Gerry Adams (4)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1903

GERRY ADAMS, et al.,

Plaintiffs-Appellants,

v.

JAMES BAKER, SECRETARY OF STATE, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLEES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in sustaining the denial of a visa to Gerry Adams upon the conclusion that, on the basis of Adams' advocacy of and involvement in terrorist violence, the government had advanced a facially legitimate and bona fide reason for refusing to admit the alien to the United States under 8 U.S.C. 1182(a)(28).

2. Whether the district court erred finding that neither Section 901 of Public Law 100-204, nor the McGovern Amendment, 22 U.S.C. 2691, nor the First Amendment provides any basis to compel the admission of Gerry Adams to the United States notwithstanding his ineligibility for a visa under 8 U.S.C. 1182(a)(28).

STATEMENT OF THE CASE

A. Nature Of The Case

This lawsuit arose as a challenge to the denial of a non-immigrant visa to an alien, Gerry Adams, who sought entry into the United States in March 1988. Adams' visa application was denied under the exclusionary provisions of 8 U.S.C. 1182(a)(28)(F) upon the determination, by consular officers in Belfast in consultation with the Deputy Secretary of State, that the alien was ineligible for admission to the United States because of his advocacy of and personal involvement in terrorist violence. Claiming an interest in meeting with Adams on American soil, a United States citizen and several organizations and associations brought suit seeking equitable relief to set aside the visa denial and to compel the admission of the alien.

The district court entered summary judgment for the government holding that, in proffering the Deputy Secretary's explanation of the challenged visa denial, defendants had provided a "facially legitimate and bona fide reason" for the alien's exclusion in accordance the principles of Kleindienst v. Mandel, 408 U.S. 753 (1972). The court rejected plaintiffs' statutory and constitutional claims as insufficient to compel the Adams' admission into the United States. Plaintiffs appeal that judgment.

B. Statement Of Facts And Prior Proceedings

1. Denial Of Adams' Visa Application

Gerry Adams is a citizen and resident of the Republic of Ireland. J.A. 46. Since 1983, Adams has been the President of

Sinn Fein, an organization which the United States views to be the political arm of the Provisional Irish Republican Army (PIRA). J.A. 41, 78. On or about January 19, 1988, Adams applied at the American Consulate General in Belfast, Ireland, for a nonimmigrant visa. J.A. 38. Adams' application stated that the alien wished to visit the United States for three weeks in March 1988 and that the purpose of his trip was "political work." J.A. 46. Adams had applied for nonimmigrant visas on six previous occasions, and each such application had been denied on the grounds that the alien was inadmissible to the United States under 8 U.S.C. 1182(a)(28)(F). J.A. 38.

Upon consideration of Adams' 1988 application, the responsible consular officer determined that the alien remained ineligible for a visa under the provisions of Subsection 28(F) that require the exclusion of aliens who advocate assaults on government officers, unlawful destruction of property, or sabotage. J.A. 38. The officer's determination was based on Adams' support for and personal involvement in the violent activities of the PIRA. J.A. 39. In accordance with normal visa processing procedures, the consular officer sought an advisory opinion from the Department of State.[1] J.A. 38.

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[1] The Immigration and Nationality Act of 1952, as amended, reserves the granting or refusal of visas to the exclusive authority of United States consular officers. 8 U.S.C. 1104(a)(1). By regulation, the consular officers may, in the course of adjudicating visa applications, obtain the Department's guidance through advisory opinions on questions of law or the application of law to a particular set of circumstances. 22 C.F.R. 41.121(d) (1989).

Adams' January 1988 visa application and the consular request for an advisory opinion were referred to (then) Deputy Secretary of State Whitehead, who concurred in the consular finding that the alien was ineligible for admission to the United States under 8 U.S.C. 1182(a)(28)(F)(ii), (iii), and (iv).[2] J.A. 43. Deputy Secretary Whitehead explained that the PIRA has conducted a campaign of violence that has included (i) indiscriminate acts of terrorism resulting in thousands of civilian casualties, (ii) assaults on and assassinations of judges, ambassadors, police officers, and other government officials, (iii) the use of bombs and other explosive devices to destroy stores, factories, and other property, and (iv) acts of sabotage directed at courthouses, utilities, and other facilities. J.A. 39-41; see J.A. 122-30. However, Adams' exclusion was not based on the alien's mere membership in or affiliation with the PIRA, but rather on his direct and personal relationship as an individual to the violence committed by the PIRA.[3] J.A. 41-43.

There were three bases for the finding of Adams' particular relationship to the PIRA's violent activities. First, Adams has declared that "armed struggle is a necessary and morally correct form of resistance" against the government authorities in Northern Ireland, and repeatedly has expressed "his personal approval

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[2] Mr. Whitehead was at the time Acting Secretary of State. J.A. 37.

[3] Membership in the Provisional Irish Republic Army (or the Provisional Sinn Fein) is not by itself a basis for visa ineligibility. J.A. 43-44.

of and support for the PIRA's campaign of terrorist violence." J.A. 41. Second, Adams has been identified as one of several persons responsible for the decisions controlling the PIRA's violent activities. J.A. 41-43. Third, Adams served as the commanding officer of the Belfast Brigade, a unit that committed bombings and other acts of terrorism that killed and wounded hundreds of persons and destroyed substantial property. Id.

The Deputy Secretary further explained that he deemed Adams' personal involvement in terrorist violence to place the alien outside the provisions of both the McGovern Amendment (22 U.S.C. 2691, pertaining to certain organizations and ideologies) and Public Law 100-204 (limiting visa denials based on the alien's "beliefs, statements, or associations"). J.A. 44. Moreover, the Deputy Secretary declined to recommend a waiver of Adams' visa ineligibility because Adams' admission to the United States would prejudice our foreign policy by undercutting our efforts to enhance international cooperation against terrorism, conflicting with our foreign policy goal of a peaceful resolution of the problems of Northern Ireland, and damaging our relations with both the United Kingdom and the Republic of Ireland. J.A. 44-45. The judgment to exclude Adams was not based on the alien's politics or the information he sought to convey, but rather rested solely on the alien's personal involvement in terrorism. J.A. 45.

The United States Vice Consul denied Adams' visa application by letter dated March 21, 1988. J.A. 74.

2. The Exclusion Provisions Of The Immigration Act

The terms and conditions under which aliens may enter the United States, as visitors or immigrants, are set forth in the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 et seq. The Act is administered jointly by the Attorney General, the Secretary of State, and United States consular officers abroad. 8 U.S.C. 1103, 1104. With exceptions not relevant here, no alien may enter the United States without first having applied for and obtained an immigrant or nonimmigrant visa. See 8 U.S.C. 1181(a), 1182(a)(26).

Nonimmigrant visas are issued to aliens seeking temporary admission into the United States for one or more of the purposes specified in 8 U.S.C. 1101(a)(15). The alien has "the burden of proof . . . to establish that he is eligible to receive such visa . . . or is not subject to exclusion under any provision of [the Act]." 8 U.S.C. 1361. The Act further provides that "[n]o visa or other documentation shall be issued to an alien if . . . the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 212 [8 U.S.C. 1182] or any other provision of law." 8 U.S.C. 1201(g).

Section 212(a) of the Act lists 33 separate categories of aliens who "shall be ineligible to receive visas and shall be excluded from admission into the United States." 8 U.S.C. 1182(a). The category at issue in this litigation, 8 U.S.C. 1182(a)(28) (Subsection 28) applies to eight different classes of

aliens. Adams was found ineligible under Subsection 28(F)(ii), (iii), and (iv), which bar the admission to the United States of

> Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character, or (iii) the unlawful damage, injury, or destruction of property, or (iv) sabotage.

8 U.S.C. 1182(a)(28)(F).

Certain findings of inadmissibility under Subsection 28 are subject to a waiver recommendation under 22 U.S.C. 2691, commonly known as the McGovern Amendment. For those aliens subject to its provisions, the Amendment provides that the Secretary of State "should" recommend to the Attorney General that the grounds for exclusion be waived under section 212(d)(3) of the Act,[4] unless the Secretary certifies to Congress that "the admission of such alien would be contrary to the security interests of the United States." 22 U.S.C. 2691(a). The McGovern Amendment, however, applies only to aliens whose sole basis for exclusion is "membership in or affiliation with a proscribed organization." 22 U.S.C. 2691(a).

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[4] Under 8 U.S.C. 1182(d)(3)(A), aliens falling into 30 of the 33 categories contained in section 212(a) may, in certain circumstances, still be granted a visa. A visa may issue to such aliens if, inter alia, the Secretary of State or consular officer recommends that a visa be granted, and the Attorney General, in his discretion, approves the recommendation. Subsection 28 is one of the exclusion categories that is potentially subject to such a waiver of ineligibility.

Findings of inadmissibility under section 212 of the Act are also subject to the temporary provisions of section 901 of Public Law 100-204.[5] Section 901 provides that aliens may not be denied nonimmigrant visas "because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution." 101 Stat. 1399, 8 U.S.C. 1182(a) note. Section 901, however, does not apply to aliens "who a consular officer . . . knows or has reasonable ground to believe has engaged, in an individual capacity or as a member of an organization, in a terrorist activity." § 901(b)(2), 101 Stat. 1399. "Terrorist activity" is defined as "the organizing, abetting, or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily harm to individuals not taking part in armed hostilities." § 901, 101 Stat. 1399-1400.

In consultation with the Deputy Secretary of State, the United States consular officers in Belfast determined that, because of his advocacy of and personal involvement in terrorist violence, Gerry Adams was ineligible for a nonimmigrant visa under Subsection 28(F), and that the alien was not subject to a waiver recommendation under the McGovern Amendment or admission to the United States under section 901 of Public Law 100-204.

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[5] Section 901 of Public Law 100-204, occasionally referred to as the Moynihan-Frank Amendment, applies to aliens who seek nonimmigrant visas or admission to the United States before 1991. Pub. L. No. 100-204, 101 Stat. 1399-1400 (1987), as extended by Pub. L. No. 100-461, § 555, 102 Stat. 2268-36 to -37 (1988).

3. Proceedings In The District Court

One individual and several corporations and associations who had invited Gerry Adams to visit the United States filed a lawsuit challenging the March 1988 visa denial in the United States District Court for the District of Massachusetts. J.A. 4-17. Plaintiffs alleged that the exclusion was unauthorized by Subsection 28(F) and was contrary to section 901 of Public Law 100-204. J.A. 15-16. In the alternative, plaintiffs contended that if the statute authorized the visa denial, the statute violated the First Amendment. Id.

The government moved for dismissal or, alternatively, summary judgment and proffered the testimony of Deputy Secretary Whitehead explaining the bases for the challenged visa denial. J.A. 36-45. Plaintiffs cross-moved for summary judgment and proffered a declaration in which Gerry Adams took issue with some of the facts provided by the Deputy Secretary. J.A. 76-88. On July 14, 1989, the district court entered summary judgment for defendants. Add. 1-12. While refusing to dismiss the suit for lack of jurisdiction, standing, and justiciability,[6] the district court agreed with the government that plaintiffs' statutory and

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[6] The district court denied the government's motion to dismiss principally on the basis that the Supreme Court had reached the merits of the alien's exclusion in Kleindienst v. Mandel, 408 U.S. 753 (1972). Add. 4-7. The government respectfully remains of the view that Kleindienst did not resolve the threshold issues presented by this case, and that judicial review of visa adjudications at the behest of third parties such as appellants is contrary to both the Immigration and Nationality Act and the requirements of Article III. Here, however, the government did not cross-appeal from the district court's judgment.

constitutional claims are subject to the deferential analysis prescribed by Kleindienst v. Mandel, 408 U.S. 753 (1972). Add. 7-11. The court held that it was "facially legitimate and bona fide" to deny Adams a visa based on the alien's advocacy of and involvement in PIRA terrorist violence and, for reasons of United States foreign policy, to decline to waive the alien's statutory ineligibility. Id. The court also rejected plaintiffs' constitutional attack on Subsection 28(F), holding the statute to be within Congress' power to regulate alien traffic across our borders. Id. Plaintiffs now appeal this judgment.

SUMMARY OF ARGUMENT

1. The district court properly sustained the Executive's decision to deny Gerry Adams a visa upon the judgment that the government had provided a "facially legitimate and bona fide" reason for the alien's exclusion in accordance with the principles of Kleindienst v. Mandel, 408 U.S. 753 (1972).

Consistent with substantial and long-settled precedent, the Supreme Court has directed that, to the extent that any judicial review is appropriate, courts must sustain facially legitimate alien exclusions. The proximity of our nation's foreign affairs and the inherently political character of questions bearing upon the regulation of alien traffic across our borders makes immigration matters "largely immune from judicial control." Fiallo v. Bell, 430 U.S. 787, 792 (1977). This deference is applicable to both statutory and constitutional claims. While the courts are divided on whether any review may be had of consular visa

denials, no court has required more than a "facially legitimate" reason for an alien's exclusion.

The district court properly found that a "facially legitimate" reason for Adams' exclusion was provided by the testimony of the Deputy Secretary of State, which explained that Adams was ineligible for a visa under 8 U.S.C. 1182(a)(28)(F) because of his advocacy of and personal involvement in PIRA terrorist violence. The action taken by the consular officers in consultation with the Deputy Secretary conformed to the pertinent statutory and regulatory provisions, and the explanation of the response to Adams exceeded in form and substance that held by the Kleindienst Court to be sufficient against the claims of a citizen audience disappointed by the alien's exclusion. Adams is required to satisfy the consular officers that he is eligible for admission to the United States (8 U.S.C. 1201(g), 1361), and neither his declaration nor appellants' evidentiary quarrels provide any basis for judicial intervention in the visa determination.

2. Appellants have provided no basis upon which to set aside the exclusion of an alien who is involved in terrorist violence or to disturb the judgment below. Adams' advocacy of and participation in PIRA violence fits within the plain language of 8 U.S.C. 1182(a)(28)(F)(ii), (iii), and (iv), and there is no principled basis upon which to limit the statutory provisions. Adams' involvement in terrorist violence bars application of Public Law 100-204 because the limited protection of "beliefs, statements, or associations" does not reach Adams' particular

advocacy and because Congress expressly denied protection to aliens involved in terrorist activity. Adams is not entitled to a waiver of his visa ineligibility under 8 U.S.C. 1182(d)(3) and the McGovern Amendment, 22 U.S.C. 2691(a), because the alien was excluded for reasons other than membership in a "proscribed organization", and because the foreign policy implications of the alien's admission to the United States provide a proper basis for the Executive to withhold discretionary relief. Finally, appellants' claims are falsely premised on the notion that the First Amendment restrains the regulation of alien traffic across our borders. In the context of travel to and from the United States, the Supreme Court has rejected constitutional challenges by aliens and citizens alike to limitations imposed by the political branches of government. Whatever constitutional interest citizens may have in the ideas and information held by an alien does not give rise to a right to import the alien into the United States. The district court properly concluded that appellants have no constitutional right to meet with Gerry Adams on American soil. The judgment below should be affirmed.

STANDARD OF REVIEW

An alien seeking a visa to enter the United States bears the burden of demonstrating, to the satisfaction of the consular officers reviewing his application, that he is eligible for admission under the provisions of the Immigration and Nationality Act of 1952, as amended. 8 U.S.C. 1201(g), 1361; see 22 C.F.R. 41.101 et seq. The courts are divided on the susceptibility of

visa denials to judicial review. Compare, e.g., Centeno v. Shultz, 817 F.2d 1212 (5th Cir. 1986), cert. denied, 108 S. Ct. 696 (1988)(no review), and Burrafato v. Dept. of State, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976)(same), with Allende v. Shultz, 605 F. Supp. 1220, 1223 (D. Mass. 1985) (limited judicial review), and Abourezk v. Reagan, 594 F. Supp. 880, 883 n.10 (D.D.C. 1984), rev'd on other grounds, 785 F.2d 1043 (D.C. Cir. 1986)(same). This Court has not yet ruled on this issue. See Allende v. Shultz, 845 F.2d 1111, 1114 (1st Cir. 1988). Assuming jurisdiction, the Executive's determination to exclude an alien from the United States must be sustained if "facially legitimate and bona fide." Kleindienst v. Mandel, 408 U.S. 753 (1972). See Amanullah v. Nelson, 811 F.2d 1, 9-10 (1st Cir. 1987).

The district court's findings of fact regarding the circumstances underlying the Executive's decision to refuse to admit Gerry Adams to the United States must be sustained unless shown to be clearly erroneous. See, e.g., Langhammer v. Hamilton, 295 F.2d 642, 647 (1st Cir. 1961). The district court's conclusions of law are reviewable de novo. See, e.g., North American Industries, Inc. v. Feldman, 722 F.2d 893, 898-99 (1st Cir. 1983). The district court's application of the Kleindienst "facially legitimate" standard to the challenged visa denial is a mixed question of fact and law. See Amanullah v. Nelson, 811 F.2d at 9-10.

ARGUMENT

I. THE DISTRICT COURT PROPERLY SUSTAINED THE EXECUTIVE'S DECISION TO DENY ADAMS A VISA

In assessing plaintiffs' demand that they be allowed to bring Gerry Adams into the United States, the district court recognized the limited scope of judicial inquiry into immigration decisions. The court sustained the challenged visa denial upon the judgment that the government's conclusions regarding Adams' involvement in terrorist violence and the adverse foreign policy consequences of his admission provide a "facially legitimate and bona fide reason" for the alien's exclusion, in accordance with the principles of Kleindienst v. Mandel, 408 U.S. 753 (1972). Add. 7-11. The court was correct both on the law and in its application of the law to the Executive's decision to refuse Adams admission to the United States.

A. Courts Must Uphold Facially Legitimate Exclusions Of Aliens Seeking To Enter The United States

The regulation of alien traffic across our borders is a highly political area of the law, the special character of which the Supreme Court repeatedly has emphasized. See generally Fiallo v. Bell, 430 U.S. 787, 792-96 (1977); Mathews v. Diaz, 426 U.S. 67, 81-82 (1976). The special character of immigration law arises first from its proximity to our relations with other countries and sovereignties. "[A]ny policy toward aliens is vitally and intricately interwoven" with the conduct of our foreign affairs. Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952); see Mathews v. Diaz, 426 U.S. at 81. More importantly, as a

matter of our own sovereignty, the issue of which aliens shall be permitted to visit and share in our society is perhaps the ultimate political question. "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." Kleindienst, 408 U.S. at 766-67, quoting Galvan v. Press, 347 U.S. 522, 531 (1954).

The Supreme Court has been equally steadfast on the limited role of the judiciary in immigration disputes.

> Our cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."

Fiallo v. Bell, 430 U.S. at 792, quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953). Certain aspects of immigration policy have been said to lie wholly outside the courts' authority. For example, the Supreme Court consistently has refused to find a role for the judiciary in assessing the propriety or wisdom of the particular criteria established by Congress for the admission of aliens to the United States.

> The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of Congress and wholly outside the power of this Court to control.

Harisiades v. Shaughnessy, 342 U.S. at 596-97 (Frankfurter, J., concurring). See Boutilier v. INS, 387 U.S. 118, 123 (1967) ("Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden"); Kleindienst, 408 U.S. at 766,

quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 329 (1895)("'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens"). Accord Amanullah v. Nelson, 811 F.2d 1, 5 (1st Cir. 1987).

The law is equally clear that the courts have no authority to review consular determinations on visa applications. See, e.g., Centeno v. Shultz, 817 F.2d 1212 (5th Cir. 1986), cert. denied, 108 S. Ct. 696 (1988); Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970 (9th Cir. 1986); Ventura-Escamilla v. INS, 647 F.2d 28, 30 (9th Cir. 1981); Burrafato v. Dept. of State, 523 F.2d 554, 556-57 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976). See also City of New York v. Baker, 878 F.2d 507, 512 (D.C. Cir. 1989). The doctrine of consular non-reviewability is consistent with both the language and legislative history of the Immigration and Nationality Act. 8 U.S.C. 1104(a)(1); S. Rep. No. 1515, 81st Cong., 2d Sess. 622 (1950).[7]

The immunity of these areas of immigration law from judicial scrutiny is not affected by the presence of constitutional claims

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[7] 8 U.S.C. 1104(a)(1) reserves to United States consular officers exclusive authority to grant or refuse visas. In developing what became the Act of 1952, Congress expressly rejected review of consular visa decisions: "Objection has been made to the plenary authority presently given to consuls to refuse the issuance of visas . . . [T]o allow an appeal from a consul's denial of a visa would be to make a judicial determination of a right when, in fact, a right does not exist. Permitting review of visa decisions would permit an alien to get his case into United States courts, causing a great deal of difficulty in the administration of the immigration laws . . . [T]he question of granting or refusing immigration visas to aliens should be left to the sound discretion of the consular officers." S. Rep. No. 1515, 81st Cong., 2d Sess. 622 (1950), reproduced at J.A. 56-57.

against the legislative or consular determination. For example, in Fiallo v. Bell the Supreme Court refused to scrutinize a gender-based distinction in the ability of individuals to confer immigration benefits under the Act, despite the assertion of claims under the First, Fifth, and Ninth Amendments. 430 U.S. at 797-98 (on immigration "line-drawing" matters, "we have no judicial authority to substitute our political judgment for that of Congress"). Similarly, the courts in Centeno and Burrafato refused to review the consular decisions despite First and Fifth Amendment claims by U.S. citizen family members disappointed by the visa denials. See also Anetekai v. INS, 876 F.2d 1218, 1222 & n.6 (5th Cir. 1989); Silverman v. Rogers, 437 F.2d 102, 107 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971). The Supreme Court has rejected the suggestion that the degree of judicial forbearance in immigration disputes depends on the proximity of the particular matter to significant government interests such as foreign policy or national security, declaring that it found no indication "that the scope of judicial review is a function of the nature of the policy choice at issue." Fiallo, 430 U.S. at 796.

For those immigration matters which have been found appropriate for judicial scrutiny, the Supreme Court has made it clear that only "a narrow standard of review [applies to] decisions made by the Congress or the President in the area of immigration and naturalization." Fiallo, 430 U.S. at 796, quoting Mathews v. Diaz, 426 U.S. at 81-82. Thus, for example, the Supreme Court in

Mathews rejected a Fifth Amendment challenge to a restriction on alien eligibility for Medicare benefits that had not been shown to be "wholly irrational". 426 U.S. at 83. Similarly, in Kleindienst the Court refused the First Amendment claims of a citizen audience where the Executive had a "facially legitimate and bona fide" reason for the alien's exclusion. 408 U.S. at 770.

The Supreme Court has not yet decided whether the denial of a visa to an alien seeking admission to the United States is a matter that lies beyond the proper province of the judiciary. Cf. United States v. Fausto, 108 S. Ct. 668, 675 (1988) (presumption favoring judicial review may be overcome where contrary intent discernible from statutory scheme). In Kleindienst, the Court found it unnecessary to decide whether the Executive might determine to deny admission to an alien "in its sole and unfettered discretion, [giving] any reason or no reason" therefor. 408 U.S. at 769. However, the Court did hold that

> when the Executive [refuses to admit an alien who is excludable under the Immigration and Nationality Act] 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 the First Amendment interests of those who seek personal communication with the applicant.

408 U.S. at 770. The Kleindienst Court made clear that the scope of the "facially legitimate" standard is narrowly limited, rejecting any consideration of the importance or significance of the frustrated "dialogue" between the excluded alien and his citizen audience (408 U.S. at 768-69), and brushing aside the possibility of any factual inquiry into the Executive's decision

to refuse admission. See 408 U.S. at 778 (Marshall, J., dissenting). To sustain the challenged exclusion, the Court found it sufficient that, in a letter to the alien's counsel, an appropriately empowered government officer stated (without explanation) that he had refused to waive Dr. Mandel's visa ineligibility because the alien had abused the conditions of his previous visit to the United States. 408 U.S. at 769.

Those courts that have examined visa denial challenges have uniformly concluded that the Kleindienst "facially legitimate" test provides the appropriate standard for and limit of judicial inquiry. See, e.g., Allende v. Shultz, 605 F. Supp. at 1224 (D. Mass. 1984); Abourezk v. Reagan, 592 F. Supp. 880, 882-83 (D.D.C. 1984), vacated and remanded on other grounds, 785 F.2d 1043 (D.C. Cir. 1986); El Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982). The test has been applied to both statutory and constitutional challenges to visa determinations. Compare, e.g., El-Werfalli (statutory) with Abourezk (statutory and constitutional). While the courts remain divided on the question whether any judicial review is appropriate in such cases (compare, e.g., Allende, 605 F. Supp. 1220, with Ben-Issa v. Reagan, 645 F. Supp. 1557 (W.D. Mich. 1986)), no court has subjected a visa denial to more rigorous scrutiny that the deferential Kleindienst analysis.

This Court has not yet decided whether the denial of visas by consular officers is a proper matter for judicial inquiry. Cf. Allende, 845 F.2d at 1114. However, the Court has agreed that, for both statutory and constitutional challenges, Klein-

dienst provides the appropriate yardstick by which to measure the Executive's exclusion of aliens under our immigration laws. Amanullah v. Nelson, 811 F.2d at 9-11. The court below properly assessed the challenged denial of Adams' visa application under the "facially legitimate and bona fide" standard.

B. The District Court Properly Found A Facially Legitimate Basis For Adams' Exclusion

The law provides that the alien applicant seeking a visa to enter the United States must establish his eligibility for admission to the satisfaction of the consular officer, and that the consular officer shall not grant a visa if he has reason to believe that the applicant falls within any of the categories specified by in section 212(a) of the Act. 8 U.S.C. 1201(g), 1361. Here, the Deputy Secretary of State has declared that, based on the alien's advocacy of and personal involvement in PIRA terrorist violence, there is reason to believe that Adams falls with those portions of Subsection 28(F) pertaining to assaults on government officials, unlawful property damage, and sabotage. J.A. 39-43; see J.A. 122-30. The reason provided for the challenged visa denial more than satisfies the Kleindienst standard.

The stated basis for Adams' visa denial plainly conforms to the statutory exclusion criteria. The PIRA's campaign of violence has included assaults on government officers, unlawful property damage, and acts of sabotage which fall within Subsection 28(F). See J.A. 39-41; 126-30. The described nexus between Adams and such violence -- the alien's personal involvement as an advocate and a PIRA policymaker and field commander -- shows both

that Adams failed to demonstrate his eligibility for a visa and that there was reasonable if not overwhelming ground to believe that the alien is statutorily barred from admission to the United States. See J.A. 41-43.

Moreover, the process by which the consular officers adjudicated Adams' visa application similarly conforms to the pertinent statutory and regulatory procedures. See 8 U.S.C. 1201(g), 1202(c); 22 C.F.R. 41.101 et seq. (1989). Finally, there is no question regarding the authority of either the consular officers or the Deputy Secretary of State to make the judgments and take the actions that they did on Adams' visa application. Where, as here, the visa was denied by appropriately authorized officers in a manner that is free from any facial inconsistency with the referenced statutory criteria, the Kleindienst standard has been satisfied. See 408 U.S. at 769-70.

Indeed, when compared to the actual facts of Kleindienst, the reason offered for Adams' visa denial far exceeds the level of "facial legitimacy". In Kleindienst, the government declined to provide the Court with an explanation of the challenged exclusion. 408 U.S. at 769. The Supreme Court nevertheless held that a sufficient basis to sustain the exclusion was provided by the fact that the INS had written a letter to the alien applicant in which the agency concluded simply that a waiver of statutory ineligibility was unwarranted, stating that during a previous visit to the United States, the alien had "flagrant[ly] abuse[d] the opportunities afforded him to express his views in this

country." 408 U.S. at 759. Neither the letter nor any other proffer by the government identified the particular activities deemed to constitute the referenced "abuse" by the alien, or explained the process by which the negative judgment was reached, or offered a rationale as to how such "abuse" by the alien fell within the underlying statutory provisions.[8] Moreover, the government in Kleindienst raised no claim of any prejudice other than the alien's violation of the terms of his previous visa, and asserted no concern regarding the consequences of the alien's prospective admission to or activities within the United States.

Here, by contrast, the Deputy Secretary of State has explained in detail both the decision regarding the alien's exclusion and the bases therefor. Moreover, this explanation was provided to the district court in the form of sworn testimony. J.A. 36-45. Finally, while Kleindienst made clear that the courts are not to assess the weight of the government's interests in such admission disputes, the administrative concerns expressed regarding Dr. Mandel cannot easily be compared to the concerns here over Adams' relationship to terrorism and our nation's for-

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[8] The Kleindienst Court held that the INS letter provided a "facially legitimate and bona fide" reason to refuse to admit the alien notwithstanding claims (i) that Mandel had been unaware of the visa limitations he purportedly abused, (ii) that the referenced "abuses" apparently consisted of the fact that the alien had spoken at more universities than he had specified in his previous visa application, and (iii) that there existed no basis in the record for the agency's finding concerning the alien's alleged misconduct. 408 U.S. at 773 n.4 (Douglas, J., dissenting) and 778 (Marshall, J., dissenting).

eign affairs.[9] Plainly, the explanation offered for Adams' exclusion from the United States exceeds in form and in substance the showing held sufficient in Kleindienst. The district court properly concluded that the government had adequately explained the challenged visa denial. See El Werfalli, 547 F. Supp. at 153-54. Cf. Allende v. Baker, No. 89-1360, slip op. at 12-13 (1st Cir. Dec. 5, 1989)(a foreign policy-based exclusion under Subsection 27 was not unreasonable).

The district court also properly rejected any evidentiary quarrel with the finding of Adams' statutory ineligibility. Add. 10. Principally on the strength of a declaration in which the alien purports to refute the findings and conclusions underlying the visa denial (J.A. 76-88), appellants challenge both the consular judgment concerning Adams' relationship to terrorist violence and the reliability of the information considered by such officer in reaching his judgment. Br., at 20-28. There is no reason, however, to substitute the alien applicant's view of the pertinent circumstances for that of the responsible Executive officers.

First, while Adams denies "each and every one of [the Deputy Secretary's] accusations," the alien does not state that he has had no personal involvement in any aspect of the violence that

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[9] In Amanullah, this Court found immigration enforcement concerns by the INS District Director a sufficient basis under Kleindienst to deny parole to Afghanistani aliens who sought to enter the United States pending resolution of their asylum claims. 811 F.2d at 11. Unlike the aliens in Amanullah who were being detained by the INS, the exclusion determination challenged in present case does not involve a loss of the alien's liberty.

has wrecked Northern Ireland, and nowhere disavows advocacy of acts of violence directed against government officers and property. See J.A. 76-88. Adams acknowledges if not expressly endorses the carnage, characterizing the IRA as "a military organization engaged in an armed insurrection against the British occupation," and he neither condemns nor criticizes the terrorism waged by that organization. Id. Adams' declaration neither refutes nor conflicts with the consular judgment.

Second and more important, it would not matter even if Adams had denied any advocacy of or involvement in the violence in Northern Ireland, or if he could prove that there were errors in the information underlying the visa determination. Factual determinations by the consular offices cannot be reviewed by the Secretary of State (8 U.S.C. 1104(a)(1)), and cannot be reviewed by the courts. See, e.g., Ventura-Escamilla, 647 F.2d at 31, citing Loza-Bedoya v. INS, 410 F.2d 343, 347 (9th Cir. 1969). See also Rivera de Gomez v. Kissinger, 534 F.2d 518 (2d Cir.), cert. denied, 429 U.S. 897 (1976) (consular judgment on validity of marriage); Burrafato, 523 F.2d at 556 (failure of consular officer to specify visa denial grounds). The law entrusts the consular officers with the first and final judgment on questions of fact, and if Adams believed that the information considered by the government is inaccurate or incomplete, his (only) recourse would be to present his evidence to the consular officer. 22 C.F.R. 40.6 (1989).

Similarly misdirected is appellants' attack (Br., at 23-26) on the evidentiary quality of the information underlying the visa determination. Without conceding any of the criticisms, it does not matter whether the articles, books, and other materials referenced by the Deputy Secretary would be inadmissible at trial, or that the information concerning Adams' involvement in terrorism might be less than fully complete or reliable.[10] Rules of civil procedure or evidence do not apply to the consular processing of visa applications; rather, to protect the United States against the various harms and evils embodied in the admission criteria, consular officers properly may consider all available information.[11] See, e.g., 22 C.F.R. 41.102(b), 41.103(b), and 41.105(a).

Finally, appellants are wrong in their suggestion (Br., at 20) that the statutory standard of "reason to believe" should be

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[10] Appellants inaccurately characterize the finding of statutory ineligibility as resting solely on the several books and other materials referenced by the Deputy Secretary in his declaration. See Br., at 22. Each citation in Mr. Whitehead's testimony indicates that it is merely by way of example of the types of information that is available and has been considered regarding Adams and the PIRA. The references contained in the declaration are by no means exhaustive of the information underlying the challenged visa determination. See, e.g., Terrorist Group Profiles, J.A. 122-30. Cf. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)(sustaining use of confidential information in exclusion determinations).

[11] That the British declined to prosecute Adams under their criminal law for his IRA membership has no bearing on his inadmissibility under our immigration law. See Br., at 10, 26. Even were the pertinent legal standards at all similar, the quantum of evidence necessary to deny an alien the privilege of admission to the United States is not the same as that required to impose imprisonment or other criminal penalty.

viewed as equivalent to probable cause. See McMullen v. INS, 788 F.2d 591, 598-99 & n.2 (9th Cir. 1986). While the evidence linking Adams to terrorist violence satisfies such higher standards, all that is required is information sufficient to permit a "reasonable person" to believe that the alien falls within the statutory proscriptions. 22 C.F.R. 40.6 (1989); see also Hamid v. INS, 538 F.2d 1389, 1391 (9th Cir. 1976). It is absurd to suppose that the consular officers would have the resources or authority to pursue factual issues in foreign countries with the precision and reliability of our domestic criminal justice system, or to suggest that alien admission be governed by evidentiary standards that deprive us of the protection afforded by the sound judgment of the officers who actually examine the visa applicants. See Langhammer v. Hamilton, 295 F.2d at 647. Cf. Amanullah, 811 F.2d at 16-17 (rejecting evidentiary hearings to test exclusion of aliens denied parole). Equally important, evidentiary arguments cannot obscure the alien's responsibility for the pertinent factual proof, for under our law it is the visa applicant who must prove himself eligible for admission to the United States. 8 U.S.C. 1201(g), 1361.

Appellants' suggestion that the courts substitute themselves as triers of fact on Adams' visa application is contradicted by law and was properly rejected by the court below. Because the Executive has provided an explanation for Adams' exclusion which meets and exceeds the Kleindienst standard, the district court properly entered judgment sustaining the challenged visa denial.

II. APPELLANTS PROVIDE NO BASIS TO DISTURB THE JUDGMENT TO EXCLUDE AN ALIEN INVOLVED IN TERRORIST VIOLENCE

Appellants ask that the judgment to exclude Adams be set aside on the basis of several statutory and constitutional arguments that were raised and rejected below. Appellants first contend that Adams' involvement in terrorist violence does not fit within the exclusionary provisions of 8 U.S.C. 1182(a)(28)(F). Appellants next contend that the government is required by Public Law 100-204 and the McGovern Amendment to admit Adams to the United States notwithstanding his inadmissibility under Subsection 28(F), and that the alien's exclusion is contrary to the First Amendment. The district court properly found these claims to be meritless. Add. 10-11.

A. Adams' Involvement In Terrorist Violence Requires Exclusion Under Subsection 28(F)

Appellants contend that Adams is not excludable under Subsection 28(F) because the statute applies only to "anarchists" and does not reach Adams' particular "advocacy" against the British authorities in Northern Ireland. Br., at 32-35. The district court sustained the government's position that, as an alien who advocated and practiced terrorism, Adams falls within those portions of Subsection 28(F) pertaining to "advoca[cy] of . . . unlawful violence in furtherance of political aims." Add. 2, 10. Subsection 28(F) embraces Adams' involvement in PIRA violence.

First, nothing on the face of Subsection 28(F) supports the limitations urged by appellants. While other subparagraphs of 8

U.S.C. 1182(a)(28) do make reference to "anarchists" and aliens "oppos[ed] to all organized government", Subsection 28(F) is not so limited,[12] and all of the various categories of excludable aliens specified in Subsection 28 are stated in the disjunctive (as are the several subdivisions within Subsection 28(F)). Additionally, two of the three subparagraphs of Subsection 28(F) under which Adams was found inadmissible -- those barring unlawful property damage and sabotage -- are not limited to attacks on government property or facilities. 8 U.S.C. 1182(a)(28)(F)(iii) and (iv). The statutory provisions on their face embrace the human and property casualties of the PIRA's violence.[13] Cf. Allende, 845 F.2d at 1119 ("we must enforce the literal meaning of the statute").

The statute applies to aliens who "advocate or teach" unlawful violence, language which gives no reason to exclude Adams' involvement in PIRA violence. The Immigration and Nationality Act defines "advocates" as "includ[ing], but . . . not limited to, advises, recommends, furthers by overt act, and admits belief in." 8 U.S.C. 1101(a)(2); see also 8 U.S.C. 1101(e)(1). The

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[12] Compare 8 U.S.C. 1182(a)(28)(A), (B), and (G) with 8 U.S.C. 1182(a)(28)(C), (D), (E), (F), and (H). Cf. Kleindienst, 408 U.S. at 754 (sustaining the exclusion of a "revolutionary Marxist" under Subsection 28(D) and 28(G)(v)).

[13] In contrast to the provisions pertaining to unlawful property damage and sabotage, Subsection 28(F)(ii) is directed toward assaults on "government" officers. 8 U.S.C. 1182(a)(28)(F)(ii). However, appellants' emphasis on this limitation (Br. at 32-33) ignores the undisputed fact that the casualties of the PIRA's terrorism have included "judges, ambassadors, police officials" and other government officers. J.A. 41.

provisions on their face reach advocacy by action as well as words, and embrace Adams' personal support for and involvement in PIRA violence. Cf. INS v. Phinpathya, 464 U.S. 183, 189 (1984) (the plain meaning of the immigration statutes must be enforced).

Second, even were there any ambiguity regarding the scope of Subsection 28(F), the agency's reasonable interpretation of the statute is entitled to deference. See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Massachusetts v. U.S. Department of Education, 837 F.2d 536, 541 (1st Cir. 1988). To construe Subsection 28(F) as encompassing advocacy of the type of violence practiced by the PIRA is neither clearly erroneous nor inconsistent with the statutory plan.[14] Such a "permissible" construction must be sustained. Chevron, 467 U.S. at 842-43; see INS v. Wang, 450 U.S. 139, 144 (1981).

Finally, appellants provide no basis upon which to exclude Adams from the reach of Subsection 28(F). To restrict Subsection

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[14] Appellants' suggestion (Br. at 34 n.30) that Adams' terrorism would fit more appropriately under Subsection 27 than Subsection 28(F) ignores the plain language of the Act, as well as the fact that the statutory exclusion criteria do overlap and need not be applied in mutually exclusive fashion. For example, the same alien might be excludable both because he is insane and because he has had an attack of insanity (Subsections 2 and 3), or because he is a drug addict and is believed to be a narcotics trafficker (Subsections 5 and 23). Many of the thirty-three exclusion categories are at least partially redundant with one another, and it is settled that individual aliens may simultaneously fall within more than one statutory class. See, e.g., Matter of Rivero-Diaz, 12 I & N 475 (BIA 1967) (finding an anti-Castro propagandist to be excludable under both Subsections 27 and 29, and not reaching the alien's possible further excludability under Subsection 28(F)(ii) and (iii)).

28(F) to aliens who are opposed to "all forms of government" (see Br. at 34) would exclude from the provision all terrorists who profess to have a particular political purpose or target for their violence. It makes no sense to limit the statutory protection of our borders to only those aliens engaged in random violence. It is similarly unreasonable to exclude from Subsection 28(F) aliens whose violence is characterized as a "political struggle". See Br., at 34-35. The question of which political violence is "acceptable" violence is best left to the political branches of government and provides no basis for narrowing the reach of the admission criteria.[15] See McMullen v. INS, 788 F.2d 591, 595-98 (9th Cir. 1986). Cf. 22 U.S.C. 2691(c) (excluding from the McGovern Amendment aliens affiliated with the Palestine Liberation Organization). The fact that the PIRA and Adams claim to have acted with political motivation[16] is irrelevant for purposes of the alien's admission to the United States. Adams'

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[15] In the same bill enacting the Section 901 on which appellants rely, Congress defined "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." Pub. L. No. 100-204, § 140(d)(2), 101 Stat. 1349 (emphasis added). Further, Section 901 expressly does not apply to aliens who are involved in any manner of terrorism, without regard to whether or not such violence is associated with anarchism or other ideologies.

[16] In McMullen, the Ninth Circuit rejected the claim of a PIRA member seeking asylum or withholding of deportation from the United States. Concluding that the PIRA is "unquestionably a 'terrorist' organization," the court held that the PIRA's random acts of violence against the ordinary citizens of Northern Ireland and elsewhere constitute "serious nonpolitical crimes" barring immigration relief. 788 F.2d at 597, 598. Cf. Doherty v. Meese, 808 F.2d 938 (2d Cir. 1986)(denying habeas relief to block the deportation of an alleged PIRA member).

advocacy of and involvement in PIRA violence was properly found to fall within the exclusion provisions of Subsection 28(F).

B. Adams' Involvement In Terrorist Violence Bars Application Of Public Law 100-204

Appellants' principal argument is that, because section 901 of Public Law 100-204 prohibits visa denials based on the alien's "past, current, or expected beliefs, statements, or associations", Adams cannot be refused admission to the United States. See Br., at 15-28. Section 901, however, is not so broad as to free Adams from the admission criteria of 8 U.S.C. 1182(a), and it does not forbid his exclusion simply because he seeks a dialogue with United States citizens. The district court properly held that, because Adams was excluded for his personal involvement with terrorism rather than protected association or ideas, Section 901 is inapplicable. Add. 10.

First, section 901 of Public Law 100-204 applies only to those "beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution." Appellants concede, as they must, that the First Amendment does not extend to all forms of communication and advocacy. Br., at 17. See, e.g., Rankin v. McPherson, 483 U.S. 378, 386-87 (1987)(First Amendment would not protect threat to kill government official); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(First Amendment would not protect advocacy of imminent lawlessness). See also Mendelsohn v. Meese, 695 F. Supp. 1474, 1479-83 (S.D.N.Y. 1988). Particularly in light of the bloodbath visited upon Northern Ireland by the PIRA,

it is reasonable to place Adams' unabashed advocacy of "armed insurrection" outside the protection of the First Amendment. Cf. McMullen v. INS, 788 F.2d 591, 598 (9th Cir. 1986).

Second, even if Adams' particular advocacy would fall within the First Amendment, the alien remains beyond the reach of Section 901. Congress did not provide the benefits of Public Law 100-204 to all aliens, but excluded, inter alia, any alien

> who a consular officer . . . knows or has reasonable ground to believe has engaged, in an individual capacity or as a member of an organization, in a terrorist activity.

Pub. L. No. 100-204, § 901(b)(2), 101 Stat. 1399-1400.[17] Congress defined "terrorist activity" as including "organizing, abetting, and participating in wanton or indiscriminate acts of violence" (id.), and intended to deny protection to aliens who "support and assist" in such violence as well as those "actually pulling a trigger or planting a bomb." 133 Cong. Rec. H11344 (daily ed. Dec. 14, 1987). Moreover, Congress did not make this exclusion of alien terrorists subordinate to First Amendment limitations, but broadly included within the forbidden "support and assistance" matters such as "planning, recruiting, and fund-raising." 133 Cong. Rec. H11344. Cf. 8 U.S.C. 1101(a)(2) and (e)(1) (defining "advocacy"). Again, Adams' advocacy of ter-

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[17] Congress also withheld First Amendment protection from aliens who are Nazis, aliens who have persecuted others, and aliens who are members of or representatives or spokesmen for the Palestine Liberation Organization. Pub. L. No. 100-204, § 901, 101 Stat. 1399-1400.

rorist violence places him outside the protection of Section 901.[18]

Adams is further barred from Section 901 because of his personal involvement in the PIRA's terrorist activities. The Deputy Secretary of State has testified that there is reason to believe that Adams has been personally involved in the PIRA's violent activities as both a policy maker and a field commander. J.A. 41-43. Adams' participation in the PIRA's terrorist campaign in Northern Ireland makes him precisely the sort of individual excluded from Section 901. On the basis of the alien's actions as well as his advocacy, the district court properly concluded that Adams is ineligible for the benefits of Public Law 100-204.

Third, section 901 does not amend the existing provisions of law concerning alien admission or alter the burden of proof imposed on visa applicants. It remains the obligation of each alien seeking to enter the United States to provide sufficient evidence to satisfy the consular officers that he is not ineligible for admission under 8 U.S.C. 1182(a) or any other provision of law. 8 U.S.C. 1201(g), 1361. For those aliens to whom it applies, Section 901 simply provides that they cannot be excluded because of First Amendment protected activity, it does not pro-

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[18] The Immigration and Nationality Act defines "advocates" as "includ[ing], but . . . not limited to, advises, recommends, furthers by overt act, and admits belief in." 8 U.S.C. 1101 (a)(2). The Act further defines "advocacy" as including "[t]he giving, loaning, or promising of support or of money of any other thing of value to be used for advocating." 8 U.S.C. 1101(e)(1).

vide that protected activity immunizes the alien from exclusion for any reason or frees him from the ordinary requirements of visa applicants.[19] Cf. Amanullah, 811 F.2d at 14 (rejecting an interpretation of the Refugee Act that would result in admission on demand).

Finally, appellants cannot bring Gerry Adams within Section 901 by reliance this Court's decision in Allende. See Br., at 12-13. Unlike the present case, Allende involved an exclusion under Subsection 27 for reasons of the foreign policy prejudice threatened by the alien's mere admission to the United States. The Allende Court had no occasion to address either the meaning of Subsection 28(F) or the reach of the terrorist exception to Section 901. Additionally, while the focus in Allende was on the consequences that would result from the alien's admission to the United States,[20] Mr. Adams was excluded because of that which has

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[19] Appellants appear to suggest that Section 901 burdens the government with demonstrating a permissible justification for excluding aliens who seek to cross our borders. Br., at 19-28. Neither the language nor the legislative history of Public Law 100-204 supports such a radical change in the immigration law. On its face, Section 901 did not amend the provisions of the Immigration and Nationality Act governing admission and visa applications, and Congress expressly declared its intent not to alter the existing law concerning standing to challenge admissions determinations. Pub. L. No. 100-204, § 901(c).

[20] Unlike the provisions under which Adams was excluded, Allende involved Subsection 27 which speaks prospectively of aliens who seek admission to the United States "to engage in [prejudicial] activities." 8 U.S.C. 1182(a)(27). Subsection 28 has no prospective orientation, but addresses what the alien is or has done at the time he seeks admission. 8 U.S.C. 1182(a)(28). Appellants' suggestion (Br., at 12-13, 31) that Adams was excluded in anticipation of "speech-related activities" distorts both the law and the record. See J.A. 45.

happened in the context of his involvement in terrorism. Aliens who already have achieved their inadmissibility under the statutory criteria do not become eligible for a visa simply because they wish to deliver a speech in the United States. Under both the Immigration and Nationality Act and Section 901, Adams has been properly excluded because he has failed to show that he is not ineligible for a visa based on his personal involvement in terrorism.

C. Adams Is Not Entitled To A Waiver Of His Visa Ineligibility

Appellants contend that the Executive was required to admit Adams to the United States through a waiver of his statutory ineligibility under 8 U.S.C. 1182(d)(3) and the McGovern Amendment, 22 U.S.C. 2691(a). Br., at 28-32. The referenced provisions do empower the Secretary of State and the Attorney General, in their discretion, to authorize the issuance of a nonimmigrant visa for certain inadmissible aliens, but in this case no waiver was recommended or granted. The district court properly sustained the lack of waiver on the grounds that the McGovern Amendment does not apply to Adams and that waiver was appropriately withheld based on concerns regarding the foreign policy consequences of the alien's admission to the United States. Add. 7-10.

First, the McGovern Amendment applies only to those aliens whose statutory ineligibility arises because of membership in a "proscribed organization", that is, those communist and other organizations that are specified within 8 U.S.C. 1182(a)(28). See S. Rep. No. 95-194, 95th Cong., 1st Sess. 13, reprinted in

1977 U.S. Code Cong. & Admin. News 1635. Moreover, the McGovern Amendment expressly does not apply to aliens who are "excludible for reasons other than membership in or affiliation with a proscribed organization." 22 U.S.C. 2691(a). Adams falls outside the McGovern Amendment because the PIRA is not a "proscribed organization". J.A. 43-44.[21] However, even were the PIRA such an organization, the McGovern Amendment would remain inapplicable because there is a basis for Adams' exclusion -- his involvement in terrorism -- other than his ideological association with that group.

Second, even if the McGovern Amendment were applicable, the alien would not be entitled to a visa or admission to the United States. For those aliens to whom 22 U.S.C. 2691(a) applies, the statute merely directs the Secretary of State to choose between recommending to the Attorney General a waiver of ineligibility or certifying to Congress that admission would be contrary to the security interests of the United States.[22] Regardless of whether

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[21] Neither the PIRA nor the Sinn Fein is a "proscribed organization" within the meaning of subsection 28. Deputy Secretary Whitehead testified that "[m]embership in the PSF and PIRA, in and of itself, is not, and never has been, a basis for a finding of [visa] ineligibility." J.A. 44.

[22] The McGovern Amendment contains no provision for enforcement. Because the purpose of the McGovern Amendment was to aid greater compliance with the so-called Helsinki Agreement, a compact among several nations which is not self-executing, it reasonably may be asked whether 22 U.S.C. 2691 provides a proper basis for an alien or his sponsors to challenge an exclusion. See, e.g., Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373-75 (7th Cir. 1985)(Helsinki Accords provide no private cause of action). Cf. Abourezk, 785 F.2d at 1057-58; Amanullah, 811 F.2d at 16 n.10.

the waiver of statutory ineligibility is raised upon the Secretary's recommendation or otherwise,[23] the statutes provide no procedures or criteria for the Attorney General's waiver determination. See 22 U.S.C. 2691; 8 U.S.C. 1182(d)(3). The granting of a waiver is wholly permissive and is left to the Attorney General's sound discretion. See Kleindienst, 408 U.S. at 755-56, 769-70.[24] Thus, neither the McGovern Amendment nor the waiver provisions of 8 U.S.C. 1182(d)(3) provide a vehicle for Adams or his audience to compel the alien's admission to the United States. Cf. City of New York, 878 F.2d at 512.

Third, assuming arguendo that waiver recommendations and determinations are subject to review, Adams' involvement in terrorism and the Secretary's concern regarding the foreign policy consequences of the alien's admission provide a sufficient basis to sustain the absence of a waiver. Deputy Secretary Whitehead's testimony shows that Adams was excluded for reasons other than membership in an organization within the McGovern

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[23] In contrast to the McGovern Amendment which pertains only to matters arising under Subsection 28, the provisions of 8 U.S.C. 1182(d)(3) authorize the Attorney General to waive almost all of the various statutory grounds for exclusion (withholding such authority only in the case of aliens excludable under Subsections 27, 29, and 33). Moreover, unlike the Secretary's affirmative responsibility with respect to aliens who are subject to 22 U.S.C. 2691, the general waiver provisions of 8 U.S.C. 1182(d)(3) impose no obligation on the Attorney General to consider or provide a waiver in any case of inadmissibility.

[24] At the time Kleindienst was decided, section 212(d)(6) of the Act required the Attorney General to report to Congress any waiver of statutory inadmissibility. 408 U.S. at 755-56. This requirement was deleted in 1981. Act of Dec. 29, 1981, § 4(2), Pub. L. No. 97-116, 95 Stat. 1611.

Amendment. J.A. 41-43. In any event, the explanation provided by the Deputy Secretary for the absence of a waiver recommendation plainly exceeds the standard established in Kleindienst for such matters.

Appellants err in their assertions that foreign policy consequences are irrelevant to the McGovern Amendment, and that a failure to embrace Adams and his advocacy within the waiver mechanism will render the Amendment meaningless. Br., at 30-31. Foreign policy consequences are inescapably germane to both exclusions and waivers of excludability.[25] See Kleindienst, 408 U.S. at 765-67; see also Mathews v. Diaz, 426 U.S. at 81-82; Harisiades v. Shaughnessy, 342 U.S. at 588-89. Moreover, in adopting the McGovern Amendment, Congress intended to protect ideas not actions, and even then only to protect certain ideologies from the ordinary application of our immigration laws. 22 U.S.C. 2691, as amended; see 1977 U.S. Code Cong. & Admin. News 1634-35 and 1979 U.S. Code Cong. & Admin. News 982. It is both reasonable and appropriate to exclude aliens who are involved in terrorism from the discretionary grace available through the waiver provisions. See Kleindienst, 408 U.S. at 769-70; see also Chevron, 467 U.S. at 844-45. The district court properly rejected appellants' waiver claims.

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[25] The McGovern Amendment itself was enacted with a view to our country's foreign affairs (see 1977 U.S. Code Cong. & Admin. News 1634-35), and the courts consistently have rejected arguments seeking to insulate the issue of an alien exclusion from foreign policy considerations. See, e.g., Allende, 845 F.2d at 1120 n.6; Abourezk, 785 F.2d at 1053. Cf. Allende v. Baker, slip op. at 12.

D. The First Amendment Does Not Limit The Regulation Of Alien Traffic Across Our Borders

Appellants contend that because their ability to communicate with Adams is impaired by the challenged visa denial, either the alien's exclusion or the statute barring his admission violates their First Amendment rights. The district court rejected such claims, holding that the government had not exceeded its authority to fix and apply the standards for alien admission to the United States. Add. 10-11. Appellants' constitutional argument is based on the demonstrably false premise that the First Amendment restrains the authority of the political branches of government to regulate the physical movement of aliens across our borders.

First, the Supreme Court repeatedly has rejected First Amendment challenges to the exclusion and deportation of aliens. See, e.g., Kleindienst, 408 U.S. at 768-69 (exclusion of Marxist journalist); Harisiades v. Shaughnessy, 342 U.S. at 591-92 (deportation of resident alien member of Communist Party); United States ex rel. Turner v. Williams, 194 U.S. 279, 292-94 (1904) (exclusion of anarchist). See also Mathews v. Diaz, 426 U.S. at 78-80; Boutilier v. INS, 387 U.S. at 123 ("Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden"). Appellees are aware of no reported case holding that the First Amendment limits the inherently political judgment of which aliens should be permitted to cross our borders and be

admitted to our society.[26] See also Galvan v. Press, 347 U.S. at 529-31. The courts that have reached and resolved the First Amendment claims of citizens seeking alien admission have sustained the challenged exclusions. See, e.g., Kleindienst, 408 U.S. at 769-70; Abourezk, 592 F. Supp. at 886-87 (rev'd on other grounds, 785 F.2d 1043). See also Abourezk, 785 F.2d at 1074-76 (Bork, J., dissenting); Ben-Issa, 645 F. Supp. at 1562-64.

The substantial precedent establishing that alien admission is a political question independent of ordinary constitutional limitation cannot be evaded by references to cases arising in domestic and/or criminal contexts. See Br., at 35-37. The

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[26] Appellants' reliance (Br. at 15, 17) on Rafeedie v. INS, 688 F. Supp. 729 (D.D.C. 1988), aff'd and rev'd in part, 880 F.2d 506 (D.C. Cir. 1989), is misplaced. Rafeedie, a lawful permanent resident physically present in the United States, challenges the use of the special procedures authorized by 8 U.S.C. 1225(c) to expel him from this country. Rafeedie involves exclusion proceedings in which the government bears the burden of proof, unlike the present case in which the "off-shore" visa applicant must demonstrate that he is not ineligible for admission under the statutory criteria. Moreover, in Rafeedie the scope and application of Subsection 28(F) have not yet been reached.

In related litigation, American Arab Anti-Discrimination Committee v. Meese, 714 F. Supp. 1060, 1082-84 (C.D. Cal. 1989), appeal pending, the district court has held, in the context of a challenge to deportation from the United States, that the First Amendment requires the invalidation of, inter alia, those portions of the Act pertaining to the advocacy of unlawful property damage. 8 U.S.C. 1251(a)(6)(F)(iii), conforming to 8 U.S.C. 1182(a)(28)(F)(iii). American Arab challenges the deportation of a lawful permanent resident, not the exclusion of an alien seeking to enter the United States. See Shaughnessy v. Mezei, 345 U.S. 206, 212 (1952). Moreover, as far as Subsection 28(F) is concerned, the interim decision in American Arab at present involves that statutory language pertaining to only one of the three separate bases under which Adams was found inadmissible. The district court judgment -- which the government believes to be error -- is neither binding on nor dispositive of the present controversy.

admission or exclusion of aliens from the United States is not subject to the rigors of Brandenburg v. Ohio or similar First Amendment scrutiny. Kleindienst, 408 U.S. at 769-70.[27] The Supreme Court has recognized that the regulation of alien traffic across our borders is constitutionally unique. From Turner to Galvan, and Harisiades to Boutilier, Kleindienst, Diaz, and Fiallo, the Supreme Court has rejected all constitutional challenges to the substantive admission criteria established by the political branches of government.

Additionally, the Supreme Court has considered and rejected the suggestion echoed by appellants (Br. at 41-43) that the deferential analysis applied to alien admission "requires serious re-evaluation." See Kleindienst, 408 U.S. at 767. This Court, too, recently found no reason to revisit the settled principles limiting judicial review of alien exclusion determinations. Amanullah, 811 F.2d at 10. Appellants have addressed their legislative claims to the wrong forum.[28]

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[27] Relying on Brandenburg, the dissent in Kleindienst suggested that aliens such as Dr. Mandel could not be excluded absent advocacy of "imminent lawlessness". 408 U.S. at 773, 780 (Douglas and Marshall, JJ., dissenting). The Court, however, concluded that, notwithstanding the asserted First Amendment interest of the citizen audience, the alien's exclusion must be sustained if "facially legitimate and bona fide." 408 U.S. at 769-70.

[28] In Amanullah, as here, the parties opposing exclusion "railed against [the Kleindienst] rubric as being overly obsequious in its deference" to the Executive. This Court found ample basis to reject such complaint. 811 F.2d at 10-11.

The "growing concern" expressed by appellants and several commentators regarding what they believe to be "ideological ex-

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Second, to subject the Executive's visa authority to First Amendment limitations would extend to aliens a constitutional protection that is unavailable to citizens. That is, in the face of citizen claims of a First Amendment interest in intercourse with foreign nationals, the Supreme Court has refused to limit the Executive's authority to revoke passports or to restrain international travel. Haig v. Agee, 453 U.S. 280, 306-07 (1981); Zemel v. Rusk, 381 U.S. 1, 16-17 (1965). See also Regan v. Wald, 468 U.S. 222, 240-43 (1984); Califano v. Aznavorian, 439 U.S. 170, 176-77 (1978). If the First Amendment does not apply to the regulation of citizens seeking to travel outside the United States, it cannot be urged that the constitutional guarantees apply to the movement of aliens into the country. To so hold would be either to contradict the settled rule that aliens have no constitutional right to enter the United States (see Landon v. Plasencia, 459 U.S. 21, 32 (1982)), or to embrace the absurd proposition that citizens have a protected right of third person travel by aliens across our borders that neither the citizens nor the aliens themselves enjoy directly.

Third, what is at stake here is not the control of ideas and

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[28](...continued)
clusion" (Br. at 41-42) cannot obscure the relative infrequency of such cases. Cf. Kleindienst, 408 U.S. at 768 n.7; Abourezk, 592 F. Supp. at 888 n.26. Moreover, such "concern" provides no basis for this Court to redistribute the authority of the political branches of government to regulate alien traffic across our borders. Appellants' argument assumes that Congress cannot or will not fulfill its responsibility in this area, a notion contradicted by the very provisions of the McGovern Amendment and Public Law 100-204 upon which appellants rely.

information, but the regulation physical movement. See Haig v. Agee, 453 U.S. at 309. While the latter obviously may impact on the former (see Kleindienst, 408 U.S. at 764), even outside the unique area of immigration, First Amendment requirements are less rigorous where the focus of the challenged regulation is activity or conduct. See, e.g., Boos v. Berry, 108 S. Ct. 1157, 1168-69 (1988); United States v. O'Brien, 391 U.S. 367, 376 (1968). See also Farrakhan v. Reagan, 669 F. Supp. 506, 510-12 (D.D.C. 1987), aff'd mem., 851 F.2d 1500 (D.C. Cir. 1988). In rejecting a right-to-travel argument by resident aliens who raised a Fifth Amendment challenge to Medicare eligibility restrictions, the Supreme Court declared, "The power of Congress to prevent the travel of aliens into this country cannot seriously be questioned." Mathews v. Diaz, 426 U.S. at 86 n.26.

What appellants assert here is a "right to meet", and such right finds only limited support in the First Amendment.[29] Even

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[29] The Constitution does not guarantee a convenient or optimal setting for speech and association (see Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981)), and the First Amendment right to select the persons with whom one communicates or associates does not necessarily give rise to a protectable interest in determining the place or circumstances of such encounters.

> Under the guise of exercising the First Amendment right of free speech, a person may not reposition himself where he otherwise would have no authority to be.

Berrigan v. Sigler, 499 F.2d 514, 520 (D.C. Cir. 1974)(rejecting a First Amendment challenge to the denial of a citizen-parolee's request to travel to Hanoi). See also Pell v. Procunier, 417 U.S. 817, 832-34 (1974)(rejecting, in light of available alternative channels of communication, demands for face-to-face access to prisoners).

if the First Amendment provides a protectable "right to meet" in other contexts, Kleindienst made clear that such right cannot displace the Executive's facially legitimate exclusion of an alien who is statutorily excludable for admission. Cf. Smith v. INS, 684 F. Supp. 1113, 1118 (D. Mass. 1988)(the "liberty interest in marriage does not encompass the right to have one's alien spouse remain in this country"); Almario v. Attorney General, 872 F.2d 147, 151-52 (6th Cir. 1989) (same). A constitutional interest in ideas held by an alien simply does not translate into a constitutional right to "import" that alien into the United States.[30]

These principles and the validity of Subsection 28(F) are not affected by the overbreadth doctrine. See Broadrick v. Oklahoma, 413 U.S. 601, 609-18 (1973). Appellants have not specified precisely what they contend is the constitutionally protected activity in this case: terrorism, communication with Adams, or the entry of the alien into the United States. See Br., at 35-37. The only activity that the challenged statute regulates is the physical movement of aliens across our borders.

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[30] Appellants do not explain how their interest in meeting with Adams on American soil is more worthy or significant than the similar interests of other citizens in any of the millions of visa determinations that are made each year. See Kleindienst, 408 U.S. at 769. Under appellants' view of the First Amendment, visa denials might be challenged by, for example, citizens wishing to invite members of a foreign parish, temple, or mosque to come to the United States for prayer meetings, to invite persons serving in foreign armed forces to come to the United States to join in a veterans' day parade, or to invite disappointed visa applicants to come to the United States to participate in a conference on immigration law reform.

The citizen plaintiffs, whose movement is unaffected by the statute and who remain free to communicate with Adams without limitation (which they have done), have no constitutional right to bring an alien into the United States.[31] Inasmuch as Congress could close our borders to all aliens without constitutional offense (see Harisiades, 342 U.S. at 596-97 (Frankfurter, J., concurring); Haitian Refugee Center v. Gracey, 600 F. Supp. 1396, 1405 (D.D.C. 1985), aff'd, 809 F.2d 794 (D.C. Cir. 1986)), there can be no overbreadth in refusing entry to aliens who fail to satisfy such criteria as Congress deems appropriate.[32]

Finally, it is not grounds for constitutional complaint that the statute allows the political branches of government to select among the alien-applicants and thereby "censor" the ideas and information that they might bring to the United States.[33] See Br., at 35-38. All visas are inherently and inescapably "licenses" and, as the Supreme Court repeatedly has emphasized, the political branches may pick and choose among aliens (and their ideologies)

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[31] Appellants' concern for the ability to advocate "armed insurrection" (see Br. at 17-18) is also untouched by the regulation. Both Adams and his citizen sponsors remain fully unencumbered in the content and practice of their advocacy, and even may share their views in face to face meetings if the citizens travel to Adams rather than insisting on importing the alien across our borders.

[32] Appellants apparently have abandoned the accompanying "void for vagueness" argument raised against Subsection 28(F) in district court. See Br., at 35-44. The Supreme Court has refused to apply "void for vagueness" principles to immigration admission criteria. Boutilier, 387 U.S. at 123; see also Mathews, 426 U.S. at 80-82.

[33] Deputy Secretary Whitehead's testimony disavowed any purpose of censorship in this case. J.A. 45.

without offending the Constitution.[34] See, e.g., Kleindienst, 408 U.S. at 765-67. It does not matter what else aliens such as Adams would do or say in the United States if they fall within any of the classes Congress has deemed to be undesirable.

> Were we to endorse the proposition that governmental power . . . must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an [excludable] alien . . . one of two unsatisfactory results would 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 strength of the audience's interest against that of the Government in refusing [to admit] the particular alien applicant according to some as yet undetermined standard.

Kleindienst, 408 U.S. at 768-69. Just as Kleindienst found no constitutional defect in excluding an alien journalist who was statutorily inadmissible because of his political ideology, the First Amendment provides no basis to disturb the decision to refuse Adams a visa because of his advocacy and practice of terrorist violence.

To the extent that the admission criteria of 8 U.S.C. 1182(a)(28)(F) are subject to any constitutional scrutiny, all that need be shown is that such criteria are not "wholly irrational." Mathews, 426 U.S. at 83; see also Califano v.

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[34] In analogous contexts, the courts have rejected First Amendment challenges to regulatory actions by the political branches of government in matters touching upon our nation's foreign affairs. See, e.g., DKT Memorial Fund Ltd. v. Agency for International Development, 887 F.2d 275, 289-90 (D.C. Cir. 1989) (sustaining the Executive's authority to "make viewpoint based choices in foreign aid and foreign affairs"); Palestine Information Office v. Shultz, 853 F.2d 932, 941 (D.C. Cir. 1988) (notwithstanding citizen interests, foreign entities have no constitutional right of representation on American soil).

Aznavorian, 439 U.S. at 177. The exclusion of aliens who support or practice violent attacks on persons and property satisfies such standard. Indeed, the interest in closing our borders to alien terrorists is sufficiently compelling to satisfy even the most stringent of constitutional tests. See, e.g., United States v. O'Brien, 391 U.S. at 376-77. The district court properly held that neither Subsection 28(F) nor its application to exclude Adams from the United States violates the First Amendment.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

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