10-1971

Kleindienst v. Mandel

Lewis F. Powell Jr

Court USDC, E.D. N.Y.
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 71-16

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., Appellants

vs.

ERNEST MANDEL, ET AL.

7/2/71 Appeal filed.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....														
Rehnquist, J.				✓										
Powell, J.				✓										
Blackmun, J.				✓										
Marshall, J.							✓							
White, J.				✓										
Stewart, J.							✓							
Brennan, J.							✓							
Douglas, J.							✓							
Burger, Ch. J.				✓										

No. 71-16
Mitchell et al v. Mandel

This case involves the validity of Section 212(a)(28) of the Immigration and Nationality Act of 1952 (the McCarren Act), which prescribes classes of aliens eligible to receive visas.

Mandel, a Belgium marxist, is in a prohibited class, but the statute authorizes the Attorney General to admit an alien "temporarily despite his inadmissibility".

Mandel sought a visa to lecture in the U.S.; the Secretary of State recommended approval, but the Attorney General refused.

Mandel, together with several U.S. citizens, brought this action to declare the statute unconstitutional as a violation of the First Amendment rights of the U.S. citizens who wish to hear Mandel. They can receive his writings or go to Belgium. The restriction is only against his coming here.

Two members of the three judge court held that the statute violated First Amendment freedoms, the third judge dissenting. Both opinions are elaborate and scholarly.

The Solicitor General's Jurisdictional Statement states that:

> "This Court has repeatedly held that the decision to exclude (aliens) and the grounds for admissibility are not matters for judicial inquiry."

Cases cited by the S.G. include: Mishimura Ekiu v. U.S., 142 U.S. 651, 659; Boutilier v. Immigration Service, 387 U.S. 118, 123; Galvan v. Press, 347 U.S. 522, 531 (quoting Mr. Justice

Frankfurter); United States v. Shaughnessy, 338 U.S. 537; and United States v. Williams, 195 U.S. 279; see also Harisiades v. Shaughnessy, 342 U.S. 580.

The majority opinion of the three judge court takes the position - if I understand it correctly - that the power to exclude aliens is not absolute and is subject to judicial review. The opinion draws a distinction between exclusion where the alien advocates "violent revolution or subversion by revoluntionary communism" (page 14A of S.G.'s brief), and the mere advocacy of marxist philosophy. The Court relies on Dennis v. United States, 341 U.S. 491, 508-512; Yeatts v. U. S., 354 U.S. 298, 324-325; and several other cases.

It appears from the opinions - although not entirely clearly - that all of the cases relied on by the majority of the three judge court involve U.S. citizens or the deportation of aliens already in the United States pursuant to valid entry.

If my preliminary reading of these opinions is correct, this case presents a challenge to the established doctrine that the power to exclude aliens is not subject to judicial review or limited by the Bill of Rights.

Before making my final decision, I would like to know whether the line of cases cited in the S.G.'s brief will, in effect, be overruled if appellee's position is sustained?

I would also like to know, if Mandel's position is sustained, what limits - if any - would then exist on the right of each American citizen (claiming First Amendment protection) to insist that a particular alien be admitted unless the Government can prove that such alien (within the Dennis doctrine) will advocate violent revolution or subversion by revoluntionary communism?

* * * * *

As a matter of policy, the statute in question seems to me to be too broad and possibly lacking in appropriate standards. My concern is whether (i) the judiciary, vindicating First Amendment rights of U. S. citizens, has the constitutional authority to interfere with what should be a legislative and executive responsibility; and (ii) whether if the court below is affirmed, the effect will be to overrule a long line of Supreme Court decisions.

It is also difficult for me to see, as a matter of administration of the immigration laws, how any alien can be excluded or denied a visa without the real risk of some friend who is a U.S. citizen demanding judicial review.

See My Notes Attached

No. 71-16 OT 1971 A Hold for Nine Case

John N. Mitchell et al. v. Ernest Mandel et al.

"Appeal" from USDC for EDNY (3-Judge Court)(Feinberg, Circuit Judge, Bartels & Dooling)(Bartels, USDJ, dissenting)

First Amendment; Exclusion of Aliens.

Appellee Mandel is a citizen and resident of Belgium. He is not a member of the Communist Party, but he is an orthodox Marxist of the the Trotskyist school. He is editor-in-chief of the Belgian Left Socialist Weekly, and the author of a two volume work entitled Marxist Economic Theory. He is an academic advocate of the doctrine of Marxism, but the Govt does not contend that he has at any time ever attempted to incite subversive action. The appellees other than Mandel are citizens of the US who had issued invitations to Mandel in 1969 to participate in conferences and to speak at universities and other forums in the US.

Sections 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952, 8 USC 1182(a)(28)(D) and (G)(v), provide that:

> . . . 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 . . . 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 . . . any . . . matter . . . advocating or teaching . . . (v) the economic, international, and governmental doctrines of world communism . . . .

Pursuant to this statute, Mandel was and is ineligible for a nonimmigrant visa. The statute has an exception, however, which

provides in pertinent part:

> . . . an [ineligible] alien . . . may, after approval by the Attorney General of a recommendation by the Secretary of State . . . 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 . . . .

The Secretary of State recommended that Mandel be granted a nonimmigrant visa for the contemplated 6 day vist and lecture tour, but the Attorney General refused to grant the requested waiver and visa, despite the fact that Mandel had been admitted into the US in 1962 and again in 1968 pursuant to recommendations by the Secretary of State and waivers by the then Attorneys General.

Appellees then commenced this suit against the Sec. of State and the AG, claiming that the statutory exclusion provisions are unconstitutional, and that their application to Mandel was in any event unconstitutionally arbitrary and unreasonable. The Chief Judge of CA 2 ordered a 3-judge court convened in USDC for ED NY; and the USDC held the political exclusion provisions of the statute unconstitutional as applied to Mandel, enjoined the Govt from applying the political exclusion provisions to deny Mandel admission to the US as a nonimmigrant visitor, and ordered the appellants to grant a nonimmigrant visa to Mandel. Relief was limited to Mandel's case (the statute was declared unconstitutional as applied, rather than unconstitutional on its face).

Query? See p 11 a of majority opinion. If their opinion stands, what would be left of Section 212(a)(28)?

The Govt did not base its refusal to grant the visa on any claim that Mandel has subversive affiliations, that his presence in the US would endanger the national security, or that his exclusion is dictated by foreign policy considerations. Indeed, the Govt did not identify any governmental interest involved, giving no reason for excluding Mandel, but relying instead on the discretion of the Attorney General.

See p 2 of SG's Brief.

The crux of the USDC's opinion is that appellees' 1st amendment rights have been infringed by the Govt in this case. Over the last decade, this Court has noted that the 1st amendment "protects the right to receive information and ideas." Stanley v. Georgia, 394 US 557, 564 (1969). See Red Lion Broadcasting Co. v. FCC, 395 US 367, 389-90 (1969); Lamont v. Postmaster General, 381 US 301, 305-07 (1965). The USDC followed these cases to conclude that this case involves primarily the 1st amendment rights of the American appellees, rather than any rights of appellee Mandel. Neither the Govt nor the dissent in the USDC takes the position that appellees' 1st amendment rights are not involved. The position of the Govt seems to be that, in the lawful pursuit of proper foreign policy and national security objectives, the Govt may have in this case had an "incidental" effect on appellees' 1st amendmemt rights, and that such "incidental" effect is permissable since it is necessary to accomplish the legitimate purpose sought to be achieved.

The position of the Govt in this case is somewhat analogous to its position in the "Pentagon Papers" case. In both cases 1st amendment rights were at stake, although in this case those 1st amendment rights are of a different character. In both cases the Govt argued that the Constitution conferred upon it powers and responsibilities that must override any 1st amendment considerations. In this case those constitutional powers and responsibilities are denominated "foreign policy" and "national security". This Court has recognized that 1st amendment rights enjoy a preferred position under our constitutional scheme, and that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." New York Times Co. v. United States, 403 US 713 (1971). The Govt refused to offer any justification for the exclusion of Mandel in this case, thus

the Govt would appear to come up short should any "balancing" test be applied, for the Govt has advanced nothing to put on its side of the scales.

As noted above, relief in this case was limited to Mandel. Presumably the Govt can in any future case challenging its right to exclude aliens under the authority of the two subsections of the statute involved in this case prevail upon a showing of the reasons for excluding the particular alien involved. Since the Govt handles these matters on a case-by-case basis, they presumably have a reason for exclusion in cases where exclusion is ordered. The decision below leaves untouched the many sections of the statute (literally dozens) which declare aliens ineligible for visas for a variety of specific reasons unrelated to publications and beliefs. I would therefore avoid this 1st amendment can of worms at this time by joining Douglas, Brennan, Stewart and Marshall in voting to AFFIRM.

CEP

71-16 U. S. v. MANDEL Argued 4/18/72

3 Judge Ct held Fed Statute void on its face – as violative of 1st Amend.

Friedman

This case doesn't involve rights of Mandel – but 1st amend. rts of U.S. Citizens who want to hear Mandel

Mandel's books are available in U.S. – tape recordings of his lectures are presented in U.S.

~~Position~~.

Appellees have shifted position. In DC they attacked Const. of statute. In this Court they assert that exception to statute ~~was~~ was misapplied here – where it is argued that AG abused his discretion

Congress has plenary power to control admission of aliens.

This statute bars an act – the entry of an alien. There is no abridgment of speech – a video tape, books, articles, Telstar, etc are all available.

Most visa ~~are~~ requests are granted

Read Jay v Boyd (in Reply Brief) 351 U. S 345, 357

→ I must read Bowdin oral argument (especially near end)

Bowdin (for Mandel)

"No case has upheld 'unfettered discretion' of an official.

Denies shift of position - but admits shift in emphasis

~~Re~~

Argues that A G. abused his discretion — "bureaucratic stubbornness" "arbitrary".

In 1969 - about 5000 applications for exceptions were made & all allowed except 9.

~~How~~

Emphasis on fact that Mandel wished to lecture at universities.

There are "gradations" of interest re speech. Case would be different if friends or family of Mandel wanted the visa.

What about request by various groups - e.g. Anti-War groups ~~were~~ - suppose they wanted Che Guevara Castro or ~~a~~ some fascist bandit.

Each case must turn on its facts

Bowdin repeatedly emphasized role of Universities.

what about moore lodge

Conf. 4/18/72

Court .....
Argued April 18, ..., 1972.
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 71-16

MITCHELL

vs.

MANDEL

Reversed

7 to 2

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

DOUGLAS, J. Affirm

Unique case. Prior cases do hold as chief indicates. But this is different — this involves 1st Amend rights of great importance.

Would decide case by case.

Wouldn't grant allow everyone in.

MARSHALL, J. Reverse

Agrees with Stewart

BRENNAN, J. Affirm

Lamont - closest case (op. by Brennan) 1st Amend. protects right to hear as well as to speak.

Different problem as to where to draw line — must decide on case by case basis

BLACKMUN, J. Reverse

Agrees with Potter

STEWART, J. Reverse

Lamont did not involve people. Power to control entry of aliens is absolute. Turner v. Wong.

Mandel's views can reach our people - TV, radio, Telstar.

Laws exclude all felons & homosexuals. There are unions, but control of aliens is absolute.

POWELL, J. Reverse

Action of A G was extremely unwise. But if, as conceded, aliens may be excluded.

Right to hear can't be extended to Aliens. I agree with Potter

A "case by case" rule here would be impossible to apply. Would we grant request of Harvard but not of Moose Lodge of Daughters of Confederacy. This is legislative problem.

WHITE, J. Reverse

Up to Congress

REHNQUIST, J. Reverse

Agrees with Potter

MXXXX: The Chief Justice Passed initially. After discussion - Reverse

Turner v Wong & similar cases held Ex Branch almost has unlimited right

Appellees concede that a flat ban on aliens would be Const., but since discretion is granted it must be exercised reasonably.

Concepts of due process, 1st amend, etc do not apply.

lfp/ss 4/19/72

No. 71-16 MITCHELL v. MANDEL
Argued 4/18/72

Tentative Impressions*

This involves the refusal of the Attorney General to approve a temporary visa for Prof. Mandel, a Belgian Marxist who had been invited to speak at various American colleges.

The Imigration and Nationality Act of 1952 (8 U. S. C. 1182(a)(28)(D) and (G)(v)), provides in part that:

> "The following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> "(D) Aliens . . . who advocate the economic . . . doctrines of world Communism . . ."

Under this statute, Mandel was ineligible for a visa. But the statute allows the Attorney General, upon recommendation of the Secretary of State, to authorize a temporary visa despite the normal rule of the statute.

Mandel had been admitted to the country in 1962 and again in 1968. Although the Secretary of State recommended an exception this

*These impressions are dictated on the afternoon following argument to record my initial and tentative impressions. I will have read, in preparation for the arguments, the principal briefs, some of the cases and the bench memo. I hope to do further study and have discussion with the appropriate law clerk before the Conference. My views are subject to change and to the discussion of the Conference.

time, the Attorney General denied the visa. The only reason indicated in the record (Exhibit Q, p. 68 of the Appendix) is a statement in a letter from the Immigration Service stating that on his 1968 trip Mr. Mandel was guilty of a "flagrant abuse of the opportunities afforded him". There is evidence in the record that Mandel's failure to comply with conditions was inadvertent or unknowingly.

Suit was instituted by Mandel and various professors, avering denial of First Amendment rights, asserting that the statute was unconstitutional as applied to Mandel, and that in any event the action of the AG was arbitrary and capricious.

A three-judge court sustained the complaint, and held that plaintiffs were entitled to the injunction. The court held that although Mandel had no individual right to enter the country "the citizens of the country (have the right under the First Amendment) to have the alien enter and have him explain and seek to defend his views." Thus, a first amendment right was found to exist with respect to American citizens who wished to hear the views of any alien.

Judge Bartels dissented, expressing the view that the policy expressed in the statute (national security and foreign policy considerations) overrode any First Amendment interest citizens may have in bringing aliens into the country.

Position of Appellees in this Court:

As pointed out in the reply brief of the SG, and as borne out by the oral argument, appellees no longer predicate their case in any significant degree on the unconstitutionality of the statute. The focus of their attack has shifted to the alleged arbitrary and capricious exercise by the Attorney General of his discretion to waive an alien's inadmissibility.

This is quite a shift in position, certainly from that taken by the district court - which held the statute unconstitutional as applied to appellees. If the statute, as so applied, is unconstitutional, the Attorney General had no discretion to exercise.

Mr. Boudin admitted in oral argument that, under the statute, some people could be excluded in the sound exercise of discretion. He emphasized that the public interest in education - and free speech on the campus - placed professors in a different and higher category than other classes of mortals. To use his term, Mr. Boudin argued that there are "gradations" of interest in free speech, and that there is a greater interest on the campus than elsewhere.

He also argued that the Attorney General could not have "unfettered discretion". While Boudin was not clear, he apparently thinks the

statute should provide standings, and perhaps a due process type hearing, before the Attorney General can exercise his judgment. Mr. Boudin ignored the fact that the broad policy of the statute is to exclude persons like Mandel. I must say that, to me, this policy is a stupid one - certainly at this time. But it could hardly be an unconstitutional policy, unless this statute were discriminatorily applied.

Boudin's argument would require the admission of Mandel because invited by college professors, but would exclude an alien invited say - by the Moose Lodge, or the Daughters of the Confederacy.

My Tentative View:

Although this case troubles me because I am not in sympathy with the statute, and also because the Attorney General exercised - in my view - extraordinarily poor judgment I am still in doubt as to how I shall vote.

It seems clear to me that Congress has the right to exclude any and all aliens, so long as this is done on a nondiscriminatorial basis.

It is also clear to me that a majority of the three-judge court made an absurdly unsound judgment in holding that the First Amendment gives the right to any American citizen to "hear" and "debate with"

any foreigner whom he may wish to bring into the United States. This would make an utter shambles of the immigration laws.

This leaves me with onlythe argument - pressed by Boudin - that the AG had a discretionary role and that he exercised it abitrarily and capriciously. But here, on must remember that the statute excluded all aliens in Mandel's class, and provided only for a limited exception by the Attorney General. It is not clear to me how Congress could prescribe any meaningful standards. Nor is it clear that any type of "due process" hearing is necessary under the Constitution or indeed would be feasible to adminster.

I will await the discussion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 3, 1972

Memorandum for the Chief Justice

Re: No. 71-16 - Mitchell v. Mandel

While I appreciate the assignment of this opinion to me and have worked on it almost continuously since that time, I sincerely regret that I find myself unable to write it. As a matter of fact, I am convinced that my vote was in error.

You will remember that my vote was to agree because "we had come too far to turn back." However, my further research convinces me that I am not in accord with The Chinese Exclusion Case and do not agree that the Constitution gave to either Congress or the Executive the broad power they assert.

As I said before I am sorry, but I will have to go down as a "backslider."

T.M.

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 8, 1972

71-16, Kleindienst v. Mandel

Dear Harry,

I agree with your memorandum, which I hope will become the opinion of the Court.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1972

Re: No. 71-16 - Kleindienst v. Mandel

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

6/13/72 CEP

Join

MEMORANDUM TO MR. JUSTICE POWELL

Re: No. 71-16, Kleindienst (Mitchell) v. Mandel

This is the HOLD-FOR-NINE 1st amendment right to hear case, involving the power of the Executive Branch to deny visas to aliens seeking entry into this country for the purpose of delivering lectures.

The USDC (2-to-1) held that US citizens had a first amendment right to hear Mandel, and held the statutes authorizing the AG to deny admission to aliens because of their beliefs [redacted] unconstitutional.

The Conference voted to reverse; you voted to reverse. HAB has circulated an opinion for the Court, which PS and Rehnquist have joined. WOD has circulated a dissent.

HAB recognizes the existence of a limited first amendment right to hear, and he also recognizes the plenary power of the [redacted] Legislative Branch to formulate rules for the exclusion of aliens. He concludes the opinion by holding:

> In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under §212(a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this 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. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.

WOD's dissent emphasizes that national security is not involved, and that the majority's decision makes the AG a censor of ideas. The guts of WOD's opinion is:

> Thought control is not within the ~~possible~~ competence of any branch of government. Those who live here may need exposure to the ideas of people of many faiths and many creeds to further their education. We should construe the Act generously by that First Amendment standard, saying that once the State Department has concluded that our foreign relations permit or require the admission of a foreign traveller, the Attorney General is left only with the ~~powers~~ problems of national security, importation of heroin, or other like matters within his competence.

WOD, in other words, has written on statutory rather than constitutional grounds.

HAB's opinion is very narrow. It addresses only the narrow issue in this case. There are doubtless some on the Court who would have preferred a broader opinion, giving plenary exclusion power to the AG in all cases, irrespective of whether the AG seeks to justify his exercise of the power. That question is not presented by this case.

CEP

June 14, 1972

Re: No. 71-16 Kleindienst v. Mandel

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 16, 1972

RE: No. 71-16 - Kleindienst v. Mandel

Dear Thurgood:

Please join me in your dissent in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

6/17/72 CEP

MEMORANDUM TO MR. JUSTICE POWELL

Re: No. 71-16, Kleindienst (Mitchell) v. Mandel, DISSENT of Justice Marshall

Justice Marshall has circulated a dissent, which Justice Brennan has joined. WOD has also circulated a dissent, which I discussed in my memo on HAB's opinion for the Court.

Marshall's dissent strikes me as being very well written, and it makes what seems to me to be the strongest case for his position. The dissent turns on what the First Amendment requires in cases where the rights of American citizens are at issue.

CEP

Pete — I'd joined Blackmun. Any other result would open door to demands by any & all antagonists to demand that aliens be admitted.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 19, 1972

Re: No. 71-16 - Kleindienst v. Mandel

Dear Harry:

Please join me.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 22, 1972

Re: No. 71-16 - Kleindienst v. Mandel

Dear Harry:

Please join me.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
	~~dissent~~ 6/12/72				~~4/24/72~~	5/8/72		
join HAB 6/22/72		join TM	join HAB 6/8/72	join HAB 6/19/72	will not write opinion 5/3/72		join HAB 6/14/72	join HAB 6/12/72
					dissent 6/16/72			
					71-16 Acting Atty. Gen. v. Mandel			

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

From: Blackmun, J.

1st DRAFT

Circulated: 6/8/72

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 71-16

Richard G. Kleindienst, Acting Attorney General of the United States, et al., Appellants, *v.* Ernest Mandel et al.	On Appeal from the United States District Court for the Eastern District of New York.

Reversed
6/13-14
Join

[June —, 1972]

MR. JUSTICE BLACKMUN, Memorandum.

The appellees have framed the issue here as follows:

> "Does appellants' action in refusing to allow an alien scholar to enter the country to attend academic meetings violate the First Amendment rights of American scholars and students who had invited him?" [1]

Expressed in statutory terms, the question is whether §§ 212 (a)(28)(D) and (G)(v) and § 212 (d)(3)(A) of the Immigration and Nationality Act of 1952, 66 Stat. 182–185, 8 U. S. C. §§ 1182 (a)(28)(D) and (G)(v) and § 1182 (d)(3)(A), providing that certain aliens "shall be ineligible to receive visas and shall be excluded from admission into the United States" unless the Attorney General, in his discretion, upon recommendation by the Secretary of State or a consular officer, waives inadmissibility and approves temporary admission, are unconstitutional as applied here in that they deprive American citizens of freedom of speech guaranteed by the First Amendment.

[1] Brief 1.

The challenged provisions of the statute are:

> "Section 212 (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:
>
> . . . . .
>
> "(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 . . .
>
> "(d) . . . .
>
> "(3) Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) . . . may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General . . . ."

Section 212 (a)(6) provides that the Attorney General "shall make a detailed report to the Congress in any case in which he exercises his authority under paragraph

(3) of this subsection on behalf of any alien excludable under paragraphs (9), (10), and (28) . . . ."

I

Ernest E. Mandel resides in Brussels, Belgium, and is a Belgian citizen. He is a professional journalist and is editor-in-chief of the Belgian Left Socialist weekly La Gauche. He is author of a two-volume work entitled "Marxist Economic Theory" published in 1969. He asserted in his visa applications that he is not a member of the Communist Party. He has described himself, however, as "a revolutionary Marxist." [2] He does not dispute, see 325 F. Supp., at 624, that he advocates the economic, governmental, and international doctrines of world communism.[3]

Mandel was admitted to the United States temporarily in 1962 and again in 1968. On the first visit he came as a working journalist. On the second he accepted invitations to speak at a number of universities and colleges. On each occasion, although apparently he was not then aware of it, his admission followed a finding of ineligibility under § 212 (a)(28), and the Attorney General's exercise of discretion to admit him temporarily, on recommendation of the Secretary of State, as § 212 (d)(3)(A) permits.

On Sptember 8, 1969, Mandel applied to the American Consul in Brussels for a nonimmigrant visa to enter the United States in October for a six-day period during which he would participate in a conference on

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[2] E. Mandel, Revolutionary Strategy in the Imperialist Countries (1969), reprinted in Appendix 54–66.

[3] In their brief, appellees, while suggesting that § 101 (a)(40), defining "world communism," and § 212 (a)(28)(D) are unacceptably vague, "do not contest the fact that appellants can and do conclude that Dr. Mandel's Marxist economic philosophy falls within the scope of these vague provisions." Brief 10, n. 8.

"Technology and the Third World" at Stanford University.[4] He had been invited to Stanford by the Graduate Student Association there. The invitation stated that John Kenneth Galbraith would present the keynote address and that Mandel would be expected to participate in an ensuing panel discussion and to give a major address the following day. The University, through the office of its president, "heartily endorse[d]" the invitation. When Mandel's intended visit became known, additional invitations for lectures and conference participations came to him from members of the faculties at Princeton, Amherst, Columbia, and Vassar, from groups in Cambridge, Massachusetts, and New York City, and from others. One conference was to be in New York City sponsored jointly by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference; Mandel's assigned subject there was "Revolutionary Strategy in Imperialist Countries." Mandel then filed a second visa application proposing a more extensive itinerary and a stay of greater duration.

On October 23, the Consul at Brussels informed Mandel orally that his application of September 8 had been refused. This was confirmed in writing on October 30. The Consul's letter advised him of the finding of inadmissibility under § 212 (a)(28) in 1962, the waivers in that year and in 1968, and the current denial of a waiver. It said, however, that another request for waiver was being forwarded to Washington in connection with Mandel's second application for a visa.

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[4] Entry presumably was claimed as a nonimmigrant alien under § 101 (a)(15)(H)(i) of the Act, 8 U. S. C. § 1101 (a)(15)(H)(i), namely, "an alien having a residence in a foreign country which he has no intention of abandoning . . . who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability . . . ."

The Department of State, through its Bureau of Security and Consular Affairs and by a letter dated November 6 to Mandel's New York attorney, asserted that the earlier waivers had been granted on condition that Mandel conform to his itinerary and limit his activities to the stated purposes of his trip, but that on his 1968 visit he had engaged in activities beyond the stated purposes. For this reason, it was said, a waiver "was not sought in connection with his September visa application." The Department went on to say, however, that it had now learned that Mandel might not have been aware in 1968 of the conditions and limitations attached to his visa issuance, and that, in view of this and upon his assurances that he would conform to his stated itinerary and purposes, the Department was reconsidering his case. On December 1 the Consul at Brussels informed Mandel that his visa had been refused.

The Department of State in fact had recommended to the Attorney General that Mandel's ineligibility be waived with respect to his October visa application. The Immigration and Naturalization Service, however, acting on behalf of the Attorney General, see 28 U. S. C. § 510, in a letter dated February 13, 1970, to New York counsel stated that it had determined that Mandel's 1968 activities while in the United States "went far beyond the stated purposes of his trip, on the basis of which his admission had been authorized and represented a flagrant abuse of the opportunities afforded him to express his views in this country." The letter concluded that favorable exercise of discretion, provided for under the Act, was not warranted and that Mandel's temporary admission was not authorized.

Mandel's address to the New York meeting was then delivered by transatlantic telephone.

In March Mandel and six of the other appellees instituted the present action against the Attorney Gen-

eral and the Secretary of State. The two remaining appellees soon came into the lawsuit by an amendment to the complaint. All the appellees who joined Mandel in this action are United States citizens and are university professors in various fields of the social sciences. They are persons who invited Mandel to speak at universities and other forums in the United States or who expected to participate in colloquies with him so that, as the complaint alleged, "they may hear his views and engage him in a free and open academic exchange." The plaintiffs claimed that the statutes in question are unconstitutional on their face and as applied and that their application to Mandel was arbitrary and unreasonable. The American plaintiffs urged that Mandel's exclusion violated their First and Fifth Amendment rights and that §§ 212 (a)(28) and (d)(3)(A) are void on their face and as applied in that they were denied both equal protection and due process. Declaratory and injunctive relief was sought.

A three-judge district court was duly convened. The case was tried on the pleadings and affidavits with exhibits. Two judges held that, although Mandel had no personal right to enter the United States, citizens of this country have a First Amendment right to have him enter and to hear him explain and seek to defend his views. The court then entered a declaratory judgment that § 212 (a)(28) and § 212 (d)(3)(A) were invalid and void insofar as they had been or might be invoked by the defendants to find Mandel ineligible for admission. The defendants were enjoined from implementing and enforcing those statutes so as to deny Mandel admissions as a nonimmigrant visitor. Judge Bartels dissented. 325 F. Supp. 620 (EDNY 1971). Probable jurisdiction was noted. 404 U. S. 1013 (1972).

II

Until 1875 alien migration to the United States was unrestricted. The Act of March 3, 1875, 18 Stat. 477, barred convicts and prostitutes. Seven years later Congress passed the first general immigration statute. Act of August 3, 1882, 22 Stat. 214. Other legislation followed. A general revision of the immigration laws was effected by the Act of March 3, 1903, 32 Stat. 1213–1222. Section 2 of that Act made ineligible for admission "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law." By the Act of October 16, 1918, 40 Stat. 1012, Congress expanded the provisions for the exclusion of subversive aliens. Title II of the Alien Registration Act of 1940, 54 Stat. 670, 671, amended the 1918 Act to bar aliens who, at any time, had advocated or were members of or affiliated with organizations that advocated violent overthrow of the United States Government.

In the years that followed, after extensive investigation and numerous reports by congressional committees, see *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 94, n. 37 (1961), Congress passed the Internal Security Act of 1950, 64 Stat. 987. This Act dispensed with the requirement of the 1940 Act of a finding in each case, with respect to members of the Communist Party, that the party did in fact advocate violent overthrow of the Government. These provisions were carried forward into the Immigration and Nationality Act of 1952.

We thus have almost continuous attention on the part of Congress since 1875 to the problems of immigration and of excludability of certain defined classes

of aliens. The pattern generally has been one of increasing control with particular attention, for almost 70 years now, first to anarchists and then to those with communist affiliation or views.

III

It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise. *United States ex rel. Turner* v. *Williams,* 194 U. S. 279, 292 (1904); *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537, 542 (1950); *Galvan* v. *Kress,* 347 U. S. 522, 530–532 (1954); see *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 592 (1952).

The appellees concede this. Brief, at 33, Tr. of Oral Arg. 28. Indeed, the American appellees assert that "they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien." Brief, at 14. "Dr. Mandel is in a sense made a plaintiff because he is symbolic of the problem," Tr. of Oral Arg. 22.

The case, therefore, comes down to the narrow issue whether the First Amendment confers upon the appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country or, in other words, to compel the Attorney General to allow Mandel's admission.

IV

In a variety of contexts this Court has held that the First Amendment protects the right to "receive information and ideas," the freedom to hear as well as the freedom to speak.

> "It is now well established that the Constitution protects the right to receive information and ideas.

> 'This freedom [of speech and press] . . . necessarily protects the right to receive . . . .' *Martin* v. *City of Struthers,* 319 U. S. 141, 143 (1943) . . . ." *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969).

This was one basis for the decision in *Thomas* v. *Collins,* 323 U. S. 516 (1945). The Court there held that a labor organizer's right to speak and the rights of workers "to hear what he had to say," *id.,* at 534, were both abridged by a state law requiring organizers to register before soliciting union membership. In a very different situation, MR. JUSTICE WHITE, speaking for a unanimous Court upholding the FCC's "fairness doctrine" in *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 386–390 (1969), said:

> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . 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 right may not be constitutionally abridged either by Congress or by the FCC." *Id.,* at 390.

And in *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965), the Court held that a statute permitting the Government to hold "communist political propaganda" arriving in the mails from abroad unless the addressee affirmatively requested in writing that it be delivered to him placed an "unjustifiable burden" on the addressee's First Amendment rights. MR. JUSTICE BRENNAN, concurring and joined by two other Justices, stated, "I think the right to receive publications is . . . a fundamental right." *Id.,* at 308. This Court has recognized that this right is "nowhere more vital" than in our schools and universities. *Shelton* v. *Tucker,* 364 U. S. 479, 487 (1960); *Sweezy* v. *New Hampshire,* 354 U. S.

234, 250 (1957) (opinion of Chief Justice Warren); *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1967). See *Epperson* v. *Arkansas,* 393 U. S. 97 (1968).

In the present case, the District Court majority held:

> "The concern of the First Amendment is not with a non-resident alien's individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien enter and to hear him explain and seek to defend his views; that, as *Garrison* [v. *Louisiana,* 379 U. S. 64 (1964)], and *Red Lion* observe, is of the essence of self-government." 325 F. Supp., at 631.

The Government disputes this conclusion on two grounds. First, it argues that exclusion of Mandel involves no restriction on First Amendment rights at all since what is restricted is "only action—the action of the alien coming into this country." Brief, at 29. Principal reliance is placed on *Zemel* v. *Rusk,* 381 U. S. 1 (1965), where the Government's refusal to validate an American passport for travel to Cuba was upheld. The rights asserted there were those of the passport applicant himself. The Court held that his right to travel and his asserted ancillary right to inform himself about Cuba did not outweigh substantial "foreign policy considerations affecting all citizens" that, with the backdrop of the Cuban missile crisis, were characterized as the "weightiest considerations of national security." *Id.,* at 13, 16. The rights asserted here, in some contrast, are those of American academics who have invited Mandel to participate with them in colloquia, debates, and discussion in the United States. In light of the Court's previous decisions concerning the "right to receive information," we cannot realistically say that the problem facing us disappears entirely or is nonexistent because

the mode of regulation bears directly on physical movement. In *Thomas* the registration requirement on its face concerned only action. In *Lamont* too, the face of the regulation dealt only with the Government's undisputed power to control physical entry of mail into the country. See *United States* v. *Robel,* 389 U. S. 258, 263 (1967).

The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches, and because "technological developments," such as tapes or telephone hook-ups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary here in light of the discussion that follows in Part V—we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.

V

Recognition that First Amendment rights are implicated, however, is not dispositive of our inquiry here. In accord with ancient principles of the international law of nation-states, the Court in *The Chinese Exclusion Case,* 130 U. S. 581, 609 (1889), and in *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1893), held broadly, as the Government describes it, Brief, at 20, that the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government . . . ." Since that time,

the Court's general reaffirmations of this prinicple have been legion.[5] The Court without exception has sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Boutilier* v. *Immigration and Naturalization Service,* 387 U. S. 118, 123 (1967). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 339 (1909). In *Lem Moon Sing* v. *United States,* 158 U. S. 538, 547 (1895), the first Mr. Justice Harlan said,

> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

Mr. Justice Frankfurter ably articulated this history in *Galvan* v. *Press,* 347 U. S. 522 (1954), a deportation case, and we can do no better. After suggesting, at 530, that "much could be said for the view" that due process places some limitations on congresssional power in this area "were we writing on a clean slate," he continued:

> "But the slate is not clean. As to the extent of the power of Congress under review, there is not merely a 'page of history' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with

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[5] See, for example, *Ekiu* v. *United States,* 142 U. S. 651, 659 (1892); *Fok Yung Yo* v. *United States,* 185 U. S. 296, 302 (1902); *United States ex rel. Turner* v. *Williams,* 194 U. S. 279, 294 (1904); *Keller* v. *United States,* 213 U. S. 138, 143–144 (1909); *Mahler* v. *Eby,* 264 U. S. 32, 40 (1924); *Shaughnessy* v. *Mezei,* 345 U. S. 206, 210 (1953); cf. *Graham* v. *Richardson,* 403 U. S. 365, 377 (1971).

> the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. . . .
>
> "We are not prepared to deem ourselves wiser or more sensitve to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens . . . ." *Id.*, at 531–532.

We are not inclined in the present context to reconsider this line of cases. Indeed, the appellees, in contrast to the *amicus,* do not ask that we do so. The appellees recognize the force of these many precedents. In seeking to sustain the decision below, they concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by § 212 (a)(28)(D) and (G)(v), and that First Amendment rights could not override that decision. Brief, at 16. But they contend that by providing a waiver procedure, Congress clearly intended that persons ineligible under the broad provision of the section would be temporarily admitted when appropriate "for humane reasons and for reasons of public interest." S. Rep. No. 1137, Committee on the Judiciary, 82d Cong., 2d Sess., 12 (1952). They argue that the Executive's implementation of this congressional mandate through decision whether to grant a waiver in each individual case must be limited by the First Amendment rights of persons like appellees. Specifically, their position is that the First Amendment rights must prevail at least where the Government advances no justification

whasoever for failing to grant a waiver. They point to the fact that waivers have been granted in the vast majority of cases.[6]

Appellees' First Amendment argument would prove too much. In almost every instance of an alien excludable under § 212 (a)(28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well known, and the popular. Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under § 212 (a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the

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[6] The Government's brief states:

"The Immigration and Naturalization Service reports the following with respect to applications to the Attorney General for waiver of an alien's ineligibiltiy for admission under Section 212 (a)(28):

Year	Total Number of Applications for Waiver of Section 212 (a)(28)	Number of Waivers Granted	Number of Waivers Denied
1971	6210	6196	14
1970	6193	6189	4
1969	4993	4984	9
1968	4184	4176	8
1967	3860	3852	8

Brief 18, n. 24. These cases, however, are only those that, as § 212 (d)(3)(A) provides, come to the Attorney General with a positive recommendation from the Secretary of State or the consular officer. The figures do not include those cases where either of these officials had refrained from making a positive recommendation.

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. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious. Indeed, it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive.

Appellees seek to soften the impact of this analysis by arguing that the First Amendment claim should prevail at least where the Executive advances no justification at all for denial of a waiver. Brief 26. The Government would have us reach this question, urging a broad decision that Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given. See *Jay* v. *Boyd,* 351 U. S. 345, 357–358 (1956); *Hintopoulos* v. *Shaughnessy,* 353 U. S. 72, 77 (1957); *Kimm* v. *Rosenberg,* 363 U. S. 405, 408 (1960). This record, however, does not require that we do so, for the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver. And that reason was facially legitimate and bona fide.

The Government has chosen not to rely on the letter to counsel either in the District Court or here. The fact remains, however, that the official empowered to make the decision stated that he denied a waiver because he concluded that previous abuses by Mandel that were contrary to the Government's interests made it inappropriate to grant a waiver again. With this, we think the Attorney General validly exercised the plenary power which Congress delegated to the Executive by § 212 (a) (28) and (d)(3).

In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable

under § 212 (a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this 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. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.

Reversed.

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Reviewed 6/17/72

No. 71-16 - Kleindienst v. Mandel

From: Marshall, J.

Mr. JUSTICE MARSHALL dissenting.

JUN 16 1972

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Dr. Ernest Mandel, a citizen of Belgium, is an internationally famous Marxist scholar and journalist. He was invited to our country by a group of American scholars who wished to meet him for discussion and debate. With firm plans for conferences, colloquia, and lectures, the American hosts were stunned to learn that Mandel had been refused permission to enter our country. American consular officials had found Mandel "ineligible" to receive a visa under §212 (a)(28) (D) and (G)(v) [of the Immigration Act,] which bars even temporary visits to the United States by aliens who "advocate the economic, international and governmental doctrines of world communism" or "who write or publish any written or printed matter * * * advocating or teaching * * *" such doctrines. Under §212(d)(3), the Attorney General refused to waive ineligibility.

I, too, am stunned to learn that a country with our proud heritage has refused Dr. Mandel temporary admission. I am convinced that Americans cannot be denied the opportunity to hear Dr. Mandel's views in person because their government disapproves of Dr. Mandel's ideas, and, therefore, I dissent.

I

As the majority correctly observes, "In a variety of contexts this Court has held that the First Amendment protects the right to 'receive information and ideas,' the freedom to hear as well as the freedom to speak." The reason for this is that the First Amendment protects a process - in Justice Brandeis' words, "reason as applied through public discussion," Whitney v. California, 274 U.S. 357, 375 (1927) (concurring opinion) - and the right to speak and hear are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensible to the discovery and spread of political truth." Id.; see Terminiello v. Chicago, 337 U.S. 1, 4 (1949). Its protection is "a fundamental principle of the American government." Whitney v. California, supra at 375. The First Amendment means that government has no power to thwart the process of free discussion, to "abridge" the freedoms necessary to make that process work. See Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring, with whom Goldberg, J., and Harlan, J., joined).

There can be no doubt that by denying the American appellees access to Dr. Mandel, government has directly prevented the free interchange of ideas.[1] It has, of course, interfered with appellees' personal rights both to hear Mandel's views and to develop and articulate their own views through interaction with Mandel. But as the court below recognized, apart from appellees' interests, there is also a "general public interest in the prevention of any stifling of political utterance." 325 F.Supp. 620, 632 (1971). And government has interfered with this as well.[2]

II

What is the justification for this extraordinary governmental interference with the liberty of American citizens? And by what reasoning does the Court uphold Mandel's exclusion? It is established constitutional doctrine, after all, that government may restrict First Amendment rights only if the restriction is necessary to further a compelling governmental interest. E.g., Lamont v. Postmaster General, supra at 308; N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963); Gibson v. Florida Legislative Committee, 372 U.S. 539, 546 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

A. Today's majority apparently holds that Mandel may be excluded and Americans' First Amendment rights abridged because the Attorney General has given a "facially legitimate and bona fide" reason for refusing to waive Mandel's visa

ineligibility. I do not understand the source of the queer standard. Merely "legitimate" governmental interests cannot override Constitutional rights. Moreover, the majority demands only "facial" legitimacy and good faith, by which it means that this Court will never "look behind" any reason the Attorney General gives. No citation is given for this kind of unprecedented deference to the Executive, nor can I imagine (nor am I told) the slightest justification for such a rule. 3/

Even the briefest peek behind the Attorney General's reason for refusing a waiver in this case would show that it is a sham. The Attorney General informed appellees' counsel that the waiver was refused because Mandel's activities on a previous American visit "went far beyond the stated purposes of his trip * * * and represented a flagrant abuse of the opportunities afforded him to express his views in this country * * *." App. 68. But, as the Department of State had already conceded to appellees' counsel, Dr. Mandel "was apparently not informed that [his previous] visa was issued only after obtaining a waiver of ineligibility and therefore [he] may not have been aware of the conditions and limitations attached to the [previous] visa issuance." App. 22. There is no basis in the present record for concluding that Mandel's behavior on his previous visit was a "flagrant abuse" - or even wilful or knowing departure - from visa restrictions. For good reason,

the Government in this litigation has never relied on the Attorney General's reason to justify Mandel's exclusion. In these circumstances, the Attorney General's reason cannot possibly support a decision for the Government in this case. But without even remanding for a factual hearing to see if there is any support for the Attorney General's determination, the majority declares that his reason is sufficient to override appellees' First Amendment interests.

B. Even if the Attorney General had given a sufficiently compelling reason for declining to grant a waiver under Section 212 (d)(3)(A), this would not, for me, end the case. As I understand the statutory scheme, Mandel is "ineligible" for a visa, and therefore "inadmissible," solely because, under Section 212 (a)(28), he has advocated communist doctrine and has published writings advocating that doctrine. The waiver question under Section 212(d)(3)(A) is totally secondary and dependent, since it may be triggered only by a determination of (a)(28) "inadmissibility." The Attorney General's refusal to waive "inadmissibility" does not itself generate a new statutory basis for inadmissibility; the Attorney General has no roving power to set new ad hoc standards for visa ineligibility. Rather, the Attorney General's refusal to waive inadmissibility simply has the same effect as if no waiver provision existed; "inadmissibility" still rests on the (a)(28) determination.

Thus, even if the Attorney General has a good reason for refusing a waiver, this Court, I think, must still face the question it tries to avoid: under our Constitution, may Mandel be declared inadmissible under (a)(28)?

C. In any event, since it is clear to me that the Attorney General's asserted reason is insufficient to exclude Mandel, I turn to the sole justification urged by the Government here or below - that ~~the Government~~ it has the power to exclude Mandel in this case because he "advocates" and "publishes * * * printed matter * * * advocating * * * doctrines of world communism." Section 212 (a)(28).

Still adhering to standard First Amendment doctrine, I do not see how (a)(28) can possibly represent a compelling governmental interest to override appellees' interests in hearing Mandel.[4] Unlike (a)(27) or (a)(29), (a)(28) does not claim to exclude aliens who represent an active and present threat to national security. Rather, (a)(28) excludes aliens solely because they have advocated communist doctrine. Our cases make clear, however, that government has no legitimate interest in stopping the flow of ideas. It has no power to restrict the mere advocacy of communist doctrine, divorced from incitement to imminent lawless action. Noto v. United States, 367 U.S. 290, 297-98 (1961); Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969).

The First Amendment represents the view of the Framers that "[t]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones," "more speech." Whitney v. California, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring). Where Americans want to hear about Marxist doctrine, even from advocates, government cannot prevent them simply because it does not approve of the ideas. It certainly may not selectively pick and choose which ideas it will let into the country. Cf. Police Department v. Mosley, ___ U.S. ___(1972). But, as the court below put it, Section 212 (a)(28) is nothing more than "a means of restraining the entry of disfavored political doctrine," 325 F.Supp. 620, 626 (1971), and such an enactment cannot justify the abridgment of appellees' First Amendment rights.

In saying these things, I am merely repeating established First Amendment law. Indeed, this Court has already applied that law in a case concerning the entry of communist doctrine from foreign lands. In Lamont v. Postmaster General, 381 U.S. 301 (1965), this Court held that the right of an American addressee to receive communist political propaganda from abroad could not be fettered by requiring the addressee to request in writing its delivery from the Post Office. See, id. at 308 (Brennan, J., concurring). The burden imposed on the right to receive

information in our case is far greater than in Lamont, with far less justification. In Lamont, the challenged law merely regulated the flow of mail, and required the Postmaster General to forward detained mail immediately upon request by the addressee. By contrast, through Section 212(a)(28), the Government claims absolute power to bar Mandel permanently from academic meetings in this country. Moreover, in Lamont, the government argued that its interest was not to censor content but rather to protect Americans from receiving unwanted mail. Here, Mandel's exclusion is not incident to a legitimate regulatory objective, but is based directly on the subject matter of his beliefs.

D. The heart of the Government's position in this case, and the basis for its distinguishing Lamont, is that its power is distinctively broad and unreviewable because "the regulation in question is directed at the admission of aliens." Brief, p. 33. Thus, in the Government's view, this case is no different from a long line of cases holding that the power to exclude aliens is left exclusively to the "political" branches of government, Congress and the Executive.

These cases are not the strongest precedents in the U.S. Reports, and the majority's baroque approach reveals its reluctance to rely on them completely. They include such milestones as The Chinese Exclusion Case, 130 U.S. 581 (1889),

and Fong Yue Ting v. United States, 149 U.S. 698 (1893), in which this Court held that the right to expel Chinese aliens from our midst is "inherent in sovereignty."

But none of these old cases must be "reconsidered" or overruled to strike down Dr. Mandel's exclusion, for none of them was concerned with the rights of American citizens. At least where the rights of Americans are involved, there is no basis for concluding that the power to exclude aliens is absolute. "When Congress' exercise of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." Robel v. United States, 389 U.S. 258, 264 (1967). As Robel and other cases described in footnote 5 show, all governmental power--even the war power, the power to maintain national security, and the power to conduct foreign affairs--is limited by the Bill of Rights.[5/] When individual freedoms are at stake, we do not blindly defer to broad claims of the Legislative or Executive, ~~power,~~ but rather we consider these claims in light of the individual freedoms. This should be our approach in the present case, even though the Government urges that the question of admitting aliens may involve foreign relations and national defense policies.

The majority recognizes that the right of American citizens to hear Mandel is "implicated" in our case. There were no rights of Americans involved in any of the old alien exclusion cases, and therefore their broad counsel about deference to the political branches is inapplicable. Surely a Court which can distinguish between pre-indictment and post-indictment lineups, Kirby v. Illinois, ___ U.S. ___ (1972), can distinguish between our case and cases which involve only the rights of aliens.

I do not mean to suggest that simply because a group of Americans wish to hear an alien speak, they can automatically compel even his temporary admission to our country. Government can prohibit aliens from even temporary admission if exclusion is necessary to achieve a compelling governmental interest.[5/] Actual threats to the national security, public health needs, and genuine requirements of law enforcement are the most apparent interests which would surely be compelling. But in Dr. Mandel's case, the Government has, and claims, no such compelling interest. We are concerned here only with temporary admissions to the country by "nonimmigrants," a class not covered by quotas. Gordon and Rosenfield, Immigration Law and Procedure §2.6 (1971). Mandel's "ineligibility" for a visa is based solely on Section 212 (a)(28). The only governmental interest

embodied in that section is that the government wants to keep certain ideas out of circulation in this country. This is hardly a compelling governmental interest. Section (a)(28) may not be the basis for excluding an alien where Americans wish to hear him. Without any claim that Mandel "live" is an actual threat to this country, there is no difference between excluding Mandel because of his ideas and keeping his books out because of its ideas. Neither is permitted. Lamont v. Postmaster General, supra.

III

Dr. Mandel has written about his exclusion, concluding that "[i]t demonstrates a lack of confidence" on the part of our government "in the capacity of its supporters to combat Marxism on the battleground of ideas." He observes that he "would not be carrying any high explosives, if I had come, but only, as I did before, my revolutionary views which are well known to the public." And he wryly notes that "In the nineteenth century the British ruling class, which was sure of itself, permitted Karl Marx to live as an exile in England for about forty years." Appendix 54.

The government does not dispute that Dr. Mandel's brief trip would involve nothing but a series of scholarly conferences and lectures. To follow the path of the Government in this case departs from the basic traditions of our country, its

fearless acceptance of free discussion. By deferring to the Executive, this Court departs from its own best role as the guardian of individual liberty in the face of governmental overreaching. Principles of judicial restraint designed to allow the policial branches to protect national security have no place in this dispute. Dr. Mandel should be admitted for his brief visit.

I dissent.

FOOTNOTES

1. Twenty years ago, the Bulletin of the Atomic Scientists devoted an entire issue to the problem of American visa policy and its effect on the interchange of ideas between American scholars and scientists and their foreign counterparts. The general conclusion of the Editors - supported by printed statements of such men as Albert Einstein, Hans Bethe, Harold Urey, Arthur Compton, Michael Polyani, Raymond Aron, and J. Coulomb - was that American visa policy was injurious to the development of American science and American intellectual development, and harmful to our prestige abroad. Volume VIII, No. 7, October 1952, pp. 210-17 (statement of Special Editor Edward Shils). The detrimental effect of American visa policy on the free exchange of ideas continues to be reported. See Note, Opening the Floodgates to Dissident Aliens, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 141, 143-49 (1970); Bull, of the Atomic Scientists, Vol. XI, December 1955, pp. 367-73.

2. The availability to appellees of Mandel's books and taped lectures is no substitute for live, face to face debate, just as the availability to us of briefs and exhibits does not supplant the essential place of oral argument in this Court's work.

3. Compare Frankel, Bench Warrants Upon the Prosecutor's Demand, 71 Col. L. Rev 403, 414 (1971). (The writer is the distinguished United States District Judge.)

4. The majority suggests that appellees "concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by §212(a)(28)(D) and G(v) and that First Amendment rights could not override that decision." This was certainly not the view of the court below, whose judgment the Government alone has challenged here and appellees have moved to affirm. It is true that appellees have argued to this Court a ground of decision in alternative to that argued and adopted below; but they have hardly conceded the incorrectness of what they successfully argued below. They have simply noted at p. 16 of their Brief that even if this Court rejects the broad decision below, there would nevertheless be a separate and narrower basis for affirmance. See Tr. of Oral Arg. 24, 25-26, 41-42.

5. In Robel, this Court struck down a statute making it a criminal offense for any employee of a "defense facility" to remain a member of the Communist Party, in spite of Government claims that the enactment came within the "war power." In Aptheker v. Secretary of State, 378 U.S. 500 (1964), the Government unsuccessfully sought to defend the denial of passports to American members of the Communist Party, in spite of claimed threats to the national security. In Zemel v. Rusk, 381 U.S. 1 (1965), the passport restriction on travel to Cuba was upheld, but the Court rejected any assumption "that simply because a statute deals with foreign relations, it can grant the executive totally unrestricted freedom of choice." Id at 17. In Schneider v. Rusk, 377 U.S. 163 (1964), the Government unsuccessfully attempted to justify a statutory inequality between naturalized and native-born citizens under the foreign relations power. And in Lamont itself, as Justice Brennan noted, the Government urged that the statute was "justified by the object of avoiding the subsidization of propaganda of foreign governments which bar American propaganda;" Justice Brennan answered that Government must act "by means and on terms which do not endanger First Amendment rights." Id at 310.

6. I agree with the majority that courts should not inquire into such things as the "probity of the speaker's ideas." Neither should the Executive, however. Where Americans wish to hear an alien, and their claim is not a demonstrated sham, the crucial question is whether the Government's interest in excluding the alien is compelling.