

June 1985

## The Nylon Curtain: America's National Border and the Free Flow of Ideas

Burt Neuborne

Steven R. Shapiro

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

---

### Repository Citation

Burt Neuborne and Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 Wm. & Mary L. Rev. 719 (1985), <https://scholarship.law.wm.edu/wmlr/vol26/iss5/3>

# ARTICLES

## THE NYLON CURTAIN: AMERICA'S NATIONAL BORDER AND THE FREE FLOW OF IDEAS

BURT NEUBORNE\* and STEVEN R. SHAPIRO\*\*

When Winston Churchill coined his inspired bit of rhetoric some forty years ago, he shaped the perceptions of a generation. By characterizing the Soviet empire as encased in an iron curtain,<sup>1</sup> Churchill projected the essence of a closed, totalitarian regime bent on manipulating its citizens through controlled information flow; a regime that could never risk the free exchange of information, values, and ideals with competing social systems. More than any other phrase, "iron curtain" has symbolized for many of us in the postwar West the specter of whole nations turned into prisons, with national borders acting as walls to keep ideas out and citizens in.

Like most rhetoric, even Churchill's tended to be one-dimensional, blinding many in the West to the existence of indigenous popular support for socialist societies premised on values different from our own, and grossly oversimplifying the problem of our relationship with the Soviet world. Despite its tendency to oversimplify, however, Churchill's equation of national borders with prison walls has, far too often, been chillingly accurate. National borders are routinely used as iron curtains in ways that demean the human spirit,<sup>2</sup> whether applied literally to the Berlin Wall or to Soviet

---

\* Legal Director, American Civil Liberties Union; Professor of Law, New York University School of Law.

\*\* Staff Counsel, New York Civil Liberties Union; Adjunct Professor of Law, Brooklyn Law School.

The authors have served and are serving as counsel in a number of cases discussed in this Article. Accordingly, we make no claim to be dispassionate observers. We have attempted, though, to avoid arguing positions merely because they would be beneficial to our clients. The material in this article reflects our personal beliefs—partisan as they may be.

1. Sir Winston Churchill first used the phrase "iron curtain" in a speech at Westminster College in Fulton, Missouri on March 5, 1946.

2. See COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984, REPORT SUBMITTED TO

Jewry, or figuratively to foreign book censorship in Poland, travel bans in Hungary, or the jamming of foreign radio transmissions throughout the Soviet bloc.

To many of us growing up under Churchillian rhetoric, national borders as iron curtains were the principal points of differentiation between "us" and "them." For us, the national border was a significant concept tied to economic regulation, cultural pride, and personal security. We would have felt betrayed, however, if our border were transformed into a physical or ideological barrier. That is why it is so painful to acknowledge the gradual emergence of America's national border as a serious barrier to free trade in ideas.

The problem should not be overstated. We do not have a Berlin Wall. No captive peoples are imprisoned behind our borders. Most books and periodicals from abroad remain available. But a problem there is—and a serious one—for a formidable network of regulations and statutes exists that uses our national border to keep foreign ideas out and American citizens in. Books and periodicals from presidentially designated "enemy" nations may not be brought into the United States without a government license.<sup>3</sup> Returning travellers from politically suspect locations routinely are subjected to searches designed to prevent the importation of subversive literature into the United States.<sup>4</sup> Visitors from abroad with suspect political backgrounds may not enter the United States to give a speech without government permission.<sup>5</sup> Average Americans cannot travel abroad to visit, and learn about, nations on the President's enemies list.<sup>6</sup> Americans can be stripped of their passports as a punishment for speech deemed "likely" to do seri-

---

SENATE FOREIGN RELATIONS COMMITTEE AND HOUSE COMMITTEE ON FOREIGN AFFAIRS BY THE DEPARTMENT OF STATE, 98th Cong., 1st Sess. Senate Pt. 99-6 (1984).

3. See Trading With the Enemy Act, § 5(b), 50 U.S.C. app. § 5(b) (1982) and the regulations promulgated thereunder, 31 C.F.R. § 515 (1985) (Cuba); 31 C.F.R. § 500 (1985) (Vietnam, North Korea, and Cambodia); see also International Emergency Economic Powers Act, 50 U.S.C. § 1701-1706 (1982).

4. See 19 U.S.C. § 1305 (1982); see also 19 U.S.C. § 1496 (1982); 19 C.F.R. §§ 162.5-162.22 (1985).

5. See Immigration & Nationality Act of 1952, 8 U.S.C. §§ 1182(a)(27) & (a)(28) (1982); 9 DEPARTMENT OF STATE, FOREIGN AFFAIRS MANUAL (Visa TL-880, ¶ 1); 22 C.F.R. § 41.130(c) (1985); see also 22 U.S.C. § 2691 (1982) (the McGovern Amendment).

6. See Trading With the Enemy Act, § 5(b), 50 U.S.C. app. § 5(b) (1981); 31 C.F.R. § 515.560 (1985); see also International Emergency Economic Powers Act, 50 U.S.C. § 1701-1706 (1982).

ous damage to our foreign policy.<sup>7</sup> Books and films produced abroad may be branded as "foreign political propaganda" by the government, and sellers and exhibitors may be forced to report the identities of purchasers to the government.<sup>8</sup> American academics may be forbidden to teach foreign students, and to speak about or publish their scientific research because the government fears the "export" of their ideas.<sup>9</sup> American filmmakers are inhibited from exporting films depicting America in an unfavorable light if the government thinks the films may be "misleading" or "subject to misapprehension" by foreign audiences.<sup>10</sup>

A nation that prohibits the importation of foreign books from "enemy" nations; searches returning travelers for "subversive" literature; bans foreign speakers on the basis of their politics; restricts the ability of its citizens to travel to hostile nations; silences dissidents by threatening to deny them the ability to travel abroad; monitors the identities of persons reading or disseminating "foreign propaganda"; forbids its academics from freely speaking before and teaching to foreigners; inhibits its filmmakers from exporting unflattering material; and deters discussion of forbidden topics abroad by penalizing the speakers, has turned its border into an information barrier. That America's border has not become an iron curtain is a tribute to the strength of our commitment to intellectual openness and individual freedom. That America's border has been permitted to evolve into a discernible impediment to the free flow of ideas is both a warning about the vulnerability of that commitment and a call to action.

This Article describes the degree to which our border currently interdicts the flow of information; sketches the inadequate judicial response to the problem; and suggests an approach that respects institutional limitations on the judiciary while providing much

---

7. See Passport Act of 1926, 22 U.S.C. § 211a (1982); 22 C.F.R. § 51.70(b)(4) (1985).

8. See Foreign Agents Registration Acts (FARA), § 4(b), 22 U.S.C. § 611-618 (1982); 28 C.F.R. § 5 (1985).

9. See The Arms Export Control Act, 22 U.S.C. §§ 2751-2796 (1984) (and the regulations promulgated thereunder, 22 C.F.R. §§ 121-130 (1985)); The Export Administration Act, 50 U.S.C. app. §§ 2401-20 (1982), (and the regulations promulgated thereunder, 15 C.F.R. §§ 368-399 (1985)).

10. See 19 U.S.C. §§ 2051-2052 (1982); Exec. Order No. 11311, 3 C.F.R. § 593 (1966); 22 C.F.R. §§ 502.1-502.8 (1985).

needed protection for first amendment values.<sup>11</sup>

# I. GOOD FENCES MAKE GOOD NEIGHBORS: THE AMERICAN BORDER AS A RESTRICTION ON THE FREE FLOW OF INFORMATION

## A. *Limitations on the Ability to Hear Foreign Speakers with "Suspect" Political Views*

The McCarran-Walter Act<sup>12</sup> was enacted in 1952 over President Truman's veto, despite the President's warning that "seldom has a bill exhibited the distrust evidenced here of citizens and aliens alike." Two provisions of the Act are of particular concern to this Article.<sup>13</sup> Each has been cited by Democrats and Republicans in support of efforts to exclude foreign speakers from the United States.

Section 1182(a)(28) explicitly bans the entry of any alien affiliated at any time with the Communist Party of the United States, any other "totalitarian" party of the United States, the Communist Party of any foreign entity, or "who advocates, [writes or publishes] the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship."<sup>14</sup> If an alien's political beliefs fall within

11. This Article focuses on the courts. By so doing, we do not mean to overlook the vital role that Congress could and should play in this field. Indeed, the cleanest and most unified approach to the problems discussed in this Article would be for Congress to repeal the statutory provisions that arguably permit the Executive to restrict the information flow across the border.

12. 8 U.S.C. §§ 1101-1525 (1982).

13. The Act sets out thirty-three categories of excludable aliens, ranging from relatively uncontroversial prohibitions on carriers of communicable diseases, 8 U.S.C. § 1182(a)(6) (1982), to controversial bans on homosexuals, 8 U.S.C. § 1182(a)(4) (1982), and persons with suspect political backgrounds, 8 U.S.C. § 1182(a)(28) (1982).

14. 8 U.S.C. § 1182(a)(28) (1982). Section 1182(a)(28)(c) provides for the exclusion of:

Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided*, That nothing in this paragraph, or in any other provision of this chapter, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States

the prohibition on communism or totalitarianism set forth in section (a)(28), the Attorney General, acting on the recommendation of the Secretary of State, may, nevertheless, grant a discretionary waiver of excludability.<sup>15</sup> From 1952 to 1977, thousands of aliens each year were found politically excludable under section (a)(28) and referred to the Attorney General for possible waivers.<sup>16</sup> Although the vast majority of these aliens eventually obtained waivers from the Attorney General, the delay and humiliation involved in the waiver process discouraged some speakers from applying for American visas and frustrated others who did apply from following through with their proposed visits.<sup>17</sup> More seriously, numerous aliens whose political views were particularly disturbing to the government were denied waivers and barred from the country. The list of those excluded over the past thirty years reads like an intellectual and cultural honor roll, including Pablo Neruda, Carlos Fuentes, Gabriel Garcia Marquez, Regis Debray, Ernst Mandel, Dario Fo, and even Pierre Trudeau.<sup>18</sup>

Disturbed by the divergence between our professed commitment to the ideals of the Helsinki Accords and our practice of ideological exclusion, Congress enacted the McGovern Amendment in 1977, requiring the Secretary of State to recommend a waiver of excludability for any alien deemed politically excludable under section (a)(28) unless the Secretary certifies to the Speaker of the House that the alien's admission would threaten the country's security, as

---

by force, violence, or other unconstitutional means.

Other subsections of the provision provide, inter alia, for the exclusion of aliens who are anarchists, 8 U.S.C. § 1182(a)(28)(A) (1982), who advocate or teach "opposition to all organized government," 8 U.S.C. § (a)(28)(B) (1982); who write or publish material advocating communism or anarchism, 8 U.S.C. § 1182(a)(28)(G) (1982); or who belong to an organization that "writes, circulates, distributes, prints, publishes, or displays" such material, 8 U.S.C. § 1182(a)(28)(H) (1982). Another provision of the law stipulates that an otherwise ineligible alien may receive a visa if he or she has terminated any prohibited membership and actively opposed any prohibited doctrines for at least five years. 8 U.S.C. § 1182(a)(28)(I) (1982).

15. 8 U.S.C. § 1182(d)(3) (1982).

16. See *Exclusion and Deportation Amendments: Hearings on H.R. 4509 and H.R. 5527 Before the Subcommittee on Immigration, Refugees and International Law of the House Committee on the Judiciary*, 98th Cong., 2d Sess. 145 (1984) (testimony of Jeri Laber) (hereinafter *Exclusion Hearings*).

17. *Id.* at 145 (testimony of Joan Clark, Assistant Secretary of State for Consular Affairs).

18. For the circumstances surrounding the branding of Trudeau as excludable, see *U.S. Still Blacklists 3,000 Canadians for Politics*, N.Y. Times, Feb. 19, 1984, at 21.

opposed to foreign policy, interests.<sup>19</sup> The McGovern Amendment is, admittedly, an odd and ambiguous statute. It uses the word "should" rather than "shall" in discussing the State Department's obligations and it contains no direction at all to the Justice Department, which exercises final authority over the waiver process.<sup>20</sup> Nevertheless, experience and intuition both suggest that the Justice Department understandably is reluctant to overrule a waiver recommendation by the Secretary of State.<sup>21</sup>

The political force of the McGovern Amendment clearly has been recognized by the Reagan Administration, which has largely eschewed reliance on section (a)(28) to bar foreign speakers. In its stead, the Reagan Administration increasingly has relied on section (a)(27) of the McCarran Act, which authorizes the exclusion of aliens whose "activities" in the United States will be "prejudicial to the public interest."<sup>22</sup> Unlike section (a)(28), an exclusion under

---

19. The McGovern Amendment is codified at 22 U.S.C. § 2691 (1982) and provides:

For purposes of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe [signed at Helsinki on August 1, 1975] and for purposes of encouraging other signatory countries to comply with those provisions, the Secretary of State should, within 30 days of receiving an application for a nonimmigrant visa by any alien who is excludable from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such alien, unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives of the Senate. Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludable for reasons other than membership in or affiliation with a proscribed organization.

The government has suggested that the use of the phrase "should" in the McGovern Amendment renders it wholly precatory. No court has construed the phrase.

20. *Id.*

21. A letter dated October 18, 1983, from Alvin Paul Drischler, Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs, to Vice President Bush in his capacity as President to the Senate, recommended amendment of the McGovern Amendment to permit the Secretary of State to consider foreign policy factors under section (a)(28) because the Attorney General does not feel qualified to do so. A copy of the Drischler letter has been filed with the United States Court of Appeals for the District of Columbia Circuit as Exhibit B to the Brief of Appellants in *Abourezk v. Reagan*, 592 F. Supp. 880 (D.D.C. 1984) (appeal docketed, No. 84-5673, D.C. Cir. Oct. 16, 1984).

22. 8 U.S.C. § 1182(a)(27) (1982). Section 1182(a)(27) provides for the exclusion of, [a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to

section (a)(27) cannot be waived by the Attorney General and is, therefore, outside the reach of the McGovern Amendment's limitation on the refusal to grant waivers.<sup>23</sup>

The first indication of the administration's change of strategy occurred when Hortensia Allende, widow of the late President of Chile, was denied permission to travel from her home in Mexico City to San Francisco to deliver a speech on the role of women in Latin American society at the invitation of, among others, the Archdiocese of San Francisco and Stanford University.<sup>24</sup> Initially, the government invoked section (a)(28), claiming that Mrs. Allende's role as an official of the World Peace Council made her an officer of a communist front organization and, thus, ineligible for an entry visa. When it became clear that the McGovern Amendment would require the Secretary of State to recommend a waiver of excludability because Mrs. Allende could not conceivably be deemed a threat to national security, the government changed theories and denied her an entry visa under section (a)(27), claiming her presence in the United States to give a speech would be prejudicial to the public interest.<sup>25</sup>

In the years following the exclusion of Mrs. Allende, the government repeatedly has used section (a)(27) as the basis for excluding speakers with whom it disagrees. For example, in 1983, General Nino Pasti, who had served as a Vice Air Marshal of NATO and as

---

engage in activities which would be prejudicial the public interest, or endanger the welfare, safety, or security of the United States.

Prior to the enactment of the McGovern Amendment, section (a)(27) was invoked rarely to exclude aliens because of their ideas or political views. From 1963 to 1982, section (a)(27) was invoked a total of 519 times. The bulk of the exclusions appear to have had no connection with the ideological status of the proposed speaker. *See Exclusion Hearings, supra* note 16, at 90 (statement of Joan Clark, Assistant Secretary of State for Consular Affairs).

The government has conceded that section (a)(27) was invoked because of the ideological status of an alien speaker: in 1959, to deny admission to Otto Skorzeny; in 1958, 1961, and 1962 to deny admission to a Formosan dissident, Thomas Liao; in 1964 to deny admission to Mme. Ngo Dinh Nhu; and in 1975 to deny admission to several Rhodesian citizens. *See Brief for the Appellees at 54-55, Abourezk v. Reagan*, No. 84-5673 (D.C. Cir. Oct. 16, 1984); *see also* 1 Op. Off. Legal Counsel 64 (April 1977) (asserting power to exclude aliens under section (a)(27) for "foreign policy" reasons).

23. The waiver provisions of 8 U.S.C. § 1182(d)(3) explicitly exclude aliens who have been denied admission under section (a)(27), section (a)(29) (dealing with espionage or violent overthrow), or section (a)(33) (dealing with former Nazi officials guilty of persecution).

24. *See generally* Allende v. Shultz, No. 83-3984-C (D. Mass. April 2, 1985).

25. *Id.* at 2-3.



the ranking Italian Air Force officer in both NATO and the Pentagon, was invited to visit the United States to deliver a series of speeches highly critical of the deployment of American cruise missiles in Western Europe.<sup>26</sup> General Pasti accepted the invitation but was unable to secure permission to enter the United States to speak.<sup>27</sup> As with Mrs. Allende, the American government suggested that General Pasti's association with the World Peace Council disabled him from receiving a visa under section (a)(28), but failed to invoke section (a)(28) because it would, in all likelihood, have resulted in General Pasti's eventual admission under the McGovern Amendment. Instead, the government relied on section (a)(27) and barred General Pasti from entering the country.<sup>28</sup>

Similarly, in 1983, the New York City Commission on the Status of Women decided to hold hearings on the state of the family. The Commission invited two well-known Cuban specialists in juvenile and family law, Maria Lezcano and Olga Finlay, to testify in New York City about the status of the family in Cuba and Cuban responses to the problem of juvenile delinquency.<sup>29</sup> As with Mrs. Allende and General Pasti, the government invoked section (a)(27)

---

26. *Cronin v. Shultz*, *appeal docketed*, No. 84-5708 (D.C. Cir. Oct. 16, 1984).

27. *Id.* (declaration of Nino Pasti, filed in *Cronin*). General Pasti's declaration recites that he was a four star general in the Italian Air Force; that from 1963-1966 he was stationed at the Pentagon, and that in 1966 he became Vice-Supreme Commander of NATO for Nuclear Affairs. After his mandatory retirement from the military at age 65, General Pasti served from 1976-1983 as a member of the Italian Senate, elected as a Left Independent. He currently edits a monthly magazine, *Lotte per la Pace et il Disarme* (Struggle for Peace and Disarmament).

28. Prior to the refusal to permit him to speak in 1983, General Pasti routinely had received entry visas on at least five occasions. *Id.*

29. *See City of New York v. Shultz*, *appeal docketed*, No. 84-5681 (D.C. Cir. Sept. 28, 1984).

The New York City Commission on the Status of Women was established by New York City in 1975. Its function is to conduct research and investigation into the status of women for the purpose of recommending institutional change.

On September 7, 1983, the Commission invited Olga Finlay and Leonor Rodriguez Lezcano to discuss day care and other Cuban mechanisms supportive of women. *See id.* (affidavit of Marilyn Flood).

Ms. Finlay is a lawyer who has represented the Federation of Cuban Women before international organizations since 1980. In 1979, she was the Cuban delegate to UNICEF's International Year of the Child. In 1977, she was the Cuban representative to the United Nations Commission on the Status of Women. She lived in the United States for fifteen years as a child, before returning to Cuba in 1961. *Id.* (declaration of Olga Finlay). Ms. Lezcano is an expert on the status of black women in Cuba. *Id.* (declaration of Leonor Lezcano).

and denied visas to both speakers, announcing that it would be prejudicial to the public interest to permit the two Cuban women to enter the United States in order to speak.<sup>30</sup>

When a representative of Cornell University protested the government's refusal to permit Ms. Lezcano and Ms. Finlay to speak in connection with Cornell's Latin American Studies Program, the State Department candidly responded that the visas were denied because a speaking tour "would have been prejudicial to the public interest by providing these two officials with forums for propagating Cuban policies before United States audiences."<sup>31</sup> Indeed, shortly thereafter, Ms. Finlay was granted a visa to attend a meeting of the Pan American Health Organization in Washington, D.C., on condition that she not leave that city or speak to any American groups.<sup>32</sup>

Still another example of the use of the visa power as a device to license foreign speakers occurred in 1983 when a number of American lawyers and academics invited Tomas Borge, Nicaragua's Interior Minister, to visit the United States to discuss Nicaraguan policies.<sup>33</sup> Despite having told Mr. Borge several months earlier that he would be welcome in the United States, the State Department declined to grant his application for a visa.<sup>34</sup> No official reason was ever given for barring Mr. Borge from his speaking tour. In a re-

---

30. *Id.* (affidavit of then Assistant Secretary of State Lawrence Eagleburger); *id.* (affidavit of Louis Goelz).

31. *Id.* (letter of Kenneth W. Skoug, Jr. to Thomas H. Holloway attached to declaration of Thomas H. Holloway).

32. *Id.* (declaration of Olga Finlay). In addition to the shifting fortunes of Ms. Finlay's visa requests, the experience of Dario Fo, one of Italy's leading dramatists, further illustrates the arbitrary and capricious nature of the ideological exclusion process. Fo was twice denied an American visa for political reasons in the early 1980's. These visa denials were explained by a government official in the following terms. "Nobody in [the] State [Department] thinks Fo is going to throw bombs . . . [I]t's just that Dario Fo has never had a good word to say about the United States." Munk, *Cross Left*, *The Village Voice*, June 2, 1980, at 86.

Fo applied once again in September 1984, hoping to be present for the Broadway rehearsals and premiere of his play, "Inquiry into the Accidental Death of an Anarchist." This last application was granted with no explanation or attempt to distinguish his earlier unsuccessful requests. Gussow, *U.S. to Give Visa to Fo, Controversial Writer*, *N.Y. Times*, Oct. 31, 1984, at C19.

33. See *Abourezk v. Reagan*, 592 F. Supp. 880 (D.D.C. 1984) (appeal docketed, No. 84-5673, D.C. Cir. Sept. 28, 1984).

34. *Id.* (declaration of Thomas Borge).

vealing comment on the denial, however, Secretary of State Shultz observed that free speech "can get abused by people who do not wish us well."<sup>35</sup> Similarly, an unidentified White House source explained the denial by saying that "the government did not want to give Mr. Borge a propaganda platform in the United States."<sup>36</sup> In short, under a combination of sections (a)(27) and (a)(28), Americans hear only those foreign speakers whom the government chooses to permit them to hear.<sup>37</sup>

*B. Limitations on the Importation of Foreign Books and Periodicals from "Enemy" Countries*

In 1917, Congress enacted the Trading With the Enemy Act (TWEA) to permit the President to control wartime trade with Germany and the Austro-Hungarian Empire, and to facilitate the resumption of normal trading patterns after World War I.<sup>38</sup> In 1933, the Act was expanded to cover peacetime national emergencies.<sup>39</sup> In 1942, President Roosevelt reimposed restrictions on trading with our wartime enemies and delegated his powers under the TWEA to the Secretary of the Treasury.<sup>40</sup> In 1950, President Tru-

---

35. Washington Post, December 3, 1983, at A12.

36. N.Y. Times, November 30, 1983, at A11.

37. Additional examples of the government's use of the visa power as a censorship technique include the refusal to permit the recipients of the Robert F. Kennedy Foundation's first annual human rights award to enter the country to receive the award. The RFK Foundation had elected to give its first award to Salvadoran mothers whose children are missing and presumed executed by the current regime. Washington Post, Nov. 21, 1984, at D1. Shortly thereafter, Roberto D'Aubuisson, a Salvadoran politician publicly linked to death squads and a plot to assassinate the American Ambassador was granted a visa. N.Y. Times, Dec. 4, 1984, at A9, col. 1. Similarly, the government selectively granted visas to persons invited to a debate on El Salvador organized by the Center for Democratic Institutions and broadcast nationwide so as to exclude Ruben Zamora, chief political spokesman for the insurgents. N.Y. Times, November 20, 1984, at A22, cols. 1-2.

38. Act of Oct. 6, 1917, ch. 106, 40 Stat. 411 (1917). 50 U.S.C. app. 5(b) (1982). The purposes of the Trading With the Enemy Act were set forth in congressional colloquy which is reproduced in COMMITTEE PRINT OF THE HOUSE SUBCOMMITTEE OF INT'L TRADE AND COMMERCE OF THE COMMITTEE ON INT'L RELATIONS: TRADING WITH THE ENEMY: LEGISLATIVE AND EXECUTIVE DOCUMENTS CONCERNING REGULATION OF INTERNATIONAL TRANSACTIONS IN TIME OF DECLARED NATIONAL EMERGENCY, 47-48, 81, 158-60, 179, 94 Cong., 2d Sess. (1976).

39. Act of March 9, 1933, ch. 1, 48 Stat. 1 (1933).

40. Exec. Order No. 9193, 3 C.F.R. 1174, 1175 (1942). President Roosevelt exempted \$500 per month from the embargo for living and travelling expenses within any foreign country. General License No. 33, pursuant to Exec. Order No. 8389, 3 C.F.R. 645 (1940) (Sept. 10, 1940, amended, Oct. 23, 1941); see 28 FED. RES. BULL. 1088 (1942). The TWEA was not used

man declared a national emergency on the eve of the Korean War that empowered him under the TWEA to regulate trade with China and North Korea as designated "enemy" nations, and then delegated authority to administer the Act to the Director of the Office of Foreign Assets Control.<sup>41</sup>

President Truman's declaration of national emergency was never rescinded despite the end of the Korean War in 1953. As a result, the temporary trade restrictions authorized by the TWEA were transformed into a permanent fixture of postwar American life.<sup>42</sup> Congress finally responded in 1977 by restricting the president's peacetime power to impose unilateral trading restrictions pursuant to the TWEA.<sup>43</sup> At the same time, Congress grandfathered all exercises of regulatory authority in force as of July 1, 1977.<sup>44</sup> Because of the grandfather provision, draconian restrictions on trade with Cuba, North Korea, Vietnam, and Cambodia remain in effect, including bans on the purchase of books, films, and periodicals produced in these "enemy" countries.

Under regulations issued by the Office of Foreign Asset Control, covering North Korea, Vietnam, and Cambodia,<sup>45</sup> and parallel reg-

---

to control personal travel during World War II. 7 Fed. Reg. 1409 (1942); Exec. Order No. 9193 (July 6, 1942); *see also* Treas. Dept. Order No. 120, Dec. 19, 1950, as amended, 32 Fed. Reg. 3472.

41. Presidential Declaration, Dec. 16, 1950; *see also* Treas. Dept. Order 128 (Oct. 15, 1962) (Cuba).

42. Proclamation No. 3004, 67 Stat. C31, (Jan. 17, 1953); *see also* Exec. Order No. 10896, 3 C.F.R. 425 (1960); Exec. Order No. 11037, 3 C.F.R. 621 (1962); Exec. Order No. 11387, 33 Fed. Reg. 47 (1967). Presidential ability to assume extraordinary power based on a declaration of national emergency is now regulated under the National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255, 50 U.S.C. §§ 1601-1651 (1982).

43. 50 U.S.C. § 1601(a) (1982); *see also*, 50 U.S.C. §§ 1701-06 (1982). At the same time that Congress restricted the President's power under the TWEA, it authorized the president to impose trade restrictions under the International Emergency Economic Powers Act, 50 U.S.C. § 1701-1706 (1982), but made the exercise of those powers subject to a congressional veto. *See infra* note 72.

44. Pub. Law 95-223, 91 Stat. 1625 (1977). Pursuant to the grandfather clause, the President may continue exercising "authorities" in effect on July 1, 1977 on a year-to-year basis if he finds the restrictions to be in the national interest.

If a grandfathered "authority" lapses, it cannot be unilaterally reimposed by the President. 50 U.S.C. §§ 1701-1706 (1982). The scope of the grandfather clause was broadly construed in *Reagan v. Wald*, 104 S. Ct. 3026 (1984), to include the reimposition of restrictions not actually in effect on July 1, 1977, so long as some restrictions affecting the country in question were in place on that date.

45. 31 C.F.R. § 500.204 (1985).

ulations issued by the Office of Cuban Asset Control,<sup>46</sup> books and magazines from such "enemy" nations may not be brought into the United States in the absence of a special import license issued by the Treasury Department. To obtain a license, an applicant must persuade the Treasury Department that the books are gifts which will not economically benefit the "enemy" nations or, alternatively, that payment for the books has been made into a blocked account.<sup>47</sup> Without a license, no American may buy books or periodicals from a nation on the President's "enemies list."<sup>48</sup>

This licensing authority has been used in the past, and may be used in the future, to block the importation of books and magazines from designated foreign nations. On several occasions during the 1960's, for example, customs officials seized packages containing English language books and newspapers produced in North Vietnam and China and refused to permit them into the United States until the addressees obtained import licenses from the Treasury Department.<sup>49</sup> Attempts to obtain licenses were met with intrusive questionnaires and processing delays of up to eight weeks. Efforts to obtain judicial relief from these restrictions were largely unsuccessful.<sup>50</sup> Thus, at the height of the national debate over the Vietnam War, access to books, newspapers, magazines and films produced in North Vietnam and China was virtually cut off. No mechanism existed to permit an American to subscribe to a North Vietnamese newspaper, to buy a Chinese book, or to import

---

46. 31 C.F.R. § 515.101-515.809 (1985).

47. 31 C.F.R. § 515.544 (1985) (Cuba); 31 C.F.R. § 500.204 (1985) (North Korea, Vietnam, Cambodia). By contrast, the recent trade embargo imposed against Nicaragua, *infra* note 202, includes a general license for the importation of books and magazines. Nicaraguan Trade Control Regulations, 50 Fed. Reg. 19890 (1985) (to be codified at 31 C.F.R. 540.100-809 (1985)).

48. Under existing regulations, otherwise forbidden books or magazines can be purchased by recognized educational or research institutions if the materials are approved by the Library of Congress or the National Science Foundation. In addition, "scholars" returning to the United States from approved trips abroad may bring back research material. 31 C.F.R. § 515.545(a)(1)(2) (1985). Newsgathering organizations also are permitted to purchase items for domestic news publication or broadcast. 31 C.F.R. § 515.546 (1985).

49. See, e.g., *Teague v. Regional Comm'r of Customs*, 404 F.2d 441 (2d Cir.), *cert. denied*, 394 U.S. 977 (1968) (Black, Douglas, and Harlan, JJ., dissenting from denial of certiorari); *Veterans & Reservists for Peace v. Regional Comm'r of Customs*, 459 F.2d 676 (3rd Cir.), *cert. denied*, 409 U.S. 933 (1972).

50. See *supra* note 49.

a film produced in either country. Even when material was forwarded from North Vietnam or China without charge, addressees were obliged to identify themselves to the government as wishing to receive the "enemy" material, to persuade the Treasury Department that no financial benefit was accruing to the "enemy" nation, and to undergo a long waiting period before delivery.<sup>51</sup>

Recently, Americans seeking to import periodicals from Cuba have encountered similar difficulties. In May 1981, the Reagan Administration directed customs officials and postal authorities to seize thousands of Cuban publications en route to American readers pending receipt of Treasury Department import licenses for each item.<sup>52</sup> Until then, trade regulations applicable to Cuba had not been enforced against Americans wishing to import Cuban books and magazines for personal use.<sup>53</sup>

Faced with a repeat of the Vietnamese and Chinese book-banning that had taken place in the late 1960's, over one hundred subscribers to Cuban books and periodicals sought judicial assistance.<sup>54</sup> One day before the government's answer was due, the Customs Service released single copies of books and magazines to addressees without a special license, thus mooting the case.<sup>55</sup>

---

51. *Teague*, 404 F.2d at 444 n.5; *Veterans and Reservists for Peace*, 450 F.2d at 682.

52. The Treasury notification sent to each addressee stated:

You are the addressee of a mail shipment containing publications from Cuba. This mail has been detained by the United States Customs Service because its unlicensed importation is prohibited by the Cuban Assets control regulations (31 C.F.R. Part 515).

This office may not release this merchandise to you unless you present to us, together with this notice, either in person or by mail

A Foreign Assets Control License.

Applications for these licenses may be obtained from:

Office of Foreign Assets Control

1331 G Street, N.W.

Washington, D.C. 20020

Tel: 202-376-0408

53. The government has maintained records on persons recovering books and magazines from Cuba since 1962. See Declaration of Dennis M. O'Connell, Director, Treasury Dept. of Foreign Asset Control, submitted in *The Nation v. Haig*, No. 81-2988-MA (D. Mass Feb. 12, 1980).

54. *The Nation v. Haig*, No. 81-2988-MA (D. Mass. Feb. 12, 1980).

55. The Treasury Department instructions concerning single copies are contained in Treasury Memorandum, FAC No. 95111, ¶ III, which states:

A. Single Copy Imports

U.S. Customs Service is authorized to release to the addressee, whether an

The fragile truce on book and newspaper imports established in 1982 appears to be holding. Single copies of books and magazines are currently permitted into this country from Cuba, Cambodia, North Korea, or Vietnam without a special license.<sup>56</sup> A member of the general public may not, however, receive more than one copy of a book or newspaper from an "enemy" country unless he or she persuades the Treasury Department that the books are a gift.<sup>57</sup>

In addition to the TWEA, government officials have invoked 19 U.S.C. section 1305<sup>58</sup> to search the personal effects of returning travellers for subversive literature or obscene material.<sup>59</sup> Unlike

---

individual, an institution or other organization, single copies of any Cuban, Vietnamese, North Korean or Cambodian publications. For purposes of this notice, the term "publications" include books, newspapers, magazines films, phonographs records, tapes, photographs, microfilm, microfiche, posters and similar materials.

56. See 31 C.F.R. § 515.545 (1985).

57. 31 C.F.R. § 515.544 (1985) (Cuba); 31 C.F.R. § 500.204 (1985) (North Korea, Vietnam, and Cambodia).

Ironically, the administration is pursuing an aggressive policy designed to pump American ideas into Cuba. See Exec. Order 12323, 46 Fed. Reg. 47207 (1981) (establishing Presidential Commission on Broadcasting to Cuba).

58. 19 U.S.C. § 1305 (1982) provides, in pertinent part:

All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material. . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles . . . shall be subject to seizure and forfeiture as hereinafter provided: *Provided* . . . That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court as hereinafter provided.

59. For examples of the harassment of journalists returning from trips to "enemy" countries and the seizure of their books and periodicals see *Haase v. Webster*, 608 F. Supp. 1227 (D.D.C. 1985) (dismissed as moot upon deposit of seized material with the court), and *Worthy v. Webster*, No. 82-0183 (D.D.C., stipulation entered Dec. 10, 1982) (settled for \$16,000, return of all seized material, and destruction of all records).

the TWEA, section 1305 attempts to distinguish between protected and unprotected material, and to exclude only material which falls outside the protection of the first amendment. In practice, the statute has served as an invitation to overzealous border officials anxious to seize books and newspapers that appear unfriendly to the United States.<sup>60</sup> When such improper action is challenged in court, the government has generally settled and returned the seized materials, occasionally paying damages.<sup>61</sup> But, thus far, no attempt has been made to issue regulations preventing the routine violation of first and fourth amendment rights by border officials bent on preventing subversive books from entering the country.<sup>62</sup>

### *C. Limitations on Travel to "Enemy" Countries*

Government restrictions on travel abroad have a long and unfortunate history in this country. At times, the government has attempted to block specific individuals from travelling abroad because of their political beliefs.<sup>63</sup> At other times, the government has barred all Americans from travelling to designated parts of the world for ideological reasons.<sup>64</sup>

---

60. See *supra* note 59.

61. See *Worthy v. Webster*, No. 82-0183 (D.D.C., stipulation entered Dec. 10, 1982).

62. Despite the emergence of clear Supreme Court precedent governing seizure of material putatively protected by the first amendment, neither regulations nor judicial decisions exert control over the discretion of customs agents. Compare *Marcus v. Search Warrant*, 367 U.S. 717 (1961) and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) with *Worthy v. Webster*, No. 82-0183 (D.D.C., stipulation entered Dec. 10, 1982).

In addition to section 1305 seizures, the National Security Agency routinely intercepts all overseas telephone calls and "its computers then store the mass of acquired communications to select those which may be of specific foreign intelligence interest." *Halkin v. Helms*, 598 F.2d 1, 4 (D.C. Cir. 1978).

63. See *supra* notes 16-18 and accompanying text. State-imposed restrictions on the ability of individuals to travel outside their native land have rightly been perceived and condemned as an indicia of totalitarianism in the modern world. See COMMISSION ON SECURITY AND COOPERATION IN EUROPE, IMPLEMENTATION OF THE FINAL ACT OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: FINDINGS AND RECOMMENDATIONS TWO YEARS AFTER HELSINKI, REPORT TRANSMITTED TO THE HOUSE COMM. ON INT'L RELATIONS, 95th Cong., 1st Sess. 91 (1977).

The Helsinki Accords, formally named The Final Act of the Conference on Security and Cooperation in Europe, were signed on August 1, 1975. 3 DEPT. STATE BULL. 323 (1975), reprinted in 14 INTERNATIONAL LEGAL MATERIALS 1292 (1975). The Helsinki Accords are not a treaty. They are declarations of intention to conform to commonly endorsed human rights practices.

64. For discussions of attempts to limit the ability of Americans to travel abroad, see, for



Before World War I, an informal system of area travel restrictions evolved under the Passport Act of 1856, which delegated power to grant passports to the Secretary of State.<sup>65</sup> Under the pressures of World War I, Congress enacted the first explicit travel control statute, which forbade travel without a valid passport.<sup>66</sup> With the lapse of the wartime legislation, travel restrictions were enforced through sporadic attempts to impose geographical limits on the use of American passports<sup>67</sup> and attempts to ban American communists from travelling abroad.<sup>68</sup>

Controversy over the degree to which passport area limitations could be used to enforce travel restrictions led in 1978 to the passage of legislation stripping the Executive of the power to impose area restrictions on travel except during war, armed hostilities, or imminent danger to the public health.<sup>69</sup> One year earlier, President Carter had removed all travel restrictions to Cuba in compliance with the Helsinki Accords.<sup>70</sup> Unfortunately, this brief period of unrestricted travel lasted only a short while.

In 1982, President Reagan promulgated new regulations under the TWEA, which treat travel-related personal expenditures for food and lodging as prohibited economic transactions requiring a Treasury Department license.<sup>71</sup> Thus, while the Executive is forbidden by law from unilaterally imposing direct area restrictions on travel to nations on the "enemies" list,<sup>72</sup> it has unilaterally for-

---

example, Velvel, *Geographical Restrictions on Travel: The Real World and the First Amendment*, 15 U. KAN. L. REV. 35 (1966); Note, *Area Restrictions and the Right to Travel Abroad*, 81 COLUM. L. REV. 902 (1981); Note, *Travel and the First Amendment: Zemel v. Rusk*, 13 U.C.L.A. L. REV. 740 (1966); see also ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *FREEDOM TO TRAVEL* (1958). For an early discussion of the problem, see Riesman, *Legislative Restrictions on Foreign Enlistment and Travel*, 40 COLUM. L. REV. 793 (1940).

65. 11 Stat. 60 (1856); see U.S. DEPT OF STATE, *THE AMERICAN PASSPORT*, 36-42 (1898).

66. Act of May 22, 1918, ch. 81, §§ 1-2, 40 Stat. 559 (1918).

67. See, e.g., DEPARTMENT OF STATE, *PASSPORT RESTRICTIONS ON TRAVEL TO CERTAIN AREAS* (April 25, 1966).

68. See *United States v. Laub*, 385 U.S. 475 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958).

69. Pub. L. No. 95-426, § 124, 92 Stat. 971 (1978) (codified at 22 U.S.C. § 211a (1982) (often cited as the Passport Act of 1978)).

70. President's News Conference of March 9, 1977, 13 WEEKLY COMP. PRES. DOC. 328-29 (March 14, 1977).

71. 31 C.F.R. § 515.560 (1985); see 47 Fed. Reg. 32060 (1982) (codified at 31 C.F.R. § 515.560(j) (1985)).

72. Under current law, area travel restrictions may be imposed only with the acquiescence

bidden travellers to buy food or pay for lodging while in the proscribed countries. The existing regulations permit recognized scholars and professionals to visit these countries,<sup>73</sup> and travellers may accept the hospitality of free overseas trips.<sup>74</sup> In general, however, Americans interested in learning more about Cuba, North Korea, Vietnam, or Cambodia, may not spend any money on their foreign travels without risking the prospect of ten years in jail.<sup>75</sup>

#### *D. Limitations on the Dissemination of Foreign Political Propaganda*

The TWEA imposes a flat ban on the unlicensed importation of books and newspapers from designated "enemy" countries. The Foreign Agents Registration Act<sup>76</sup> (FARA) imposes burdensome restrictions on the dissemination of many foreign books, films, and periodicals that escape the TWEA ban.

Enacted in 1938 by a Congress concerned over the spread of Nazi-sponsored propaganda in the United States,<sup>77</sup> FARA was amended in 1942 to require persons acting as agents of a foreign principal, whether government or private, to report each dissemination of political material in the interest of a foreign principal to the Internal Security Division of the Justice Department; to label the disseminated material as foreign political propaganda; and to file with the Department of Justice the names of persons and orga-

---

of Congress pursuant to the International Emergency Economic Powers Act, Pub. L. 95-223, 50 U.S.C. §§ 1701-1706 (1982) (often cited as IEEPA). President Carter invoked IEEPA to ban all travel to Iran during the Iranian hostage crisis. Exec. Order No. 12211, 45 Fed. Reg. 26685 (1980); 45 Fed. Reg. 29287 (adding 31 C.F.R. § 535.428 (1985)).

For a discussion of the legality of former Attorney General Ramsey Clark's unsponsored visit to Teheran in an attempt to negotiate a release of the hostages, see N.Y. Times, June 12, 1980, at 12. No action was taken against him.

No case has yet considered the impact of Immigration & Naturalization Serv. v. Chadha, 454 U.S. 1077 (1983), on IEEPA's grant of power to Congress to terminate an area travel ban by joint resolution of Congress.

73. 31 C.F.R. § 515.560 (1985).

74. 31 C.F.R. § 515.560(j) (1985).

75. Willful violation of any provision of the Trading With the Enemy Act is punishable by up to a \$50,000 fine, up to ten years of imprisonment, or both. 50 U.S.C. app. § 16 (1982).

76. 22 U.S.C. §§ 611-618 (1982).

77. Pub. L. 75-583, 52 Stat. 631 (1938); see S. Rep. No. 1783, 75th Cong., 2d Sess. (1938).

nizations to whom the material was disseminated.<sup>78</sup>

From 1938 to 1945, nineteen criminal prosecutions were brought for failure to comply with the dissemination controls imposed by FARA.<sup>79</sup> For example, an American employee of the Spanish Library of Information, a Spanish government-controlled organization, was convicted of writing articles on behalf of the Spanish government without filing them with the Department of Justice, labeling them as foreign political propaganda, and keeping records of persons to whom the articles were disseminated.<sup>80</sup> Similarly, nine Americans were convicted for disseminating political material on behalf of the German-American Vocational League, an alleged Nazi propaganda agency, without registering as foreign agents.<sup>81</sup> The Postmaster General secured a ruling from the Attorney General in 1940 permitting him to exclude from the mails material entering the United States from Germany which appeared designed to influence Americans on behalf of Germany unless the material was labeled and monitored in accordance with FARA.<sup>82</sup>

The most publicized recent invocation of FARA took place in 1982, when the Internal Security Division of the Department of Justice singled out three films produced under the auspices of the National Film Board of Canada, ordered that they be labeled as foreign political propaganda, and requested that records of theaters and organizations showing the films be turned over to the Justice Department.<sup>83</sup> The three documentaries targeted by the Jus-

---

78. 22 U.S.C. §§ 612(a) (1982) (registration statement); *id.* 614(a) (dissemination report); *id.* § 614(b) (labeling requirement). The text of FARA does not require disclosure of the identities of persons to whom dissemination is made. However, 28 C.F.R. § 5.401 (1985) requires that dissemination reports be filed on form OBD 69, requiring disclosure of any organization or theater exhibiting a film and any person to whom 100 copies of any book or pamphlet were disseminated. The disclosure forms are available for public inspection. 22 U.S.C. § 616 (1982). Failure to file the necessary forms is a criminal offense. 22 U.S.C. § 618 (1982).

79. For an excellent practical analysis of problems raised by FARA, see *THE REGISTRATION OF FOREIGN AGENTS IN THE UNITED STATES: A PRACTICAL AND LEGAL GUIDE* (D.C. Bar Ass'n. 1981).

80. *United States v. Kelly*, 51 F. Supp. 362 (D.D.C. 1943).

81. *United States v. German-American Vocational League*, 153 F.2d 860 (3rd Cir.), *cert. denied*, 328 U.S. 833, *app. diss.*, 156 F.2d 235 (3rd Cir.), *cert. denied*, 329 U.S. 760 (1946).

82. 39 Op. Att'y Gen. 535 (1940).

83. The government made this determination without a hearing or notice to interested parties. The incident is discussed in *Canadian Films and Foreign Agents Registration Act: Oversight Hearings Before the Subcom. on Civil and Constitutional Rights of the House*

tice Department dealt with acid rain and the threat of nuclear war.<sup>84</sup>

After the films' American distributors initiated legal action, a stipulation was entered releasing the American distributors from any duty to register as foreign agents or to label the films.<sup>85</sup> The Justice Department declined, however, to remove the films from the coverage of FARA, leaving the New York office of the Canadian Film Board with the apparent obligation to report their dissemination to the Justice Department.<sup>86</sup> Not surprisingly, once the government labeled the films as foreign political propaganda, the decision whether to exhibit them became politicized, often turning less on the merits of the films than on the propriety of exhibiting foreign political propaganda.<sup>87</sup>

Under the government's current reading of FARA, virtually any book published abroad is a potential candidate for dissemination control, so long as it has the capacity to rouse its American audience to "political" action.<sup>88</sup> If, for example, Orwell's 1984 were

---

*Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983).

A challenge to the use of FARA against the Canadian films is pending currently. *Block v. Smith*, *appeal docketed*, No. 84-5318 (D.C. Cir. April 2, 1984).

84. *Id.*

85. Declaration of Joseph E. Clarkson in *Block v. Smith*, *appeal docketed*, No. 84-8318 (D.C. Cir. April 2, 1984); see also Stipulation dated June 13, 1983 between plaintiffs and defendants in *Block v. Smith*, *appeal docketed*, No. 84-5318 (D.C. Cir. April 2, 1984) (on file in ACLU office).

86. Since 1947, the New York City Office of the National Film Board of Canada has voluntarily registered as an agent of a foreign principal and has submitted to the Justice Department annual lists of Canadian films distributed in the United States. See Declarations of William Litwack and Joseph E. Clarkson, submitted in *Block v. Smith*, *appeal docketed*, No. 84-5318 (D.C. Cir. April 2, 1984). Once before, in 1962, a question arose concerning the applicability of FARA dissemination controls to a Canadian Film Board production, but the issue quickly was mooted by the withdrawal of the film from the American market. See Memorandum of Law submitted on behalf of plaintiffs in *Block v. Smith*, *appeal docketed*, No. 84-5318 (D.C. Cir. April 2, 1984).

87. See, e.g., Declarations of Christian Ballantyne and Donna Barkman, submitted in *Block v. Smith*, *appeal docketed*, No. 84-5318 (D.C. Cir. April 2, 1984).

88. The definition of political propaganda subject to FARA dissemination controls is set forth at 22 U.S.C. 611(j) (1982), which provides:

The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adopted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of

published by a British publishing house and distributed in the United States, its dissemination in the United States by agents of the foreign publishing company might well be subject to labeling and monitoring under FARA.<sup>89</sup>

Each of the four sets of controls discussed above involves attempts to limit the flow of information from abroad across our national border. Censorship at the national border, however, blocks a two way street. Each of the controls discussed below uses our border to keep information within the United States.

### *E. Controlling the Flow of Information Out of the United States by Denying Passports*

For over a century, the executive branch has used its power to grant or deny passports to prevent certain Americans from traveling abroad to speak or engage in political associations when such speech or association was deemed detrimental by the Executive to the nation's foreign policy interests or to its national security.<sup>90</sup>

---

a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or to promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence. As used in this subsection the term 'disseminating' includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails.

89. It is possible to secure an exemption from FARA for "bona fide religious, scholastic, academic or scientific pursuits or of the fine arts." 22 U.S.C. § 613(e) (1982). Whether 1984 would qualify for a "fine arts" exemption is speculative. Exemptions from FARA are also available for persons engaged in private and nonpolitical activities in furtherance of bona fide trade and commerce of a foreign principal. 22 U.S.C. § 613(d) (1982). Dissemination of material falling under § 611(j) would, however, appear to block a § 613(d) exemption.

90. J. MOORE, A DIGEST OF INTERNATIONAL LAW 920 (1906); U.S. DEP'T OF STATE, THE AMERICAN PASSPORT 49-54 (1898); see also 13 Op. Att'y Gen. 89, 92; 23 Op. Att'y Gen. 509, 511; Exec. Order No. 654 (1907); Exec. Order No. 2119-A (1915); Exec. Order No. 2362-A (1916); Exec. Order No. 2519-A (1917); 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 268, at 498-99 (1942); 2 PAPERS RELATING TO FOREIGN RELATIONS OF UNITED STATES 1802 (1907).

This effort began with passage of the Passport Act of 1856, 11 Stat. 60 (1856) and then continued under the Passport Act of 1926, 22 U.S.C. § 2121a (1926), as modified by Congress in 1976 and 1978. See 1978 Foreign Relations Authorization Act, Pub. L. No. 95-426, § 124 (1978).

Perhaps the most notorious attempt to prevent Americans from going abroad to engage in speech was the denial, during the McCarthy era, of passports to American communists because of what they might say or do while abroad.<sup>91</sup> The Secretary of State even denied a passport in 1948 to Leo Isaacson, a member of Congress who wished to travel to Greece to speak in favor of the attempt to establish a leftist regime.<sup>92</sup> Other prominent Americans denied passports in order to block speech abroad have included Arthur Miller, Paul Robeson, and Linus Pauling.<sup>93</sup>

When, in 1978, Congress formally removed the Secretary's peacetime power to impose geographical area restrictions on American passports, the use of passport restrictions as travel constraints on American citizens seemingly had ended. In fact, area restrictions were quickly replaced by an even more effective travel deterrent—a prohibition on the spending of money for food or lodging in proscribed countries.<sup>94</sup> Moreover, in December 1979, the Secretary of State asserted the power to revoke or deny an American's passport for speech abroad "likely" to cause "serious damage" to the nation's foreign policy or to its national security.<sup>95</sup> The target of the Secretary's wrath was Phillip Agee, a former official of the CIA, who travelled abroad widely, exposing the activities of the CIA in various countries and publicizing the identity of covert CIA agents.<sup>96</sup>

While Agee's speech may arguably have fallen beyond the scope of the first amendment,<sup>97</sup> the power asserted by the Secretary extends to any speech "likely" to do "serious damage" to the nation's foreign policy. Presumably, therefore, Americans who travel abroad to oppose the nation's foreign policy by engaging in speech or association now risk revocation of their passports at the discre-

---

91. See *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); see Note, *Passport Refusals for Political Reasons*, 61 YALE L. J. 171 (1952).

92. N.Y. Times, April 11, 1948, at E9.

93. See Note, *supra* note 91, at 176.

94. See *supra* notes 69-75 and accompanying text.

95. See 22 C.F.R. §§ 51.70(b)(4), 51.71(a) (1984). The regulations were issued in 1966.

96. The facts surrounding the revocation of Agee's passport are taken from the Supreme Court's opinion in *Haig v. Agee*, 453 U.S. 280 (1981). See *infra* notes 215-23 and accompanying text.

97. Congress has since enacted a statute making it a crime to reveal the identity of a covert CIA agent. See Intelligence Identities Protection Act of 1982, 50 U.S.C. § 421 (1982).

tion of government officials whose policies they criticize.<sup>98</sup>

*F. Restricting the Flow of Information Out of the United States by Export Control Restrictions*

In an effort to prevent the export of American technology to unfriendly foreign nations, Congress has restricted trade in certain items without regard to whether the items involve classified information. Pursuant to the Export Administration Act of 1979,<sup>99</sup> the Arms Export Control Act of 1976<sup>100</sup> and the regulations promulgated under both statutes,<sup>101</sup> the Department of Commerce maintains a "Commodity Control Unit" and the Departments of State and Defense maintain a "Munitions List." These mechanisms form the basis of an export licensing system governing the export of certain unclassified "technical data." The definition of "technical data" in the regulations is virtually unlimited, covering

information of any kind that can be used or adapted for use, in the design, production, manufacture, utilization or reconstruction of articles or materials.<sup>102</sup>

Concerned over the alleged "hemorrhaging" of American technical know-how to foreign countries, the Reagan Administration has

---

98. The scope of the power asserted is demonstrated by an excerpt from the Solicitor General's argument in *Haig v. Agee*.

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.

Tr. of Oral Argument, *Haig v. Agee*, at 20.

99. 50 U.S.C. app. § 2401 (1982).

100. 22 U.S.C. § 2751 (1982). Although the Export Control Act formally expired on March 30, 1984, the President has used emergency powers under IEEPA to continue its restrictions in effect pending congressional enactment of renewal legislation. Exec. Order No. 12,740, 49 Fed. Reg. 13,099 (1984).

101. 15 C.F.R. §§ 368.1-399.2 (1985); 22 C.F.R. §§ 121.01-130.33 (1985).

102. 15 C.F.R. § 379.1(a) (1985); 22 C.F.R. § 125.01 (1985); see also 15 C.F.R. § 379.1(b) (1985) (covering oral exchanges of information in the United States).

used the export control machinery to restrict the flow of information out of the United States by treating the delivery of a scientific paper to an audience including foreigners as an "export" of technical data requiring an export license. For example, in 1982 the government forced the cancellation of at least 100 of the 700 papers scheduled for presentation at an international symposium of photo-optical engineers,<sup>103</sup> and forced the American Vacuum Society to rescind invitations to scientists from Poland, Hungary, and the Soviet Union.<sup>104</sup>

Having defined the delivery of a scientific paper before an international audience as a forbidden export of technical data,<sup>105</sup> the administration turned to academe. In 1981, the government defined the teaching of certain practical, though unclassified, information to students from China and Eastern Europe as an export of technical data requiring an export license. Letters were sent to university professors throughout the United States warning them to use caution in teaching foreign students about, among other things, advanced computer design or microelectronics because such teaching might require an export license.<sup>106</sup> Although many educational officials vigorously repudiated the government's attempt to block the teaching of unclassified data to lawfully admitted foreign students,<sup>107</sup> the impact of the government's threats on individual professors cannot be measured. The appearance of a course open

---

103. *SCIENCE*, September 24, 1982, at 1233.

104. See Holden, *Feds Defend Bubble Meddle*, *SCIENCE*, May 9, 1980, at 577. In April 1985, the government again forced cancellation of about a dozen unclassified papers scheduled for presentation at a conference sponsored by the Society of Photo-Optical Instrumentation Engineers. *N.Y. Times*, April 8, 1985 at A15. Conferees attending the presentation of certain other papers were required to certify that they would not export the information presented. *N.Y. Times*, April 9, 1985, at A21.

105. 15 C.F.R. § 379.1(b) (1985).

106. See NATIONAL ACADEMY OF SCIENCES: SCIENTIFIC COMMUNICATION AND NATIONAL SECURITY (1982) (popularly known as the CORSON REPORT after Dale Corson, former President of Cornell University); see also M. WALLERSTEIN & L. MCCRAY, UPDATE OF THE CORSON REPORT, Jan. 26, 1984, at 12, cited in Shattuck, *Federal Restrictions on the Free Flow of Academic Information and Ideas*, Harvard University, Office of Vice President for Government, Community and Public Affairs, January 1985; *SCIENTIFIC AMERICAN*, April 1982, at 70.

107. For a particularly eloquent and courageous response, see CORSON REPORT, *supra* note 106, at 172-81 (response of the University of Minnesota). Harvard and Stanford also took firm positions rejecting the initiative. See *HARVARD CRIMSON*, Dec. 2, 1981; CORSON REPORT, *supra* note 106, at 180-81. Several incidents are briefly described in Shattuck, *supra* note 106, at 20-23.



only to American citizens at a school like UCLA is hardly an encouraging sign.<sup>108</sup>

### *G. Inhibitions on the Export of American Films and Audio-Visual Materials*

In 1948, the United States formulated the so-called "Beirut Agreement."<sup>109</sup> The purpose of the Agreement is to facilitate the international circulation of films and audio-visual materials. To promote that goal, signatories agree to waive import duties, fees and taxes on any item certified as educational, scientific, or cultural by the exporting country.<sup>110</sup> The United States is a signatory to the Beirut Agreement and our obligations under the Agreement are carried out by the United States Information Agency (USIA).<sup>111</sup> The USIA, however, has refused to certify for duty-free treatment any American film that "attempts to influence opinion, conviction or policy . . . [or] to espouse a cause."<sup>112</sup>

Thirty American films were denied certification in 1979, 27 in 1980, 34 in 1981, and 31 in 1982 and the first three months of 1983.<sup>113</sup> Among the well-known films denied certification were *The Killing Ground*, an ABC documentary on toxic waste disposal that won two Emmys and First Prize at the Monte Carlo Film Festival; *Soldier Girls*, a documentary about a platoon of female army recruits undergoing basic training that won the Prix Italia and a British Academy Award; and Joseph Strick's Academy Award-win-

---

108. The course at UCLA open only to American citizens involves Metal Matrix Composites, which, although unclassified, deals with technical data deemed by the government to be subject to export control. See M. WALLERSTEIN & L. McCRAY, *supra* note 106, at 9.

109. Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, opened for signature, July 15, 1949, 17 U.S.T. 1578, T.I.A.S. No. 6116, 197 U.N.T.S.3 (1949). Entered into force with respect to the United States on January 12, 1967. See S. Rep. No. 626, 89th Cong. Ad. News, 3143. Pub. L. No. 89-634, 80 Stat. 879 (1967) (formal ratification).

110. *Id.*

111. 22 C.F.R. §§ 502.1-8 (1985).

112. 22 C.F.R. § 502.6(b)(3) (1985). USIA regulations require a film to be "educational," which is defined as material that "instruct[s], or inform[s] . . . maintain[s], increase[s] or diffuse[s] knowledge . . . augment[s] international understanding and good will . . . [and is] representative, authentic, and accurate." 22 C.F.R. § 502.6(a)(3) (1985).

113. Robinson, *Silenced Screens. The Role of the United States Information Agency in Denying Export Certificates to American Films*, 17 N.Y.U. J. OF INT'L L. AND POL. — (1985) (forthcoming).

ning *Interviews with My Lai Veterans*.<sup>114</sup> Because denial of certification subjects an American film to payment of foreign import duties of up to \$50,000,<sup>115</sup> the failure to certify often renders exportation economically impossible, thus blocking the exportation of scores of controversial films critical of the United States.

When Americans cannot buy books and magazines from countries on a Presidential enemies list; cannot import "subversive" books; cannot hear foreign speakers with suspect political backgrounds; cannot travel to foreign countries where the President does not wish them to go; cannot disseminate, read, or view many foreign books or films on political issues without being reported to the Internal Security Division of the Department of Justice; cannot vigorously denounce American policies abroad without risking passport revocation; cannot deliver scientific papers to international audiences or teach university courses in advanced physics or optics to foreign students without government permission; and cannot export controversial films without USIA certification, we have allowed our national border to take on the attributes of an information barrier. While the barrier may not be "iron," it is a barrier nevertheless. Even a nylon curtain is a serious threat to our role as a symbol of intellectual openness in a world where censorship and information control threaten to become the norm.

---

114. The reasons given for denial of certification convey the highly ideological nature of the reviewing process. Among the films denied certification through 1984 were:

1. *From the Ashes . . . Nicaragua Today*. Reason: Fails to mention Cuban and Soviet influence on Nicaraguan Military Buildup; Presented United States as aggressor in the U.S.-Nicaragua relationship.

2. *Whatever Happened to Childhood?* Reason: Although material is representative, authentic and accurate, it distorts the real picture of . . . youth in the U.S. because only small percentage are troubled.

3. *Resurgence: The Movement for Equality vs. the Klu Klux Klan*. Reason: Klan influence in U.S. overstated; film could too easily be construed as typical of U.S. as a whole, suggests that U.S. government fosters Klan.

4. *Soldier Girls*. Reason: Sequences may lend themselves to being misunderstood and misinterpreted by foreign audiences.

5. *The Killing Ground*. Reason: Might mislead foreign audiences to believe Americans need arousing to dangers of hazardous wastes, which is no longer true.

6. *Campaign '80*. Reason: Could lead to misunderstanding of U.S. and political institutions by foreign audiences.

115. Rosenberg, *For Our Eyes Only*, AMERICA FILM, July-Aug. 1983, at 40-41. Robinson, *supra* note 113, at 182-87.

## II. THE CURRENT STATE OF JUDICIAL PROTECTION OF THE FLOW OF IDEAS ACROSS OUR NATIONAL BORDER

Perhaps the most significant and least controversial role of judicial review in a democratic system is the protection of the flow of information and ideas necessary for functioning self-government.<sup>116</sup> Democratic principles are reinforced, not diminished, by judicial review that prevents a transient majority from tampering with the flow of information necessary to assure its continued political accountability.<sup>117</sup> Not surprisingly, therefore, we have grown accustomed, especially during the past sixty-five years,<sup>118</sup> to a vigorous, dual judicial role in the preservation of free expression.

On one level, American judges have created procedural guidelines to minimize the potential for majoritarian overreaching. Whether the procedural guidelines have been couched as prohibitions on vague<sup>119</sup> or overbroad<sup>120</sup> statutes, bans on standardless permit systems,<sup>121</sup> doctrines of clear statement,<sup>122</sup> or restrictions on

116. See generally J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); see also *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (Stone, C.J.).

117. The role of the judiciary in protecting speech necessary for democratic decisionmaking is often associated with the writings of Alexander Meiklejohn. See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

118. Modern conceptions of the role of the judiciary in enforcing the first amendment date from classic Holmes-Brandeis opinions in *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); *Pierce v. United States*, 252 U.S. 239 (1920) (Brandeis, J., joined by Holmes, J., dissenting); *Schaeffer v. United States*, 251 U.S. 466 (1920) (Brandeis, J., joined by Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting); *Debs v. United States*, 249 U.S. 211 (1919); *Schenck v. United States*, 249 U.S. 204 (1919); see also *Masses Publishing Co. v. Patten*, 244 Fed. 535 (S.D.N.Y. 1917) (L. Hand, J.), *rev'd* 246 F.2d (2d Cir. 1917). The first modern case to overturn a conviction on what would today be considered first amendment grounds was *Fiske v. Kansas*, 274 U.S. 380 (1927). *Gitlow* was repudiated in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). See generally Strong, *Fifty Years of Clear and Present Danger: From Schenck to Brandenburg—And Beyond*, 1969 SUP. CT. REV. 41.

119. *E.g.*, *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 109 n.5 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Herndon v. Lowry*, 301 U.S. 242, 261 (1937); see also *Stromberg v. California*, 283 U.S. 359, 369 (1931).

120. *E.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Thornhill v. Alabama*, 310 U.S. 88 (1940); cf. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

121. *E.g.*, *Haynes v. Oradel*, 425 U.S. 610 (1976); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444

delegation,<sup>123</sup> the common theme has been an insistence upon rigorous adherence to prophylactic procedural norms, often rooted in respect for separation of powers, designed to insulate free expression from majoritarian erosion.

On a substantive level, American judges, confronted with a challenge to a restriction on free expression, have asked two questions: one, does the restriction suppress a particular point of view;<sup>124</sup> and, two, even if no selective suppression is involved, is the restriction genuinely necessary to achieve an important social goal?<sup>125</sup>

Federal courts on occasion, have been protective of first amendment values in cases affecting the free flow of information across our national border.<sup>126</sup> More typically, however, national border cases have been regarded as *sui generis* by the federal courts and, consequently, the doctrinal protections of the first amendment

---

(1938); *see also* *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Thomas v. Collins*, 323 U.S. 516 (1945); *Largent v. Texas*, 318 U.S. 418 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

122. *E.g.*, *Greene v. McElroy*, 360 U.S. 474, 507 (1959); *Kent v. Dulles*, 357 U.S. 116 (1958); *see also* *Schneider v. Smith*, 390 U.S. 17, 25 (1968); *United States v. Laub*, 385 U.S. 475 (1967); *Viereck v. United States*, 318 U.S. 236 (1943).

123. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116-17 (1976); *see also* *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

124. *E.g.*, *Police Dep't of Chicago v. City of Mosley*, 408 U.S. 92 (1972); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

125. *E.g.*, *Cohen v. California*, 403 U.S. 15 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Hague v. C.I.O.*, 307 U.S. 496 (1939).

126. Procedural guidelines were enforced in *Viereck v. United States*, 318 U.S. 236 (1943) when the Supreme Court applied the doctrine of clear statement in narrowly construing the Foreign Agents Registration Act to exclude publications disseminated by a foreign agent on his own behalf. Similarly, in *Kent v. Dulles*, 357 U.S. 116 (1958), the Court explicitly invoked the doctrine of clear statement and the delegation doctrine to strike down regulations denying passports to American communists. Finally, in *United States v. Laub*, 385 U.S. 475 (1967), the Court, once again, used the clear statement rule to block criminal prosecution of Americans for travelling to Cuba in violation of geographical area bans inserted into their passports.

Classic substantive first amendment doctrine was applied in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), when the Supreme Court struck down a statutory prohibition on granting passports to American communists and in *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965), when the Court invalidated postal regulations requiring addresses of "communist political propaganda" to specifically request its delivery. *See also* *Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding a travel ban to a Cuban at the height of the Cuban missile crisis based on classic first amendment standards).

have not been applied.<sup>127</sup> The net result of the Court's ambivalence about classic first amendment review in national border cases has been the gradual emergence of a degree of censorship at the border that would not be tolerated in any other sphere of our national life.

The Court's ambivalence about exercising classic first amendment review in national border settings appears to rest on the confluence of three factors. First, many, if not all, of the procedural techniques used to insulate the first amendment from majoritarian erosion are drawn from classic separation of powers theory.<sup>128</sup> The void for vagueness doctrine, the doctrine of clear statement, the ban on standardless permits, and the general restriction on legislative delegation all seek to enforce the proper allocation of authority between the legislative and executive branches. When a case arises in the context of the national border, however, it often involves areas, such as foreign policy or military deployment, where classic separation of powers theory is at least arguably inapplicable. Unlike most lawmaking settings, where the legislature's primacy is conceded and the Executive's role is perceived generally as derivative,<sup>129</sup> national border cases often involve areas where the Executive plausibly asserts power to act as the primary enunciator of policy, or, at the very least, as an equal partner with the Congress.<sup>130</sup>

---

127. For example, in *Haig v. Agee*, 453 U.S. 280 (1981), the Court refused to apply vagueness, overbreadth, delegation or clear statement rules in upholding regulations granting power to the Secretary of State to revoke a passport because of speech likely to do serious damage to American foreign policy. In *Regan v. Wald*, 104 S. Ct. 3026 (1984), the Court refused to apply well established canons of statutory construction in upholding the power of the Secretary of the Treasury to ban personal expenditures for food or lodging while traveling in Cuba. In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the Court brushed aside substantive first amendment challenges to the refusal to permit a Marxist economist to enter the country to make a speech.

128. For a general discussion of separation of powers theory, see W. GWYNN, *THE MEANING OF THE SEPARATION OF POWERS* (1965); M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967). See generally Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Law*, 1981 DUKE L. J. 1; Quint, *The Separation of Powers Under Carter*, 62 TEX. L. J. 785 (1984); Sharp, *The Classical American Doctrine of Separation of Powers*, 2 U. CHI. L. REV. 385 (1934-1935).

129. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

130. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *C & S Airlines v. Waterman S.S. Co.*, 333 U.S. 103 (1948); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Curtiss-Wright Export Co.*, 229 U.S. 304 (1936); *Charlton v. Kelly*, 229 U.S. 447 (1913); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1308-12 (2d Cir. 1973), *cert. denied*, 416 U.S. 936

Because the precise allocation of power between the legislative branch and the executive branch is uncharted in many national border cases, courts understandably are reluctant to enforce procedural norms designed to assure the strict functional separation of legislative and executive power. This Article argues, however, that while reluctance to enforce strict separation of powers norms may make good sense in national border cases not implicating substantive constitutional values, when substantial first amendment concerns are added to the equation, the balance tips decidedly toward judicial enforcement of separation of power norms, to prevent the concentration of censorial power in the hands of a single branch.<sup>131</sup>

Second, traditional substantive first amendment review often requires a court to measure the gravity of the asserted governmental interest in suppressing the speech in question.<sup>132</sup> In national border cases, however, the nature of the asserted governmental interest often involves assessments of fact and policy beyond the institutional competence of the judiciary, making judges extremely wary of estimating the importance of an asserted government justification. For example, in upholding regulations that prevent Americans from travelling to Cuba,<sup>133</sup> or from listening to foreign speakers,<sup>134</sup> the Supreme Court refused to measure the gravity of the asserted governmental justifications and, thus, felt bound to defer to any justification that was not facially invalid. This Article argues that such a reluctance, while understandable, should not preclude review of censorship programs that are obviously not con-

---

(1974); *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

131. See *infra* notes 245-64 and accompanying text. The dual role of separation of powers as a functional device for allocating power to the appropriate branch and as a prophylactic device designed to prevent undue concentrations of power in a single branch is discussed in Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363 (1982). See generally M. VILE, *supra* note 128, at 1-118 (prophylactic role); W. GWYNN, *supra* note 128, at 31-35, 119-24; M. VILE, *supra* note 128, at 53-75 (functional role). Using the shorthand labels, functional separation of powers is not present in many national border cases; but when national border cases implicate substantive constitutional values like free speech, a degree of prophylactic separation of powers is particularly important.

132. In *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965), for example, the Court ridiculed the asserted governmental interest.

133. *Regan v. Wald*, 104 S. Ct. 3026 (1984).

134. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

tent-neutral, and should not preclude review of purported justifications that verge on the pretextual.<sup>135</sup>

Finally, traditional first amendment review often requires a court to balance the risks of censorship against the risk of free flow of the information.<sup>136</sup> The articulation of the clear and present danger test is simply one example of judicial reluctance to speculate about the effects of speech that form the basis for government censorship. In many national border contexts, however, the asserted justifications for censorship involve damage to foreign policy and national security interests. Confronted with such grave potential consequences, courts have been reluctant to require proof of a close nexus between the speech and the asserted evil. Instead, courts have permitted censorship so long as the evil *might* flow from the speech.<sup>137</sup> Given the danger to a free society created by widespread censorship at the national border, reviewing courts should insist upon proof, not merely that speech *might* damage our foreign policy or even our national security, but that it is reasonably likely to do so. Moreover, at a minimum, the gravity of the evil that can justify national border censorship must be greater than mere damage to an administration's amorphous "foreign policy" interests; rather, a genuine threat to national security must arise before the national border can be used to impede the free flow of ideas.<sup>138</sup>

---

135. See *infra* text accompanying notes 231-44.

136. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). In *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), for example, the Court insisted upon making an independent determination of the danger created by providing passports of American communists.

137. See *supra* note 133 and accompanying text. In *Regan v. Wald*, the Court did not require any substantiation for the government's assertion that American travel dollars (at most, 8 million dollars per year) would materially aid the Cuban economy, despite the fact that the government permitted American corporations to engage in hundreds of millions of dollars in annual trade with Cuba through wholly owned foreign subsidiaries.

The United States lifted its embargo on trade with Cuban by foreign subsidiaries of United States corporations in 1975 and approved the end of the embargo imposed by the Organization of American States as well. CONGRESSIONAL QUARTERLY, INC., 1502 (May 31, 1980); see RESOLUTION I OF THE SIXTEENTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS (July 29, 1975); DEPARTMENT OF STATE, 1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 20, 25, 601 (1976).

138. The distinction between "foreign policy" and "national security" is at the heart of the McGovern Amendment, which seeks to prevent the use of section (a)(28) to exclude speakers for "foreign policy" reasons, but recognizes "national security" as a permissible basis for exclusion. 22 U.S.C. § 2691 (1982).

Before elaborating what we believe to be the appropriate judicial role in national border-censorship cases, we review the current legal status of the various programs discussed in Part I.

### *A. Denying Visas to Foreign Speakers*

Judicial review of ideological exclusion of foreign speakers is complicated by occasional confusion over whose rights are at stake. An alien outside the United States has no constitutional right to enter the country, even for the purpose of delivering a speech, but an American listener inside the country stands on an entirely different constitutional footing. The Supreme Court has explicitly recognized that the first amendment includes the right to receive, as well as the right to disseminate, information.<sup>139</sup> Since the exclusion of foreign speakers sharply affects the rights of American audiences to receive information from abroad, Americans wishing to invite a foreign speaker have both standing and a cognizable cause of action under current law to challenge a refusal by the government to permit the speaker to enter the United States.<sup>140</sup>

Unfortunately, while the procedural questions have been resolved in favor of judicial review, the substantive standard applied by the courts has been virtually useless. Focusing more on the rhetoric than the actual holding in *Kleindienst v. Mandel*, lower federal courts have refused to distinguish between visa denials that are ideologically based and those that are not.<sup>141</sup> Even in the former instance, most courts, with one recent and notable example, have deferred to the government's proffered explanation for excluding a foreign speaker. The government has not been asked to defend the substantiality of its interests, show the likelihood of damage if the speech is allowed, or show the gravity of the anticipated harm. Fairly read, *Kleindienst* does not compel such a de-

---

139. The first amendment right to receive information was explicitly recognized in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965). The right to receive information is at the heart of the recognition of the protected nature of commercial speech. See Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOKLYN L. REV. 437 (1980).

140. See *Kleindienst*, 408 U.S. at 753 (1972); see also *Fiallo v. Bell*, 430 U.S. 787 (1977).

141. See, e.g., *Abourezk v. Reagan*, 592 F. Supp. 880 (D.D.C. 1984), appeal docketed, No. 84-5673 (D.C. Cir. Oct. 16, 1984).



gree of judicial restraint when a viable first amendment claim is presented.<sup>142</sup>

In *Kleindienst*, the issue was whether Ernst Mandel should have been granted an entry visa to permit him to deliver a series of lectures at American universities.<sup>143</sup> Noting Mandel's international reputation as a Marxist theoretician, the government declared him excludable under section (a)(28).<sup>144</sup> Six American professors who had either invited Mandel to the United States or who hoped to engage in colloquia with him challenged the Attorney General's refusal to grant him a waiver as an exercise of content-based censorship.<sup>145</sup> The district court directed the Attorney General to grant the waiver unless the denial could be justified as necessary to protect a weighty government interest.<sup>146</sup> The decision was overturned by the Supreme Court, which accepted the government's argument that the refusal to grant a waiver was not based on Mandel's views or the content of his proposed speeches, but solely because he had violated conditions attached to an earlier waiver by engaging in impermissible fund-raising activity.<sup>147</sup> Confronted with such a "facially-neutral and bona fide reason" for denying the waiver, the Court refused to weigh the government's interest against the first amendment rights of Mandel's American audience.<sup>148</sup>

*Kleindienst* did not decide the facial constitutionality of section (a)(28), or the proper judicial response to visa denials that cannot be justified in content-neutral terms.<sup>149</sup> Nonetheless, the *Kleindienst* decision has been given the broadest possible reading by most lower courts. For example, in *NGO Committee on Disarmament v. Haig*<sup>150</sup> and *McDonald v. Kleindienst*,<sup>151</sup> visa denials to foreign speakers were upheld despite the apparent relationship between the speaker's politics and the visa denial, and despite the

---

142. *Kleindienst*, 408 U.S. at 757.

143. *Id.* at 762.

144. *Id.* at 759.

145. *Id.* at 762.

146. *Mandel v. Mitchell*, 325 F. Supp. 620 (E.D.N.Y. 1971), *rev'd*, *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

147. 403 U.S. at 769.

148. *Id.*

149. *Id.* at 770.

150. No. 82 Civ. 3636 (S.D.N.Y. 1982), *aff'd*, 697 F.2d 294 (2d Cir. 1982).

151. No. 72 Civ. 1228 (S.D.N.Y. 1974).

government's failure to articulate any substantial justification.<sup>152</sup>

Passage of the McGovern Amendment reduces the likelihood that section (a)(28) cases like *Kleindienst* will recur. It is extremely improbable, for example, that the State Department could have or would have certified to Congress that Mandel's admission to the United States to deliver a series of speeches threatened national security. Had the McGovern Amendment been in effect at the time, Mandel probably would have received a visa. Nothing on the face of the McGovern Amendment compels the Attorney General, who actually issues the waiver of ineligibility under section (a)(28), to accept the recommendation of the Secretary of State. The desire to preserve political harmony between the State and Justice Departments, however, is a potent political consideration reinforcing the spirit of the McGovern Amendment.

Perhaps for that reason, reliance on section (a)(28) has noticeably decreased in controversial cases. Instead, section (a)(27), not subject to the McGovern Amendment, has emerged as the principal impediment to foreign speakers seeking admission to the United States.<sup>153</sup> The extent to which section (a)(27) will continue to serve as a censorial substitute for section (a)(28) turns on the outcome of two pending challenges to its use.

In both *Allende v. Shultz*<sup>154</sup> and *Abourezk v. Reagan*,<sup>155</sup> American citizens whose invitations to foreign speakers were frustrated by denied entry visas challenged the use of section (a)(27) as a censorship device.<sup>156</sup> The complaints in each case assert similar claims:

---

152. Compare *Lesbian/Gay Freedom Day Comm. v. Immigration & Naturalization Serv.*, 541 F. Supp. 569 (N.D. Cal. 1982), *aff'd*, *Hill v. Immigration & Naturalization Serv.*, 714 F.2d 1470 (9th Cir. 1983).

153. An exclusion under section (a)(27) is also not subject to a waiver by the Attorney General. See 8 U.S.C. § 1182(d)(3) (1982).

154. *Allende v. Shultz*, No. 83-3984-C (D. Mass.) (Mem Op. April 2, 1985) (speaking invitations to Mrs. Hortensia Allende in San Francisco and Boston).

155. *Abourezk v. Reagan*, 592 F. Supp. 880 (D.D.C. 1984), *appeal docketed*, No. 84-5681 (D.C. Cir. Sept. 28, 1984). The *Abourezk* case, which challenges the government's refusal to permit Thomas Borge, the Minister of Interior of Nicaragua, to fulfill speaking invitations in the United States, is consolidated with *The City of New York v. Shultz*, appeal docketed, No. 84-5681 (D.C. Cir. Oct. 16, 1984), challenging the government's refusal to permit two Cuban invitees to testify before the New York City Commission on the Status of Women and Cronin v. Shultz, No. 84-5708 (D.C. Cir. Oct. 16, 1984) challenging the government's refusal to permit General Nino Pasti to accept speaking invitations in the United States.

156. See *supra* note 24-37 and accompanying text for a discussion of the *Allende*,

first, that section (a)(27) was not intended to authorize visa details based on lawful speech or association, but solely to authorize visa denials based on improper "activities" within the United States; and, second, that the visa denials violated the first amendment.

The district court in *Abourezk* rejected both theories in an opinion that illustrates the reluctance of courts to apply traditional first amendment analysis in national border-censorship cases.<sup>157</sup> While conceding that the plaintiff's statutory argument was a powerful one—indeed, that a literal reading of the statute would not encompass the power to ban foreign speakers—the district court declined to apply the classic maxim that doubts about the meaning of a statute should be resolved in favor of free expression.<sup>158</sup> Instead, the court elected to extend the statute beyond its literal terms to permit the exclusion of someone whose mere *entry* or *presence* in the United States—as opposed to his improper *activities* once there—would be prejudicial to the public interest.<sup>159</sup> Moreover, the district court explicitly refused to apply the doctrines of vagueness, delegation, or the ban on standardless permits despite the assertion of wholly unbridled discretion in the Executive to ban foreign speakers.<sup>160</sup>

The plaintiff's substantive first amendment challenge fared no better. Citing *Kleindienst*, the district court required only that the government articulate a facially neutral reason for denying the visas, and did not inquire whether the reason was plausible, or whether the facial justification was sufficiently compelling or imminent to warrant the suppression of free expression.<sup>161</sup> Moreover, the district court permitted the government to articulate its alleged facially neutral justification, not openly as in *Kleindienst*, but through secret affidavits never revealed to plaintiffs' counsel.<sup>162</sup>

The district court in *Abourezk* did hold that the government could not constitutionally bar a foreign speaker from entering the

---

*Abourezk*, *City of New York*, and *Cronin* cases.

157. *Abourezk*, 592 F. Supp. at 886-88.

158. *Id.* at 884-85.

159. The District Court noted: "On a strictly textual basis, [plaintiffs'] contention is not unpersuasive, for the statutory provision mentions only activities." *Id.* at 884.

160. *Id.* at 886 n.19.

161. *Id.* at 888.

162. *Id.* at 887-88.

United States "solely on account of his proposed message."<sup>163</sup> The potential significance of that ruling was largely undermined, however, by the court's final disposition of the case. In particular, the court's apparent acceptance of an impermissible ideological motive on the government's part is difficult to defend. The secrecy surrounding the government's case renders any comment necessarily speculative, but, based on the district court's own thumbnail description of the *in camera* evidence,<sup>164</sup> the visa denials in *Abourezk* appear to have been based on the government's desire to express *its* disapproval of the speakers' political views, in some instances because such an expression of disapproval was desired by a friendly government. Assuming that was the gist of the secret affidavits submitted in *Abourezk*, the content-based nature of the government's censorship could not be more apparent.<sup>165</sup> Ironically, the government's desire to use the visa denial process as a form of symbolic disapproval of a foreign speaker's politics was allowed by the district court to take precedence over the desires of American citizens to hear the speakers in question.

The court in *Allende*<sup>166</sup> reached a different result through a different procedure. Specifically, the district judge refused to grant summary judgment based on secret affidavits.<sup>167</sup> Confining himself to the public record, he concluded that the government's assertion that the admission of Ms. Allende "would [be] prejudicial to the conduct of the foreign affairs of the United States" was too conclusory to overcome plaintiff's first amendment interest in hearing Ms. Allende.<sup>168</sup> In addition, the *Allende* decision points to the adoption of the McGovern Amendment as a significant indicia of congressional interest, and strongly suggests that section (a)(28) rather than section (a)(27) is the appropriate statute for the gov-

---

163. *Id.* at 887.

164. *Id.* at 888.

165. The claim that the government's obligation of content-neutrality will be confused with the government's endorsement of ideas it opposes has been rejected consistently in first amendment cases. See *Widmar v. Vincent*, 454 U.S. 263 (1981); *Prune Yard Shopping Center v. Robbins*, 447 U.S. 74 (1980); *Healy v. James*, 408 U.S. 169 (1972).

166. *Allende v. Shultz*, No. 83-3984-C (D. Mass. April 2, 1985).

167. *Id.* at 11-13.

168. *Id.* at 9-10. Plaintiff's appeal in *Abourezk* was argued before the Court of Appeals for the District of Columbia Circuit on September 23, 1985.

ernment to use in ideological exclusion cases.<sup>169</sup>

Of course, settings do exist in which section (a)(27) may be applied properly to deny an entry visa. For example, in *El-Werfali v. Smith*,<sup>170</sup> a Libyan student was denied a visa under section (a)(27) because his proposed activities in the United States included training in aircraft maintenance. A world of difference exists, however, between denying a visa to a student from a potentially hostile nation who wishes to acquire skills with obvious military relevance and denying a visa to a person who has been invited by American citizens to deliver a speech. Unless and until the courts can be persuaded of that difference, however, section (a)(27) will continue to function as a virtually unreviewable grant of power to the Executive to censor foreign speakers on the basis of their politics.

### *B. Bans on the Importation of Foreign Books*

Pursuant to the settlement in *The Nation v. Haig*,<sup>171</sup> single copies of books and periodicals from countries designated by the President as enemy nations may now be brought into the United States without an import license. Multiple copies of such material, and films, continue to require an import license that will not be issued unless the imported items are free.<sup>172</sup> The existence of the 1982 truce on single copy imports alleviates, but does not solve, the constitutional problem. Moreover, the fragility of the truce, as well as the continuing ban on imports of more than a single copy, makes additional litigation likely. Under current case law, the prospect for such legal action is far from promising.

In *Teague v. Regional Commissioner of Customs*,<sup>173</sup> the United States Court of Appeals for the Second Circuit rejected a challenge to the refusal to deliver English language newspapers produced in North Vietnam and China to American addressees without an import license. When the government represented to the court that licenses for newspapers mailed free of charge would be granted

---

169. *Id.*

170. 547 F. Supp. 152 (S.D.N.Y. 1982).

171. See *supra* notes 52-57 and accompanying text.

172. See *supra* notes 45-48 and accompanying text.

173. 404 F.2d 441 (2d Cir.), *cert. denied*, 394 U.S. 977 (1968).

within ten days of application, the court dismissed the case,<sup>174</sup> without confronting the possible conflict between *Lamont v. Postmaster General*,<sup>175</sup> which had invalidated a postal requirement that an addressee of Communist political propaganda explicitly request its delivery, and *Teague*,<sup>176</sup> which required an addressee of North Vietnamese or Chinese newspapers to request their delivery and to swear that he was not paying for them.<sup>177</sup>

Similarly, in *Vietnam Veterans Against the War v. Regional Commissioner of Customs* (VVAW),<sup>178</sup> the United States Court of Appeals for the Third Circuit upheld the refusal to deliver newspapers mailed free of charge from North Vietnam and China unless the addressees applied for and received import licenses for each item. In an opinion more sophisticated than *Teague*, the Third Circuit recognized the tension between its holding and *Lamont*, but expressed its hope that the license applications would be kept confidential.<sup>179</sup> Unlike *Lamont*, where no plausible explanation was ever offered for the disclosure requirement,<sup>180</sup> the court held that the act of obtaining a license was necessary to the functioning of the trade embargo.

Neither *Teague* nor VVAW dealt with a ban on importation of books. Each dealt solely with the constitutionality of procedures for obtaining delivery of books concededly falling outside the TWEA's ban. Thus, were the government to abrogate the 1982 truce and attempt to apply the TWEA to the purchase of single copies of books and magazines, neither *Teague* nor VVAW would provide a precedent. The Supreme Court's recent opinion in *Regan*

---

174. The Second Circuit concluded that any restrictions on free speech were merely incidental to "the proper general purpose of the regulations: restricting the dollar flow to hostile nations." *Id.* at 445.

175. 381 U.S. 301 (1965).

176. *See supra* note 173.

177. The certiorari petition in *Teague* was delayed in the mail several days by a snow-storm which disrupted mail service in New York City and Washington, D.C., causing the petition to arrive out of time under the then existing rules of the Supreme Court. Justices Black and Douglas, dissenting from the denial of certiorari, stressed the possible conflict between *Lamont* and *Teague* and suggested that the petition's late receipt was a factor in the denial of certiorari. 394 U.S. at 977. Justice Harlan also dissented from the denial of certiorari. 394 U.S. at 984.

178. 459 F.2d 676 (3d Cir.), *cert. denied*, 409 U.S. 933 (1972).

179. *Id.* at 682.

180. *Id.*

*v. Wald*,<sup>181</sup> upholding the validity of the TWEA regulations forbidding travelers to Cuba from buying food or lodging without a Treasury Department license, does, however, offer some indication of current judicial thinking on the subject. If a travel ban is valid, a similar regulation forbidding the purchase of books and magazines also might be valid, although the strength of the first amendment right to receive books from abroad is apparently perceived by the Court as stronger than the mere freedom to travel outside the country.<sup>182</sup> Nevertheless, the Court's decision in *Regan* hardly bodes well for future TWEA cases.

The legal status of attempts by customs officials to search incoming baggage for subversive books in an alleged attempt to enforce 19 U.S.C. section 1305 seems less problematic.<sup>183</sup> The Supreme Court repeatedly has held that careful procedures must surround any attempt to seize material putatively within the protection of the first amendment.<sup>184</sup> Whatever the power of customs officials to conduct border searches generally, the absence of any standards or mechanisms to control the unbridled discretion of officers searching for books, even at the border, renders the current practice constitutionally suspect. Indeed, the government appears to concede as much. When customs officials seized books and newspapers from William Worthy upon his return from Iran, the government settled his claim for \$16,000, returned all the seized material, and destroyed all records of the incident.<sup>185</sup> The government has not, however, promulgated guidelines designed to prevent the seizure of books at the border without prior judicial approval.<sup>186</sup>

### C. Bans on Travel to Forbidden Countries

When President Carter ended restrictions on travel to Cuba in

---

181. 104 S. Ct. 3026 (1984).

182. The *Regan* Court demoted the capacity to engage in international travel from a "right" to a "freedom." See *infra* note 195 and accompanying text.

183. See *supra* notes 58-62.

184. *E.g.*, *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Heller v. New York*, 413 U.S. 483 (1973); *Lee Art Theater v. Virginia*, 392 U.S. 636 (1968); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); see Monaghan, First Amendment "Due Process", 83 HARV. L. REV. 518 (1970).

185. See *supra* note 59.

186. *Freedman v. Maryland*, 380 U.S. 51 (1968).

1977,<sup>187</sup> and Congress outlawed the use of area restrictions in American passports in 1978,<sup>188</sup> Americans were free for the first time in many years to travel anywhere without hindrance by their government. Four years later, the era of free travel ended abruptly with the reassertion of Treasury regulations under the TWEA forbidding expenditures for food or lodging while traveling in forbidden countries.<sup>189</sup>

Food and lodging restrictions were upheld by the Supreme Court in *Regan v. Wald*.<sup>190</sup> The plaintiffs in *Regan*, American citizens wishing to travel to Cuba, launched three statutory challenges to the Treasury regulations. First, they argued that the 1978 congressional amendments to the Passport Act barring the use of area restrictions in American passports evinced a congressional intention to permit freedom of travel in accordance with the Helsinki Accords and, thus, rendered the regulations invalid. Second, they argued that the restrictions on foreign trade contained in Section 5(b) of the TWEA had never been construed as applying to personal expenditures for food and lodging incident to personal travel. Finally, they argued that congressional action in 1977 severely limiting the Executive's power to restrict trade on the basis of a declaration of national emergency rendered the regulations invalid because they had not been promulgated with the assent of Congress in accordance with the newly enacted congressional requirements. Recognizing that Congress had grandfathered all exercises of Executive authority in effect on July 1, 1977, the *Regan* challengers argued that President Carter had lifted all travel restrictions to Cuba on March 9, 1977, thus removing the Cuban travel ban from the grandfather provision.

The Treasury regulations initially were invalidated by both the First and Eleventh Circuits on the ground that bans on travel to

---

187. President's News Conference of March 9, 1977, 13 Weekly Comp. Pres. Doc. 328-29 (March 14, 1977).

188. The 1978 Foreign Relations Authorization Act, Pub. L. 95-426, § 124; 92 Stat. 971 (now codified at 22 U.S.C. § 211(a) (1982)); see also S. Rep. 842, 95th Cong., 2d. Sess. 14 (1978).

189. 31 C.F.R. § 515.201(b) (1985). From 1977 to 1982, expenses incident to personal travel were exempted from 201(b) coverage. 31 C.F.R. § 515.560, 42 Fed. Reg. 16621 (1977). The general license was removed by President Reagan in 1982. 47 Fed. Reg. 17030 (1982).

190. 104 S. Ct. 3026 (1984).



Cuba did not fall within Congress' grandfather provision.<sup>191</sup> The Supreme Court reversed, holding that because some trade with Cuba still was embargoed on July 1, 1977,<sup>192</sup> the Executive's general power to extend the embargo to other forms of trade fell within Congress' grandfather authority.<sup>193</sup>

Whatever the correctness of the Court's broad reading of the grandfather clause and the Court's rejection of the challengers' other two statutory theories, the closeness of the question cannot be disputed. Two courts of appeals and four dissenting Supreme Court justices accepted the challengers' statutory position. Close questions of statutory construction normally are resolved in favor of the first amendment. *Regan* proceeds on the opposite assumption. The decision thus represents a paradigmatic example of the Court's recent reluctance to apply process-based techniques routinely utilized to preserve first amendment values in other contexts to cases involving the flow of ideas across the national border.

Undoubtedly, the Court's answer to this criticism would be that the first amendment values implicated by the travel restrictions in *Regan* were minimal at best.<sup>194</sup> The manner in which the Court reached that conclusion is itself highly suspect. First, the Court characterized international travel as a mere "freedom" rather than a "right," without explaining either the source or the significance of this hierarchy of values.<sup>195</sup> Second, the Court described the restriction on travel as merely incidental to a valid governmental in-

---

191. *Wald v. Regan*, 708 F.2d 794 (1983); *United States v. Frade*, 709 F.2d 1387 (11th Cir. 1983).

192. 31 C.F.R. § 515.201(b) (1985). The grant of a general license under Regulation 560 exempting travel from subsection 201(b) was deemed by the Court to itself be an exercise or regulatory authority.

193. *Regan*, 104 S. Ct. at 3038-39.

194. *Id.* at 3038 n.25.

195. The "right-freedom" semantic dichotomy is derived from *Haig v. Agee*, 453 U.S. 280, 306 (1981), and *Califano v. Aznavorian*, 439 U.S. 170, 176-77 (1978). The Court, quoting *Zachariah Chafee*, displayed a very different attitude in *Kent v. Dulles*, 357 U.S. 116 (1958):

An American who has crossed the ocean is not obliged to form his opinion about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspaper . . . In many different ways, direct contact with other countries contributes to sounder discussions at home.

*Id.* at 127 (quoting *Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 195-96 (1956)).

terest in denying Cuba access to American dollars without ever examining whether the restriction was necessary to further that governmental interest.<sup>196</sup> Specifically, the Court in *Regan* declined to weigh the impact of the regulation against the actual dollar impact of recreational travel to Cuba.<sup>197</sup> At the time of the litigation, no more than eight million dollars annually were expended by Americans travelling to Cuba,<sup>198</sup> a sum dwarfed by the hundreds of millions of dollars in trade with Cuba by multinational affiliates of American corporations.<sup>199</sup> The relatively minor sum of American travel dollars could not possibly affect the Cuban economy in any meaningful manner, giving rise to a strong suspicion that the regulations were intended to cut off travel rather than dollars. Nevertheless, the Court steadfastly looked the other way and approved the ban. If *Regan* is a harbinger of the future, a legal challenge to other cynical attempts to use the national border as a censorship device may prove extremely difficult.

Post*Regan* activity in the forbidden travel zone has centered on government attempts to investigate scholars and professionals travelling to Cuba within existing TWEA exemptions.<sup>200</sup> Subpoenas have been issued to lawyers and scholars travelling to Cuba, and to persons arranging the trips, requiring detailed itineraries to assure that the travellers are actually engaged in research, not tourism.<sup>201</sup>

Similarly, evidence is mounting of a government campaign to harass and intimidate Americans travelling to Nicaragua, which presently is not covered by a travel ban.<sup>202</sup> The FBI admits to interviewing 100 such travelers upon their return; others put the

---

196. *Regan*, 104 S. Ct. at 3038-39.

197. *Id.*

198. Declaration of Hal Mayerson in *Regan*, 104 S. Ct. 3026 (1984). This account does not include money spent by Cuban nationals, who were exempt from the travel ban under the regulation. See 32 C.F.R. § 515.560(a)(1) (1985).

199. *Id.*

200. 31 C.F.R. § 515.560(a)(1) (1977).

201. See N.Y. Times, Sept. 17, 1984, at A4.

202. On May 1, 1985, however, the President imposed an embargo on trade with Nicaragua, pursuant to IEEPA, citing the "extraordinary threat" posed by Nicaragua "to the national security and foreign policy of the United States." Exec. Order No. 12,513, 50 Fed. Reg. 18629 (1985). The embargo forbids the exchange of all goods and services with Nicaragua, except for "those destined for the organized democratic resistance."

number much higher.<sup>203</sup> In addition, some travellers to Nicaragua have complained that their taxes were audited and their mail interrupted soon after their trips. The government denies all of these charges.<sup>204</sup>

*D. Limitations on the Dissemination of Books and Films In the Interest of a Foreign Principal*

Much of the litigation over the scope of FARA involves the question of who is a lobbyist on behalf of a foreign government.<sup>205</sup> Definitional questions aside, the requirement that foreign agents register with the American government and disclose their principals is relatively uncontroversial. When the statute is applied to persons communicating directly with the general public, however, and not merely to persons lobbying government officials, its scope and effect dramatically expand, and the constitutional questions it raises dramatically increase.

In *Viereck v. United States*,<sup>206</sup> the Supreme Court construed FARA to exclude disseminations by a foreign agent made on his own behalf and not on behalf of his foreign principal. Even with this narrowing construction, the statute's potential reach is enormous. For example, much of the nation's ethnic press retains close ties with political and social groups abroad, and often presents views in close harmony with those of foreign governments or private groups. The point at which close cooperation between an ethnic newspaper and foreign subscribers or supporters ripens into an agency relationship triggering FARA frequently is not clear. In

---

203. N.Y. Times, April 19, 1985, at B20.

204. *Id.*

205. See S. Rep. No. 875, 88th Cong., 2d Sess. (1964) (leading up to the 1966 Amendments to FARA, Pub. L. No. 89-468, 80 Stat. 244 (1966)). See generally *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964); *Attorney Gen. v. Covington & Burling*, 411 F. Supp. (D.D.C. 1976), *injunction denied*, 440 F. Supp. 1117 (D.D.C. 1979); *Liberian Services v. Levy*, 75 Civ. 3133 (S.D.N.Y. 1976); *Attorney Gen. v. United States - Japan Trade Council, Inc.*, 76 Civ. 1290 (S.D.N.Y. 1976); *Attorney Gen. v. DGA Int'l*, Nos. 75-2040, 75-2041 & 75-2042 (D.D.C. 1975); *Attorney Gen. v. American-Chilean Council*, No. 78-2379 (D.D.C. 1979); *Attorney Gen. v. Carter*, No. 80-1735 (D.D.C. 1980). The unreported cases are helpfully summarized in Pattison & Taylor, *THE REGISTRATION OF FOREIGN AGENTS IN THE UNITED STATES: A PRACTICAL AND LEGAL GUIDE* (published by the District of Columbia Bar 1981).

206. 318 U.S. 236 (1943). Possibly, *Viereck's* narrow construction applies only to the 1938-1942 version of FARA. *Id.* at 237-38. The Justice Department appears content to follow *Viereck* even as to post-1942 cases.

contrast, the chilling effect of requiring a newspaper to register with the government is obvious.<sup>207</sup>

The potential for censorship inherent in FARA turns principally on the outcome of *Block v. Smith*,<sup>208</sup> which challenged the government's efforts to apply FARA to three Canadian films.<sup>209</sup> As with most national border information cases, the plaintiffs in *Block* challenged the statute's vagueness, the Executive's reading of the statute, and the constitutionality of the action at issue.

The district court rejected the plaintiffs' challenge, holding that branding the films as "foreign political propaganda" did not vest their American distributors with article III standing to challenge the label. The district court's standing analysis, however, appears to have confused standing with a decision on the merits, because by any measure of article III standing, the distributor of a film suffers a cognizable injury-in-fact when the film is characterized as foreign political propaganda, and when records are kept of the theaters and organizations exhibiting the films.

Assuming that distributors have standing, the most vulnerable aspect of FARA would appear to be its reporting provisions, requiring distributors to report the identities of groups and theaters exhibiting covered films or receiving more than one hundred copies of a book or newspaper.<sup>210</sup> Whatever interest the government may have in assuring that viewers and readers know the foreign source of a film or book, the government appears to have no legitimate interest in learning who is reading the books or exhibiting the films.<sup>211</sup> Moreover, as with so many regulations in the national bor-

---

207. Thus, if the government is successful in requiring *The Irish People* to register as an agent of the Irish Northern Aid Committee because of a close ideological relationship and the purchase of advertising, much of the nation's ethnic press will be similarly vulnerable. *Attorney Gen. v. Irish Northern Aid Comm.*, 346 F. Supp. 1384 (S.D.N.Y.), *aff'd mem.*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1080 (1972).

208. No. 84-5318 (D.C. Cir.) (currently pending). Judge Richey's District Court opinion is unreported and is set out in the Circuit Court appendix at JA 292-318.

209. The application of FARA to these films was preliminarily enjoined in *Keene v. Smith*, No. S-83-287 (E.D. Cal. Sept. 7, 1983). To date, no further action has been taken in that case.

210. 29 C.F.R. § 5.401 (1985) (requiring the use of Form OBD 69).

211. *See generally* *Brown v. Socialist Workers Campaign Comm.*, 459 U.S. 87, 91-92 (1982); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Talley v. California*, 362 U.S. 60 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958); *see also* *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965).

der-censorship area, the reporting requirement has no support in the statute itself, but is the product of unilateral executive law-making.<sup>212</sup>

Nor does the government have a legitimate interest in imposing denigrating labels on books and films with which it disagrees.<sup>213</sup> While a requirement of country-of-origin labeling might survive first amendment scrutiny, no legitimate interest is served by the government's imposition of a denigrating label on a book or a film, especially in the absence of any procedural safeguards, and pursuant to vague and overbroad criteria that invite discriminatory application.<sup>214</sup>

### *E. Denying Passports to Dissidents Because of Speech*

Faced with Phillip Agee's persistent attempts to hamper the CIA by disclosing the identities of its covert agents in foreign countries, and limited by the lack of any available criminal sanctions covering Agee's activities, in 1979 the Secretary of State invoked regulations authorizing the revocation of Agee's passport for activities likely to have a seriously damaging effect on foreign policy or national security.<sup>215</sup>

Agee challenged the revocation, arguing that the Passport Act did not authorize revocation or denial of a passport as a punishment for speech harmful to foreign policy. Both the United States District Court for the District of Columbia<sup>216</sup> and the United States Court of Appeals for the District of Columbia<sup>217</sup> agreed, holding that the statutory language did not expressly authorize the revocation of Agee's passport, and that Congress did not acquiesce in the exercise of such authority. The Supreme Court reversed, finding the Executive's occasional assertion, without congressional

---

212. The reporting requirement flows from OBD 69, which requires the disclosure of the names of persons receiving 100 copies of any book and the identities of any theater or organization showing a film. The use of Form OBD 69 is required by 28 C.F.R. § 5.401 (1985). Disclosure of the identities of recipients is nowhere discussed in the statute itself.

213. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

214. One district court recently issued an injunction against FARA's use of the political propaganda label on precisely these grounds. *Keene v. Meese*, No. Civ. S.-83-287 (E.D. Cal. Sept. 12, 1985). See generally *Smith v. Goguen*, 415 U.S. 566 (1974).

215. See *Haig v. Agee*, 453 U.S. 280, 282-87 (1981).

216. *Agee v. Vance*, 483 F. Supp. 729 (D.D.C. 1980).

217. *Agee v. Muskie*, 629 F.2d 80 (D.C. Cir. 1980).

demurrer, of the power to revoke a passport, sufficient grounds for inferring congressional acquiescence.<sup>218</sup> The Court's struggle to distill congressional acquiescence from the equivocal record in *Agee* is unprecedented in any other first amendment context. Moreover, the Court declined to apply facial overbreadth or vagueness doctrines, noting that *Agee's* conduct was within the hard core of unprotected activity, and leaving for another day the precise limits, if any, on the Secretary's power.<sup>219</sup>

*Agee* is less disturbing for its precise holding than for its potential scope. Given the life-threatening nature of *Agee's* activity, whether his speech fell within the protection of the first amendment is debatable. *Agee* narrowly stands, therefore, for the unremarkable principle that a passport can be revoked because of unprotected activity that threatens the life of American officials abroad.<sup>220</sup> But both the wording of the Secretary's regulation,<sup>221</sup> and the overheated language of the *Agee* opinion,<sup>222</sup> go far beyond the facts of the case. Under the terms of the regulation, no distinction is made between protected and unprotected speech. Further, no attempt is made to define the required injury in terms of a threat to life or personal safety. Instead, "serious damage" to "foreign policy" suffices. Accordingly, an American who speaks in Nicaragua or El Salvador condemning American foreign policy, or rallies support in Europe for antinuclear policies, no longer can assume that his passport is safe from revocation. While *Aptheker* strongly suggests that a passport revocation based on protected activity would be unconstitutional,<sup>223</sup> after *Agee*, the outcome is no longer so certain. Finally, as with many overbroad regulations af-

---

218. *Haig*, 453 U.S. at 301-03.

219. *Id.* at 309 n.61.

220. For purposes of the case, *Agee* conceded "any charge [the Government] wants to make," including the charge that *Agee's* activities were causing serious damage to the national security. *Id.* at 287 n.11.

221. 22 C.F.R. § 51.70(b)(4) (1985) authorizes the revocation of a passport if "the Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."

222. *Agee's* activities precipitated predictably strong language from the Court. 453 U.S. at 308-09. As Justice Brennan noted in dissent, "this case is a prime example of the adage that 'bad facts make bad laws.'" *Id.* at 319 (Brennan, J., dissenting).

223. *Aptheker v. United States*, 378 U.S. 500 (1964). The Court appears to read *Aptheker* as forbidding passport denials on ideological grounds. *Regan v. Wald*, 104 S. Ct. 3026, 3038 (1984).

fecting speech, the regulation's actual application probably is less significant than the self-censorship its overbreadth induces in speakers not wishing to risk passport revocation.

*F. Limits on Teaching Foreign Students and Speaking Before International Audiences*

Many educational institutions have refused to comply with the government's attempt to regulate the teaching of foreign students under the rubric of export control. No court has yet ruled on the practice.<sup>224</sup> As the current UCLA catalogue attests,<sup>225</sup> however, the government's warnings may well have encouraged some American academics to exclude foreign students from certain courses.

The government's efforts to limit the presentation or publication of scientific research data have been far more successful. When a researcher depends upon government financial support, concessions on publication or presentation as a condition of the research grant are relatively easy to exact. While some universities, notably Harvard and Stanford, have refused to conduct research under such conditions,<sup>226</sup> undoubtedly schools and individuals exist which are neither so scrupulous nor so prosperous. Moreover, even if a researcher or university were willing to launch a legal challenge to a coerced contractual provision providing for prepublication review by the government, the *Snepp*<sup>227</sup> principle would loom as an immediate hurdle to obtaining relief. *Snepp* notwithstanding, we believe that under current law government contracts imposed on private scientists requiring prepublication review of unclassified research would not survive first amendment scrutiny.

*G. Inhibitions on the Exportation of Films*

No case law exists discussing the USIA's refusal to certify films

---

224. See *supra* note 107 (response of the University of Minnesota).

225. See *supra* note 108.

226. See *supra* note 107.

227. *Snepp v. United States*, 444 U.S. 507 (1980). In *Snepp*, the Court enforced a contractual provision requiring CIA preclearance of material published by ex-agents.

While the *Snepp* contract might be upheld as a narrow, consensual arrangement involving a handful of persons with access to highly classified data, attempts to expand *Snepp* to cover situations where consent is a fiction, large numbers of persons are involved, and no classified information is at stake, should fail.

for duty-free export under the Beirut Agreement.<sup>228</sup> Were such a challenge to be brought, the usual issues would surface. The USIA regulations bear little relation to the text of the Beirut Agreement, and are inconsistent with its spirit.<sup>229</sup> Moreover, the vagueness of the regulations predictably has led to their ideological application, with films denied certification solely because they portray American society in an unfavorable light.<sup>230</sup> Finally, the overtly content-based application of the certification machinery raises obvious substantive first amendment questions. Were ordinary principles of first amendment review to be applied to the USIA system, it would not survive. Under the extraordinarily deferential standard applied by the Supreme Court in *Agee*, *Kleindienst*, and *Regan*, however, the issue remains in doubt.

### III. TOWARD A MORE EXTENSIVE JUDICIAL ROLE IN PROTECTING THE FLOW OF IDEAS ACROSS OUR NATIONAL BORDER

Recent case law hardly encourages optimism about the prospects for close judicial scrutiny of impediments to the flow of information and ideas across the national border. Indeed, the trend probably points in the opposite direction. Nevertheless, the assumption that present judicial attitudes are immutable, or that they even reflect a coherent legal theory, is mistaken.

As much as anything else, current case law illustrates a problem of judicial perception. Courts, reluctant to interfere with the foreign policy judgments of elected officials, have not yet grown accustomed to viewing the issues raised by this Article in first amendment terms. Accordingly, an approach is needed that enables the courts to protect individual speech interests without intruding into areas more properly left to the political branches. The doctrinal foundations for such an approach already exist. Indeed, the fundamental postulates of our constitutional system compel a more active judicial role in this field.

That courts are not the proper forum for foreign policy decisions is undisputed. Lost in acceptance of this proposition is the notion that courts are ideally suited, in fact uniquely placed, to fulfill two

---

228. See *supra* note 109.

229. See *supra* note 112.

230. See *supra* notes 113 & 114.



equally critical responsibilities in a democratic society. First, courts can and should ensure that those in charge of our foreign policy remain politically accountable through open debate. Second, courts properly may insist that the power to limit debate, if tolerable at all, should not be vested in a single individual or, under our system of checks and balances, in a single branch of government.

The advantage of this approach is that it places the courts in a structural rather than a substantive role. Applying the first principle, courts are enforcing a vertical separation of powers between the governors and the governed. Applying the second principle, courts are enforcing a horizontal separation of powers among the executive, legislative, and judicial branches. Most importantly, in neither case is the judiciary determining the outcome of any policy debate.

*A. Content-Based Restrictions On Public Debate Are Inconsistent with the First Amendment*

That government officials may not place content-based limitations on public debate lies at the very core of modern first amendment theory.<sup>231</sup> The explanation is obvious. Restricting debate reduces pressure for change and inhibits the ability of the political majority to determine its will, thereby undermining the legitimating feature of democratic government.

In *Aptheker*, a federal statute barring communists from obtaining American passports to travel abroad was struck down by the Supreme Court for reasons closely allied with the prohibition against content-based restrictions on speech.<sup>232</sup> Similarly, in *Lamont*, the Court invalidated a law that required American citizens to register with the Post Office prior to receiving certain communist literature.<sup>233</sup> Both decisions implicitly and properly recognized that content-based censorship poses the same danger to democratic decisionmaking whether or not the border is involved. Moreover, the institutional competence of the judiciary to identify and invalidate content-based limits on public debate does not depend

---

231. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Police Dep't of the City Chicago v. Mosley*, 408 U.S. 92 (1972).

232. *Aptheker v. Secretary of State*, 378 U.S. 500, 513-14 (1964).

233. See *supra* note 175 and accompanying text.

on the issues being debated, or whether the national border is crossed.

Ironically, the Court's opinion in *Kleindienst* often is cited as evidence that the obligation of content neutrality does not apply to visa denials and, by extension, to any decision affecting the flow of information or ideas across the national border.<sup>234</sup> In fact, the *Kleindienst* decision can fairly be read as holding only that the government's proffer of a content-neutral and plausible explanation for barring Mandel enabled the Court to avoid traditional first amendment analysis.<sup>235</sup>

Special expertise in diplomacy or war is not required to realize that the first amendment forbids the banning of foreign speakers based on their political associations or writings. Once the focus is shifted from the foreign speaker, who has no first amendment rights, to the American audience, which possesses full first amendment rights, the issue of judicial capacity in national border cases involving content-based censorship largely disappears.

To be meaningful, the doctrine of content neutrality cannot be confined to those rare instances in which the government concedes an ideological motive.<sup>236</sup> Even where government censorship ostensibly is triggered by goals unrelated to speech or association—such as the refusal to permit books, magazines, or people to travel to or from Cuba under the TWEA—courts have a significant role to play. As in other contexts where free speech values are at stake, the judiciary must remain alert to the possibility that a neutral reason for blocking speech is merely a pretext designed to shield an unspoken content-based judgment.<sup>237</sup> The judicial techniques

---

234. *E.g.*, NGO Comm. on Disarmament v. Haig, No. 72 Civ. 3636 (S.D.N.Y. 1982), *aff'd*, 697 F.2d 294 (2d Cir. 1982). ("In the area of discretionary admission of excludable aliens . . . the government may act for political reasons.") (slip op. at 7).

235. See *supra* note 146 and accompanying text.

236. See *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). The difficulty of proving an intent to suppress speech is discussed in Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1; Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205 (1970); see also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 208-21 (1962).

237. *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968), upholds the government's right to impose incidental restriction on speech if necessary to achieve a legitimate and non-ideological state interest. The *O'Brien* test is not satisfied if the asserted interest is merely a pretext masking ideological motives.

for making this determination are reasonably uncontroversial. If an ostensibly neutral standard is applied more harshly against one category of speaker than against another, doubts about institutional competence should not deter a court from piercing the pretext of neutral justification.

Similarly, requiring the government to establish a reasonable correlation between means and ends is separate and distinct from a judicial inquiry into the validity of the government's policy goals. The courts need not, and should not, question the wisdom of a trade embargo against Cuba in order to question the constitutionality of extending the embargo to interrupt the flow of information and ideas between that country and ours. Absent a close nexus between means and ends, a court may fairly assume that the government's motivation is related to the suppression of ideas.<sup>238</sup> For example, the efficacy of the embargo in Cuba, involving minor sums used in purchasing books, magazines, and lodging is highly dubious. Conversely, the inability to purchase such items, and the accompanying exposure they bring to competing ideas and to a competing political and social system, diminishes the ability of the American public to evaluate the need for the trade embargo imposed on its behalf by elected officials.

The inquiry into means and ends cannot be divorced entirely from substantive considerations. At what point a trade embargo is imperiled by exempted transactions may be a matter of legitimate dispute. Inevitably, grey areas will arise where the judgment of political officials must, and should be, accepted. In many other cases, however, the issue will not be close and, faced with the necessity of offering a public explanation, the government will either relent or assert some other, noneconomic interest.

Typically, the other interest asserted by the government is the need to convey its own symbolic message. For example, the government has argued that any relaxation of a total trade embargo will be perceived by the Cuban government as a weakening of American resolve. Alternatively, the government has sometimes maintained that a calculated "disinformation" campaign orchestrated

---

238. See Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOKLYN L. REV. 437 (1980).

by a hostile nation can undermine American foreign policy.<sup>239</sup> These arguments are difficult to accept in a system based on the premise that the answer to allegedly false speech is more speech, not suppression. Similarly, no support exists in either constitutional or democratic theory for the claim that the government's own speech interests outweigh the speech interests of its citizens.<sup>240</sup>

Occasionally, the Court has relied on the theory that the first amendment protects only the right to speak, and not the right to obtain information from any source at any time.<sup>241</sup> The right to obtain information from an unwilling source is, of course, not the issue. Rather, the issue is whether the government may interpose the national border as a communications barrier between a *willing* speaker and a *willing* listener. When the government impedes or diverts that communication stream, it strikes at the very heart of the first amendment. When the government does so ideologically, distorting public debate in favor of its own policies, the courts become an entirely appropriate forum for probing the government's asserted justification.

Sometimes this process of judicial inquiry may compel a first amendment exception to an otherwise comprehensive licensing scheme. That outcome should neither disturb nor surprise us. For example, the government may license street vendors,<sup>242</sup> but not street preachers.<sup>243</sup> Moreover, the religious values enshrined in the first amendment often require the government to make accommodations in otherwise lawful government programs.<sup>244</sup> What is unique and constitutionally unjustified about recent national border-censorship cases is the judicial willingness to grant the execu-

---

239. For example, in *NGO Comm. on Disarmament v. Haig*, No. 72 Civ. 3636 (S.D.N.Y. 1982), the government argued that the Japanese delegates barred from attending the United Nations Second Special Session on Disarmament in New York City belonged to a Japanese disarmament group affiliated with the World Peace Council, which the government described as a front for Soviet propaganda.

240. See M. YUDOF, *WHEN GOVERNMENT SPEAKS* (1980).

241. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).

242. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976).

243. *E.g.*, *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

244. *E.g.*, *Thomas v. Review Bd.*, 450 U.S. 707 (1982); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); see also *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3235 (U.S. Oct. 1, 1984).

tive branch the right to determine with virtually unfettered authority what information and ideas Americans may receive from other countries.

*B. Procedural Techniques for Protecting First Amendment Values in National Border Settings*

American judges have evolved at least five sets of process-based doctrines designed to insulate first amendment values from majoritarian erosion. The clear statement doctrine requires an explicit manifestation of congressional intent to encroach on first amendment values.<sup>245</sup> The void for vagueness doctrine requires that statutes or regulations impinging on significant constitutional values, especially first amendment values, be drafted with a degree of precision to assure that uncontrolled discretion is not vested in enforcement officials.<sup>246</sup> The overbreadth doctrine requires statutes or regulations impinging on free speech to distinguish between protected and unprotected activity.<sup>247</sup> The delegation doctrine prohibits Congress from vesting enforcement officials with excessive discretion, especially when first amendment interests are at stake.<sup>248</sup> Finally, the ban on standardless permit systems forbids officials from exercising undue discretion about who is to be permitted to speak.<sup>249</sup>

Each of these procedural techniques has a common prophylactic core—an insistence upon precise legislative articulation of the ground rules under which free speech may be suppressed. This core assures, first, that enforcement officials will not substitute subjective, content-related criteria in deciding who may speak; and, second, ensures meaningful judicial review to ensure compliance with the ground rules. These procedural techniques also have a common root in classic separation of powers doctrine. Viewed functionally, these techniques assure that the executive branch implements only what the legislative branch has decreed.

Domestically, these allocative principles are essentially undis-

---

245. See *supra* note 122.

246. See *supra* note 119.

247. See *supra* note 120.

248. See *supra* note 123.

249. See *supra* note 121.

puted. A serious question arises, however, concerning their applicability in national border settings involving foreign affairs and military security. Unlike domestic situations where the classic tripartite separation of powers model is operative,<sup>250</sup> national border cases often involve the exercise of powers granted by the Constitution jointly to the Executive and to Congress, without regard to the classic separation of powers model. When the President exercises the foreign affairs power, his coequal status with Congress differs from his derivative role in domestic affairs. To the extent that procedural techniques like delegation and vagueness are designed to reinforce the primary lawmaking role of Congress, and to ensure the derivative role of the Executive in the classic separation of powers scheme, they are less obviously applicable in national border cases because it is no longer clear that the Executive should be kept on a tight rein.

Accordingly, the Court has shown far less concern about separation of powers principles in foreign affairs cases if convinced that the Executive and the Congress are acting in support of a common political vision. Thus, in *United States v. Curtiss-Wright Export Co.*,<sup>251</sup> the Court upheld a criminal conviction for selling arms to Bolivia, triggered by a presidential certification that the sale of such arms would endanger peace in the area. More recently, in *Dames & Moore v. Regan*,<sup>252</sup> the Court upheld President Carter's authority to issue executive orders overriding judicial attachments of Iranian funds and transferring outstanding claims against Iran to an International Tribunal as part of the agreement freeing

---

250. *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

251. 299 U.S. 304 (1936). In *Curtiss-Wright*, a joint resolution of Congress conditionally forbade arms sales to participants in the Chaco dispute between Bolivia and Paraguay if the President certified that such a ban would contribute to reestablishing peace in the area. The President forbade the sales from 1934-1935. *Curtiss-Wright* was indicted for selling guns to Bolivia during the embargo and defended on the ground that the joint resolution delegated excessive discretion to the Executive.

The Joint Resolution utilized in *Curtiss-Wright* to signify congressional approval would probably not satisfy the criteria set forth in *Immigration & Naturalization Serv. v. Chadha*, 103 S. Ct. 2764 (1983), to measure the proper exercise of article I power.

Whether a crime can be created by a Joint Resolution, as opposed to the formal article I legislative process, was, apparently, not considered in *Curtiss-Wright*. The Joint Resolution in *Curtiss-Wright* is set out in Chap. 365, 48 Stat. 811 (1934).

252. 453 U.S. 654 (1981).

Americans held hostage in Teheran. The decision in *Dames & Moore* is particularly revealing because evidence of formal legislative authorization for the transfer of claims from American courts was minimal.<sup>253</sup> Yet, given the fact that the branches were exercising a shared constitutional power, the Court's focus upon the existence of an apparent political agreement between the branches seems appropriate.<sup>254</sup>

If the Supreme Court is correct in holding that procedural techniques rooted in classic separation of powers doctrine have little or no role in foreign affairs cases like *Curtiss-Wright* and *Dames & Moore*, why should they have any applicability in national border-censorship cases? The current Supreme Court seems to think they should not have any applicability. The Court's approach in *Haig v. Agee* and *Regan v. Wald* is, from a separation of powers standpoint, indistinguishable from *Curtiss-Wright* or *Dames & Moore*. In both *Agee* and *Regan*, the Court ignored serious separation of powers weaknesses in the Executive's purported authority and strained to find legislative sanction not readily apparent in either case. The Court was wrong in both instances. What differentiates *Curtiss-Wright* and *Dames & Moore* from national border-censorship cases is the threat to first amendment values posed by the latter. When no substantive constitutional values are endangered, as in *Curtiss-Wright* or *Dames & Moore*, strict enforcement of separation of powers norms is an unnecessary impediment to the efficient functioning of a shared foreign relations power. When first amendment values are at stake, however, respect for separation of powers doctrine is necessary, not to enforce a functional allocation of responsibility between Congress and the President, but to fulfill the other great task of separation of powers—the prevention of undue concentrations of power in the hands of a single set of officials under conditions that threaten substantive constitutional values.<sup>255</sup>

Treating national border-censorship cases identically with for-

---

253. Authorization for the vacation of attachments was found in a straightforward way by broadly construing the President's power under IEEPA. *Id.* at 669-74.

The Court conceded that no statute authorized claims transfer, but upheld it because Congress had acquiesced in *analogous* activity. *Id.* at 675. *Dames & Moore* is the farthest afield the Supreme Court has ever gone to find legislative authorization for executive action.

254. *Id.* at 674.

255. See Neuborne, *supra* note 131, at 372.

eign affairs cases that do not implicate substantive constitutional values overlooks the two significant roles that the separation of powers doctrine plays in our system. On a functional level, separation of powers doctrine directs governmental decisions to the institutions considered most likely by the Founders to perform them effectively.<sup>256</sup> The paradigm example of functional separation of powers is the vesting of domestic lawmaking authority in a large representative body, the Congress, which is capable of reflecting the degree of compromise and interest-balancing necessary to make law in a democracy, while vesting the task of enforcing the law in a single official, the President, capable of swift and decisive action. Given the Founders' decision to blur the lines of authority between Congress and the President in the foreign affairs and military security spheres, the functional aspect of separation of powers assume a diminished role in those areas, at least when the two branches are not in disagreement.

The stakes change, however, when substantive values of constitutional magnitude, especially first amendment values, are implicated by congressional or presidential action. Under those circumstances, separation of powers plays an even more significant role by assuring that the power to override important constitutional values is not concentrated in the hands of a single group of interested officials.<sup>257</sup> This prophylactic aspect of separation of powers doctrine, described elsewhere as "negative" separation,<sup>258</sup> is designed to preserve liberty by introducing a degree of controlled inefficiency into the governmental process whenever a value of constitutional magnitude is threatened.

Negative or prophylactic separation of powers has served as a fundamental structural guarantee of liberty for much of our Nation's history.<sup>259</sup> It is dangerously wrong for the Supreme Court to

---

256. *Id.*

257. See *supra* note 121. These permit cases are prime examples of the refusal to permit censorial power to be concentrated in a single set of officials.

258. Neuborne, *supra* note 131, at 372.

259. The historic concern with prophylactic separation of powers is illustrated by the prohibition on common law crimes (preventing a fusion of power in the judiciary), see, e.g., *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch.) 32 (1812), and the prohibition on Bills of Attainder (preventing a fusion of power in the Congress), see, e.g., *United States v. Brown*, 381 U.S. 437 (1965); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (preventing a fusion of powers in the executive).



ignore this guarantee in national border-censorship cases merely because it may be inapplicable in those foreign affairs cases not implicating constitutional values.<sup>260</sup>

Prior to *Regan* and *Agee*, the Supreme Court had shown some recognition of this distinction. In *Viereck*,<sup>261</sup> the Court was confronted with two plausible readings of FARA and adopted the narrower construction, exempting the individual writings of registered foreign agents from the Act's dissemination controls. In *Kent v. Dulles*,<sup>262</sup> the Court refused to sustain the Executive's right to deny passports to American communists based on the vague word-

---

The first amendment permit cases, the void for vagueness doctrine, the first amendment due process cases and the clear statement cases are all examples of a sustained refusal to permit an undue concentration of power to censor speech in the executive branch.

260. See *DeArellano v. Weinberger*, 745 F.2d 1500, 1515 (D.C. Cir. 1984) (en banc), *vacated mem.*, 105 S. Ct. 2355 (1985) ("The executive's power to conduct foreign relations free from the unwarranted supervision of the judiciary cannot give the executive carte blanche to trample the most fundamental . . . rights of this country's citizenry.")

Even in *Dames & Moore*, the Court was careful to provide additional protection for substantive constitutional values. Confronted with an argument that President Carter's transfer of pending judicial claims against Iran to an International Tribunal was an unconstitutional seizure of property, the Court carefully refrained from rejecting the claim, noting that it was premature because the international tribunal might well prove an effective forum and that, in any event, should the tribunal's remedy prove illusory, the President's action would be judicially reviewable in the Court of Claims. *Dames & Moore*, 453 U.S. at 689-90. If the property rights of American creditors are entitled to meaningful judicial protection against government seizure in the pursuit of foreign policy, surely the first amendment liberty rights of Americans should receive a like degree of protection when the government overrides them in the name of foreign policy.

261. *Viereck v. United States*, 318 U.S. 236, 245-46 (1943). In *Viereck*, the defendant, who had registered as an agent of a German newspaper and an organ of the German government in 1940, was charged with failing to report that he had operated a publishing house and supplied members of Congress with information and speeches. The defendant argued that because the unreported activities were on his own behalf, they did not fall within the statute, even though the regulations required disclosure of all activities. The Court divided, with Chief Justice Stone narrowly reading the statute for a five person majority and Justices Black and Douglas arguing for a broad reading. Justices Jackson and Reed did not participate.

262. 357 U.S. 116 (1958). In *Kent*, the Secretary refused to issue a passport to Rockwell Kent until he swore that he was not a member of the Communist Party and was not going abroad to advance the Communist movement. *Id.* at 117, n.1. Justice Douglas wrote for a majority of five, stating: "[w]here activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." *Id.* at 129. Whether Justice Douglas' opinion in *Kent* can be squared with his dissent in *Viereck* is doubtful.

ing of a 1926 statute. And in *Laub*,<sup>263</sup> the Court declined to find congressional authorization for criminal prosecutions of persons travelling to and from Cuba in violation of an area restriction contained in the passport. *Agee* and *Regan* plainly reflect a very different judicial philosophy.

Most attempts at censorship follow a common pattern; speech is to be prevented, not because it is intrinsically harmful, but because the speech itself, or the failure to take the government action which prevents the speech, allegedly will lead to an evil which the government has the duty or, at least, the power to prevent. Four fundamental questions are raised in any such process: first, how grave must the threatened evil be to justify suppression of the speech; second, how likely must it be that permitting the speech will result in the threatened evil; third, is it really necessary to block the speech to avoid the threatened evil; and, finally, who gets to answer questions one, two, and three?

When the person called upon to answer questions one, two, or three is a bureaucrat closely tied to the execution of the policy or program in question, an understandable danger exists that the official will deflect error on the side of his or her program or policy, treating each speech-created impediment as a grave evil and each risk as a foregone conclusion. For example, were we to delegate ultimate responsibility for deciding whether to permit leafletting in parks to the Commissioner of Sanitation, we would risk an answer which equated litter with original sin and leafletters with Mephistopheles. Such an understandable tendency toward bureaucratic tunnel vision would risk substantial, and unnecessary, overdeterrence of free expression.<sup>264</sup>

---

263. In *United States v. Laub*, 385 U.S. 475 (1967), the government sought to utilize 8 U.S.C. § 1185(b) as the basis for criminally prosecuting persons who arranged travel for Americans to Cuba in defiance of the area controls for passports upheld in *Zemel v. Rusk*, 381 U.S. 1 (1965). Section 1185(b) provided, in relevant part, "it shall . . . be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States, unless he bears a valid passport." Justice Fortas, writing for a unanimous Court, ruled that persons travelling to Cuba did not violate section 1185(b) because they possessed valid passports at the times they crossed the American border and, thus complied with the statute's literal terms. *Laub*, therefore, rendered the area restrictions upheld in *Zemel* virtually unenforceable.

264. "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the

One way of dealing with the problem is to be serious about enforcing prophylactic separation of powers doctrines that effectively preclude self-interested bureaucracies from overdetering speech in the quest for enhanced efficiency. If both the City Council and the Commissioner of Sanitation must make the rules about leafletting in the parks, a degree of objectivity is imposed that insulates expression. To ensure that decisions about suppressing speech in national border contexts are not made by well-meaning bureaucrats afflicted with tunnel vision, the Supreme Court should return to its earlier practice of enforcing procedural techniques like the vagueness, delegation, and standardless permit doctrines in the context of national border-censorship cases.

### CONCLUSION

Shi Huang Ti is known as the First Emperor of China. His reign, which lasted from 221-210 B.C., is remembered today for two remarkable initiatives: he began construction of the Great Wall to shield his country from foreign armies and he banned all books to shield his country from foreign ideas. This unhappy policy reflects a pattern that has persisted for two thousand years. For those wielding power, the tendency to view censorship as an instrument of security often is irresistible. For judges reviewing the sort of censorial decisions described in this Article, the pressure to defer to the security judgments of political officials frequently is overwhelming.

The march of technology has made the world an increasingly small and interrelated place. International travel now occurs with a speed and ease that would have been unthinkable only a few decades ago. Multinational corporations depend daily on the international exchange of information through elaborate computer networks. The notion that freedom of movement across national borders should not be constrained by political considerations has become a human rights benchmark by which countries are routinely and properly judged.

The difficult constitutional issues raised by the international exchange of information and the international movement of individu-

---

constitutionally protected interests in free expression." *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965).

als have, nevertheless, received very little attention in American legal literature. There are relatively few reported decisions and fewer academic commentaries. Moreover, what analysis exists is almost entirely ad hoc. No consistent doctrine has emerged to reconcile sovereign control of the borders with our national commitment to free speech and debate. Indeed, despite sixty-five years of first amendment jurisprudence, the law in the national border-censorship area resembles the early free speech cases of the 1920's, when free speech interests were typically acknowledged, even applauded, but rarely upheld. Surely we can do better.