tion and the revised report, that the government must be able to exclude terrorists and others representing a genuine threat to our national security or to our foreign policy interests. This resolution urges that U.S. law concerning visa denials conform to what is the current practice of the State Department. In doing so, it would remove an anachronistic statutory provision that was enacted during the hysteria of the McCarthy era in the McCarron Act.... This resolution is premised on a belief that a free exchange of information and ideas, subject to clearly defined exceptions to protect legitimate national interests, is crucial to a democratic society. Through open and robust debate in the market place of ideas, American citizens learn facts, take positions and make choices which affect their lives and shape the course of history."

Secretary Neukom then reported that the Board of Governors recommended that the proposal, as revised, be approved.

By voice vote and without debate, the recommendation was approved. As approved it reads:

> *Be It Resolved,* That the American Bar Association recommends that United States law concerning visa denials should conform to the following standard:
>
> An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current political beliefs or political associations or on the basis of the expected content of the person's statements in the United States.
>
> However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or activity in which the government believes they intend to engage, would harm the interests of the United States, including the foreign relations of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country, nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation, nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.
>
> Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28).

National Conference of Commissioners on Uniform State Laws.[9] The Conference's report, concerning the Uniform Securities Act, was withdrawn by the proponents.

Section of Family Law.[10] **Leonard L. Loeb** of Wisconsin, Section Delegate of the Family Law Section moved to defer action on the Section's report concerning a Model Adoption Act in order to allow further

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[9]The full report of the Conference can be found at page 191.
[10]The full report of the Section can be found at page 209.

REPORT NO. 2 OF THE

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION*

Be It Resolved, That the American Bar Association recommends that U.S. law concerning the free exchange of information and ideas across the American border be amended in accordance with the following standards:

1(a). An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current political beliefs or political associations. However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or other activity in which the government believes they intend to engage, would harm the interests of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President. Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28).

1(b). An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of the anticipated consequences of the intended exchange of ideas. However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or other activity in which the government believes they intend to engage, would harm the interests of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation or of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President. Adoption of this principle would require modification

*The recommendation was approved as amended. See page 13.

of current interpretations of existing statutes as well as repeal or modification of 8 U.S.C. Section 1181(a)(28).

2. The right of Americans to travel abroad to gather information or exchange ideas should not be restricted because of past or current political beliefs or associations or because of the expected consequences of any anticipated exchange of information not prohibited by U.S. law. However, this principle would not preclude passport restrictions, regardless of the stated purpose of the trip, if based upon (a) an anticipated exchange of information prohibited by law; (b) other activities not protected by the First Amendment to the Constitution; or (c) restrictions based on health and safety considerations. Adoption of this principle would require modifications in existing passport regulations but no changes in law.

REPORT

INTRODUCTION

Expanding contacts across borders and permitting a free exchange or interchange of information and ideas increase confidence; sealing off one's people from the rest of the world reduces it. [President Ronald Reagan, Jan. 17, 1984][1]

The participating states...make it their aim to facilitate free movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating states...

* * * *

The participating states...make it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage cooperation in the field of information and the exchange of information with other countries... [Helsinki Final Act of 1975][2]

A free exchange of information and ideas among American citizens is crucial to the health of our democratic society. Through open and robust debate in the "marketplace of ideas," American citizens inform themselves of policy choices which shape and affect their lives. The flow of information in and out of the United States is an important part of this exchange. Moreover, international obligations of the United States require the government to take steps to facilitate the flow of information. However, the free exchange of ideas across the American border is currently impeded by a number of

[1] *N.Y. Times*, Jan. 17, 1984, at A8.

[2] Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1975. In order to implement these commitments in the section on "Co-operation in Humanitarian and Other Fields," the Final Act contains a number of specific commitments to facilitate the movement of people and information. See "Inhibiting Public Debate: U.S. Violations of the Helsinki Accords," A Helsinki Watch Report, May 1984.

laws and regulations which permit governmental restriction or control of the flow of information into and out of the United States.

This Recommendation and Report urge the House of Delegates of the American Bar Association to affirm the right of free exchange of ideas and information across the American border.[3]

This Report describes those laws which exclude foreigners from the United States on the basis of their political beliefs, inhibit the ability of American citizens to travel abroad, and restrict the import and export of informational material. Judicial deference to Congress in matters of immigration policy, foreign affairs, and national security means that the courts are unlikely to strike down these provisions. Congress must act as a matter of policy to fulfill the purposes of the First Amendment and to act in good faith to meet our undertakings under international law. Adherence to the recommended principles would require changes in these laws so as to ensure the American public the "opportunity for free political discussion to the end that government may be responsive to the will of the people."[4]

ADMISSION OF ALIENS INTO THE UNITED STATES

> The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." [Supreme Court in *New York Times v. Sullivan*][5]

The Immigration and Nationality Act[6] provides clear authority to exclude aliens who are believed to be coming to the United States to "engage in activities which would be prohibited by the laws of the United States relating to espionnage, sabotage, [or] public disorder, or in other activity subversive to the national security."[7] It also permits the exclusion of those who would come to the United States to engage in "activities" such as violations of the Export Control Act or political kidnapping, hijacking and extortion.[8] The Act also provides that:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the Unit-

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[3]Adoption of the Recommendation would be consistent with and a logical extension of three previous policies adopted by the Association. In August of 1983, the House of Delegates adopted a resolution recommending to Congress that any legislation which would give the President powers to act in an immigration emergency should protect the right to travel. Further, on two occasions (August 1977 and February 1978), the House urged support for the implementation of the Helsinki Accords, which contain the provisions on freer exchanges of information and movement of persons quoted in the text above.

[4]*Stromberg v. California*, 283 U.S. 359, 369-70 (1931).

[5]*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), quoting Learned Hand in *United States v. Associated Press* 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).

[6]8 U.S.C. Sec. 1101 et seg. This statute governs the entry of both visitors and immigrants into the United States.

[7]8 U.S.C. Sec. 1182(a)(29).

[8]8 U.S.C. Sec. 1182(a)(27). See Department of State, Foreign Affairs Manual, Pt. II, Sec. 41.91(a)(27), reprinted in Gordon & Rosenfield, Immigration Law & Procedures 32-214, 215 (1983). See also, Memorandum from Mary C. Lawton, Counsel for Intelligence Policy Office of Intelligence Policy Review (Dept. of Justice) for William B. Wrk, Executive Secretary, Interdepartmental Committee on Internal Security (ICIS) (March 1, 1982).

ed States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.[9]

None of these provision would be disturbed by the proposed Recommendations 1(a) or 1(b).

What would be directly affected by the proposed principle 1(a) is the so-called "ideological exclusion" provision of the Act. Under the statute, an alien is ineligible to receive a visa to enter the United States whenever, among other grounds, a consular officer or the Attorney General has reason to believe that the alien is an anarchist, a member of a communist or totalitarian party, advocates the doctrines of world communism or the establishment of a totalitarian dictatorship, or belongs to or is affiliated with an organization that publishes or distributes materials espousing such doctrines.[10] The section does not require a finding that the alien's admission, presence in the U.S. or activities in the U.S. would cause injury. The simple fact that an alien holds or held any of the enumerated beliefs or belongs or belonged to a proscribed organization requires exclusion unless a waiver is granted. In vetoing the Act in 1952, President Harry Truman noted that "seldom has a bill exhibited the distrust evidenced here for citizens and aliens alike."[11]

These provisions apply to foreign nationals who seek permanent residency, as well as those who wish to enter the United States for short, temporary visits. According to the Immigration and Naturalization Service, 8,000 people from 98 countries are currently restricted from entering this country because of their political beliefs or associations. In 1983, approximately 700 persons were excluded under Sec. 212(a)(28).[12] Others simply refuse to apply or to provide information about their political activities.[13]

Not only do the ideological exclusion provisions of the current law contrast sharply with our national tradition of free speech, they also contravene at least the spirit of the Final Act of the Conference on Security and Cooperation in Europe, signed at Helsinki in 1975, in which the states pledged to facilitate the free movement and contacts among persons and organizations of the participating nations.[14]

The McCarran-Walter Act damages our intellectual life by denying information about controversial ideologies relevant to today's world, however hostile and antithetical to our dominant political beliefs. The American public is also denied access to non-political scholarly and cultural presentations when foreign

[9]8 U.S.C. Sec. 1182(f).

[10]These "ideological exclusions" provisions are contained in 8 U.S.C. Sec. 1182(a)(28).

[11]98 Cong. Rec. 8082, 8084 (1952).

[12]Letter from Davis R. Robinson, State Department Legal Adviser to Professor John Norton Moore, July 3, 1984. p.2 (Hereinafter State Dept. Letter).

[13]Under the provisions of this Act, the current Prime Minister of Canada, Pierre Elliot Trudeau, was even barred at one time from entering this country, after his attendance at an economics conference in Moscow prompted the Immigration and Naturalization Service to Classify him as a communist sympathizer. "U.S. Still Blacklists 3,000 Canadians for Politics," *N.Y. Times*, Feb 19, 1984, at 21.

[14]See note 2, supra.

artists and writers are denied permission to visit this country on ideological grounds. The many writers and artists who have been refused entry under the provisions of this Act include Nobel prize-winning authors Gabriel Garcia Marquez, and Csezlaw Milosz; Argentinean author Julio Cortezar; Italian playwright Dario Fo; Mexican author Carlos Fuentes; and French author Regis Debray.

In 1977, Congress passed the "McGovern Amendment" to the McCarran Act with the specific full purpose of achieving greater compliance with the Helsinki Act's basic principle of freedom of international travel.[15] The McGovern Amendment, however, has not achieved its full purpose. The McGovern Amendment addresses visa denials based on that section of the Act which denies visas to aliens who are affiliated with a communist or totalitarian party, or a related organization.[16] Under the Amendment, the Secretary of State must recommend a waiver to the Attorney General to permit such aliens to enter the United States unless the Secretary of State finds and so certifies to both Houses of Congress that the alien's admission "would be contrary to the security interests of the United States."[17]

However, the effect of the McGovern Amendment has not been as extensive as some thought it would be. Although it has removed some of the admission barriers, it applies on its face only to the exclusion provisions relating to membership and not to those related to beliefs. The Executive Branch has taken the position that the provisions of the Amendment apply only to those excluded because of membership and has declined to apply it to those excluded because of beliefs.

Principle 1(a) would require that Sec. 212(a)(28) not apply to visitors seeking entry into the United States for the purpose of meeting with Americans. The result would be that the government would be neither required nor permitted to exclude aliens seeking to visit the United States based simply on their current or past political associations or beliefs. (Since the principle applies only to visitors coming to the United States at the invitation of Americans it would not apply to applications for permanent resident status; they could still be denied on the basis of political beliefs or associations.)

In testimony before the House Judiciary Subcommittee on Immigration and in a letter by the legal Advisor of the State Department commenting on an earlier draft of this report the current administration has, while not endorsing repeal of Section 28, indicated that its primary concern would be satisfied if it maintained the right to exclude aliens if their visit to the United States would cause injury to the foreign policy or other interests of the United States.[18]

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[15]See 22 U.S.C. Sec. 2691(a).

[16]See 8 U.S.C. Sec. 1182(a)(28).

[17]22 U.S.C. Sec. 2691(a). The McGovern Amendment supplements a waiver procedure previously existing in the law. When the McCarran Act was initially enacted, Congress recognized that cases might arise where extenuating circumstances justified the temporary admission of otherwise inadmissible aliens under the statute. Thus, under the Act, a consular officer or the Secretary of State has discretionary authority to recommend that an alien's ineligibility to receive a visa be waived, and the Attorney General has the discretionary authority to grant the waiver. 8 U.S.C. Sec. 1182(d)(3).

[18]State Department Letter, p4.

Principle 1(b) would prohibit the denial of a visa to an alien invited to speak in the United States if the only injury to the United States would, in the government's view, derive *solely* from the fact that the person was giving a speech or from the content of the speech. A person who was coming to the United States to give a speech could be denied entry if the person's mere entry into the country would cause injury. For example, application of the principle would not have prevented the government from denying entry to the Shah of Iran, even if he were coming here to give a speech, if the government feared that the American embassy would be seized if he were admitted. The principle also does not prohibit the denial of entry to an entire class of people, e.g., all Iranians during the hostage crisis, and would have permitted denial of entry to specific Iranians even if they were coming to the United States solely to speak.

Principle 1(b) proceeds from the belief that it is important for American citizens to be able to invite foreigners to the United States to discuss matter of mutual interest. The government should have the right to deny entry for the reasons described above (or if the person is excludable for other nonideological reasons.) However, where the government does not believe that the alien is planning to engage in any activity other than pure speech, that speech alone should not be the basis of a denial. This is not because the making of a speech in the United States by a foreigner could not injure the national interest. It is rather because permitting the government to deny visas in such situations runs the risk that those making the decision would undervalue the importance of permitting the exchange of information while exaggerating the possible injury to national security.

Several recent visa denials illustrate the possible dangers of permitting the government to deny visas solely on the basis of the expected consequences of pure speech. Although the reasons for the denials in each case are not fully known and the issues involved are currently under litigation, the following episodes, in which visas were denied under Sec. 212(a)(27)[19], may be instances of situations in which visas were denied solely only the basis of the expected consequences of pure speech:

- In March of 1983, Mrs. Hortensia Allende, widow of Chilean President Salvadore Allende, was denied a visa to enter the United States. Mrs. Allende was invited to the San Francisco area by the Roman Catholic Archdiocese, Stanford University, and the Northern California Ecumenical Council. Her visa denial stated that Mrs. Allende is "an active member of the World Peace Council," an alleged Soviet-front organization, and as such, her planned address to California church groups on women's and human rights issues would be "prejudicial to the public interest."
- In October of 1983, visas were denied to two Cuban women, both members of the Federation of Cuban Women,

[19]8 U.S.C. Sec. 1182(a)(27). The applicability of this section to situations where the activity is speech, is currently under challenge in the courts. See, e.g., *Abourezk v. Reagan*, Civ. No. 83-3739 (D.D.C. 1983).

which the State Department describes as a "mass organization" whose function is to promote the objectives of the Cuban Communist party. The Cuban representative at the United Nations Commission on the Status of Women, Olga Finlay, an authority on the legal rights of women and children in Cuba, and Maria Rodri- guez Lezcano, Secretary of Foreign Relations for the Federation of Cuban Women, had been invited by church and university groups throughout the United States to discuss issues relating to women and the law. The Director of the office of Cuban Affairs at the State De- partment explained that their visit to the United States "would have been prejudicial to the public interest by providing these two officials with forums for propagating Cuban policies before U.S. audiences."[20]

- In October of 1983, the Administration denied a visa to Nino Pasti, a former North Atlantic Treaty Organization (NATO) General, former member of the Italian Senate, and public critic of the recent placement of Pershing II and cruise missiles by the United States in Europe, on the grounds that his speaking before groups concerned with U.S. nuclear weapons policies would be "prejudicial to the public interest." The State Department describes him as a member of the World Peace Council.[21]

Whether principle 1(b) would prohibit these visa denials would depend on the specific facts in each of these cases, and whether the anticipated harm arose from something more than simply the delivery of a speech.

The federal courts' deference to the will of Congress in this area mandates the need for congressional action. Indeed, a broad spectrum of groups, including the American Association of University Professors, the American Association for the Advancement of Science, the American Sociological Association, the American Library Association and the National Academy of Sciences, has already called for the repeal of ideological exclusion provisions of the McCarran Act.[22] Moreover, repeal of these provisions would be consistent with the purposes and intentions of the Helsinki Final Act and would make more effective and more credible American efforts to persuade Eastern Bloc countries to

[20]Letter, dated October 21, 1983, from Kenneth N. Skoug, Jr., Director, office of Cuban Affairs, to Thomas H. Holloway, Director, Cornell University, Latin American Studies Program.

[21]See Complaint for Injunctive and Declaratory Relief, *Cronin v. Shultz*, Civ. No. 83-3895 (D.D.C. 1983).

[22]See "Section 212(a)(28) of the Immigration and Nationality Act, The Case For Repeal," submitted to the Select Commission on Immigration and Refugee Policy by: The Fund for Free Expression, PEN American Center, The Lawyers Committee for Human Rights, The International Freedom to Publish Committee of the Association of American Publishers, The Helsinki Watch, The American Association of University Professors, The American Association for the Advancement of Science, The American Sociological Association, The American Library Association, and the National Academy of Sciences, September 1980.

permit a freer movement of people and ideas.

The Recommendation accompanying this Report would require eliminating the narrow ideological remnants of the McCarthy era, while permitting the exclusion of aliens whose activities endanger the welfare, safety, or security of the United States. This principle would safeguard the American public's right to receive ideas from abroad by eliminating barriers to unpopular foreign political beliefs and philosophies, and would support our declared intentions under the Helsinki Final Act. It would permit the continued exclusion of terrorists and others who seek entry to engage in illegal activity or other activity detrimental to U.S. security.

RESTRICTIONS ON THE RIGHT OF AMERICANS TO TRAVEL ABROAD

> Travel abroad, like travel within the country...may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic to our scheme of values. [Supreme Court in *Kent v. Dulles*][23]

Under the Passport Act of 1926, the Secretary of State has the power to grant, to deny, or to revoke passports.[24] However, in 1978 Congress amended the Act to provide specifically that "unless authorized by law, a passport may not be designated as restricted for travel to or for use in any other country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travelers."[25]

This legislation was enacted after passport restrictions on explicitly ideological grounds were limited by two leading Supreme Court decisions. In *Kent v. Dulles*, the Supreme Court concluded that the right to travel is a liberty protected by the Fifth Amendment, and that Congress had not intended the passport statutes to authorize the Executive to deny passports on the basis of citizens' beliefs or associations.[26] In *Aptheker v. Secretary of State*, the Court held unconstitutional a statute that expressly prohibited the issuance of passports to members of communist organizations.[27]

Earlier, the Executive Branch routinely denied passports to particular individuals on the basis of their political beliefs. Passports were denied to Congressman Leo Isaacson, playwright Arthur Miller, actor and singer Paul Robeson, and Nobel prize winner Linus Pauling, among others, because the State Department determined that travel abroad by these talented and outspoken individuals was "contrary to the best interests of the United States."[28] Although the most fre-

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[23]*Kent v. Dulles*, 357 U.S. 116, 126 (1958).
[24]22 U.S.C. Sec. 211a.
[25]Id. Pub. Law No. 95-426, Sec. 124, 92 State. 963, 971 (1978).
[26]357 U.S. 116, 130 (1958). According to the Court in *Kent v. Dulles*, since the Executive's authority to revoke passports affects an area protected by important constitutional rights, "all delegated powers that curtail or dilute" those rights must be narrowly construed. Id. at 129.
[27]378 U.S. 500, 514 (1964). As in *Kent v. Dulles*, supra, the Court in Aptheker v. Secretary of State declared that a governmental regulation affecting "basic freedoms" such as foreign travel must be narrowly drawn.
[28]See Note, "Passport Refusals for Political Reasons," 61Yale L. J. 171 (1952).

quent targets of travel control at that time were artists and scientists, lawyers involved in international litigation, congressional investigators, and even federal judges were denied passports on the basis of their political activities.

Principle 2 is thus reflected in the decisions of the Supreme Court and the Passport Act as amended. The Administration does not claim the right to deny passports to any individual because of beliefs or associations, or to restrict travel because of anticipated speech.

The sole area in which there remains some ambiguity as to the consistency of current law and regulations with principle 2, relates to a section of a 1966 State Department regulation which authorizes the Secretary of State to revoke a U.S. passport if the "national's activities abroad are causing or are likely to cause serious damage to the national security or foreign policy of the United States.."[29]

In upholding the validity of this section the Supreme Court may have left open the possibility of an interpretation of the regulation which would violate the principle.[30] The most expansive view of the meaning of the provision was given in an exchange between the Solicitor General, arguing the case for the government, and a Justice:

> Question: [Solicitor] General McCree, supposing a person right now were to apply for a passport to go to Salvador, and when asked the purpose of his journey, to say, to denounce the United States policy in Salvador in supporting the junta. And the Secretary of State says, I just will not issue a passport for that purpose. Do you think that he can consistently do that in the light of our previous cases?
>
> Mr. McCree: I would say, yes, he can. Because . . . [t]he President of the United States and the Secretary of State working under him are charged with conducting the foreign policy of the Nation, and the freedom of speech that we enjoy domestically may be different from that we can exercise in this context.[31]

Nothing in the *Agee* decision explicitly rejected that position although the court stated that passport restrictions may be used to restrict activities, not speech.[32] The government has not used the authority of the *Agee* decision to deny or revoke a passport in a manner which would violate the second principle in the proposed resolution. Adoption of the principle would require that the regulation be amended or interpreted to provide that the denial or revocation of a passport may not be based *solely* on the intention of a person to exchange information unless that exchange of information was restricted by law. A person who the State Department believed intended to engage in activities which threatened national security could be denied a passport even if he intended also to give speeches.

CONCLUSION

The United States government should not exclude foreigners from

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[29]22 C.F.R. Sec. 51.70(b)(4)

[30]*Haig v. Agee,* 453 U.S. 280 (1981).

[31]Id., Tr. of Oral Argument at 20.

[32]Id., at 662-663.

the U.S. on the basis of their political beliefs, or deny American citizens' right to travel abroad on ideological grounds. Removing these restrictions would strengthen our constitutional system by ensuring Americans access to foreign ideas and people, making possible a more fully informed and politically sophisticated citizenry.

Respectfully submitted,

ABNER J. MIKVA
Chairperson

February, 1986