position and intensively scrutinized his résumé before hiring him.[167] Rev. Malloy was baffled by the government's

156. *See* N.Y. Times v. United States (Pentagon Papers), 403 U.S. 713, 714 (1971).
157. *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 205 (2003).
158. *Id.* at 201.
159. *Id.* at 211.
160. Am. Acad. of Religion v. Chertoff, 463 F. Supp. 2d 400, 415 (S.D.N.Y. 2006).
161. *Id.* at 418.
162. *Id.* at 418.
163. *Id.* at 414–16.
164. Kleindienst v. Mandel, 408 U.S. 753, 757–58 (1972).
165. *Am. Acad. of Religion*, 463 F. Supp. 2d at 416.
166. *Id.* at 416.
167. Sontag, *supra* note 17.

refusal to grant Ramadan a work visa.[168] Thomas W. Simmons, a former ambassador to Pakistan, told the Stanford University Press: "A scholar like him, who's thoroughly Islamic but has his feet firmly planted in the modern world, is – I won't say a pearl beyond prize, but certainly a pearl."[169]

Moreover, the government's new explanation for revoking Ramadan's visa lacks veracity. The government used Ramadan's own revelation that he donated a small sum to a Swiss humanitarian organization to revoke his visa.[170] The organization was blacklisted by the State Department[171] a year after the donation but still remains a legitimate charity in Europe. The government's continued exclusion of Ramadan despite the availability of hundreds of literary works and Ramadan's amenability to interviews regarding political and religious views at the consulate shows bad faith.

F. THE NEW EXCLUSION PROVISION IS UNCONSTITUTIONALLY VAGUE

The new exclusion provision is vague because it provides no real guidance to officials charged with enforcing immigration law on who is and who is not covered.[172]

As the Court stated in *Grayned v. City of Rockford*:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values . . . . Vague laws may trap the innocent by not providing fair warning . . . . A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . . . Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'"[173]

No place in the Immigration and Naturalization Act are the terms "endorse," "espouse," and "persuade" defined.[174] Failure to provide precise definitions to these terms gives too little guidance to immigration officials in determining whether to admit or to exclude a foreigner. For instance, a visa applicant who admires the humanitarian work of a faction

168. *Id.*
169. *Id.*
170. Ramadan, *supra* note 83.
171. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).
172. Brief for Am. Anthropological Ass'n, v. Chertoff, 463 F. Supp. 2d 400 (S.D.N.Y. 2006) [hereinafter Brief for Petitioners].
173. Grayned v. City of Rockford, 408 U.S. 108, 109 (1972).
174. Brief for the Petitioners, *supra* note 170, at 13.

of a designated terrorist organization will be excluded for her endorsement of the group despite her antipathy toward the militant faction of the group. Immigration officials are entrusted with making subjective judgments based solely on speech, in deciding whether to admit or to deny an applicant.

The State Department devised its own interpretation providing even less guidance to immigration officials than Congress provided.[175] An immigration official who finds a controversial statement in a visa applicant's history is unlikely to know whether that statement is an "irresponsible expression of opinion."[176] The State Department could easily use the new exclusion provision to keep foreign scholars with refreshing ideas from accepting teaching positions at American universities and participating in seminars.[177] Given the Bush administration's fervent opposition to stem cell research, the officials could bar foreign scientists who support stem cell research in an effort to curb debate on federal spending.[178] The new exclusion provision is already used to bar foreign academics that support a more balanced approach to the Israeli-Palestinian conflict.[179] Under both of these scenarios, the State Department could exclude the alien without showing that he or she supports or engages in violent activities.

The institutions who invite excluded foreign scholars will be deterred from re-inviting scholars whose visas were denied or revoked on past occasions. Foreign academics and their ideas will be discredited and essentially smeared by the government when they are excluded because of their speech. Academic institutions operate on good reputations and access to funds.[180] They may be discouraged by the cost of visa applications and travel arrangements and bureaucratic handling of particular visa requests. Moreover, they may agonize over negative media coverage from right-wing media outlets that rush to label them as terrorist sympathizers.

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175. *Groups Call for End on Ban of European Muslim Scholar*, AMERICAN CIVIL LIBERTIES UNION, Feb. 23, 2007, http://www.aclu.org/safefree/general/28667prs20070223.html.

176. *Id.*

177. *ACLU, NYCLU Challenge U.S. Exclusion of Renowned Muslim Scholar*, NEW YORK CIVIL LIBERTIES UNION, Oct. 25, 2007, *available at* http:// nyclu.org/node/1437/print.

178. Charles Babington, *Stem Cell Bill Gets Bush's First Veto*, WASH. POST, July 20, 2006, A4.

179. *Groups Call for End on Ban of European Muslim Scholar, supra* note 173.

180. Thomas J. Graca, *Diversity-Conscious Financial Aid after Gratz and Grutter*, 34 J.L. & EDUC. 519, 522–23 (2005).

The current approach to excluding foreigners based on ideas and beliefs is unacceptable. By singling out foreign scholars for exclusion, the Administration manipulates the public debate over intriguing issues.

VI. TWO COMPETING AIMS: ACADEMIC FREEDOM V. PLENARY POWER

Courts generally do not defer to the legislative judgment as to whether a regulation comports with the First Amendment.[181] However, the Supreme Court refused to apply strict scrutiny in *Mandel*, instead opting for a more deferential standard toward the legislature.[182] The Court was concerned that by invalidating section 28 of the McCarran-Walter Act, any alien whose ideas are influential in the U.S. will be able to bypass the immigration system because Americans want to exchange ideas with him in person.[183]

Although the word "immigration" is found nowhere in the Constitution, the U.S. Constitution provides the federal government with authority over immigration policy and decisions in three provisions.[184] However, that does not mean courts decline to hear a case when an immigration matter is on the table. Immigration policy is not immune from challenge merely because it has political implications. In *I.N.S. v. Chadha*, the Court held that non-citizens threatened with deportation can challenge the constitutional legality of the process which led to their status despite the remote availability of other forms of relief.[185]

Although courts will hear First Amendment claims from non-citizens challenging a deportation order, often they will sustain the order.[186] For instance, in *Turner v. Williams*,[187] the Supreme Court rejected a First Amendment challenge from an alien being charged with being an anarchist thereby subject to deportation under the Alien Immigration Act of 1903.[188] The Alien Immigration Act authorized the Executive Branch to bar from admission "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or all

181. Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 843–44 (1978).
182. Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972).
183. *Id.* at 768–69.
184. *See* U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. I, § 9, cl. 1.
185. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 935–36 (1983).
186. *See, e.g.*, Turner v. Williams, 194 U.S. 279 (1904).
187. *Id.* at 292–95.
188. Alien Immigration Act, Pub. L. No. 57-162, 32 Stat. 1213 (1903).

government or of all forms of law."[189] The Court denied the constitutional challenge and upheld the Act.[190] Chief Justice Fuller wrote for the majority:

> Whether rested on the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe; or on the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States, the act before us is not open to constitutional objection.[191]

Moreover, even where the First Amendment rights at stake are not those of the non-citizen, but certain American citizens who wish to hear that non-citizen speak, the Court adopts a deferential standard in judging the government action instead of the non-deferential strict scrutiny standard ordinarily applied to First Amendment challenges.[192]

Judicial deference stems from a late 19th century case involving the Chinese Exclusion Act.[193] In *Chae Chan Ping v. U.S.*,[194] a Chinese laborer relied on a reentry permit to temporarily leave the U.S.[195] The Court held that immigration decisions, even race-based exclusions, made by Congress or the executive branch were essentially "conclusive upon the judiciary."[196] The Chinese Exclusion Act did not strip immigrants of all their constitutional rights.[197] Three years earlier, the Court held in *Yick Wo v. Hopkins* that a Chinese national was entitled to equal protection relief when it overturned his conviction for breaking a city ordinance regulating laundry operations.[198] The two cases read together represent judicial deference to immigration decisions.[199] Therefore, any legislative or executive decision to exclude particular aliens on the basis of speech or beliefs faces far less scrutiny than a traditional First Amendment challenge.[200]

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189. *Williams*, 194 U.S. at 284.
190. *Id.* at 290.
191. *Id.*
192. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).
193. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).
194. *See generally* (The Chinese Exclusion Case), 130 U.S. 581 (1889).
195. *Id.* at 582.
196. *Id.* at 606.
197. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).
198. Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).
199. *See Chinese Exclusion Case*, 130 U.S. at 606; *Yick Wo*, 118 U.S. at 374.
200. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

On the other hand, the university symbolizes a marketplace of ideas where the free flow of information is vital to the success of educating students. New ideas are devised and tested among a broad spectrum of students and academics. The goal of disseminating new ideas is to reach a consensus over what John Stuart Mill most famously described as "the truth."[201] In this regard, the Court has stated: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection."[202]

The Supreme Court has never recognized there to be a constitutional right to academic freedom. However, the Court has accepted academic freedom as a reason for allowing the free flow of information in a university setting.[203] In *Keyishian v. Board of Regents*, it wrote: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[204] Moreover, those citizens barred from hearing certain ideas will likely find a remedy in the First Amendment.[205]

To understand the compromises we permit under the guise of national security, Kenneth J. Winkle's letter in support of Dr. Ari is illustrative.[206] He wrote:

> In particular, we valued—and continue to value—the unique perspective on Latin American history and culture that Dr. Ari is able to articulate as a member of the Armara indigenous people of Bolivia . . . . Dr. Ari's superlative ability to analyze and communicate the complex interaction of race, nationality, gender, and class within the history of these regions makes him an invaluable addition to the faculty of the University of Nebraska-Lincoln and indeed to American academic circles in general. Dr. Ari can contribute substantially to the kind of vibrant international community of scholarship that is essential to understanding the challenges our world confronts and preparing our students to encounter them with confidence.[207]

By continuing to deny foreign academics entry under the new exclusion provision, we lose our ability to manage our own educational institutions as we see fit. In effect, we allow the government to dictate our

201. JOHN STUART MILL, ON LIBERTY, 101 (1859).
202. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
203. *Id.*
204. *Id.* at 604.
205. *Id.* at 603.
206. Kenneth J. Winkle, *Waskar Ari: Opemn Letter to Homeland Security*, N.Y. REVIEW OF BOOKS, June 11, 2006.
207. *Id.*

curriculum by limiting admission to only those foreigners whose ideas are acceptable to the Administration's policies.

VII. CONCLUSION: A BALANCED APPROACH

The competing aims of plenary power over immigration matters and academic freedom mandate a balancing approach whereby neither government nor individuals give up their respective powers and rights. The First Amendment guarantees citizens a right to exchange ideas and views with foreigners in person.[208] Universities should be free to invite foreign scholars to participate in conferences and teach courses in subjects where they hold unique knowledge. Any governmental restrictions should be invalidated if they cannot survive strict scrutiny.

Congress should refine the new exclusion provision in the Immigration and Nationality Act to define the terms "endorse," "espouse," and "persuade." In order to prevent constitutional abuses, Congress should incorporate a finding of intent to spur violence into the law. By incorporating an intent element into the statute, any restrictions on speech or ideas would pass the *Brandenburg* standard and therefore be outside the scope of protected speech. Next, Congress should provide adequate guidance to immigration officials as to who qualifies for admission and who is excluded. Safeguards against abuse, such as waiver provisions, should be utilized so that foreign scholars with controversial ideas are not selectively excluded from entering the United States.

The government already has the power to exclude foreigners on criminal-related grounds[209] and security-related grounds.[210] The government can exclude a foreigner who is believed to be a spy,[211] who is engaging in any unlawful activity,[212] who is an anarchist,[213] who has engaged in a terrorist activity[214] who is likely to engage in a terrorist activity,[215] or whose entry is sought under circumstances that indicate an intention to cause death, serious bodily harm, or incite terrorist activity.[216] The aforementioned exclusionary provisions are sufficient to prevent dangerous individuals from entering the United States. However, the new

208. Kleindienst v. Mandel, 408 U.S. 753, 759–60 (1972).
209. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2) (2006).
210. § 1182(a)(3).
211. § 1182(a)(3)(A)(i).
212. § 1182(a)(3)(A)(ii).
213. § 1182(a)(3)(A)(iii).
214. § 1182(a)(3)(B)(i)(I).
215. § 1182(a)(3)(B)(i)(II).
216. § 1182(a)(3)(B)(i)(III).

exclusion provision does nothing to support the public safety and wellbeing of Americans. Under this provision, foreigners are excluded for their views rather than their actions.[217] This signals a return to the days of the McCarthy Era where individuals were brought before the House Un-American Activities Committee (HUAC) and interrogated about their views on Communism.

The government's reluctance to grant visas to foreigners has adversely impacted the nation's reputation as the "land of opportunity." According to a recent worldwide survey, America ranked the least traveler friendly country in the world.[218] Respondents feared immigration officials more than they feared terrorists.[219]

Under the proposed balanced approach, Dr. Ramadan and Dr. Ari would receive visas to accept their teaching positions. Both individuals possess a unique and specialized knowledge of their respective regions and peoples that would be of great value to American academic institutions. The government has not produced any evidence that either individual has intended to spur violence or violent activity.

Other applicants, like Narenda Modi, Chief Minister for the Indian state of Gujarat, would be excluded under the proposed balanced approach.[220] Modi planned to travel to the United States to speak at various Indian-American community events.[221] His visa was revoked because of alleged severe violations of religious freedom during religious riots in Gujarat in 2002 in which at least 1000 Muslims were killed.[222]

Ms. Tellez might be excluded under the terrorist activity provision for her participation in the Sandinista overthrow. However, the violence took place over two decades ago and her exclusion is more likely to be based on her criticism of Washington's policy toward the region rather than her participation in the overthrow.[223]

In sum, Congress should immediately move to take the steps proposed in this paper in order to avoid returning to McCarthy era exclusions. The government will always have mandate over immigration

217. § 1182(a)(3)(A)(iii);. § 1182(a)(B)(i)(VII).

218. *Keeping Out More Than Terrorists*, THE ECONOMIST, Feb. 8, 2006, at 33.

219. *Id.*

220. *India Condemns US Visa Decision*, BBC NEWS, Mar. 18, 2005, http://news.bbc.co.uk/2/hi/south_asia/4360259.stm.

221. *Id.*

222. *Id.*

223. W. Aaron Vandiver, Comment, *Checking Ideas At the Border: Evaluating the Possible Renewal of Ideological Exclusion*, 55 EMORY L.J. 751, 788 (2006).

decisions, but like other government powers, these decisions must not violate individual rights.