Center for Immigration Studies

Backgrounder

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Keeping Extremists Out

The History of Ideological Exclusion, and the Need for Its Revival

By James R. Edwards, Jr.

America has often faced the threat of foreigners promoting radical ideologies, including Jacobinism, anarchism, communism, fascism, and now Islamism. It is an unavoidable consequence of mass immigration. The higher the level of immigration, the more likely it is that individuals espousing hatred and violence toward America will gain entry. But whatever the level of immigration, excluding or removing noncitizens from the United States based on their promotion of such beliefs ("ideological exclusion") can help to protect the country. Historically such efforts have played this role, especially during the 20th century. With the end of the Cold War, Congress effectively repealed ideological exclusion, meaning that only active terrorists on watch lists could be barred, while those promoting the ideologies of such terrorists would have to be admitted. To end this vulnerability, ideological exclusion should be restored, allowing aliens to be excluded or deported not only for overt acts but also for radical affiliations or advocacy. Such grounds for exclusion and removal should be based on characteristics common to the many varieties of extremism, rather than target a specific ideology.

Maintaining control over aliens who wish to enter the United States and over those who already have crossed America's borders has been a guiding principle of American immigration policy since colonial days. Many of the Founding Fathers, notably many of those who served in the earliest Congresses, sought to ensure that only foreigners who embraced American ideals and republican principles would gain admittance — and it was expected that any who displayed disloyal views after arrival would be deported.

One such policy of exclusion based on an alien's ideological beliefs came to prominence in the Cold War era, and was effectively eradicated in the 1990 Immigration Act. That law eliminated the 1952 McCarran-Walter Act's iteration of ideological exclusion. Denounced as a Cold War relic, the use of ideology as a grounds for exclusion met its demise.

However, the advisability of this policy change has been called into question by a new awareness of the wisdom of the Founders and of past congressional immigration controllers in their concern for the beliefs that aliens may harbor. Today, the question has become: Is America left vulnerable because of the virtual elimination of ideological exclusion and the overexpansion of First Amendment protections to noncitizens whose allegiance lies somewhere other than with the United States of America?

Ideological exclusion rightly gives a certain amount of pause because of its nexus between our "nation of immigrants" folklore and "freedom of speech" ideals. While much public invocation of the term "nation of immigrants" to describe America's immigrant experience is vastly overblown, immigration has indeed played a role in American history that is unique among nations. Though the notion that anybody can become an American oversimplifies the case, the fact is that the United States has exhibited a remarkable willingness and ability to assimilate outsiders.

Likewise, the First Amendment to the Constitution guarantees that Congress shall not infringe upon Americans' rights to freedom of religion, speech, and press. Americans quite properly hold these rights dear. The Constitution protects these specific rights of Americans for Americans and for America's benefit. Therefore, to consider where these rights' appropriate limits lie (because, as the Supreme Court has long recognized, they are not absolute rights) can be uncomfortable.

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This *Backgrounder* begins with a review of exclusion and deportation (also known as removal) policy, highlighting the history of ideological exclusion. Next, it examines the McCarran-Walter ideological exclusion and its demise in 1990. Then, it considers certain parallels between previous concerns that informed exclusionary policies, particularly during the Cold War, and today's heightened concerns with Islamofascism following the 9/11 attacks. Finally, several policy recommendations are offered.

Exclusion & Deportation in U.S. History

Excluding and removing aliens who exhibited unwanted characteristics has been traditional American practice. Whether by colonial, state, or federal governments, the right to exclude and deport noncitizens has been vigorously exercised in this nation. Indeed, such a right is inherent to the idea of a sovereign nation.

Colonial-Era Exclusion Policies

Even before the United States became a nation, colonial governments placed restrictions on those seeking to settle in their jurisdictions. For example, many colonies rejected foreigners who were likely to become a public charge.[1] The British government used the opportunity of colonization to rid itself of thousands of undesirables, including "social misfits, convicts, and men who were driven by desperation to take a chance in the wilds of America."[2] Thus sparked the first grounds for exclusion being written into American law codes, as colonies from the 17th century on took measures to keep out individuals who could not, or would not, support themselves, as well as those who posed a moral or security threat.

America's founding settlers sought to establish a society; more, a foothold of British jurisdiction in the New World. Harvard's Samuel Huntington explains:

> *America is a founded society created by seventeenth- and eighteenth-century settlers almost all of whom came from the British Isles. Their values, institutions, and culture provided the foundation for and shaped the development of America in the following centuries. They initially defined America in terms of race, ethnicity, culture, and most importantly religion. Then in the eighteenth century they also had to define America ideologically to justify their independence from their home-countrymen.*[3]

Huntington notes the characteristic critical attitude of Americans toward immigrants (especially as distinct from settlers). This scrutiny centered on an alien's character. First as colonies, then as states, early Americans sought to preserve and protect the character of the society they and their forefathers paid so high a price to establish. For example, a Pennsylvania statesman in 1786 decried that "no mode should yet have been adopted for ascertaining the *good character* of such foreigners as have come to settle among us . . . and we should hold ourselves very deficient in political duty" not to set "an effectual bar against the idle and profligate"[4] (italics in original).

Colonial laws to curb the inflow of immigrants of suspect character from becoming part of the newly established society included requirements that ships' captains supply passenger manifests, duties or bonds imposed on arrivals adjudged as a threat to public order or a burden on society (including non-British in Pennsylvania, for example),[5] and forced return of undesirables. As circumstances arose, various approaches were taken in different colonies to control the infusion of undesirables, which included at various times Quakers, convicts (or "gaolbirds"), Catholics, disease carriers, and separatists.[6]

Old World tensions between Catholics and Protestants, especially given the keen awareness of power struggles and abuses by the religion in power in an age of established denominations, informed measures by which to exclude "papists." In the eyes of America's predominantly Protestant community, it hardly seemed prudent to have established a society for religious dissenters from the Old World's Establishment only to allow a hostile takeover by potential persecutors. Hence, Virginia in 1643 provided for the deportation of Catholic priests within five days of arrival.[7]

Besides the settlement of victims of European religious persecution, such as French Huguenots and German Palatines, the politics related to established

religions factored in. Reaction to the Catholic arrivals "was further intensified by the imperial wars of the eighteenth century, during which Catholic powers and their Indian allies decimated frontier settlements, and by the efforts of Spaniards in Florida to incite slaves to rebel or run away from their masters in Carolina and Georgia."[8] In other words, the close relation between Catholic religious belief and Roman Catholic politics was viewed as likely to influence Catholic immigrants' ideology and activism against the prevailing Protestant society.

Antebellum Exclusion Policies

Following independence, Americans continued exclusion policies, expanding them in state law. "The new states were unanimous in rejecting . . . Europe's wastrels and convicts," turning back "ships carrying transported felons."[9] Exclusion of unwanted new arrivals, deportation of aliens who proved unwanted, and various restrictions on foreigners allowed to stay continued. Many such laws affirmed colonial laws on the books or expanded them. In 1783, Virginia, for example, barred citizenship (then granted by states) to "alien enemies."[10] Nationally, the Articles of Confederation in Article IV kept from "paupers, vagabonds, and fugitives from justice" the privileges of citizenship.[11]

The Constitution tasked Congress with establishing a uniform naturalization law (Article I, Section 8), while regulation of aliens (and initially, immigration) remained largely a state matter. Events led the Federalist-controlled Congress to act for the preservation of the nascent republic. The French Revolution differed in kind from the American Revolution imposing "liberty" and "equality" with an iron fist, and seeking to spread its radical ideology throughout Europe and even to involve the United States on its side. Clear-headed Americans knew their country must not pick sides between their former ally, now a radical regime, and their former colonizing foe, from which they had won independence.[12]

The French revolutionary spirit, or Jacobinism, was exported to the New World via immigration, sparking grave foreign and domestic policy crises. Domestically, foreign-born French sympathizers and their ideological message risked the United States' neutrality. The American tour of Citizen Edmond Genet in 1793 further deepened American political divisions. Abroad, a treaty dispute led to France's refusal to seat the American ambassador in 1796 and the subsequent seizure of American merchant ships at sea. Thus, Congress enacted the Alien Enemies Act and the Alien Act in 1798.[13]

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The *Alien Enemies Act* built upon the president's war powers, authorizing him to apprehend, restrain, secure, and remove alien enemies residing in the United States during times of hostility with their native country. The *Alien Act* (often linked with the Sedition Act, perhaps the most controversial of the Federalist laws, which targeted newspapers) granted the president discretionary authority to apprehend and deport aliens who might subvert the nation.[14] These were the first federal laws directed at safeguarding the nation against aliens, in large part based on their ideology. The Alien Act was repealed, along with the Sedition Act, in the Jeffersonian backlash at perceived Federalist overreach; the Alien Enemies Act remains in force.

Even Republicans (i.e., Jeffersonians) who opposed the Alien and Sedition Acts, notably in the Virginia and Kentucky Resolutions of 1798, shared the core skepticism toward foreigners who lacked republican character and held political views contrary to American ordered liberty. For instance, James Madison backed a residency requirement prior to naturalization, telling the first Congress in 1790 that it was "necessary to guard against abuses. They should induce the worthy of mankind to come, the object being to increase the wealth and strength of the country. Those who would weaken it were not wanted." He had previously said at the Constitutional Convention that "[h]e wished to maintain the [American] character . . . [by admitting] foreigners of merit and republican principles."[15] Thomas Jefferson expressed doubts about mass immigration by aliens lacking republican virtue: "They will bring with them the principles of the governments they leave . . . or, if able to throw them off, it will be in exchange for an unbounded licentiousness."[16]

University of Dallas Professor Thomas West, examining the Founders' views on immigration, concludes "that every people has a right to exclude aliens that it deems undesirable, and a duty to exclude aliens whose excessive numbers or questionable character

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might endanger the citizens' liberty."[17] His analysis of the historical record led him to write, "None of the Founders gave a theoretical account of the right of a political community to exclude would-be immigrants. That is because such a right was obvious to all as an inference from the general principles they all shared."[18] In fact, despite Jefferson's election as president in 1800, the Republican takeover of Congress, and repeal of the Alien Act, Jeffersonians "used the [Alien Enemies] Act's provisions to intern and neutralize unnaturalized British immigrants during the War of 1812."[19]

Early Federal Exclusion Legislation

Most exclusion and removal laws operated at the state and local level throughout the antebellum period. Undesirable aliens were categorized largely the same as they had been during colonial days.[20] However, Congress enacted the first federal exclusion law on March 3, 1875. This law prohibited the entry of alien criminal convicts and prostitutes, responding to reports of immigrants arriving who were paupers, convicts, insane, unable to support themselves, and Chinese women "brought for shameful purposes." The 1875 law exempted from exclusion aliens convicted solely on political charges.[21]

In 1882, Congress added to criminals and prostitutes as exclusionary grounds both mental defectives and likely public charges. The Chinese Exclusion Act also became law that year, which cut off Chinese immigration because of low-wage Chinese workers flooding the American labor market. As a further deterrent, the Act withheld the privilege of naturalization from Chinese immigrants. The Chinese Exclusion Act remained in force until 1943. In 1891, another exclusion law barred admittance to aliens who were insane, infected with contagious disease, practiced polygamy, or convicted of a crime of moral turpitude.[22] It should be noted that polygamy was largely an ideological characteristic. Although it was a criminal act with religious connotations, it reflected an ideological worldview.

Besides a late 19th century rise in immigration levels that fed societal upheaval, including immigrant labor unrest and detrimental economic effects on American workers, foreign-born political radicals stirred public concern. Beyond urban machine politics that relied on alien grist and rising religious differences between largely Protestant natives and Catholic immigrants, alien troublemakers — anarchists — were afoot on American soil. Tichenor says:

> *The 1886 bombing of Haymarket Square in Chicago occurred during a national strike initiated by the Knights of Labor, but its hasty attribution to seven anarchists of whom six were immigrants persuaded many Americans that terrorism, labor upheaval, and political radicalism originated abroad*.[23]

President William McKinley, who had campaigned on a platform of tariffs and "big tent" themes directed at immigrants ("America for Americans, native and naturalized"), fell to an assassin's bullet in 1901. Leon Czolgosz, called "an anarchist of American birth but obviously foreign extraction," sparked congressional action to add anarchists to the exclusion list.

The 1903 law provided for exclusion and deportation of alien anarchists — those foreigners who believe in or "advocate the overthrow by force of violence of the Government of the United States or of all governments or of all forms of law, or the assassination of public officials." The 1903 Act also both bolstered public health exclusions and provided for limited exceptions for certain diseased aliens.[24] Higham reports that the first alien removed under this law was John Turner, "a mild-mannered English anarchist who made his second trip to the United States in 1903, [who] was arrested by a bevy of secret service men and deported before he had a chance to speak in public."[25] In other words, the new exclusion law barred aliens on the basis of ideological views, as had the Alien Acts just over a century earlier.

Congress further widened exclusionary grounds in 1907, including admitted criminals. It expanded such categories of barred foreigners to include "imbeciles," those carrying tuberculosis, and "feeble-minded persons," as well as persons whose mental or physical weaknesses affected their ability to support themselves. Again in 1917, exclusion laws were

bolstered — this time, by the addition of a literacy test for aliens over 16 years of age. Other 1917 exclusions included aliens "of constitutional psychopathic inferiority" and chronic alcoholics, stowaways, vagrants, and aliens who had been deported.[26] Wartime concerns led to further restrictions of foreigners based on their ideological, political, and radical beliefs and activities. Maguire writes that World War I led to

> *. . . legislation prohibiting the entry of anarchists, subversives and others dangerous to national security [being] recodified. Further attention was also given to prohibiting the entry of those engaged in sabotage, or those engaged in writing, publishing, and otherwise advocating proscribed activities. Also excluded were aliens who were members of associations involved in the circulation of such material.*[27]

A realistic, security-conscious policy thus was instituted to protect the nation from the dangerous beliefs, and actions prompted by those beliefs, of people who did not belong to the body politic of the United States and therefore could not claim rights to this nation's protection.

Socialist, anarchist, and communist organizations, such as the Industrial Workers of the World, generated labor strikes, riots, and bombings, as well as disseminating radical propaganda, in wartime and postwar America. Foreigners held prominent roles in these groups' leadership. The alien exclusion and deportation laws enabled U.S. authorities to fight back against the alien threat that came to be known generally as the Red Scare. For example, 44 aliens were held in connection with a 1919 strike in Washington State and prosecuted for deportation; three actually were deported.[28]

U.S. Attorney General A. Mitchell Palmer — his own home the target of a radical's bomb — ordered the investigation of radical organizations. One group, the Union of Russian Workers, identified itself as communist, atheist, and anarchist. Police searches of such groups turned up evidence, including radical literature and, in some instances, bomb-making material.[29] Arrests by the hundreds followed in what were called the Palmer raids, but few deportations ensued. More than 6,000 deportation warrants were issued, with about 4,000 served on alien communists and anarchists. Just over 500 alien radicals actually left the country of the 1,119 ordered deported.[30]

Arguably, exclusionary laws' bark was worse than their bite, in practice. Nevertheless, even if they were applied less vigorously than they might have been, these laws helped safeguard America through the time of the Bolshevik revolution, the rise of Nazism, communism, and fascism.

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World War II, the Cold War, and Beyond

Ideological assaults from foreigners continued after World War I and the Palmer raids. Immigrants provided fertile soil for recruiting for advocates and activists of foreign extremist causes. In fairness, while many immigrants embraced the radical ideas, others sought affiliation with people of their own ethnic and cultural origins. However, after 1920s immigration restrictions were enacted, "Communist activity became more open and militant" in the Depression Era, leading Rep. Hamilton Fish's congressional committee to recommend the outright exclusion of communists under U.S. immigration law.[31]

Soviet communists sought to infiltrate the United States and to undermine it politically, as *The Venona Secrets* makes plain. Throughout the 20th century, the Communist International, or Comintern, directed spies and recruitment and propaganda activities on American soil from the Soviet Union. For example, the Comintern in 1936 ordered "'a campaign . . . in the shortest possible period among the members of the CP [Communist Party] so that they will do everything in their power to become citizens of the USA,'" while average members with immigration problems were told to leave the party.[32]

Communist Russia took advantage of the massive inflow of Eastern Europeans that occurred before the 1920s, when U.S. immigration restrictions were adopted and immigration levels thus fell precipitously. The Communist Party in America at the time of Whittaker Chambers's joining was

> *. . . overwhelmingly foreign-born. Only one out of seven Party members spoke English well enough to be in an English-speaking branch. The other six out of seven were members of branches that spoke their native language — three-quarters of them came from the former Tsarist Empire.*[33]

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Hitler's Nazi Party took power in Germany in the 1930s, with war breaking out in Europe. The Nazi war machine, Mussolini's regime in Italy, Soviet communism pushing for world influence, as well as Imperial Japanese designs pressing in Asia, presented the United States with a foreign policy handful. A 1939 Supreme Court ruling in Kessler v. Strecker held that alien membership in a proscribed group only applied to present membership. Congress soon made it clear that past membership would be grounds for excluding aliens for ideological reasons. A 1940 law barred foreigners who had belonged to a subversive organization in the past, as well as requiring aliens in the United States to register and be fingerprinted. Another law denied a visa to and the entry of foreigners whose planned activities would "endanger the public safety."[34]

Even before the United States was drawn into World War II, the domestic threat became more serious. As tensions mounted, ideological exclusion and removal, as well as alien registration and control laws, became all the more important tools for the U.S. government to have at hand.

Secret intelligence operations by the U.S. military, known as MAGIC, intercepted and decoded Japanese diplomatic messages beginning in the late 1930s. These communications evidenced the extent of Japan's espionage on American soil. By late 1940, MAGIC unveiled Japan's plans for spying in the United States, directing the recruitment of agents from "our 'Second Generations' and our resident nationals" among others.[35]

As it had been invoked in previous wars, the Alien Enemies Act served as the basis for designating German, Japanese, and Italian nationals as enemy aliens, along with prudential controls during World War II, such as prohibiting enemy alien travel into certain areas, restricting alien property ownership, and internment (not only of Japanese nationals, but other Axis nationals). The 1940 Alien Registration Act resulted in nearly five million foreign nationals registering with the government during World War II.[36] The context of the times saw liberal columnist Walter Lippman writing in 1942:

> *The enemy alien problem on the Pacific Coast, or much more accurately, the fifth column problem, is very serious and very special. . . . The Pacific Coast is officially a combat zone; some part of it may at any moment be a battlefield. Nobody's constitutional rights include the right to reside and do business on a battlefield.*[37]

German fifth columns had assisted Hitler's European conquests, thanks to "German citizens and Nazi sympathizers" living in such nations as Poland, Belgium, Holland, and France.[38] Thus, the perceived threat was realistic.

Whereas Axis enemies during a state of war provided a somewhat clearer target for exclusion and other immigration control policies, Soviet communism had always been more surreptitious. Soviet agents, front groups, and infiltration and espionage techniques composed a broad strategy to undermine the United States. Immigrants as well as traitorous natives played a role in the communist threat. For instance, German refugee Karl Frank, alias Paul Hagen, was investigated by the FBI in 1945. His internal security case confirmed that Hagen was a communist and active in a communist front group, New Beginning.[39]

Soviet aggression escalated after the Second World War, and with it tensions mounted between the USSR and the United States. This was the Cold War, when ideological exclusion became an even more vital public policy instrument. During this period, a refugee problem arose in which people posed as refugees seeking admission using bad documents. In 1948, the Displaced Persons Act barred refugee frauds from U.S. admittance.[40]

While Soviet espionage of the American-British atomic bomb project was proceeding by 1941, the communist effort was aided by a Manhattan Project insider, Klaus Fuchs, a German refugee, who supplied the Soviet Union with valuable atomic secrets.[41] The postwar 1940s and 1950s saw Russian aggression throughout Eastern Europe, the closing off of East Germany and East Berlin, the successful theft of atomic weapons know-how, and continued Soviet militarization with a nuclear accent. Meanwhile, Soviet designs gained a clear advantage from the ability of its agents and sympathizers to travel with relative ease in and out of the United States. The realization of this

vulnerability gave rise to enactment of the 1950 Internal Security Act.

A sign that Cold War Congresses took the communist menace seriously and meant to deal with it realistically and effectively, this national security measure forbade the entry of persons likely to perform subversive activities in the United States. The codified security exclusions named such activities as sabotage, espionage, and public disorder. New categories of exclusion included membership in the Communist Party or its affiliates. This marked the first designation in law of the party's name, and achieved the "specific exclusion of Communists and Fascists from admission into the United States."[42] The law was amended the next year to allow the admittance of involuntary members of communist organizations.[43]

The McCarran-Walter Act and Ideological Exclusion

The McCarran-Walter Act of 1952, or the Immigration and Nationality Act, reorganized and recodified all U.S. immigration laws, including exclusion policies. This Act became law over President Truman's veto. It eased family separation for excluded individuals through waivers and emphasized immigrant character (barring criminals, communists, frauds, and other undesirables), health (barring such mental defectives as "idiots, imbeciles, morons, and persons of border-line intelligence") and ability (setting a labor test and prioritizing entry by aliens with needed job skills).[44] In many ways, it represented the high-water mark of American ideological exclusion policy.

Sen. Patrick McCarran (D-Nev.) and Rep. Francis Walter (D-Pa.) included ideological exclusions among the many grounds for excluding aliens from American soil, based on well-founded fears arrived at after much congressional inquiry. For example, a late 1940s Senate Judiciary subcommittee report concluded that current legal loopholes resulted in the admission of "criminals, Communists, and subversives of all descriptions . . . like water through a sieve."[45]

Sen. McCarran had told the Senate, "We must bring our immigration system into line with the realities of Communist tactics."[46] What realities? Former communists, including Whittaker Chambers, Elizabeth Bentley, and Louis Budenz, who had informed the FBI about their communist subversion and provided specific, verifiable information about communist operatives and operations, appeared at congressional hearings to expose the enemy operating from within.[47] These witnesses

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> *. . . testified that the real control of the [communist] party in the United States was in the hands of foreign agents who entered and left the country at will. Maurice Malkin, another former Communist, declared, 'The Communist Party of the United States was organized and has been led by aliens since its inception in 1919.' These witnesses recommended much more stringent immigration laws in regard to subversives in order 'to cut the lifeline of the party.'*[48]

Congressional efforts culminated in the spring of 1951, with joint House and Senate Judiciary Committee hearings on McCarran and Walter's reintroduced legislation. The latest McCarran bill largely followed the Internal Security Act's exclusions of subversives. However, the legislation allowed the entry of former members of subversive groups, if membership was nominal and forced for getting jobs or ration cards. In order to be regarded as admissible, such alien members would have to had renounced their former allegiance and for two years have actively opposed the radical ideology.[49] However, government witnesses warned that it would not be possible to determine the truth about aliens seeking entry from closed nations, and it would be better to "err in favor of American security."[50]

The McCarran-Walter Act became law by overwhelming majorities in both bodies of Congress, with sufficient strength to overcome President Truman's veto. (Truman objected to retaining the national-origins system.) It eventually listed 33 categories of excludable aliens (nine of them new). Regarding an alien's ideology, three grounds related to security and politics. Section 212(a)(27) kept out aliens who would participate in activities that would be prejudicial to the public interest or public safety. Section 212(a)(28)

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excluded aliens who belong to subversive organizations or teach or advocate prohibited views. Section 212(a)(29) barred aliens deemed likely to engage in subversive activities once here. This noncontroversial subsection kept out aliens expected to engage in espionage, sabotage, public disorder, or activity that risks national security or use of force or violence to overthrow the U.S. government.

Ideological exclusion proved a valuable policy tool for the Cold War by enhancing efforts to ferret out Soviet agents and fight communist subversion. But its application, compared with other grounds for exclusion and deportation, appears measured. From 1892 to 1980, the Immigration and Naturalization Service excluded 1,369 aliens as subversives or anarchists. Of them, 1,098 such exclusions occurred in the 1950s, or about 5 percent of all INS exclusions that decade. These grounds were employed to deport threatening aliens, too, but not greatly. Only 230 subversive or anarchist aliens were deported on those grounds in the 1950s, making it the third-lowest deportation category of the decade of 13 on INS tables, and only the fourth-ranking decade for such deportations between 1908 and 1990.

The 1960s saw 128 aliens excluded as anarchists or subversives, and 15 aliens removed for those reasons. In every decade, far more aliens were excluded or deported for criminal or narcotics violations or some other reason than were kept out or sent back for dangerous ideology or radical activism.

The State Department says it does not have available visa refusal data from 1952 to 1962. Therefore, it is difficult to draw firm conclusions regarding ideological exclusion's application by the State Department in the early years of McCarran-Walter.

Ideological Expansion by Congress and Courts

In 1951, the Supreme Court upheld the 1940 Alien Registration Act (or Smith Act) convictions of 12 Communist Party conspirators seeking the overthrow of the U.S. government in Dennis v. United States. In 1952, the court ruled in Harisiades v. Shaughnessy in favor of deporting aliens who previously belonged to subversive groups.[51] But the court was about to shift radically, as the same social forces that gave rise to the 1965 immigration overhaul, scrapping the national-origins quota system, fed elite sentiment to expand the First Amendment far beyond its original meaning. This mindset included foreigners' speech.

A number of court decisions expanded the First Amendment far beyond the Founders' original intent. For example, the judiciary loosened the long-standing protections in law that safeguarded individuals from defamatory expression and removed the legal consequences of libelous attacks. One such case was New York Times v. Sullivan in 1964. In this decision, the U.S. Supreme Court inordinately raised the standard of proof for public officials and public figures claiming defamation. Thus, unless a plaintiff could prove the publication occurred despite knowledge of falsity or in reckless disregard of the truth, even falsehoods that defame public figures now enjoyed "constitutional" protection.[52]

The same judicial activism informed other rulings with just such an expansive interpretation of the First Amendment. The 1969 case of Brandenburg v. Ohio overturned a criminal statute under which a Ku Klux Klansman had made veiled threats against the U.S. president, Congress, and the judiciary. The Supreme Court ruled that "mere advocacy" of illegal acts instead of "inciting or producing imminent lawless action" should enjoy "constitutional" protection.[53] Other cases stretched the First Amendment's protection to include not only broad written and spoken ideas, but symbolic expression such as clothing, actions such as burning the flag, and vulgarity.[54]

Into this context fell the exclusion of aliens on ideological grounds. The Supreme Court under Chief Justice Earl Warren had already practically reversed the Dennis decision, distinguishing in Yates v. United States in 1953 "an action involving the overthrow of the government from abstract discussion or writing suggesting such action."[55] Activist judges in the 1950s, 1960s, and beyond carved out the concept of "meaningful association," so that known members of a Communist Party organization, communist military, or communist government had to have performed some voluntary activity to back up ideological sympathy and membership in order to be excludable.[56] The 1961 decision in Noto v. United States let off a convicted communist advocate. In 1967, the court effectively extended First Amendment freedom of association to mean that communists might work in American national defense facilities.[57] How such an expansive perspective might decide on ideological exclusion provisions eventually came to a test.

The 1972 ruling in Kleindienst v. Mandel addressed the ideological exclusion of a Belgian socialist newspaper editor under INA Section 212(a)(28). The court determined that the exclusion was in order, as Mandel advocated world communist principles; therefore, the denial of a visa for "facially legitimate and bona fide" reasons fell within Congress's broad, plenary powers to decide aliens' admission and exclusion. Of note, the court denied Mandel standing to bring a constitutional challenge of a visa denial. The six American plaintiffs asserted that Mandel's exclusion violated their First Amendment rights of association and to receive information. However, the court declined to rule on First Amendment grounds, saying to do so "would allow all aliens to be admitted and would consequently transform Congress's plenary power into a 'nullity.'"[58]

In 1975, the United States signed the Helsinki Accords, which in part sought to ease the international movement of ideas and people. Sen. George McGovern in 1977 successfully offered an amendment that came to bear his name, ostensibly to further compliance with the Helsinki Accords. The McGovern Amendment to the fiscal 1978 Foreign Relations Authorization Act stacked the deck against Section 212(a)(28). This part of the ideological exclusion law spelled out in eight detailed subsections various alien subversives who were to be rejected for entry into the United States. These exclusionary grounds ranged from group membership to affiliation to various activities supporting the furtherance of subversive causes. Activities included writing, teaching, advocating, and publishing seditious acts against the U.S. government. It granted a waiver to aliens who could prove membership was involuntary.

The McGovern Amendment turned that system on its head; now, waivers for nonimmigrant (i.e., temporary) visas would be automatically recommended unless the alien's admission would jeopardize U.S. security interests. Further, the Secretary of State would have to certify such exclusions to Congress. Over the next two years, the amendment was refined to clarify that the instant waiver did not apply to terrorists from the Palestine Liberation Organization, nationals of nonsignatory Helsinki countries, or supposed labor unions that were in fact communist fronts.[59]

Controversy surrounding ideological exclusion festered in the 1970s, but came to a head in the 1980s, with the Reagan administration's coming to power. Congress said the Carter administration denied more visas under Subsection (27), but critics attacked the Reagan administration exclusions as aimed at foreign policy opponents.[60] Section 212(a)(27) kept out aliens believed to seek entry "solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." The only waiver under this exclusion was for certain diplomats. Certain outspoken foreigners received invitations from American groups — primarily left-wing politicians, academics, activists, and others — ostensibly to exchange ideas on foreign policy and military affairs. Most invitations appeared to be attempts to give a forum to critics of various Reagan administration policies, such as in Central America and on nuclear arms.[61]

The McGovern Amendment turned that system on its head; now, waivers for nonimmigrant (i.e., temporary) visas would be automatically recommended unless the alien's admission would jeopardize U.S. security interests.

Former NATO official Nino Pasti, a former Italian senator and air force general, was president of a peace group and active in the communist front group the World Peace Council. New England pacifist organizations invited Pasti to speak at nuclear freeze rallies, but the State Department denied him a nonimmigrant visa under paragraph (27). Nicaraguan Interior Minister Tomas Borge accepted an invitation to speak at several meetings of those opposed to Reagan administration policies toward the communist government in Nicaragua, but he was denied a visa under paragraph (27). Similarly, the government denied visas to invited speakers Olga Finlay and Leonor Rodriguez-Lezcano. These Cuban women were offered a forum at American universities and at the Third World Woman's Project of the Institute for Policy Studies.[62]

American plaintiffs challenged these exclusions, claiming they were being denied their First Amendment right to receive information and to associate with the aliens and that the Immigration and Nationality Act was being misapplied. These cases were consolidated in Abourezk v. Reagan.[63]

In 1984, the U.S. District Court for the District of Columbia found for the government, granting its motion for summary judgment. The court ruled on the statutory claims, not the constitutional ones. It determined that the "public interest" terminology "embrace[d] harm to foreign policy

interests," that the McGovern Amendment applied solely to paragraph (28), not (27), and applied the Kleindienst standard of a "facially legitimate and bona fide" basis for visa denial. This last element represented something of a balancing of First Amendment considerations with congressional and executive authority to conduct foreign relations. The court also, having reviewed in camera classified documents regarding the aliens in question, concluded that the visa denials occurred because of the persons being officials of governments or organizations hostile to this country.[64]

The Court of Appeals for the D.C. Circuit in 1986 vacated the lower court's ruling and remanded the case. While agreeing that paragraph (27)'s "public interest" clause included foreign policy matters, it ordered the lower court more fully to explore whether this exclusionary statute applied only to intended subversive activities, as the plaintiffs claimed, or also applied to simple entry or presence. This court then accepted the plaintiffs' claim that the government should only employ the paragraph (27) exclusion if an alien is not excludable under (28) relating to group membership. This argument implied that (27) was given as the basis for exclusion in order to circumvent the McGovern Amendment's strictures on (28) exclusions.[65]

In the fall of 1987, the Supreme Court upheld the appellate ruling in a per curium decision.[66] The district court, in light of the appellate decision, ultimately determined that the government had not provided sufficient evidence from the legislative history to sustain a practice of paragraph (27) exclusions based on anything other than planned activities. The court additionally applied the appellate-suggested standard to ensure that the McGovern Amendment was not bypassed via (27); the aliens' memberships would have to be taken into account, and their possible exclusion considered, under paragraph (28). In this case, the court found the government had not presented an adequate case to justify a (27) exclusion based on group membership, which the court claimed should normally be considered under (28). This meant Nino Pasti and both Cuban women could not be rejected for a visa, based on group membership, under paragraph (27); however, Tomas Borge could be kept out because of his intention to travel inside the United States as the Nicaraguan government's representative.[67]

Section 212(a)(28), pertaining to membership in communist or other dangerous groups, had already been weakened by the McGovern Amendment. Following the Left's uproar against the Reagan administration's apparent reliance on Section 212(a)(27) as an end run, Sen. Daniel Patrick Moynihan (D-N.Y.) and Rep. Barney Frank (D-Mass.) went to work. The Moynihan-Frank Amendment became law as Section 901 of the 1988-1989 Foreign Relations Authorization Act. The amendment applied both to immigrants and nonimmigrants (though when extended the next year it was narrowed to apply only to nonimmigrants). The amendment provided that aliens could not be excluded or deported "because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States." That is, American lawmakers sought to extend the First Amendment to the world — despite foreigners' lack of corresponding duties that U.S. citizens bear or the status of being subject to the U.S. government's jurisdiction.[68]

The original ideological exclusion provisions never seem to have kept out large numbers of aliens, compared with other grounds for exclusion or deportation or as a proportion of total findings of visa ineligibility. Section 212(a)(28) grounds precluded the most aliens from getting visas, compared with (27) and (29) (see Table 1). Paragraph (28) caused around 200 immigrant visa denials a year in the Johnson administration years and from roughly 1,200 to 4,500 nonimmigrant visas to be denied each of those years in the 1960s. A note in the State Department's report began to appear with the fiscal year 1968 figures that a high percentage (60 percent in FY 1968) of immigrant visa applicants overcome the grounds for refusal. In 1971, State Department reports began to show the number of annual visa refusals overcome.

From 1963 to 1991, refusals for immigrant visas under (28) ranged from 38 in 1972 to 300 in 1983. Nonimmigrant visa refusals in that period ranged from 1,182 in 1963 to 69,001 in 1990. But the vast majority of refusals of both types of visas were subsequently overcome, even before the weakening amendments.

The McGovern Amendment apparently had less effect than the Moynihan Amendment. In 1976, a fairly typical year before the McGovern Amendment, 19,305 nonimmigrant visas were denied on (28) grounds; 18,500 refusals were overcome, netting 805 aliens kept out for this ideological reason. In 1984, post-McGovern and a generally representative year, 32,218 nonimmigrant visa refusals are recorded; 31,527 were overcome, leaving 691 net nonimmigrants banned.

Table 1. Visa Refusals Under McCarran-Walter Act Ideological Grounds

Year	INA Sec. 212(a)(27)		INA Sec. 212(a)(28)		(28) Refusals Overcome		INA Sec. 212(a)(29)	
	Immigrant	Nonimmigrant	Immigrant	Nonimmigrant	Immigrant	Nonimmigrant	Immigrant	Nonimmigrant
1963	12	12	205	1,182	—*	—	4	12
1964	12	12	149	1,487	—	—	5	3
1965	6	36	160	2,017	—	—	5	18
1966	2	25	203	2,248	—	—	6	31
1967	8	7	231	4,506	—	—	4	5
1968	3	14	180	4,294	—	—	2	7
1969	4	14	183	5,292	—	—	1	3
1970	2	15	61	7,243	—	—	0	4
1971	0	24	45	7,504	26	6,057	0	2
1972	0	11	38	9,060	20	8,762	17	2
1973	1	27	60	12,018	22	12,058	0	2
1974	1	28	234	15,229	29	14,874	1	2
1975	2	16	90	18,240	24	17,465	0	6
1976	4	63	49	19,305	16	18,500	1	6
1977	2	57	63	16,185	19	15,361	1	3
1978	0	58	86	23,055	25	17,620	0	7
1979	1	37	77	25,890	35	25,691	1	3
1980	1	16	88	28,831	37	28,175	0	9
1981	1	32	91	26,935	18	26,567	0	7
1982	1	36	224	24,439	98	23,917	0	7
1983	1	26	300	26,973	236	26,211	1	2
1984	1	43	252	32,218	217	31,527	1	6
1985	0	33	279	47,574	250	46,788	0	10
1986	1	33	132	45,923	106	45,372	0	3
1987	0	20	111	37,990	83	37,914	1	12
1988	2	24	101	44,160	91	43,232	0	8
1989	2	22	110	52,067	62	51,650	0	11
1990	1	12	143	69,001	90	68,841	1	26
1991	4	12	128	39,896	128	39,819	1	20

Source: U.S. State Department Visa Office Reports, various years

*Reports did not list the number of refusals overcome until 1971.

By the late 1980s, ideological exclusion was becoming passé. McCarran-Walter in general and ideological grounds for alien exclusion in particular were hammered regularly.

While 1988 is atypically high in net nonimmigrants denied visas — 928 of 44,160 — the numbers of nonimmigrants ultimately denied visas fell precipitately each of the next three years until the 1990 Act changed the law. In 1989, only 417 of 52,067 nonimmigrant applicants failed to overcome a refusal. In 1990, it was 160 out of 69,001 who met the standard for nonimmigrant visa denial. In 1991, just 77 of 39,896 nonimmigrant visa applicants did not overcome refusal.[69]

The 1990 Immigration Act and Ideological Exclusion

By the late 1980s, ideological exclusion was becoming passé. McCarran-Walter in general and ideological grounds for alien exclusion in particular were hammered regularly. For example, one law review article insisted that Congress "establish a standard for modern times, and depart from the earlier xenophobic period."[70] Another categorized the McCarran-Walter Act as "a product of the anticommunist fervor of the McCarthy era."[71] A journal article disparaged the policy using language such as "anti-Communist hysteria of the early 1950s," "alarmist view," and "sweeping and potentially unconstitutional language in Section 212."[72] Groups such as PEN (Poets, Playwrights, Essayists, and Novelists) took up the cause of overturning ideological exclusion.

A federal court in California ruled in 1987 that Palestinian terrorist group members residing in the United States could not be deported, instead extending First Amendment protection to their speech. The court in American-Arab Anti-Discrimination Committee v. Meese deemed the "Los Angeles Eight" to have the same constitutional rights as an American citizen despite the fact that their organization, the Popular Front for the Liberation of Palestine, advocated world communism. Rather, the court applied the "inciting or producing imminent lawless action" standard from Brandenburg v. Ohio. It also refused to distinguish between nonimmigrants and permanent residents (two of the eight aliens were lawful permanent residents, while six held student visas). The Ninth Circuit upheld the lower court's decision, but the U.S. Supreme Court in 1999 reversed it.[73]

Liberal Rep. Barney Frank sponsored legislation in the 1980s to repeal or seriously weaken exclusion and deportation grounds. The House Immigration Subcommittee held a hearing on Frank's H.R. 1119 in 1987 and reported H.R. 4427 in 1988. H.R. 4427 sought effectively to gut ideological exclusion.

In the hearing on H.R. 1119, Reagan administration witness Abraham Sofaer of the State Department quoted Secretary of State George Shultz's speech at a PEN conference: "It has never been the approved policy of the United States to deny visas merely because the applicant wants to say that he disapproves of the United States or one of its policies." Sofaer said the Reagan administration was "committed to protecting the free expression of all political ideas." Visa denials on one of the ideological exclusion grounds "are not intended to deny anyone admission to the United States solely because of the beliefs he or she espouses."

He said the administration "welcome[d] revisions in section 212(a) of the INA that will ameliorate concerns about possible infringements of the right of Americans to hear all points of view." Sofaer said the administration proposed eliminating exclusions based solely on group membership or affiliation. He told the subcommittee that under the McGovern Amendment, nearly all such exclusions resulted in waivers — more than 45,000 a year. He insisted on retaining the exclusion of terrorists, then Section 212(a)(28)(F). He also said the administration sought to continue to place conditions on aliens' activities to guard against espionage or acquisition of sensitive technology.[74]

Additionally, the administration favored preserving 212(a)(27)'s authority to deny visas on foreign policy grounds. Sofaer said,

> *We strongly oppose the provisions of H.R. 1119 which would allow any person lawfully in the United States to bring a lawsuit against the Government if he or she is prevented from meeting with or hearing an alien excluded on security grounds. Foreign policy exclusions are essentially political decisions and should only be made by the branches of Government charged with this authority under the Constitution.*[75]

The Justice Department witness largely agreed with the State Department. Witnesses from various activist groups, including the American Bar Association and People for the American Way, embraced the Frank bill.

In the 101st Congress, Rep. Frank reintroduced his bill to revise the grounds for exclusion and deportation, including elimination of the ideological grounds (H.R. 1280). Sen. Alan Simpson introduced his own version of legislation to revise exclusionary grounds (S. 953). Simpson retained the core exclusions such as espionage, terrorism, certain communist affiliates or members, and the foreign policy reasons.

At the same time, Rep. Bruce Morrison (D-Conn.), who had just taken over the House Immigration Subcommittee and was pushing expansion of legal immigration, went along with the repeal of ideological exclusion in conference committee. Neither the House- nor the Senate-passed versions of the 1990 immigration bill included provisions dealing with exclusions. But the American Civil Liberties Union was pushing the repeal of ideological exclusion, and congressional staff negotiating in the conference agreed to change exclusion provisions while they were revising the Immigration and Nationality Act anyway. The product that ultimately became law was S. 358, the Immigration Act of 1990.

The 1990 Immigration Act revised the grounds for exclusion and deportation, shrinking them from 33 grounds to nine. The new law focused more on activity than beliefs. For instance, an alien could be kept out of the country if he were thought likely to involve himself in activity relating to espionage, sabotage, exporting sensitive technology, other unlawful activity, or "opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means." Terrorist activity, past or expected, could keep out an alien, as could activity in Nazi persecutions or genocide.

Foreign policy reasons for exclusion were modified, but retained. Mere presence or proposed activities that "would have potentially serious adverse foreign policy consequences for the United States" counted. Foreigners were no longer "excludable because of past, current, or expected beliefs, statements, or associations which would be lawful in the U.S." If the Secretary of State decided to exclude an alien because of "a compelling United States foreign policy interest," notice had to be given the House and Senate judiciary and foreign affairs committee chairmen.

In short, the 1990 Immigration Act for the most part gutted ideological exclusion.

Congress stressed that foreign officials or political candidates were not to be excluded from entering the United States, short of a clear foreign policy reason. In other words, Congress intended to preserve the spirit of the McGovern and Moynihan Amendments. The Act raised the standard for the exception to "compelling foreign policy interest." Coupled with the notification-of-Congress requirements placed on the Secretary of State to justify every excludability determination under these grounds, Congress "intend[ed] that this provision be used only in unusual circumstances."[76]

Membership in a totalitarian or communist party kept an alien from admission as an immigrant, but did not bar admission as a nonimmigrant. The law made it easier for alien ideologues to enter the United States, and included exceptions for would-be immigrants for involuntary membership, defectors and termination of membership, and having close family here.

Similarly, the 1990 Act narrowed grounds for deportation from 19 to five. The remaining ones matched up with the exclusion categories, except for membership in a communist group no longer being a reason for deportation. One of the very few measures that attempted to tighten up exclusion and deportation related to terrorism. The new law sought to define terrorist activity rather broadly, citing specific activities such as assassination, hijacking, and using biological, chemical, or nuclear agents to hurt people or damage property.[77] However, this provision focused narrowly on activity, not advocacy or beliefs.

In short, the 1990 Immigration Act for the most part gutted ideological exclusion. It loosened the legal and procedural barriers to entry by aliens who radically oppose the United States. It effectively codified earlier legislative attempts to extend the broadest reading of First Amendment protections to foreigners who have no allegiance or duty to the United States. It embraced an extreme vision for expanding border-crossing rights to America's sworn enemies who restrict at least most of their anti-Americanism to advocacy.

The 1990 Act's effect may be seen in the negligible number of visas refused for ideological reasons — which had already been partially undermined by the McGovern and Moynihan Amendments. For

example, the State Department in fiscal year 1992 refused a mere 14 immigrant visas on these grounds of a total of 167,267 ineligibility findings (while 19 such applicants overcame their ineligibility determination that year), as well as 42 nonimmigrant visas of 1,580,870 total nonimmigrant ineligibility findings (with 18 ineligibility determinations overcome). A net of 13 nonimmigrants were denied visas that year on terrorism grounds. In 1994, 23 immigrant visas were denied and 10 denials overcome. That year, 77 nonimmigrant visas were refused, with 14 overcome. A net of 30 nonimmigrants did not get visas that year because of their terrorist activities.

The State Department refused only 32 immigrant visas in fiscal year 2000, or 0.1 percent of total visa refusals, on terrorism and security grounds; even after the September 11, 2001, terrorist attacks, fiscal year 2002 saw only 27, or 0.1 percent, of immigrant visa refusals for these reasons. Of nonimmigrant visa refusals in fiscal year 2000, only 224, or 1 percent, were for terrorism or security reasons; fiscal year 2002 saw a mere 133 such refusals, or 0.4 percent of total nonimmigrant visa denials.[78] The INS had never excluded or deported large numbers of subversives or anarchists. Only 32 aliens were excluded on these grounds in the 1970s and just 10 from 1981 to 1984 (after which figures were so low they no longer were reported). The INS deported 230 subversive and anarchist aliens in the 1950s, 15 in the 1960s, 18 in the 1970s, and 36 in the 1980s. Only two of the 28,060 aliens deported in 1991 were on these security grounds.[79]

By essentially applying the standard of protecting the beliefs of foreigners as if a U.S. citizen held them, Congress further undermined the distinctions of citizenship. If a foreigner whose past, present, or expected beliefs, statements, or associations cannot be judged as so radical they logically would lead to activism and advocacy (even if the alien advocate never personally built a bomb), at least by others if not himself, the country can no longer keep out the very people who wish to use their voice, pen, and energy to harm this nation. This has led to serious consequences, which might well have been foreseen.[80]

Then and Now: World War II, the Cold War, and the War on Terrorism

Foreign ideologues have long sought to promote their beliefs and advance their causes on American soil. Subversives, socialists, communists, and Islamic terrorists have entered the United States in order to make converts, raise funds, organize followers, and otherwise exploit American freedoms to further their causes. Subversives have spied, spread propaganda, and stolen state and industrial secrets. Immigration has been a useful tool in the toolkit of America's enemies.

As the degree of foreign leadership of communist organizations and front groups became exposed, and as Axis (particularly Imperial Japanese) agents sought to involve its emigrants living in the United States to advantage during World War II,[81] so too did September 11 Islamofascist attacks on American soil display the significant extent to which America's enemies have used a lax immigration system against America.

Michelle Malkin has compared Japanese subversion during the Second World War with Islamic extremism in the 21st century:

> *The Japanese espionage network and the Islamic terrorist network exploited many of the same immigration loopholes and relied on many of the same institutions to enter the country and insinuate themselves into the American mainstream. Members of both networks arrived here on student visas and religious visas. Both used spiritual centers — Buddhist churches for the Japanese, mosques for the Islamists — as central organizing points. Both used native-language newspapers to foment subversive tendencies. Both leaned on extensive ethnic- or religious-based fundraising groups for support —* kais *for the Japanese, Islamic charities for Middle Eastern terrorists. Both had operatives in the U.S. military. Both aggressively recruited American citizens as spies or saboteurs, especially (but not exclusively) inside their ethnic communities. Both were spearheaded by fanatics with an intense interest in biological and chemical weapons.*[82]

The same observations hold true for communist exploitation of immigration during the 20th century. For example, Arthur Adams, a Soviet spy from Canada, stole technology from America businesses. He had served the nascent Soviet Union as its first intelligence officer in the U.S. from 1919 to 1921. Adams re-entered the United States in the late 1920s and early 1930s associated with a Soviet trade group. A communist businessman helped Adams in 1937, telling the INS that Adams worked for his company. Adams

re-entered the United States in 1938, indicated his desire to naturalize in 1940, registered for the draft under the Alien Registration Act, and used his job and immigration to perform atomic espionage during the 1940s.[83]

Another example of immigration system abuse is the Browders, infamous communists of the 1930s and 1940s. Earl Browder, who led the American Communist Party, went to prison for passport fraud. President Franklin D. Roosevelt commuted his sentence. Browder's wife, Raisa, entered the country illegally and was put into deportation proceedings. She received a legal visa at an American consulate in Canada, apparently under orders from the head of the INS, Earl Harrison.[84] Notably, some of the most vocal advocates on behalf of the Browders were "educators, religious, labor, and civic leaders." They argued Mrs. Browder's deportation would break up an "American family" because Mr. Browder was a U.S. citizen and they had three young U.S. citizen children.[85] This seemingly sympathetic case failed to mention that the Browders were out to subjugate the United States.

Similarly, what terrorism expert Steve Emerson has called "American jihad" depends heavily on American immigration laxity. Ghazi Ibrahim abu Mezer was arrested in New York City in 1997. Abu Mezer, who was planning to bomb the New York City subway, had been caught three times within about a year of his arrest, each time for illegally entering the country from Canada. When arrested, abu Mezer was out on bail during deportation proceedings, plus he had applied for political asylum.[86]

Hamas, the Palestinian terrorist network, has conducted terrorist recruit training in the United States. For example, in June 1990, Hamas ran a basic terrorist training course outside Chicago for 25 Palestinians, including newly arrived Hamas recruit Nasser Issa Jalal Hidmi. The course covered Islamic religious instruction, as well as car bombing — taught by a Libyan-American ex-Marine married to an American woman. Indoctrination continued at Islamic conventions in Kansas City. Among the propaganda there participants heard "numerous top [Hamas] officials . . . reveling in the glory of the burgeoning international Islamic movement and railing against the crusader-Zionist-infidel conspiracy being carried out by the perfidious Jews."[87]

Another Islamist terror organization, Palestinian Islamic Jihad, has sunk deep roots in the United States, thanks to the vulnerabilities of the American immigration system. For example, Bashir Nafi jetted around internationally in the furtherance of his group's cause. The INS arrested and deported Nafi in Northern Virginia in June 1996 for violating his visa.[88]

> The country can no longer keep out the very people who wish to use their voice, pen, and energy to harm this nation. This has led to serious consequences, which might well have been foreseen.

Steve Emerson has called the American Muslim Council a radical Islamist nonprofit organization. AMC is tied to the Islamic Salvation Front, whose leader in the United States was put behind bars while in removal proceedings for supporting terrorism.[89] AMC's conferences have featured propagandists for radical Islam, including terrorist Layth Shubaylat, the Muslim cleric Dr. Yusef al-Qaradawi who promotes homicide/suicide bombing, and Dr. Sami al-Arian, the subsequently indicted University of South Florida professor tied to Palestinian Islamic Jihad.[90] The Kuwaiti-born al-Arian, who has resided in the United States since 1989, was caught on videotape in 2000 expressing his "political views:"

> *Let us damn America. Let us damn Israel, let us damn their allies until death. Why do we stop? . . . Mohammad is leader. The Koran is our constitution. Jihad is our path. Victory to Islam. Death to Israel. Revolution! Revolution! Until Victory! Rolling, rolling to Jerusalem.*[91]

Former AMC moneyman Abdurahman al-Amoudi pleaded guilty to charges, including a Libyan plot to assassinate Saudi Crown Prince (now King) Abdullah, illegally funneling $340,000 for Libya, immigration, and tax violations. The naturalized U.S. citizen from Eritrea, who will lose his citizenship, addressed a Palestinian rally in Washington, D.C., in October 2000, admitting his support for terrorist groups Hamas and Hizballah. The next year al-Amoudi joined in a terrorist conference in Beirut, where leaders of Hamas, Hizballah, Islamic Jihad, and Al Qaeda agreed the "only decisive option" for achieving the Palestinian goals "is the option of Jihad in all its forms and resistance."[92] Al-Amoudi deliberately used the U.S. immigration system to further the anti-Israel (and, by implication, anti-U.S.) cause of radical Islam.

Immigration channels have enabled Islamist clerics to propagandize their radical message behind

It is plain that throughout American history, especially during the predominant threats of the 20th and 21st centuries, foreign ideologues have exploited America's immigration channels.

bars. Al Qaeda sympathizers have landed positions as chaplains in American prison systems, such as New York's. One imam told inmates that 9/11 victims "deserved what they got," and another called Osama bin Laden "a soldier of Allah."[93]

It is plain that throughout American history, especially during the predominant threats of the 20th and 21st centuries, foreign ideologues have exploited America's immigration channels. Enemy aliens have used their ability to enter and leave this country, to gain permanent residence, and to naturalize as means to their ideological ends, whether it be helping Imperial Japan during World War II, the Soviet Union during the Cold War, or Islamofascism in the age of terrorism. Therefore, it should also be plain that policymakers should reconsider beefing up ideological exclusion and removal provisions and using them as a first-line tool for protecting the United States from all enemies foreign and, once here, domestic.

Recommendations

The United States has suffered the dangerous consequences of radically diminishing exclusion and deportation based on an alien's ideology. It was folly to have bought into an "end of history" justification for scrapping ideological exclusion laws at the end of the Cold War. History actually teaches that while particular radical ideologies may wax and wane, the fundamental belief that might makes right when one has a corner on utopian "truth" never goes away, it only changes its brand name. Thus, several policy changes should be considered:

Properly read the First Amendment. It would be prudent to restore effective statutory grounds by which to protect the nation from foreign radical influences. The first step toward that restoration is acknowledging that the First Amendment is intended to protect the speech of American citizens — those with a stake in this nation, a valid claim on rights the Constitution secures, and owing duties to this republic — in the marketplace of ideas that serve and protect republican government here.

The First Amendment does not guarantee absolute free speech. It does not protect treasonous speech by U.S. citizens; it should not be regarded as protecting seditious speech by aliens. Nor should the First Amendment be twisted to allow aliens a forum for their subversive ideas. Congress should use its plenary power over immigration policy to draw a line where expression by aliens is concerned, even when American citizens ostensibly lose an opportunity to exchange or hear those ideas. Other avenues exist for the exchange of ideas than personal appearances, and provisions could be made to pursue them.

A new legal standard should be pressed: If ideologically oriented ideas expressed orally or in writing, delve into specifics at a time, in a place, and in a manner whose logical conclusion can reasonably be expected to incite dangerous, perhaps seditious, activities, then that expression should constitute unprotected speech. This standard would restore the more beneficial elements of earlier interpretations of the "clear-and-present-danger" test and its predecessor, the "bad-tendency" test. At least where aliens are concerned, it would restore a version of the test applied in such cases as Dennis v. United States. It would preserve Americans' First Amendment rights for themselves (though not addressing the problem of native-born extremists), while prudently returning appropriate leeway diminished in such decisions as Brandenburg v. Ohio.

Distinguish between citizens and aliens. We should recognize again and reemphasize the legal difference between U.S. citizens and aliens. We should not apologize for preserving, protecting, and defending the United States and her citizens by affording foreigners more limited rights and privileges.

Exclude for beliefs and advocacy, not just acts. It makes eminent common sense to keep out alien enemies before they can spread their hateful doctrines here. Thus, exclusion based on foreigners' ideology would safeguard the United States and the lives of thousands, even millions of innocent American citizens from avoidable harm in our own land, effected by just a few.

Therefore, we should promote intelligence-gathering on aliens abroad and intense investigation by consular officers. The State Department should establish management policies that reward consular officers who ferret out fraud or identify visa applicants who are found to hold anti-American, anti-democratic, anti-Western, anti-Christian, or anti-Jewish views. All

diplomatic personnel should be trained to look for such dangerous signs. Someone, perhaps within the political section or CIA station, should be charged with collecting this kind of information personally and from other diplomatic officers, then ensuring that dangerous alien advocates' identities are shared with consular offices and entered on lookout lists so these individuals will be denied visas should they apply.

The State Department's Visa Office should establish a section of specialists in the grounds of ineligibility. These experts would train consular officers and especially supervisors in how to apply this section of the law. Department leadership should actively promote application of ineligibility and exclusion, and officers should be told that they are expected to use the law. The specialists would write the training manuals and policy cables, and travel to consular posts where the application of the law is especially important (e.g., London and Riyadh) to provide extra training in the field regarding important sections of the law, including public charge, medical grounds, fraud, etc., and the importance of refusing people visas when applicable. This office would also provide advisory opinions and deal with congressional inquiries about these kinds of cases. The department should produce a mandatory annual report to Congress on trends and the application of the law. There should also be recognition or award for good work on these cases.

Giving visa officers wider latitude to deny visas of suspicious individuals might save many American lives, because many would-be terrorists are not named on watch lists since they have not yet acted. These people may be viewed as "intending terrorists," much like intending Soviet moles or "intending immigrants." Part of the promise of ideological exclusion is barring "true believers," foot soldiers in radical causes who might carry out suicide bombings, serve as couriers for extremist groups, and the like.

Similarly, the Department of Homeland Security should create incentives and empower immigration inspectors at border crossings and ports of entry with broader discretion and powers to turn away aliens seeking entry, if an inspector believes the alien should be denied entry on ideological grounds. Supervisors should back up these judgment calls, and keeping out questionable aliens should be rewarded, not discouraged.

The default position should be that an alien will be barred from the United States, not that a visa will be issued, admittance granted, or credible fear claims of asylum approved. Greater ability and

Giving visa officers wider latitude to deny visas of suspicious individuals might save many American lives.

encouragement to scrutinize and deny visa applicants, or aliens at ports of entry, who preach or imbibe ideologies of hatred and violence is part of the supply-side solution. Consular officers, immigration inspectors, and other American officials who encounter aliens seeking a visa, entry, an immigration benefit, or to stay in the United States should have broad latitude to explore an alien's political views and to make assessments about that alien's true intent or threat level.

After 9/11, personal interviews with consular officers now occur more routinely, especially in countries where ideologically suspicious aliens are known to be present. Building on 9/11 Commission staff member Janice Kephart's idea of "visa secondary" inspection, standard procedures should be set and consular officers should be trained to recognize the indicators of excludable aliens. They would refer potentially excludable aliens to a secondary, in-depth interview with a senior consular officer or intelligence officer. This would keep the primary line moving yet improve the odds of refusing visas to dangerous aliens.

Further, the law should clarify that an alien may be barred from the United States for more than one exclusionary ground and that those grounds are not intended to be mutually exclusive. Also, waivers of denials on security grounds should be more tightly controlled. Waivers should become the rare exception, not the rule. Aliens who espouse a dangerous ideology should not get a waiver to security exclusion. This would aid in the denial without waiver of individuals such as London subway terrorist-bomber Lindsey Germaine; he was a 19-year-old, Jamaican-born convert to Islam whose mother lives in Cleveland, Ohio.

Where foreigners are concerned, we should lessen the distinctions between their actions and their beliefs. That is, if a foreigner advocates seditious views, and especially if the logical conclusion of those beliefs is government overthrow or incitement of anti-American conduct, we should take those words seriously because of the consequences should they be successfully followed.

If an alien's radical views can be ascertained before his entry into the United States, the exclusion laws should be strong enough to keep him out of the country. If those views become clear or fester only after

We should restore and strengthen our ideological exclusion laws, but in a more generalized manner.

an alien has been admitted into the country, the laws should allow for taking custody of and removing him immediately. Thus, the grounds for exclusion and removal should be the same. And in ideological removal cases, mandatory detention and expedited procedures should apply.

This course would follow a "prevention first" rather than a "prosecution first" strategy. It would best serve the national interest. It would undo the supposed "fundamental rights of terrorists to speak, associate, and check explosives manuals out of their local libraries."[94]

Target radical ideology no matter its motive. Ideological exclusion and removal grounds might be revised on a more general level. In previous eras, lawmakers naturally fashioned these kinds of exclusionary laws to fit the proximate threat — for instance, anarchy in the 19th and early 20th centuries, communism in the Cold War, terrorist group membership in the 1980s and 1990s. One might expect ideological exclusion laws in the age of Islamofascism to be geared toward that specific threat, and they have been, to the extent such laws have been crafted at all.

Experience shows that these kinds of foreign threats share certain qualities. We should restore and strengthen our ideological exclusion laws, but in a more generalized manner. We should identify the characteristics common to radical belief systems and make those common characteristics the basis of new ideological exclusion and removal laws.

New ideological exclusion and removal grounds should keep out foreigners not only based on actual violent conduct, but for advocacy of "-ism" based ideas that lead others toward ideologically motivated violence or activities. In particular, the former INA Section 212(a)(28) could be a guide. This law named as excludable those aliens who advocate or teach "economic, international, and governmental doctrines" of anarchy or totalitarianism (subparagraphs (A), (B), (D)), advocate the violent overthrow of the U.S. government ((F)), or who engage in propaganda efforts to advance those ideologies ((G), (H)).

A good starting point would be to take the existing and the previous, McCarran-Walter, exclusionary provisions relating to ideology and generalizing them. Certain activities, or intended activities, such as espionage, transfer of sensitive technology, and advocacy, support, or advancement of terrorism, should keep a suspect alien out of the country. But other, less action-based matters should also cause the United States to exclude or remove an alien. These include, clearly, membership in or affiliation with an organization (terrorist, totalitarian, or otherwise) whose purpose is to destroy the United States or overthrow its government, as well as the foreign policy implications of an alien's admittance simply because of who he is.

Having sat under the tutelage of known extremist teachers (radical imams, antigovernment advocates, separatist movement leaders, etc.), supporting in any fashion anti-U.S. rhetoric or demonstrations, or associating with or favoring totalitarian or militant utopian advocates or groups should render an alien ineligible to enter the United States. This kind of exclusionary ground could be applied for regularly attending mosques known as hotbeds of Wahhabism, writing blog or other Internet postings or publications or running websites of ideologically radical ideas, approving of or participating in a pro-extremist or anti-American rally, or any other indication that the alien reasonably possesses the capacity or intent to act on or would advance dangerous beliefs.[95] The point here is identifying the patterns of behavior, lines of thinking, and types of language employed that are common among radicals — and keeping out foreigners who fall into those categories, regardless of what the extremist ideology is based on.

A generalized approach to writing a new ideological exclusion provision would help avoid the problems raised by writing a Muslim-specific ideological exclusion. To write the law specifying Islamic characteristics that are purely religiously related would subject the law to severe criticism after the threat of Islamofascism passes. That approach may also skirt too close to legitimate protections of that other part of the First Amendment, the free exercise of faith. It thus might cause undue hardship to faithful, moderate Muslims who also are patriotic Americans. Though certain ideologies may stem from a religion, they need not lead to exclusion of that religion's adherents solely on religion's account. We may find undesirable ideologies that are religiously motivated, but under new ideological exclusion laws, ideologues would be barred from the United States on objective ideological grounds that have profound political or security implications.

What kinds of dangerous ideas are we talking about excluding from the country? "Non-state violence as a political/military methodology is not new . . . . It proceeds from a worldview and, in almost all cases, has stated, ideologically defined, conscious goals."[96] Radical jihadists who advocate restoration of a caliphate system of government worldwide adhere to a definable set of political beliefs:

> *First, all existing governments — including those in power in the Islamic world, here called 'cartoon states' — are illegitimate (or based on* kufr, *'unbelief') and must be overthrown; and, second, Islamic law,* sharia, *must be established as the ruling legal system (emphasis in original).*[97]

This represents a jihadist ideology that, though drawn from Islam, is more than Islam. This ideology has been called Islamofascism, Wahhabism, and Islamism.

> *Wahhabism is the most extreme, the most violent, the most separatist, the most expansionistic form of Islam that exists. It's a form of Islam that not only lashes out at the West, but that seeks to take over and impose a rigid conformity on the whole Muslim world.*[98]

The utopian, totalitarian essence of this ideology that poses a clear and present danger not only to the United States but the entire world today is clearly visible. It shares marked, discernible characteristics with the Marxist brand of totalitarianism:

> *That Bolshevik taste for the absolute — for Utopia and violence — seems far distant now in the West that gave it birth. But it has reappeared within the Islamic world. The re-creation of a universal Caliphate, which ceased to rule all Muslim lands about the year 800, has become a widespread demand of radical Islamic groups from Morocco to Central Asia — a demand as abstract and utopian as Communism itself. In pursuit of such aims a cult of death as pitiless as Stalin's has gained widespread ascendancy over radical Muslims. The war against this style of tyranny demands the same energies, and meets with the same Western equivocations, as the war against Stalinism.*[99]

Therefore, an invigorated ideological exclusion and removal law should automatically ban foreigners who hold to the same essential ideology of tyranny, whether motivated by Mohammed, Marx, or someone else.

Maximize the use of technology and information. Aliens applying for a visa should have to submit all 10 fingerprints and a facial photograph at a U.S. consulate, and the equipment should be deployed to digitize visa applicant fingerprinting and photographing. Electronically stored data should be checked against all intelligence and law enforcement databases. Biometric data, which is soon to be stored electronically in passports, should be verified against the person presenting at a U.S. port of entry, so as to ensure that the person standing there is who he purports to be. These steps are generally moving forward, but should be made a top priority for completion.

The US-VISIT entry-exit system, which has yet to be fully implemented, could become the primary database of alien records. But to be effective, it must require every alien's entry and exit to be recorded, not just nonimmigrants. Alien biometric, fingerprint, and travel data must be permanently stored in the system. And, of course, US-VISIT must be placed at every single port of entry and border crossing and require Mexicans and Canadians to participate (they are currently exempt).

These uses of technology, coupled with routine analysis of the US-VISIT data, will yield a more foolproof system to admit only aliens who pose no threat and reduce the likelihood that a foreign ideologue is traveling with stolen or falsified documents. The key to making US-VISIT work is not just high-technology, but the expanded databases against which aliens are screened. Cooperation has improved among U.S. agencies and from foreign governments, but even greater cooperation, information-sharing, and intelligence is needed.

An important component that should be reinstated and integrated into US-VISIT is the NSEERS (National Security Entry-Exit Registration System) program. This program, which the Department of Justice established following the September 11, 2001, terrorist attacks but was severely weakened under the management of the Department of Homeland Security, should be statutorily mandated. NSEERS should be bolstered to require reregistration after 30 days in the country and every year thereafter by all aliens from countries of national security interest. As part of NSEERS, any alien whose ideology is questioned but has nonetheless been admitted into the

United States clearly should have to register his continued presence in the United States and demonstrate continued compliance with the terms of his visa. And to the extent aliens presenting to register have committed an immigration violation, they should be detained on the spot and put into removal proceedings, as occurred when the Justice Department ran the program.

Ensure permanent Visa Waiver Program screening. As the London suicide bombings of July 7, 2005, remind us, foreign visitors from officially friendly countries may pose a dangerous threat. The Visa Waiver Program allows visitors from such nations as Great Britain, France, and Germany to come to the United States for up to 90 days without a visa, only a passport.

But with pronounced Muslim immigration to Europe since World War II, the 15 million to 20 million European Muslims present a potentially heightened degree of danger to U.S. security. British-born ideological radicals like three of the four London terrorist bombers of Pakistani descent or shoe bomber Richard Reid would all appear on the surface as ordinary Britons; their passports would indicate nothing about their radical Islamist beliefs.[100]

The Visa Waiver Program could enable dangerous ideologues of that ilk to travel easily to the United States. In addition, terrorist groups of all kinds (e.g., the Irish Republican Army, the Palestine Liberation Organization) cooperate with each other, drug trafficking rings, and extremist states (e.g., Cuba, Libya).[101] Therefore, the VWP could be a weak link in the U.S. security chain.

The entry and exit of every VWP traveler should continue to be recorded in US-VISIT, without exception, after passports are upgraded with biometrics. Port-of-entry inspectors should not hesitate to screen VWP visitors as rigorously as regular visa-bearing travelers, particularly those who have traveled to countries of special concern.

Conclusion

Ideological exclusion is unlikely ever to be a large category in barring aliens from the United States. Its impact would probably continue to fall mostly on those seeking temporary entry rather than permanent stay. However, it could be and should be one of the grounds by which the United States denies aliens entry into this country or sends them away. In 1986, Secretary of State George Shultz told the PEN International Conference:

> *It has never been the approved policy of the United States to deny visas merely because the applicant wants to say that he disapproves of the United States or one of its policies. . . . No denial is ever based on a person's abstract beliefs.*[102]

In a post-September 11 America, we would do well to remember Richard M. Weaver's admonition that "ideas have consequences." While most Americans want to preserve a vigorous exchange of ideas on the questions facing society, not everyone may legitimately participate in that public discussion. Clearly, U.S. citizens have a valid claim as participants, while aliens should mostly be limited to observer. And the less abstract and more concrete the ideas, when they serve principally to fan flames instead of to provide light, the less they deserve First Amendment protection; they certainly do not deserve a visa.

The United States has a legitimate right to exclude from her borders foreigners whose main purpose is propaganda or to undermine U.S. policy. This country certainly has a right to bar those aliens predisposed to promote or advance radical ideologies that are inimical to American principles. To be sure, there is value in an open and honest exchange of ideas, such as when in the late 1980s President Ronald Reagan spoke in the Soviet Union and Secretary Mikhail Gorbachev spoke in the United States. But for a foreigner to serve as a propagandist, a purveyor of hate and violence and sedition, on American soil serves no valid intellectual or political or public purpose.

We should restore new, strong ideological exclusion grounds to our laws. While it may not address the threat of home-grown fanatics such as Ali Al-Timimi or Terry Nichols,[103] reducing the live threats from outside coming in will enable America to tackle those native-born dangers. The fact is that at every stage of American history immigration has exposed this nation to ideological threats. We should learn from our long experience and once again "err in favor of American security."

End Notes

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[11] Nadia Nedzel, "Immigration Law: A Bird's-Eye View," in Nicholas Capaldi, ed., *Immigration: Debating the Issues* (New York, N.Y.: Prometheus Books, 1997). Also, see Baseler, p. 225.

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[63] Other cases of that time related to challenges of ideological exclusion, but they are not discussed here in the interest of space. They include Allende v. Shultz, excluding Hortensia de Allende, the widow of an assassinated Chilean dictator and member of the Soviet front group World Peace Council; El-Werfalli v. Smith, involving a Libyan student; Harvard Law School Forum v. Shultz, regarding the exclusion of the PLO's United Nations observer.

[64] 592 F.Supp. 880 (D.D.C. 1984). Also, see *Grounds for Exclusion of Aliens*, Bartolomei, and Wohl.

[65] 785 F.2d 1043 (D.C. Cir. 1986). Also, see *Grounds for Exclusion of Aliens*, Bartolomei, and Wohl.

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[93] Malkin, pp. 153-154. Also, see Stephen Schwartz, "Saudi Friends, Saudi Foes," *Weekly Standard*, October 8, 2001, pp. 12-16, and Stephen Schwartz, "Radical Islam in America," *Imprimis*, Vol. 33, No. 5, May 2004.

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[95] For instance, British national-shoe bomber Richard Reid and French national-foiled 9/11 hijacker Zacarias Moussaoui attended a radical North London mosque, according to the *Washington Post* on July 10, 2005; 10,000 Muslims attended a 2003 conference in England sponsored by "structured extremist organization" Hizb ut-Tahrir, an op-ed in the July 8, 2005, *New York Times* said; Fallujah, Iraq, resident Saad Najam Abdullah was quoted in the *Washington Times* June 25, 2004, approving Islamist thugs who were imposing Taliban-like rule on his city; Jordanian native, Palestinian activist, and Islamic cleric Abu Qatada, whom Britain gave asylum, remarked in a London newspaper after September 11, "George Bush has no respect for the Muslim world. This has been designed to make sure he listens." Someone possessing or who approves of propaganda material could be excluded, such as having the rap video "Dirty Kuffar," which says, "O.B.L. [Osama bin Laden] pulled me like a shining star! Like the way we destroyed them two towers, ha ha!"

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[101] Families Acting for Innocent Relatives, www.victims.org.uk; "Adams tells Cuba of peace hopes," *BBC News*, December 19, 2001, http:/news.bbc.co.uk/1/hi/northern_ireland/1718541.stm.

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[103] Ali Al-Timimi is an American-born Islamist cleric convicted of inciting his followers after September 11, 2001, to join the Taliban fighting the United States in Afghanistan. Terry Nichols is an American convicted for his involvement in the 1995 Oklahoma City bombings.

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Backgrounder

Keeping Extremists Out

The History of Ideological Exclusion, and the Need for Its Revival

By James R. Edwards, Jr.

America has often faced the threat of foreigners promoting radical ideologies, including Jacobinism, anarchism, communism, fascism, and now Islamism. It is an unavoidable consequence of mass immigration. The higher the level of immigration, the more likely it is that individuals espousing hatred and violence toward America will gain entry. But whatever the level of immigration, excluding or removing noncitizens from the United States based on their promotion of such beliefs ("ideological exclusion") can help to protect the country. Historically such efforts have played this role, especially during the 20th century. With the end of the Cold War, Congress effectively repealed ideological exclusion, meaning that only active terrorists on watch lists could be barred, while those promoting the ideologies of such terrorists would have to be admitted. To end this vulnerability, ideological exclusion should be restored, allowing aliens to be excluded or deported not only for overt acts but also for radical affiliations or advocacy. Such grounds for exclusion and removal should be based on characteristics common to the many varieties of extremism, rather than target a specific ideology.

10-05

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