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Review of Visa Denials: The American Consul as 20th Century Absolute Monarch

LEON WILDES

On January 11, 1988 the United States Supreme Court denied certiorari in Centeno v. Shultz, an appeal from the Fifth Circuit Court of Appeals. The Court of Appeals had held that a consular determination denying an alien’s application for a visitor’s visa to the United States was not subject to judicial review. The case itself was not noteworthy, but the fact that the United States Supreme Court seemingly accepted the proposition is of enormous significance.

Appellant Centeno is a Filipino citizen who applied at the United States Embassy in Manila for a visitor’s visa, which the consular officer denied. Appellant Coane, Centeno’s United States citizen brother-in-law, had made unsuccessful efforts to secure a reversal of the decision. On July 17, 1986, Coane filed a complaint in the United States District Court, on behalf of himself and his brother-in-law, against the Secretary of State and others, challenging the

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denial of the visa. His complaint claimed that the denial was not authorized by the statute, was arbitrary and capricious, and violated Coane's first amendment rights. The district court dismissed the action for lack of jurisdiction on January 23, 1987.5

On appeal to the United States Court of Appeals, the determination below was affirmed. The court noted:

Under Kleindienst v. Mandel, the denial of visas to aliens is not subject to review by the federal courts. Such review is limited solely to the determination of whether a facially legitimate and bona fide reason exists for the denial of the waiver. Since Centeno was denied a visa under 8 U.S.C. § 1184(b), which does not provide for a waiver, however, the denial of his visa is not subject to any review by a federal court.

This result is in accord with our prior holdings that decisions of United States consuls on visa matters are nonreviewable by the courts.4

The lack of any meaningful administrative or judicial review of the denial of United States entry visas is one of the major outrages of the American immigration system. It is a condition which has not improved with the passage of time. This author's first article on the subject,6 published in 1959, was recently republished by the American Immigration Lawyers Association as part of a program on the subject, presumably because despite the passage of almost thirty years the law on the subject has not meaningfully changed. American consular officers, stationed abroad, still wield unbridled power with respect to the issuance or denial of immigrant and nonimmigrant visas. They are probably the only administrative employees of the United States government whose functions have been insulated from administrative and judicial review. This situation has been the subject of considerable scholarly criticism.6

Previous attacks upon the fortress-like authority of consular officers in this area, so vital to American life, have been largely unsuccessful.7

The existence of a procedure that permits American officials to exercise unbridled power in an area which affects our relations with the rest of the world is totally inappropriate in a society governed by the rule of law. This is particularly intolerable in cases which impact upon Americans whose relatives, friends, business associates, and teachers are arbitrarily denied visas to the United States. At times when it suits governmental purposes, the doctrine of consular absolu-

3. Centeno, 817 F.2d at 1212.
4. Id. at 1212, 1213-14 (citations omitted).
7. See cases cited infra notes 39, 45, 53, 69, 82.
tism in visa denial cases is clothed in the respected mantle of foreign affairs. At other times, the government sees it as unnecessary to overformalize review procedures in matters not deemed to be of high significance. In a system where consular officers do not consider assignment to a visa unit as a prestigious post, it is unlikely that such officers would err on the side of affording an alien applicant the benefit of the doubt. A United States foreign service officer whose primary objective in life is to ultimately represent his country as an ambassador is unlikely to be anxious to leave a trail of potentially embarrassing decisions. Although the situation continues to be the subject of much frustration, no meaningful administrative, judicial, or legislative relief has been forthcoming.

While we have made major strides in the development of our immigration law in such areas as the elimination of the discriminatory aspects of national quotas, racial criteria, and sexism, the last vestige of arbitrariness in the system—consular absolutism—still remains and now deserves to be removed. The provision of the Immigration and Nationality Act (INA)\(^8\) which vests in United States consular officers this unusual and exclusive jurisdiction to issue or deny visas, grants the Secretary of State jurisdiction to review the work of consular officers “except those powers, duties, and functions. . .relating to the granting or refusal of visas.”\(^9\) This limitation of the Secretary of State’s authority has been understood to eliminate both administrative and judicial review.

The doctrine by which the courts have thus far acceded to this unfortunate result raises inevitable questions about the power of Congress to limit the jurisdiction of federal courts, particularly when the statute contains no explicit limitation on the jurisdiction of courts to review the denial of visas by United States consuls.\(^10\) Surely there is no presumption of nonreviewability in United States

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\(^8\) Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (current version at 8 U.S.C. §§ 1101-1525 (1982)). Since 1952, the substantive and procedural laws relating to immigration have been consolidated in Title 8 of the United States Code.

\(^9\) INA § 104(a)(1), 8 U.S.C. § 1104(a)(1) (1988). While the statute precludes review by the Secretary of State of both the grant and denial of visas, this article is concerned only with the latter. This is because review of all visa grants is available administratively. The INA provides for such review by Immigration and Naturalization Service (INS) officials at the border where all visa holders must pass a second hurdle to gain admission. The United States visa, unlike those of most countries, does not vouchsafe admission; it permits the holder to request admission at a border. See INA §§ 211, 214, 8 U.S.C. §§ 1181, 1184 (1987).

legal doctrine or the common law. One must therefore conclude that reading an implied limitation on judicial review into the law is an unfortunate result of some difficult problems in the meager case law which constitutes the limited jurisprudence in this area. I have therefore attempted to reanalyze these cases in the hope of finding some ways to overcome these precedents for the rule that prevents us from securing an adequate remedy in many immigration cases.

This paper will address, in Section I, the historic and legal precedents which brought us to a status of consular absolutism with respect to visa issuance and denials. Section II reviews the leading cases commonly understood as the foundation for extending the statute's restriction upon administrative review by the Secretary of State into the entirely separate area of denying judicial review. It argues that judicial review should be possible, despite the current gloss on the present statute and regulations, and offers a basis of distinguishing the case law. Section III adds a constitutional argument which should mandate judicial intervention to narrowly construe the statute involved in order to avoid raising constitutional challenges. Finally, Section IV deals with potential legislative remedies and recommends Congress enact an amendment to the INA which would authorize limited administrative review, particularly in cases which significantly impact United States citizens and businesses.

SECTION I

A. Historic Development of The Grounds of Exclusion

During our early years as a nation, our borders were open. A law prohibiting the importation of Oriental slave labor, enacted in 1862, was Congress's first effort to restrict immigration. An 1875 statute barred the entry of prostitutes and convicted criminals. The first general immigration statute, passed in 1882, added lunatics, idiots, and persons likely to become public charges to the short list of excludable aliens. An 1891 amendment excluded paupers, sufferers of certain contagious diseases, and polygamists. Epileptics, professional beggars, and anarchists—the first group whose restriction was predicated on political tenets—were excluded in 1903. In 1950 communists and aliens affiliated with totalitarian parties were added

to the growing list of exclusionary grounds. Currently, there are thirty-three categories of excludable aliens.16

Early Supreme Court cases challenging America's restrictive immigration policies produced various theories sustaining these policies. In 1884 the Court held that Congress's power to regulate immigration was based on the Commerce Clause.18 In 1889, the Court held that Congress's power to exclude aliens must be within an independent nation's sovereignty over its own territory, because if the nation "could not exclude aliens it would be to that extent subject to the control of another power."19 Congress's enumerated powers over foreign commerce, naturalization, and war powers, supplemented by the "necessary and proper" clause, were first cited by the Court in 1892 as the sources of the implied congressional power to exclude prospective alien immigrants and visitors.20 In an 1896 case, the Court endorsed the congressional power to forbid entry of aliens solely "as a matter of public policy" without reference to the enumerated powers of Congress.21 In 1904, the Court held that the power to bar the entry of aliens is either inherent in sovereignty or essential to self-preservation, or derived from the enumerated powers of Congress, principally from the power to regulate commerce with foreign nations.22

Despite the confusion as to exactly why the Court ruled as it did, it is clear that Congress has plenary power to establish rules governing the admission of aliens and to exclude all those who possess whatever characteristics Congress has forbidden.

While recognizing that Congress's authority in this area also derives from its enumerated legislative powers and from the political nature of immigration decisions, the Supreme Court chose, early on, to insulate from judicial review the immigration policies enacted by the legislature. Often the Court was more comfortable with the doctrine that the powers of Congress were derived from the nebulous sovereignty of nations, a doctrine which permitted fewer theoretical challenges.23

23. Kleindienst v. Mandel, 408 U.S. 753 (1972). But see id., at 774-85 (Marshall, J., dissenting) (ours was a government of limited powers, unlike the tyrannies our found-
Moreover, early cases held that Congress had the power to delegate its immigration powers to the Executive branch and, in so doing, delegate much of its immunity from judicial scrutiny. In 1893, the Supreme Court held that congressional power to exclude or expel aliens may be exercised entirely through executive officers. In 1895, the Court held that an alien’s right of reentry under statute or treaty may be determined exclusively and with finality by executive officers “in respect of a matter wholly political in its character.” Thus were laid the premises of the exemption of certain administrative officers from judicial scrutiny.

By the turn of the century, the lower federal judiciary had been clearly and repeatedly informed by the Supreme Court that immigration matters were largely committed to legislative and executive hands and were not a proper subject for judicial intervention. This era of deference to the political branches was later to give rise to the doctrine of nonreviewability of consular decisions.

B. Development of the Visa Issuing Function

In 1917, the Departments of State and Labor issued a Joint Order to Diplomatic, Consular and Immigration Officers for the first time requiring passports and visas for aliens to enter the United States. This directive specified that the consuls ascertain that the alien understood the various exclusionary provisions of our immigration laws, and make a notation on the visa that the alien had been “advised that he will probably be rejected and deported” if the consular officer felt that the alien was inadmissible. The Joint Order appears to have required the consul to issue a visa if he was presented with a valid passport. Denying the alien admission would start at the immigration inspection point upon entry and not in the consul’s office.

26. Joint Order of the Department of State and the Department of Labor, Requiring Passports and Certain Information from Aliens Who Desire to Enter the United States During the War (July 26, 1917), reprinted in U.S. GOVERNMENT PRINTING OFFICE, LAWS APPLICABLE TO IMMIGRATION AND NATIONALITY 1042 (E. Avery ed. 1953) [hereinafter GPO IMMIGRATION LAWS].
27. Id. at 1044.
abroad. Accordingly, the first American document requiring an alien to have a visa obliged the consul to issue it, albeit with a warning. The consul's function was informational; excludability was adjudicated at the border.

The first congressional enactment giving rise to the current system of consular visas was a wartime measure which authorized the president to prescribe "reasonable rules, regulations and orders" to govern persons wishing to depart from or enter into the United States. This 1918 legislation refers to "permits to enter the United States and evidence of such permission," but no specific mention is made of passports or visas or by whom such permission shall be granted. Pursuant to this congressional authorization, President Wilson issued a proclamation finding that public safety required the implementation of restrictions and prohibitions on departure and entry of aliens. On the same day, President Wilson issued an Executive Order providing, among other things, that "no alien shall be allowed to enter the United States unless he bears a passport duly visaed in accordance with the terms of the Joint Order to the Department of State and the Department of Labor issued July 26, 1917." This Executive Order also conferred final responsibility for supervising the permission of aliens to enter the United States upon the Secretary of State. Thus, the passport and visa requirements were not statutorily created but adopted by a presidential executive order.

After World War I, the visa requirement would have been phased out, like most other war-related congressional enactments and executive implementing orders, were it not for the fact that a fee of one dollar was then being charged for each visa application and an additional fee of nine dollars was charged for each immigrant visa issued. Thus, in 1921, Congress passed "[a]n act making appropriations for the Diplomatic and Consular Services for the fiscal year ending June 30, 1922" with the proviso that "the provisions of the Act approved May 22, 1918, shall, in so far as they relate to requiring passports and visas from aliens seeking to come to the United States, continue

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31. Id. at 1050, 1063.
in force and effect until otherwise provided by law."³³ Despite the fact that the 1918 Act did not mention passports or visas, let alone require these documents, the 1921 Act extending it did.

Early challenges to the criminal provisions of the 1918 Act construed its 1921 extension as necessarily extending the executive orders issued pursuant to it. However, criminal prosecutions under the 1921 extension were dismissed since the 1921 legislation did not expressly extend those provisions of the 1918 Act, and there could be no liability for a "constructive offense."³⁴ But the visa requirement remained intact.

The requirement that aliens seeking admission to the United States possess visas issued by United States consular officers first made its permanent entry on the statute books with the Immigration Act of 1924.³⁵ President Coolidge then issued an executive order requiring that all aliens present immigration visas as provided in the 1924 Immigration Act.³⁶ The visa requirement has been preserved in every subsequent revision of United States immigration law.³⁷

SECTION 2

A. Development of the Case Law

It was not long after the visa requirement became law that court challenges arose in habeas corpus review of exclusion orders resulting from the alien not having a visa, or not having the right kind of visa. In the latter instance, where the issued visa was found to be "irregular" by immigration inspectors, the courts were willing to apply the maxim that "equity regards as done that which ought to have been done" and order the alien released. For example, if the consul neglected to sign a visa or used the wrong form, the courts found that such technical failings on the part of consular officers would not result in the alien's exclusion.³⁸

There are two seminal cases on the question of consular nonreviewability. One of the cases most often cited for the proposition that consular visa denials are not reviewable is London v. Phelps, decided by the Second Circuit in 1927.³⁹ A British subject who wanted to visit her children in New York was denied a visa by

³³ Id.
³⁴ Flora v. Rustad, 8 F.2d 335, 337 (8th Cir. 1925).
³⁶ Exec. Order No. 4027 (1924), reprinted in GPO IMMIGRATION LAWS, supra note 26, at 1074.
³⁸ In re Spinnella, 3 F.2d 196 (S.D.N.Y. 1924); see also infra note 44.
³⁹ United States ex rel. London v. Phelps, 22 F.2d 288 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928).
the consul in Montreal. She crossed the United States-Canada border and was detained as an excludable alien because she did not have a visa. On appeal from an order discharging a writ of habeas corpus, she argued that the issuance of a visa is a mere ministerial act and consequently her failure to obtain one was immaterial. In a fairly brief opinion, the Court of Appeals rejected her argument and sustained the legislation requiring aliens to have a visa before applying for entry, as well as the provision providing for the excludability of aliens without a visa. In light of the previous half-century of judicial deference to Congress in the field of immigration, the Phelps decision came as no great surprise. Surprising, however, was the last paragraph of the opinion, which is clearly dicta and which appears as if it were an afterthought, given the question before the court. The court added: "Whether the consul had acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to vis[a] a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. . . . It is beyond the jurisdiction of the court." The only authority cited for this definitive pronouncement was "3 Moore's Digest, 996."

Moore's International Law Digest was the reference source. 3 Moore's Digest 996 consists of a paragraph about how Czarist Russia's late nineteenth century policy of refusing to visa the passports of American missionaries and Jews was the subject of diplomatic correspondence. A second paragraph notes that on April 21, 1904, the House of Representatives passed a resolution to the following effect:

that the President be requested to renew negotiations with the governments of countries where discrimination is made between American citizens on the ground of religious faith or belief to secure by treaty or otherwise uniformity of treatment and protection to American citizens holding passports duly issued by the authorities of the United States in order that all American citizens shall have equal freedom of travel and sojourn in those countries, without regard to race, creed, or religious faith.

Moore's Digest is more a work on diplomatic history than what would be considered a law book today. Bearing in mind that international law in the pre-United Nations era was founded upon bilateral treaties and the principles of custom and comity, diplomatic history was a useful source for precedents in the area of consular visa deter-

40. Id. at 289.
41. Id. at 290.
42. Id.
43. 3 J. Moore, A Digest of International Law § 526, at 996-97 (1906).
minations. What the Second Circuit learned from Moore's was that when an American citizen was denied a visa to enter a foreign country, his only recourse was to have the State Department try to intercede. That appeared to be the established customary approach. Moreover, through the operation of comity, if an American's only recourse against a visa denial was through diplomatic channels, then an alien could have no greater recourse if he were denied a visa to come to the United States. The matter was evidently committed to those branches of government responsible for the conduct of foreign affairs. The federal judiciary had a long tradition of adhering to its own self-imposed rule of not meddling in foreign affairs. By raising the consular visa decision to the level of the exercise of foreign affairs discretion, the court placed that decision beyond its jurisdiction to review.

The pronouncement was quickly echoed by district courts around the country when visa questions were presented in habeas corpus actions. In 1928, in the Northern District of California, the exclusion of a Chinese youth was successfully challenged. He had a visa but it was not the right type for him to accompany his merchant father. The court said: "The granting or denying of a visa involves the exercise of discretion by consular officers with which the courts will not interfere, but the same rule does not apply to the form upon which an application is prepared." 44

Next to London v. Phelps, the most often cited authority for the doctrine of judicial nonreviewability of a visa denial was the 1929 decision of the District of Columbia Circuit in Ulrich v. Kellogg. 45 Ulrich, a naturalized American citizen, applied for a writ of mandamus to compel issuances of a visa to his alien wife in Germany. The consul in Berlin based his denial on Ulrich's wife's convictions for crimes involving moral turpitude—three times for larceny and once for abetting a forgery. The court refused to issue the writ, finding that the power to grant a visa was committed to consular officers and that no "provision of the immigration laws . . .provides for an official review of the action of the consular officers in such case by a cabinet officer or other authority." 46

The issue of review was directly raised in Ulrich. The court's language is unclear in explaining whether there was no judicial power to review the consular officer's decision or whether it was only that no administrative authority existed to direct the consular officer to

44. Ex parte Seid Soo Hong, 23 F.2d 847, 848 (N.D. Cal. 1928); see also supra note 38 and accompanying text. Equity allows a court to correct a technical defect of an issued visa, but does not allow a review of the visa denial.


46. Id. at 986.
grant the visa, thereby precluding the issuance of the specific remedy of mandamus to any party before the court. Secretary of State Kellogg would have been required to do the ministerial act of issuing a visa, had Ulrich prevailed. The procedural understanding of the decision seems the more reasonable one because the court expressly held that the offenses for which the alien had been convicted involved moral turpitude, thereby actually reviewing and upholding the substantive merits of the consul’s determination to deny the visa. Significantly, there is no repetition of the London v. Phelps language that the consul’s decision is beyond the jurisdiction of the courts. The case may therefore be limited by its facts and actually stand for the proposition that a court may review the merits of a consul’s denial of a visa. The unavailability of mandamus is inherent in the remedy.

The consular act in granting or denying a visa is discretionary and mandamus will only lie for the enforcement of a mandatory act.

By referring to the immigration laws for the alien’s exclusive remedy, the Ulrich decision reflects the reasoning of the Supreme Court’s decision in Lem Moon Sing v. United States. In that case, an alien sought to challenge his exclusion in habeas corpus proceedings, arguing that even if Congress’s power to exclude him was beyond question, the courts should have habeas jurisdiction to determine whether the statute had been lawfully applied. The Supreme Court rejected the argument because Congress had not provided for habeas review in exclusion cases. The Court reasoned then that “[t]he 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” meant that it could also “have its declared policy in that respect enforced exclusively through executive officers without judicial intervention.” The Supreme Court had retreated from this position twenty years before Ulrich, permitting habeas review of exclusion orders for denial of a fair hearing or for the application of ad hoc grounds of exclusion against an alien.

The Supreme Court has manifested its unwillingness to permit judicial review of consular visa denials in habeas corpus actions. In 1932, in Polymeris v. Trudell, the Court noted the repeated at-

47. Id.
48. 158 U.S. 538 (1895); see supra note 25 and accompanying text.
49. Lem Moon Sing, 158 U.S. at 547.
52. See supra note 1.
tempts of resident aliens in Greece to secure return permits from the
United States consul in Athens, in the course of which they hired
attorneys in Greece and in the United States to no avail. Their
American lawyer recommended that they go to Canada and enter
the United States without permits or visas and then challenge their
exclusion in habeas corpus proceedings. The Court held that the ex-
cclusion was legal and that the aliens "must show not only that they
ought to be admitted but that the United States by the only voice
authorized to express its will, has said so."54 A habeas action is not
the way to review a consul's visa denial, and the Court would not
allow the plaintiff to gain indirectly the jurisdiction of the Court
where jurisdiction to review the matter was not available directly.55

The 1972 case of Kleindienst v. Mandel,56 while it dealt with a
review of a visa denial, was not a consular review case. The exercise
of discretion being challenged in Kleindienst was the Attorney Gen-
eral's failure to waive the inadmissibility of Mandel, who was a
Marxist academician excludable under the INA.57 The Supreme
Court quoted its Lem Moon Sing decision of 1895, stating that Con-
gress had plenary power over immigration and that it may "have its
declared policy in that regard enforced exclusively through executive
powers, without judicial intervention, is settled by our previous adju-
dications."58 Despite the reaffirmation of congressional power over
the design of immigration and visa policy and of executive freedom
to act "without judicial intervention," the Court nonetheless re-
viewed the validity of the Attorney General's decision, albeit with
the minimal "facially legitimate and bona fide reason" standard.59
Even this minimal standard of judicial scrutiny is a significant de-
parture from the complete abdication of judicial review which pro-
tected the attorney general's discretion in such cases as Knauff v.
Shaughnessy60 and Shaughnessy v. Mezei,61 and which continues to
prevail in the area of judicial review of consular discretion.

54. Id. at 281.
55. A similar attempt by an alien who was denied a visa, and his American wife,
who joined him as a plaintiff, was rejected in Burrafato v. United States Dep't of State,
523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976). In Burrafato, the consul
had violated his own regulations and failed to specify the grounds for refusal. An alien
outside the United States does not meet the standing threshold to pursue a habeas action
because, unlike an alien who has been ordered excluded and deported, he is not in official
custody. As with mandamus, the nature of the remedy precluded the use of the court's
power.
56. 408 U.S. 753 (1972).
59. Id. at 770.
B. The Administrative Procedure Act

Flowing directly from Congress's plenary power to set policy concerning alien entries and from the executive's power to implement that policy free from all judicial scrutiny, the doctrine of consular nonreviewability persisted despite the evolution of a common law presumption in favor of judicial review of executive determinations, the codification of that presumption in the Administrative Procedure Act of 1946 (APA), and independent developments in the area of procedural due process.

Even before the London and Ulrich decisions, the Supreme Court was reviewing and invalidating exclusion orders for not being based on the statutory scheme of excludable characteristics. This is indicative of a judicial tendency, already evident at the turn of the century, to address due process questions and arbitrary results of the growing administrative exercise of delegated powers. The APA codified the common law presumption in favor of judicial review except 1) when the relevant statutes preclude judicial review either expressly or by implication; or 2) when "agency action is committed to agency discretion by law." Does the immigration statute preclude judicial review, expressly or by necessary implication? The INA has no provisions for judicial review of consular visa denials. Section 104(a)(1) of the INA gives the Secretary of State authority over "the powers, duties, and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." Because of the strong common-law policy favoring reviewability, the courts have been reluctant to imply a statutory preclusion of review even when a statute refers to an administrative determination as "final." Indeed, the attorney general's decision to order deportation is referred to as "final" in INA section 242(b). The Supreme Court construed "final" to mean "administratively final" in 1955, and held that deportation orders were subject to judicial review under the APA.

62. See supra note 51 and accompanying text.
64. 8 U.S.C. § 1104(a)(1) (1982) (emphasis added). The statute deals only with administrative review by the Secretary of State.
65. 8 U.S.C. § 1252(b) (1982). "[A]n administrative act is subject to judicial review unless there is a persuasive reason to believe Congress decided to deny review." Graham v. Caston, 568 F.2d 1092, 1096-97 (5th Cir. 1978).
The present statutory scheme for judicial review of exclusion and deportation orders in the INA was enacted by Congress after the courts began to review those orders on their own common-law initiative. Senator McCarran and Congressman Walter were sponsors of both the 1946 APA and the 1952 INA. In the context of debates on the deportation provisions of the INA, each assured his respective chamber that the APA was applicable to the immigration bill. When Senator Lehman introduced an amendment stating that “the provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens,” it was severely criticized by Senator McCarran and rejected. Lower courts have taken this legislative history, together with the statute’s failure to provide for any review of consular visa denials, as evidence of congressional intent to maintain the status quo and to insulate consular decisions from judicial review.

Is agency action so “committed to agency discretion by law” as to preclude judicial review? I think not in the area of visa eligibility. The courts have viewed the “committed to agency discretion” exception to judicial review under the APA to apply only when there is “no law to apply.” The thirty-three statutory grounds for exclusion, with the ample legislative, administrative, and judicial guidance which the Immigration and Naturalization Service (INS) applies on a daily basis, provide abundant “law to apply” when a consul determines a visa applicant’s excludability.

The legislative histories of the INA and APA are not conclusive and a functional analysis of how both Acts would interact in the area of consular review is a most compelling argument for the courts to assume their proper role. As recently as 1972, the Supreme Court premised the denial of review on the ground that an alien has no right to enter the United States. Not even the most strident advocate of aliens’ rights would argue that an alien has an absolute right to enter the United States. However, it is clear that he has a qualified right of entry if he meets the statutory criteria for eligibility. In 1973, the Supreme Court abandoned the traditional standing limitation to those plaintiffs who claim an injury in their “legal rights.” Moreover, the INA arguably vests a statutory entitlement

67. 98 CONG. REC. 4302 (1952) (statement of Rep. Walter); id. at 5329 (statement of Sen. McCarran).
68. Id. at 5625.
in United States citizens and permanent residents to have their families together, an entitlement which implicates their liberty interests and therefore merits procedural protection.\textsuperscript{74}

Section 10 of the APA provides that a "person...adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof."\textsuperscript{75} This provision intertwines judicial review and standing. It is often said that aliens have no standing and therefore cannot achieve judicial review.\textsuperscript{76}

Since 1970, the Supreme Court has construed standing under section 10 of the APA to require that a complainant demonstrate an "injury in fact" to an interest "arguably within the zone of interests to be protected or regulated" by the statute that has allegedly been violated by the agency action.\textsuperscript{77} This "injury in fact" test includes noneconomic injuries, and is not limited to traditionally identifiable legal rights.\textsuperscript{78}

This principle has been applied to an immigration case. The 1974 District of Columbia Circuit case of \textit{Pesikoff v. Secretary of Labor}\textsuperscript{79} held that if the plaintiff's allegation that no American workers could be found to perform the job of live-in maid was correct, then the plaintiff-employer had standing to sue because he suffered an "injury in fact" when his maid was denied a labor certification.\textsuperscript{80} Further, because "the employer's need for qualified workers is clearly not ignored" by INA section 212(a)(14), that need was thus arguably within the zone of interests protected and regulated by the INA.\textsuperscript{81}

Likewise, a federal district court held that a legal permanent resident had standing when she unsuccessfully challenged denial of her husband's visa in 1976.\textsuperscript{82}

The \textit{Pesikoff} rationale for standing under the APA applies to all immigrant visa applicants because, by definition, each of these aliens

\begin{thebibliography}{99}
\bibitem{75} 5 U.S.C. § 702 (1982).
\bibitem{76} See supra note 55.
\bibitem{78} See supra note 73.
\bibitem{80} Id. at 760.
\bibitem{81} Id.
\bibitem{82} Pena v. Kissinger, 409 F. Supp. 1182 (S.D.N.Y. 1976). In the \textit{Pena} case, the district court pointed out that a statute in force since 1856, 11 Stat. 64, provides for a remedy "[w]henever any consular officer...is guilty of any willful malfeasance or abuse of power...for all damages occasioned thereby." 409 F. Supp. at 1188. The statute was virtually never used, and was repealed by Pub. L. No. 95-105, § 111(a)(1), 91 Stat. 848 (1977) (current version in 22 U.S.C. § 1199 (1982)).
\end{thebibliography}
must have a strong connection or relationship with someone in the United States who has filed an immigrant visa petition on his behalf. The goals of an immigrant visa applicant generally coincide with those of American residents or citizens who may have standing, while the goals of an applicant for a nonimmigrant visa often do not. Sound policy might dictate drawing a line such as this in any event. While no alien has a constitutional right to enter the United States, prospective immigrants have a qualified statutory right to do so, which their families or prospective employers should be free to pursue in United States courts when United States consuls improperly deny them visas to immigrate here. Judicial review of such a denial has not been precluded by either exception to the APA and therefore should be available as a matter of common law as expressed by the APA.

SECTION 3

A Constitutional Dimension

While Congress has broad authority in the field of immigration legislation and may choose to exercise its authority to the fullest extent, even affecting the fundamental liberties of those impacted by its action, it may do so only by a clear expression of its intent. It is thus a primary principle of constitutional law that whenever possible, statutes should be construed so as to avoid raising serious questions with respect to their constitutionality. There is only one statutory provision upon which the courts have based their opinions that they lack jurisdiction to review consular visa denials. This provision, which discusses the powers and duties of the Secretary of State, provides:

The Secretary of State shall be charged with the administration and the enforcement of the provisions of this [Act] and all other immigration and nationality laws relating to the powers, duties and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the department or independent establishment under whose jurisdiction the employee is serving, any of the powers, functions, or duties conferred or imposed by this

84. See supra note 72.
85. A constitutional basis for seeking judicial review may also exist under the due process clause of the United States Constitution when a person with standing under the APA has been "deprived" of anything encompassed by the fifth amendment. Should not the grant of an 1-130 petition filed by the relative of an alien entitle the petitioner to have the beneficiary's case adjudicated according to law? The issue has not yet been successfully raised. See Pena, 409 F. Supp. at 1187.

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[A]ct or regulations issued thereunder upon officers or employees of the Department of State or of the American Foreign Service.

This formulation is anything but a clear and unequivocal statement of congressional intent to eliminate judicial review. A narrow, and thus constitutional, construction of its provisions would require that only review by the Secretary of State was precluded by statute, not that judicial review was also precluded. If congressional authority included the power to eliminate judicial review completely, and if it was Congress's intention to do so, a clear statement must be used by Congress to accomplish this purpose.

The principle requiring Congress to have expressed its intention in a clear statement has always been applied in cases involving American citizens, in order to avoid raising serious constitutional questions. In *Kent v. Dulles*, the United States Supreme Court refused to find that section 211(A) of the Passport Act of 1926 gave the executive the authority to deny a passport to a United States citizen based on alleged communist affiliation. The Court stated that: "We hesitate to find in this broad generalized...[provision] an authority to trench so heavily on the rights of the citizen."

The Court did not find the statute itself unconstitutional, but merely found that an overbroad interpretation of its provisions would raise serious constitutional questions, which could be avoided by a narrow construction. The Court further stated that it would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211(a) had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.

The same principle has been applied to immigration cases relating to aliens as well. In *Rosenberg v. Fleuti*, the term "entry" in the INA was interpreted not to include the return of a permanent resident from a brief trip outside the country. Similarly, the term "en-

88. 8 U.S.C. § 1104(a) (1982); see supra note 64.
90. 357 U.S. 116 (1958). The Passport Act of 1926, 22 U.S.C. § 211(a) (1982), provided that "[t]he Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified...under such rules as the President shall designate and prescribe."
91. *Kent*, 357 U.S. at 129.
92. *Id.* at 130.
"try" has been held not to apply to a case when an alien plainly did not expect or plan to enter a foreign port or place, likewise a narrow construction to avoid raising constitutional issues. In *Fong Haw Tan v. Phelan*, the Court narrowly interpreted a provision authorizing deportation of an alien convicted "more than once" of a crime involving moral turpitude not to include an alien convicted of multiple counts in a single proceeding. The Court stated that: "[W]e will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

What is even more frightening than the overbroad judicial gloss already given to the Immigration Act's limitation on the Secretary of State's review of visa denials is the fact that the Secretary is authorized by statute to confer these powers upon "any employee of the United States." The statute authorizes the Secretary of State, with the consent of the head of the department or agency involved, to confer visa issuing functions, presumably with the same lack of accountability, upon any other federal official. One wonders what Professors Jaffee and Hart, who struggled in vain for any parallel in our institutions for this despotic consular absolutism, would think of this.

The doctrine of strict construction of immigration statutes is a constitutional doctrine and does not rely upon the strict construction requirement in criminal statutes. Deportation has always been judicially determined to be a civil sanction, rather than a criminal penalty. Its civil nature has been used in many judicial contexts to justify the inapplicability of ex post facto laws. Similarly, its civil nature has been pointed to as the basis for inapplicability of a double jeopardy to the deportation of an alien for the same criminal viola-

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94. *Delgadillo v. Carmichael*, 332 U.S. 388 (1947). In *Delgadillo*, an alien who was a lawful resident of the United States since 1923 was torpedoed at sea while working aboard a merchant ship in 1942. His rescuers brought him to Cuba to recuperate and then he was returned to the United States. In 1944, he was convicted of a crime involving moral turpitude and was subsequently ordered deported for having committed such crime within five years of "entry" into the United States.


96. 333 U.S. at 10.
97. See supra note 88 and accompanying text.
98. *Hearings Before the President's Commission of Immigration and Naturalization Before the House Comm. on the Judiciary, 82d Cong., 2d Sess. 1575 (1952)* (statement of Professors Henry Hart and Louis J. Jaffee); see also *REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME* 146-52 (1953).


tions for which he was already incarcerated.101

Narrow construction of immigration statutes is not only consistent with permitting the judiciary to accord the highest regard for Congress's broad powers in the immigration field, but also permits the court to check arbitrary administrative action and protect the rights of American citizens involved.

SECTION 4

A Legislative Solution

Over the years, a number of legislative proposals have been introduced in the Congress to provide for either administrative or judicial review of visa denials. None of these proposals has been enacted into law.

Typical of the judicial review proposals was that of Congressman Barney Frank (D. Mass.).102 As originally introduced, the bill authorized judicial review on behalf of any person lawfully in the United States if he or she was prevented from meeting with or communicating with any alien because that alien was excluded from the United States on security grounds. The provision, like most other parts of the bill, focused on ideological exclusions and authorized an action to be brought in the federal district court in which the individual resides or in which he intended to meet with or communicate with the alien.103

The second type of proposal is typified by H.R. 2567,104 intro-

101. United States v. Ramirez-Aguilar, 455 F.2d 486 (9th Cir. 1972). Likewise, challenges for denial of bail, Carlson v. Landon, 342 U.S. 524 (1952), and cruel and unusual punishment, Fong Yue Ting v. United States, 149 U.S. 698 (1893), have been unavailing for the same reason.

102. This measure, H.R. 1119, was introduced in February 1987 into the House of Representatives. The original proposal provided for amending the grounds of exclusion and deportation in the Immigration and Nationality Act, for removing the grounds of ideologically-based exclusions and visa denials, as well as for the judicial review of visa denials. However, a later version of the bill which was approved by the Immigration Subcommittee on April 11, 1988 failed to include the judicial review provision, which was considered too controversial for inclusion. See 65 INTERPRETER RELEASES 406 (1988).


duced by Congressman Henry B. Gonzalez (D. Tex.), providing for the establishment of a Visa Review Board. The proposed Visa Review Board was to be a part of the Department of State. The board would have no effect upon the granting of a visa or admission of an alien to the United States pending review by the Visa Review Board, nor did it claim to affect the substantive law on the subject. Indeed, it limited its jurisdiction to the specified types of visas, and did not provide a forum for review of all visa denials.\textsuperscript{106}

The first issue for proposed legislation is whether it should permit administrative or judicial review of visa denials. The proposals to establish, within the Department of State, a Visa Review Board are likely to incur less opposition on the part of the State Department than a proposal for judicial review. In addition to providing for uniformity of decisionmaking, the State Department would probably find that its Advisory Opinions branch has already a good deal of material which may be used as guidance in decisionmaking with respect to the interpretation of various statutory grounds of exclusion.

A further question to be considered is whether review should be authorized for all visa denials. In fiscal year 1986,\textsuperscript{106} for example, out of 1,127,689 nonimmigrant (for instance, visitors, students, and temporary work visas) ineligibility findings, 797,962 were based upon section 214(b) of the INA, which states that "every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer . . . that he is entitled to a nonimmigrant status."\textsuperscript{107} During the same period, 119,017 of 155,208 immigrant ineligibility findings and an additional 274,947 nonimmigrant ineligibility findings were based upon INA section 221(g). That section of law states that "no visa . . . shall be issued to an alien if . . . it appears to the consular officer . . . that such alien is ineligible to receive a visa."\textsuperscript{108} These two provisions of law, equally amorphous and containing no standards for decisionmaking, apparently account for an overwhelming majority of visa denials. Thus, while it would limit the number of appeals to eliminate those holdings under sections 214(b) and 221(g), such a provision would have little effect upon consular absolutism in visa denial cases.

While providing judicial review to all visa denials could strain the already overloaded federal court system, providing administrative review to all visa denials including those of tourist visa applicants, could have a similar effect upon an administrative review board. Permitting administrative review only of immigrant visa denials would

\textsuperscript{105. See H.R. 2567, 100th Cong., 1st Sess. (1987).}
\textsuperscript{106. See United States Dep't of State, Bureau of Consular Affairs, 1986 Report of the Visa Office Table XX.}
\textsuperscript{107. 8 U.S.C. § 1184(b) (1982).}
\textsuperscript{108. 8 U.S.C. § 1201(g) (1982).}
provide no redress to numerous nonimmigrants who have important reasons to seek entry into the United States. Limiting review to certain exclusionary grounds\(^{109}\) would likewise deny any remedy to persons with substantial interests in their admission who are denied entry upon other grounds of exclusion, thus failing to curtail consular absolutism.

In actual practice, the determination of which visa denials should be subject to review is not simple, but there are guideposts to be observed. While it is possible to debate the inclusion or exclusion of various categories of visa applicants in any proposed legislation, the Gonzalez bill provided a balanced approach, permitting review in the designated areas in which there was a substantial interest in the alien's eligibility for admission to the United States. That bill included special immigrants and immediate relative immigrants, due to the interest of American citizen spouses, parents, or adult children, and preference immigrants, due to the interest of either a sponsoring American employer or that of a citizen or resident spouse, child, or parent. It also included returning nonimmigrant students, exchange visitors, or vocational students and their immediate families, with an obvious interest in avoiding the interruption of training and education. It included nonimmigrant temporary workers and intracompany transferees in INA H and L categories\(^{110}\) because of the potential hardship to United States businesses, and nonimmigrant fiancées of United States citizens. In each of the chosen categories, there is a clear interest of an American business, citizen, or lawful resident, or to any alien who has commenced training or schooling in the United States.

The experience of the government during World War II may be relevant. In endorsing the concept of administrative review of visa denials, President Truman's Commission on Immigration and Naturalization\(^{111}\) pointed to the experience of a two-person board of appeals on visa cases which successfully processed over 22,600 visa appeals during its three and one-half year wartime existence and overturned lower level decisions that had rejected visa applications in more than twenty-six percent of the cases. While there is no way of estimating how many appeals will be filed under the appeal proce-

\(^{109}\) There are 33 grounds of exclusion from the United States. See INA § 212(a), 8 U.S.C. § 1182(a) (1982).


\(^{111}\) See President's Commission on Immigration and Naturalization, Whom Shall We Welcome 148, 149 (1953).
dure, what will clearly result is the removal of the aura of consular absolutism which, it is suggested, will contribute to a better public image for the United States abroad.

The time for a meaningful review procedure for visa denials has arrived. It behooves us, as a nation guided under the rule of law, to remove this anachronism from our immigration system.

CONCLUSION

The INA precludes administrative review by the Secretary of State. Proceeding on the premise that the INA’s legislative history does not expressly preclude judicial review of consular visa denials, what functional objections exist to such review? Does the consul’s role in foreign affairs insulate him from judicial review? The Supreme Court has held that it is a mistake “to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”112 The INA describes the classes of aliens who may be lawfully barred from entry, and the propriety of that policy determination by Congress is beyond judicial scrutiny. But judicial review of the application of that law to the facts of the case does not involve foreign policy determinations any more than does the consul’s initial decision. Moreover, litigation over the propriety of a consular officer’s decision will not encumber the operation of the visa application process except to ensure that future decisions are in accord with the law. Administrative or judicial review would promote uniformity in an area where uneven ad hoc decisionmaking goes unchecked. Although courts realize there are limits to their ability to effect coordination in administrative agencies, review is particularly important here, precisely because the consular visa process provides no other remedy to guarantee uniformity.

Consular visa decisions rarely present complex questions of international or domestic importance. They normally comprise no more than the application of a detailed statutory standard to a set of facts. Visa denials must be based on one or more of the grounds of exclusion provided in the INA, and the reasons are to be explained to the unsuccessful visa applicant. Ample legislative guidance and the considerable body of case law developed in the deportation and exclusion contexts exist to enable members of a review board to perform their traditional function when reviewing consular decisions. The legislative policy behind the various grounds for exclusion would be better effectuated by the unifying results of administrative or judicial review rather than the absolute autonomy of each consular visa officer. If review is not available on a constitutional basis, the APA

offers a strong statutory basis for obtaining judicial review.

As Professor Louis Jaffe told the President's Commission on Immigration and Naturalization in 1952:

If there is such a thing as an axiom of law, it is that where there is power there must be safeguards against the abuse of power. . . . [I]t is indefensible to give to any man, acting in secret in a remote land, autocratic power to grant or withhold a privilege of such enormous value as that of entrance to this country.113
