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## Administrative Law—Expansive Discretion Allowed Executive Branch in Admission of Politically Disfavored Aliens.

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## RECENT CASES

### ADMINISTRATIVE LAW—EXPANSIVE DISCRETION ALLOWED EXECUTIVE BRANCH IN ADMISSION OF POLITICALLY DISFAVORED ALIENS.

Ernest Mandel, a Belgian citizen, is a journalist, author, and an advocate of the economic, governmental and international doctrines of world communism. Invited to participate in a conference at Stanford—and incidentally to visit several major American universities—Mandel applied for a visa in September 1969. He had visited the United States twice before on temporary nonimmigrant visas, both times after a finding of ineligibility under sections 212 (a) (28) (D), and (G) (v) of the Immigration and Nationality Act of 1952<sup>1</sup> and a subsequent grant of a waiver by the Attorney General.<sup>2</sup> These provisions establish ineligibility for admission to the United States and denial of visas to certain harmful aliens; among them are certain advocates of communism, a class of which Mandel is admittedly a member. Because Mandel “engaged in activities beyond the stated purposes of

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1. Immigration and Nationality Act § 212, 8 U.S.C. § 1182 (1970) [hereinafter referred to as Immigration Act]. The statute provides in relevant part:

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

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

.....  
(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 . . . .

.....  
(G) Aliens who write or publish . . . (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship . . . .

2. Such a waiver is provided for in section 212(d)(3) of the Immigration Act, which states:

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

Immigration Act § 212(d)(3), 8 U.S.C. § 1182(d)(3) (1970).

his trip" on his second visit in 1968, he was presently denied a waiver of ineligibility.<sup>3</sup> Evidence indicated that these activities consisted of his acceptance of more speaking engagements than his visa application had specified and his presence at a meeting in which funds were solicited for the legal defense of students who had participated in demonstrations. In response to these charges, Mandel claimed ignorance of any limitation upon the number of lectures permitted or restraints upon his attendance at such meetings, and alleged that he had not participated in the fund raising.

After the visa application was denied, the State Department learned that Mandel may indeed have been unaware of the restrictions on his earlier visit, and therefore recommended that the Attorney General waive the statutory ineligibility. The recommendation was rejected and Mandel was informed that his visa had been refused because his 1968 activities "represented a flagrant abuse of the opportunities afforded him to express his views in this country."<sup>4</sup>

Mandel and eight United States citizens who had invited him to speak and were prevented from participating in the planned academic exchange subsequently brought suit in federal district court. Plaintiffs sought a declaratory judgment that the exclusion by the Attorney General and the Secretary of State was unconstitutional, and an injunction to compel the granting of the visa. A three-judge panel enjoined the enforcement of section 212 (a) (28), holding that the infringement of appellants' right to hear and freely discuss ideas, as protected under the first amendment, was not outweighed by the protection of interests within the governmental sphere of concern. Since the sole effect of the statute in this case was to restrain the entry of disfavored political doctrine it was invalidated by the first amendment.<sup>5</sup>

On appeal, the United States Supreme Court reversed the lower court. *Held*: when the Attorney General decides, for any "facially legitimate and bona fide" reason, to refuse waiver of ineligibility, the Court will not review his judgment upon the complaint of those who were prevented from the exchange of ideas with the alien. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

The Immigration and Nationality Act of 1952<sup>6</sup> and its preceding

3. *Kleindienst v. Mandel*, 408 U.S. 753, 758 n.5 (1972) [hereinafter cited as instant case].

4. *Id.* at 759.

5. *Mandel v. Mitchell*, 325 F. Supp. 620 (E.D.N.Y. 1971).

6. 8 U.S.C. § 1101 *et seq.* (1970).

## RECENT CASES

legislation have been particularly attentive to the regulation of political dissidents—first anarchists and more recently Communist-associated individuals.<sup>7</sup> The principle upon which this control rests is a fundamental one: inherent in its sovereignty is a nation's power of self-preservation, and the exclusion of unwanted aliens is basic to that power.<sup>8</sup> The Supreme Court has uniformly refrained from interfering with Congress and the executive in cases involving deportations and admissions of aliens on the assumption that such cases relate to national security and the conduct of foreign affairs.<sup>9</sup> Even in a case in which a resident alien has claimed a violation of equal protection and due process, the Court has held that Congress has plenary power to formulate standards for the exclusion of aliens;<sup>10</sup> admission is not a right, but a privilege granted only upon such terms as Congress provides.<sup>11</sup> Since this plenary power is understood to be constitutionally allocated to the executive for reasons of national security and foreign relations, the Court characteristically engages in the process of balancing those interests against the injury to the individual's rights.<sup>12</sup> In *Jay v. Boyd*,<sup>13</sup> the Court, in a five-to-four decision, upheld the Attorney General's deportation of a resident alien even though the decision was based on secret information which the alien was not permitted to refute. Although it affirmed the executive's broad discretionary power, the Court did attempt to elucidate the criterion which must be used: the Attorney General has properly exercised his discretion if "the disclosure of the information would be prejudicial to the public interest, safety, or security."<sup>14</sup> The question of how the Court would deal with asserted first amendment rights of American citizens in conflict with an alien exclusion statute had not been determined prior to the instant case.

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7. Instant case at 761-62.

8. *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

9. "[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *accord*, *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918). *The Japanese Immigrant Case*, *Yamataya v. Fisher*, 189 U.S. 86 (1903).

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

11. *Jay v. Boyd*, 351 U.S. 345 (1956).

12. U.S. CONST. art. I, § 8; *see United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

13. 351 U.S. 345 (1956).

14. *Id.* at 358.

The statutory scheme under which Mandel's visa was denied mechanically excludes all members of particular alien classes.<sup>15</sup> Section 212 (d) (3) enables the Attorney General to grant, at his discretion, a waiver of ineligibility in certain cases.<sup>16</sup> It is clear that Congress may delegate its power to exclude aliens. However, Congress is not free to delegate *unlimited* power, for its own power is "to regulat[e] by treaty or by act . . . *except* so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution to intervene."<sup>17</sup> Under the Administrative Procedure Act, an aggrieved party's<sup>18</sup> right to judicial review is presumed unless explicitly denied by statute or unless Congressional intent to eliminate review is otherwise apparent.<sup>19</sup> It appears from the structure of the exclusion statute that Congress provided for the treatment of harmless aliens in Mandel's category by inclusion of the waiver provision which was intended to allow admission when dictated by "humane reasons and for reasons of public interest."<sup>20</sup> There are no further guidelines, either in the Act itself or in the legislative history, which manifest Congressional intent.

In delegating its authority Congress "may choose such agencies as it pleases to carry out whatever policy or rule of exclusion it may adopt, and, so long as such agencies do not transcend limits of authority or abuse discretion reposed in them, their judgment is not open to challenge or review by courts."<sup>21</sup> However, section 212 does not make clear what these limits of authority are, and it thus presents a need for judicial interpretation.

The Administrative Procedure Act established a system of judicial review which could be applied to lessen the dangers of overly broad discretion present in the Immigration and Nationality Act.<sup>22</sup> A court

15. Immigration Act § 1182(a)(28)(D),(G)(v) (1970).

16. *Id.* § 1182(d)(3).

17. U.S. CODE CONG. & AD. NEWS, 82nd Cong., 2d Sess. 1654 (1952) (emphasis added).

18. The term *aggrieved* relates to the question of standing and raises serious problems in definition generally beyond the scope of this note.

19. Administrative Procedure Act, 5 U.S.C. § 702 (1970).

20. U.S. CODE CONG. & AD. NEWS, 82d Cong., 2d Sess. 1706 (1952).

21. *Id.* at 1654.

22. The dangers inherent in this statute led to its veto by President Truman, who gave his reasons *inter alia*:

Heretofore, for the most part, deportation and exclusion have rested upon findings of fact made upon evidence. Under this bill, they would rest in many instances upon the "opinion" or "satisfaction" of immigration or consular employees. The change from objective findings to subjective feelings is not com-

## RECENT CASES

is permitted to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>23</sup> There are numerous cases in which the Court has recognized the need to limit statutorily unfettered discretion even, and perhaps most necessarily, in areas where the courts have traditionally been most reluctant to interfere.<sup>24</sup> Mr. Justice Douglas' dissent in the instant case identifies the Court's responsibility to construe the words "in the discretion of the Attorney General"<sup>25</sup> as something less than discretion to "pick and choose" at will. The Attorney General, like the Secretary of State, is given discretion only in matters within his competence and area of legitimate concern.<sup>26</sup>

In the instant case, plaintiffs asserted their first amendment right to hear,<sup>27</sup> receive, and appraise information in order to preserve the principal value of a free flow of ideas. Plaintiffs contended that the application of the statute preempted this right by the exclusion of Mandel where no legitimate purpose was served.<sup>28</sup> The district court considered the case in terms of standard first amendment concepts and found that the substance of section 212 (a) (28) was to "[restrain] the entry of disfavored political doctrine."<sup>29</sup> Under this interpretation, the statutory purpose itself was invalid, regardless of whether exclusion of aliens provided a legitimate means to that end. In refusing to apply the long line of Supreme Court alien exclusion decisions, the lower court accepted an argument similar to the one which the Supreme Court had

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patible with our system of justice. The result would be to restrict or eliminate judicial review of unlawful administrative action.

President's Veto Message to Congress, U.S. CODE CONG. & AD. NEWS 925 (1952). The Act was passed over the President's veto, with the wording of the relevant sections unchanged.

23. Administrative Procedure Act, 5 U.S.C. § 706(2) (A) (1970).

24. *Oestereich v. Selective Serv. Sys.*, 393 U.S. 233 (1968); *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

25. Immigration Act § 1182(d) (3).

26. Instant case at 2587 (Douglas, J., dissenting).

27. *Martin v. City of Struthers*, 319 U.S. 141 (1943), described a right protected by the first amendment as "the right of the individual householder to determine whether he is willing to receive [a] message." *Id.* at 143. The concept was enforced by the Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969): "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." That such a right exists is not questioned by the Court in the instant case, and the injury to that right was the basis for plaintiffs' claim of standing to sue. There was no claim that Mandel himself had a protected right to speak in the United States, but only that the other plaintiffs had a right to hear and meet with him.

28. Brief for Appellees at 14.

29. *Mandel v. Mitchell*, 325 F. Supp. 620, 626 (E.D.N.Y. 1971).

rejected in *United States ex rel. Turner v. Williams*.<sup>30</sup> In that case, the Court rejected appellants' argument that the first amendment inhibits the actual competency of Congress to pass laws abridging a Constitutional right, whether the law applies to citizens or aliens.<sup>31</sup> By adopting this line of reasoning and employing considerations of separation of powers, the lower court failed to deal with the questions actually presented by the case: the narrower and more crucial issues of due process safeguards and judicial standards in the statutory grant of discretion.

The plaintiffs' argument on appeal did not suggest as extreme a result as did the reasoning of the district court. The issue was presented not in terms of invalidation of the statute, but as a problem of construction.<sup>32</sup> The fact that the statute permitted a waiver of otherwise automatic exclusion was interpreted by plaintiffs as an indication that Congress intended the Attorney General to consider infringement of rights in relation to public interest each time a waiver was recommended. Thus, the Attorney General's alleged failure to balance these interests would make his action subject to invalidation or, more accurately, to judicial review, under the arbitrary and abuse of discretion standards of the Administrative Procedure Act.

The Government stated the problem as one of a straightforward delegation of power, and concluded that the exercise of that power should be free of judicial review. It claimed that the statute grants the Attorney General discretion as a part of the executive's established area of control. Since the restriction concerns only the act of entering the country, it cannot be said to restrict the freedom to receive information. The Court rejected this argument, noting that the restriction of that freedom can be significant even though it results from a mode of regulation which happens to be physical.<sup>33</sup>

Although the Supreme Court suggested that a first amendment right was involved, the majority felt that the decisive issue was one of judicial policy. Their extreme statement of the issue expresses the practical nature of their concern: "[T]he case . . . comes down to the narrow issue whether the First Amendment confers upon the appellee professors . . . the ability to determine that Mandel should be permitted to enter the country or, in other words, to compel the Attorney General

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30. 194 U.S. 279 (1904).

31. *Id.* at 289. *Turner*, unlike the instant case, concerned the assertion of rights by an alien.

32. Brief for Appellees at 27.

33. Instant case at 764.

## RECENT CASES

to allow Mandel's admission."<sup>34</sup> The majority reasoned that if every claim denied by the Attorney General were brought to the courts, it would require a weighing of interests in each case, with each court inventing its own standard.<sup>35</sup> The traditional judicial attitude toward executive control of alien regulation is based on the assumption that Congress intended the Attorney General, not the courts, to develop that standard. The Court refused to examine the reason given by the Attorney General, indicating that any criteria chosen by the executive, so long as it was "facially legitimate and bona fide,"<sup>36</sup> would not be questioned judicially.

Mr. Justice Douglas, dissenting, considered the harmful effect of the majority position and examined the Court's responsibility more fully. In his view, the Court should "construe the Act generously by [the] First Amendment standard,"<sup>37</sup> a process which would greatly limit the number of cases in which a waiver could be denied. Furthermore they should apply the general principle of judicial review in matters of administrative discretion: authority must not extend beyond the official's expertise.<sup>38</sup> Discretion would be limited here because the Secretary of State recommended a waiver, eliminating further consideration of foreign policy. The Attorney General, when acting beyond this authority, serves as a censor, a role clearly not intended by Congress, and plainly not acceptable by first amendment standards. Mr. Justice Douglas' view requires a judicial examination of the reason for the exclusion, and would thus have the broad discretion under the statute defined, in part, judicially.

Mr. Justice Marshall, joined by Mr. Justice Brennan, strongly opposed the majority's decision and its resulting threat, as they perceived it, to the freedoms guaranteed by the first amendment.<sup>39</sup> Refusal of the waiver, with its consequent harm to plaintiffs, can only be justified if it is necessary to further a compelling governmental interest. Unable to meet this test, the majority devised the "facially legitimate

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34. *Id.* at 762.

35. *Id.* at 769-70.

36. *Id.*

37. *Id.* at 772 (Douglas, J., dissenting).

38. "The discretion entrusted to [the Attorney General here] concerns matters commonly within the competence of the Department of Justice—national security, importation of drugs, and the like." *Id.* at 774 (Douglas, J., dissenting).

39. "[The exclusion] has directly prevented the free interchange of ideas guaranteed by the First Amendment," and has thus interfered with rights guaranteed to the appellees and to the general public who have an "interest in the prevention of any stifling of political utterance." *Id.* at 776.



and bona fide" standard, a standard which Mr. Justice Marshall found unprecedented and unjustified.<sup>40</sup> The Attorney General's reason for refusing the waiver did not appear to be supported by facts in the record, yet the majority found it sufficient to outweigh the first amendment interference. Mr. Justice Marshall's dissent went still further, reaching the constitutionality of the basic exclusionary power under section 212 (a) (28). He agreed with the district court's conclusion that "Mandel's exclusion is not incident to a legitimate regulatory objective, but is based directly on the subject matter of his beliefs."<sup>41</sup> The government claimed that its objective was the exclusion of aliens, and that its power was therefore broader than in other areas. However, because the majority failed to distinguish this case by its involvement of citizens' rights, it overestimated the extent of the exclusion power. In Marshall's view, Mandel could not be excluded constitutionally without the government showing a compelling national interest.<sup>42</sup> If evidence showing some arguable danger to national security had been offered the result could have been justified, but punishment and exclusion of ideas are not compelling interests.

The majority has taken a position in this case which it would probably characterize as one of judicial restraint. In actuality it expands the authority of the executive in an area where the statute provides all too few procedural safeguards. The statutory scheme is constitutional on its face and, if applied with due regard for the protection of rights, serves the legitimate purpose of excluding a class of persons that Congress thought harmful. Plaintiffs' basic claim should not have been that the statute was invalidated by the first amendment, but rather that the denial of the waiver was an abuse of discretion, and therefore a violation of due process.

There is no question that Congress can authorize the Attorney General to exclude individuals, but it is also clear that the Court has power to limit his authority to an appropriate effectuation of the purpose of the statute. The Court's responsibility is to devise a judicial standard, through judicial review of the Attorney General's actions, which will determine what criteria are appropriate, and what actions constitute an abuse of authority. There are ample precedents for judicial review under the Administrative Procedure Act, regardless of

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40. *Id.* at 777.

41. *Id.* at 781.

42. *Id.*

## RECENT CASES

whether the complaint is based on an infringement of first amendment rights, or of any other rights. Categorizing this as an immigration case does not destroy the requirement for judicial review, nor does it affect the Court's power to limit discretion.<sup>43</sup> Congressional delegation of authority to regulate immigration does not remove the power of review. The Court's refusal to consider the facts supporting the Attorney General's action was more serious than a refusal to engage in the balancing process required if the case had indeed presented a first amendment issue. It was an avoidance of the real issue, and of the necessity to decide the case by judicial review under the abuse of authority and "arbitrary and capricious" standard. In considering the adequacy of the reason for denial of the waiver of ineligibility, the Court could have established guidelines which at present are completely lacking. The government should have been required to prove the legality of its reason. If it were arbitrary,<sup>44</sup> or for an unacceptable purpose such as punishment, and if plaintiffs were thereby aggrieved, the action should have been invalidated by the Court. Without a firm basis of proof in the record, the Court nevertheless accepted the reason of the Attorney General as being "facially legitimate and bona fide," a standard which may well mean, in practice, any or no reason. The phrase will undoubtedly prove sufficiently vague to allow the virtually unfettered discretion which the majority claimed not to support in its opinion, thus giving an administrative official the power, under the guise of judicial restraint, to determine who American citizens will be unable to hear.<sup>45</sup>

The effect of this decision is that the Attorney General can increase the already serious restrictions on American intellectual development.<sup>46</sup> The political branches of the government are given increased control with which they can interfere with citizens' rights with virtually no interference from the Court.<sup>47</sup>

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43. *Girouard v. United States*, 328 U.S. 61 (1946).

44. Mr. Justice Marshall, in his dissent, calls the reason given "a sham." Instant case at 778.

45. *Id.* at 770. The Court neither accepted nor rejected the Attorney General's claim to absolute discretion to grant or deny a waiver of ineligibility here. Rather, the question was expressly left open. *Id.*

46. Comment, *Opening the Floodgates to Dissident Aliens*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 141, 143-51 (1970).

47. The State Department has indicated a change from the policy of the 1960's: since 1969 those aliens included under (a)(28) who are "active in leftist student organizations or invited to speak at highly publicized meetings sponsored by leftist organizations are more likely than in the past to be refused a waiver." Interview with Frederick

The majority's position is perhaps based on the conviction that the Court should not engage in a case-by-case analysis when an executive body has been delegated that task. By formulating a more realistic standard, or by placing some real limitations on the executive discretion, they would have accomplished the same result without denying the Court's own authority. The Attorney General, after this decision, is free to pursue virtually any policy he chooses, and can expect neither guidelines nor criticism from the Court.

SUSAN GINSBERG

CONSTITUTIONAL LAW—DUE PROCESS REQUIRES THAT LIMITS BE PLACED ON PSYCHIATRIC CONFINEMENT COMMENSURATE WITH THE PROCEDURAL SAFEGUARDS EMPLOYED IN OBTAINING THAT CONFINEMENT.

*We'd like to know  
A little bit about you  
For our files.  
We'd like to help you learn  
To help yourself.  
Look around you. All you see  
Are sympathetic eyes.  
Stroll around the grounds  
Until you feel at home.*

Paul Simon, "Mrs. Robinson"

In July 1966, Edward McNeil was sentenced to five years in a Maryland prison after having been convicted on two charges of assault. Prior to his actual imprisonment, the trial judge made an ex parte determination that there was reasonable cause to suspect that McNeil was a defective delinquent.<sup>1</sup> As a result, he was com-

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Smith, Jr., Deputy Administrator, Bureau of Security and Consular Affairs, Department of State, Feb. 7, 1972, in *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1153 n.97. It may be anticipated that any further changes in policy will be unreviewable, regardless of their effect on first amendment rights.

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1. A defective delinquent is defined as:  
an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who