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REVIEW OF VISA DENIALS BY CONSULAR OFFICERS

James A.R. Nafziger*

Abstract: United States consular officers stationed abroad exercise enormous discretion in deciding whether to grant or deny applications for visas by foreign citizens. The process for reviewing visa denials is exceptionally limited. Federal rules and regulations and consular practices do provide for internal review of visa denials, members of Congress and the media occasionally press for review of individual cases, and the Visa Office in the Department of State issues advisory opinions from time to time on matters of both fact and law. This process is, however, inadequate for several reasons. Time and budgetary constraints generally prevent consular officers from recording reviewable explanations for denials and from undertaking comprehensive internal review of denials. Other factors limiting internal review are the absence of any provision for attorney access to the process, the refusal of the Visa Office to disclose its opinions to applicants, and a dearth of objective standards and guidance for conducting internal review of denials. By relying on ambiguous and often antiquated authority, the State Department and the courts have prevented more formal administrative review within the Department and have narrowly restricted judicial review. In doing so, courts have rendered questionable interpretations of a provision for consular discretion in the Immigration and Nationality Act and have largely ignored both the requirements of the Administrative Procedure Act and international law. The resulting nonreviewability of most visa denials is anachronistic and peculiar. Although the author's field observations indicate that consular training and decision making are of a high quality, a more formal review process would be beneficial. The availability of administrative and judicial review of visa denials would encourage greater consistency and uniformity of decisions on visa applications and better serve the interests of fairness and legitimacy. This study concludes with two sets of recommendations. The first set is of a general nature whereas the second, more detailed set takes account of alternative levels of funding for improving the review process.

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United States consulates abroad routinely shuffle passengers on Spaceship Earth by issuing or denying visas to foreign applicants. Consular decisions often have an acute impact on individuals and families. The volume of visa applications is huge. In 1988, for example, United States consulates issued 391,834 immigrant visas and 8,679,709 nonimmigrant visas,[1] figures which in a typical year would represent about 90% of all applications.[2] These figures often tell only half the story about the significance of the visa process; the other half involves the concerns of family members, prospective employers, educational institutions, and others in the United States and abroad who may have a stake in whether a foreign applicant receives a visa. Moreover, new laws often increase the number of cases subject to the exercise of consular discretion.[3] Not surprisingly, given the increasing number of

1. UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE 1988, at 18 (1989) [hereinafter VISA REPORT].

2. *See* T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 211 (1985) (citing figures for 1983). Although the Visa Office in the State Department publishes figures on numbers of applications pending for visas and issuances, it generally does not publish figures on denials. The 10% denial rate estimated by Aleinikoff and Martin is, however, consistent with comparative information given to the author during the field study described in Section IV. The Department of Justice, in accord, estimates a 9.5% denial rate. "The annual volume of visa denials is in the neighborhood of 42,700 for immigrant visa applications and 825,000 for nonimmigrant visa applications." Letter from Robert S. Ross, Jr., Executive Assistant to the Attorney General, to Marshall J. Berger, Chairman, Administrative Conference of the United States (Oct. 13, 1989) (on file with the author).

3. For example, the Immigration Act of 1990 increases the immigration quota by approximately 35 percent. Pub. L. No. 101-649, 104 Stat. 4978. Between 1992 and 1994 the limit on allowable immigration of persons other than immediate relatives and special immigrants will increase from 490,000 to 700,000; after 1994 that limit will decline to 675,000 annually. The greatest percentage increase among preference categories is in the number of "priority," skilled and other workers. In addition, special allocations of visas will be given to foreign investors and immigrants from Hong Kong and countries that were previously deprived of historical preferences. The Act suspends deportations of some classes of aliens from four countries and lifts or modifies several grounds for exclusion. *Id.* For a summary of the Act, see 67 INTERPRETER RELEASES 1209 (1990). The Immigration Amendments of 1988, Pub. L. No. 100-658, 102 Stat. 3908 (1988) extend a program, which was incorporated in the Immigration Act of 1990, for increased admission of aliens from countries underrepresented in the population because of national quotas in earlier legislation. The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) [hereinafter IRCA] amends the Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 8 U.S.C. §§ 1101–1557 (1988) [hereinafter INA], to provide amnesty, that is, a legalized status for certain classes of undocumented aliens residing in the United States. As amnesty recipients become permanent resident aliens or citizens and seek to bring in their relatives, applications for immigrant visas are expected to increase. *See, e.g.*, STATE, Dec. 1988, at 9. IRCA also provides that aliens who have at any time failed to maintain lawful status in the United States, other than through no fault of their own or for technical reasons, may no longer seek lawful permanent residence in the United States, but only by applying for an immigrant visa at a consular post abroad. 8 U.S.C. § 1255(a)(2). The Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537, broaden the consul's power to exclude aliens who have obtained a visa through

persons affected, a light industry of commentary flourishes, geared in the past to the issue of excluding aliens for national security or ideological reasons.[4] The analysis that follows, however, is not specifically limited to denials of visas on such political grounds.

On a legal landscape populated with "orphan applicants," "mustangs," "munchkins," "visa shoppers," "refusal overcomes," and the notorious "consular absolutists," a colorful vocabulary adds a superficial sparkle to an otherwise sobering debate concerning global freedom of movement. The actual and prospective influx of aliens engages

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"sham" marriages to American citizens, even if they are resident aliens returning from visits abroad, on the basis of fraud or willful misrepresentation of a material fact. Government regulations have also shifted adjustment-of-status cases from the Immigration and Naturalization Service (INS) of the Department of Justice to the consulates. *See* Paparelli & Tilner, *A Proposal for Legislation Establishing a System of Review of Visa Refusals in Selected Cases,* 65 INTERPRETER RELEASES 1027, 1031 (1988).

4. *See, e.g.,* Committee on Immigration and Nationality Law, Association of the Bar of the City of New York, *Visa Denials on Ideological Grounds: An Update,* 8 SETON HALL LEGIS. J. 249 (1985); Helton, *Reconciling the Power to Bar or Expel Aliens on Political Grounds with Fairness and the Freedoms of Speech and Association: An Analysis of Recent Legislative Proposals,* 11 FORDHAM INT'L L.J. 467 (1988); Mann, *Monopoly in the Marketplace: The Ideological Denial of Visas,* 9 LAW & POL'Y 417 (1987); Neuborne & Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas,* 26 WM. & MARY L. REV. 719 (1985); Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents,* 100 HARV. L. REV. 930 (1987); Tilner, *Ideological Exclusion of Aliens: The Evolution of a Policy,* 2 GEO. IMMIGR. L. J. 1 (1987); Torrence, *Ideological Exclusions: A Prior Restraint Analysis,* 11 HASTINGS COMM. & ENT. L.J. 335 (1989); Voigt, *Visa Denials on Ideological Grounds and the First Amendment Right to Receive Information: The Case for Stricter Judicial Scrutiny,* 17 CUMB. L. REV. 139 (1986); Comment, *Ideological Exclusion, Plenary Power and the PLO,* 77 CALIF. L. REV. 831 (1989); Comment, *Immigration and the First Amendment,* 73 CALIF. L. REV. 1889 (1985); Note, *First Amendment and the Alien Exclusion Power—What Standard of Review?* 4 CARDOZO L. REV. 457 (1983); Note, *First Amendment Limitations on the Exclusion of Aliens,* 62 N.Y.U. L. REV. 149 (1987); Note, *Free Speech and the Right of Entry into the United States: Legislation to Remedy the Ideological Exclusion Provisions of the Immigration and Naturalization* [sic] *Act,* 4 AM. U.J. INT'L L. & POL'Y 443 (1989) (apparently referring to the Immigration and *Nationality* Act); Comment, *Ideological Restrictions on Immigration,* 8 U.C. DAVIS L. REV. 217 (1975); Note, *National Security Visa Denials: Delimiting the Exercise of Executive Exclusion Authority Under the Immigration and Nationality Act,* 28 VA. J. INT'L L. 711 (1988).

The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, substantially modifies the security and foreign policy grounds for excluding aliens. Federal legislation enacted in 1987 provided that no alien who applied for a visa during 1988 could be denied one nor be excluded from admission "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." Pub. L. 100-204, § 901, 101 Stat. 1399, 1400 (1987). In 1988 Congress extended this provision for two years, until 1991, but limited it to nonimmigrant visa applicants. Pub. L. 100-461, § 555, 102 Stat. 2268-36, 2268-37 (1988). The Immigration Act of 1990 repealed this provision and substituted a similar provision, subject to a "foreign policy" exception. Immigration Act of 1990 § 601, Pub. L. No. 101-649, 104 Stat. 4978. *See also* American Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989) (declaring certain provisions of the INA unconstitutional that have the effect of curtailing the first amendment rights within the United States of members of the Palestinian Liberation Organization (PLO)).

profound social concern about the future of the "national community"[5] and the nation's role in the global community. In the national debate, immigration often becomes an issue of defining or even preserving the body politic.

The process for reviewing consular denials of visas to foreign applicants is particularly controversial. This study will discuss the general review process, with a focus on administrative and judicial reviewability, and will offer several recommendations for improving the process.

International, constitutional, federal statutory and administrative law, as well as State Department guidelines, shape the general review process. These normative sources are interdependent. For example,

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5. The postulation of a national community also underlies the communitarian theory of a correlation between particular rights of aliens and the strength or closeness of their attachment to the country. *See* Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond,* 44 U. PITT. L. REV. 165 (1983); Schuck, *The Transformation of Immigration Law,* 84 COLUM. L. REV. 1 (1984); *cf.* Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin,* 44 U. PITT. L. REV. 237 (1983). For an analysis of alien exclusion issues that focuses only on the national community without considering international dimensions, see Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law,* 1988 WIS. L. REV. 955.

Whether the immigration power should be conceptualized as a protection of membership in some kind of "national community" is controversial. *See* Aleinikoff, *Citizens, Aliens, Membership and the Constitution,* 7 CONST. COMMENTARY 9, 10, 34 (1990):

> Unlinking the immigration power from theories of membership will undermine the current regime of immigration exceptionalism that has left the immigration power largely immune to the constitutional norms applied to other congressional powers. . . . We can end immigration exceptionalism by recognizing the weaknesses of earlier justifications and by resisting the siren song of membership theory.

(footnotes omitted).

Also controversial is the very reality of a national community in a functional sense relevant to immigration policy. As a matter of immigration and assimilation, it may be argued that historically the United States has been more of a mosaic than a melting pot, that is, more of a politically and economically organized mixture of lifestyle enclaves and communities, "ongoing associations of men and women with some special commitment to one another and some special sense of their common life." M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 62 (1983). A more complete definition of "community" is "a group of people who are socially interdependent, who participate together in discussion and decision making, and who share certain *practices* . . . . It almost always has a history and so is also a *community of memory,* defined in part by its past and its memory of its past." R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART 333 (1985) (emphasis added). A "lifestyle enclave," on the other hand:

> is formed by people who share some feature of private life. Members of a lifestyle enclave express their identity through shared patterns of appearance, consumption, and leisure activities, which often serve to differentiate them sharply from those with other lifestyles. They are not interdependent, do not act together politically, and do not share a history. If these things begin to appear, the enclave is on the way to becoming a community. Many of what are called communities in America are mixtures of *communities* in our strong sense and *lifestyle enclaves.*

Id. at 335 (emphasis added).

the term "review" connotes a coordinated mix of administrative and judicial review, whereas the capacity of consular discretion to affect individual rights raises issues of constitutional rights, and the extraterritorial circumstances of consular discretion engage conventional and customary international law. What follows is largely an analysis of this complex of authority, supplemented by a summary of the author's interviews in Mexico, China, Poland and the United Kingdom and his observations of on-line consular adjudications in Mexico and China. These interviews and observations are too limited to provide an empirical basis for analysis, but do reflect salient aspects of the actual process of exercising and reviewing consular discretion. The study concludes with a set of recommendations.

I. THE STATUTORY AND ADMINISTRATIVE PROCESS OF ADMITTING AND EXCLUDING ALIENS

In exercising a qualified right to admit or exclude aliens, states normally apply a mix of two systems of control. Under the *insular-Western Hemispheric* system a state relies on the gateway or front-end grant or refusal of permission to enter its territory. The *continental* (that is, the continental European) system, on the other hand, relies on residence control involving the attribution of immigration status to all resident aliens, the attachment of restrictions and other consequences to that status, and, typically, a requirement of personal identifications and work permits.[6] Exit or departure controls supplement the permit system. During the last fifty years, several changes have been occurring: a growing perception that a mixture of the two systems of control works best, a modest trend toward adoption of the continental system of residence permits, and an expanded role for international law in controlling immigration.[7]

The United States employs an insular-Western Hemispheric system of control, but also requires limited identification and registration of aliens. The United States Constitution provides no express grant of authority to control the entry of foreigners, although the commerce power and the power to establish a uniform rule of naturalization[8] bear most directly on issues of immigration. Instead, Congress has

6. Plender, *Recent Trends in National Immigration Control,* 35 INT'L & COMP. L.Q. 531, 535, 550–51 (1986) (the author formulates the distinction between "insular" and "continental" systems of control, the former of which is slightly modified here). *See also* Wolf, *Entry and Residence,* in THE LEGAL POSITION OF ALIENS IN NATIONAL AND INTERNATIONAL LAW 1873, 1874 (J. Frowein & T. Stein eds. 1987) [hereinafter Frowein & Stein].

7. Plender, *supra* note 6, at 535; Wolf, *supra* note 6, at 1874.

8. U.S. CONST. art. I, § 8, cls. 3–4.

relied primarily on what the courts have described as "inherent" powers to control immigration.

Whatever the constitutional premises, the Immigration and Nationality Act of 1952 (INA)[9] delegates to the Executive the authority to exclude and deport aliens according to substantive provisions for eligibility and prescribed procedures.[10] The Immigration Reform and Control Act of 1986 (IRCA),[11] among other things, establishes post-entry, continental-style procedures for verifying employment eligibility that affect citizens and aliens alike. IRCA also provides for study of the feasibility of validating social security numbers and avoiding counterfeit social security cards.

The INA imposes annual numerical limitations on alien admissions, provides detailed grounds for their exclusion and deportation, and establishes visa classes.[12] The interpretation and application of these

9. 8 U.S.C. §§ 1101–1557 (1988).

10. Defining immigration terminology:

> "[E]xclusion" means preventing someone from entering the United States who is actually outside of the United States or is treated as being so. "Expulsion" means forcing someone out of the United States who is actually within the United States or is treated as being so. "Deportation" means the moving of someone away from the United States, after his exclusion or expulsion.

Kwong Hai Chew v. Colding, 344 U.S. 590, 596, n.4 (1953), *limited by* United States v. Verdugo Urquidez, 110 S. Ct. 1056 (1990). An alien has "entered" the United States if he or she has been lawfully admitted or has physically entered unlawfully by evading the prescribed process. *See* 8 U.S.C. § 1101(a)(13); *In re* Pierre, 14 I & N Dec. 467 (Bd. Immig. App. 1973).

The controversial and somewhat fading distinction between "exclusion" and "deportation" has important due process implications. Consular decisions to deny visas are generally nonreviewable or are subject to only very limited reviewability. An alien arriving at the border or other port of entry is, however, entitled to an exclusion proceeding if the INS detains him or her for further inquiry. In a deportation proceeding, that is, after an alien's "entry" into the United States, he or she is entitled to the formalities of due process. In an exclusion proceeding, on the other hand,

> [n]otice is not required in any meaningful sense; rather, the applicant need only be informed of the issues confronting him at some point in the hearings and be given a reasonable opportunity to meet them. The rights to confrontation is not required, although depositions may be ordered if evidence is essential. Oral argument is not provided for by statute or regulation. Oral presentation of evidence is provided for, as is a limited right of cross-examination and disclosure of opposing evidence. The rights to retain counsel, to a determination on the record, and to a statement of reasons are protected, much as they are in deportation cases.

Verkuil, *A Study of Immigration Procedures,* 31 U.C.L.A. L. REV. 1141, 1160 (1984) (footnotes omitted). *See also* Appendix B.

11. 8 U.S.C. §§ 1101–1157. The statute primarily provides for sanctions against employers of undocumented aliens, legalization (or "amnesty") of resident or previously residing undocumented aliens, a special program for agricultural workers, financial and other support for the Border Patrol, and a prohibition on adjusting the status of most undocumented aliens other than under the one-time only amnesty program.

12. INA §§ 201–03, 212, 8 U.S.C. §§ 1151–53, 1182 (as modified by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978); 22 C.F.R. § 41.12 (1990).

quotas and grounds for exclusion have generated a vast jurisprudence that is generally beyond the scope of this study, but some examples relevant to the core discussion of reviewability will be cited.

The INA requires most persons seeking to enter the United States to obtain a visa.[13] This requirement had its origin as an emergency security measure during World War I.[14] Ordinarily, the alien must apply to a consulate in the home district, defined by the State Department, in which he or she resides.[15] An alien temporarily in the United States is considered to be a resident of the consular district of last residence abroad.[16] At the direction of the State Department or at their own discretion, consular officers may also accept visa applications from non-residents of a consular district who are "physically present" there.[17] The availability of this alternative jurisdictional basis is especially important to "orphan applicants."[18] Orphan applicants by definition cannot apply for a visa in their home district either because they fear persecution there, even though they are not technically refugees, or simply because there is no United States embassy or consular post in their home district. Applicants for nonimmigrant visas may also apply by mail to their home consular districts even if they are not physically present there, so long as they are able to waive

13. INA §§ 211(a), 212(a)(20)(26), 8 U.S.C. §§ 1181(a), 1182(a)(20)(26). Exceptions include temporary visitors from Canada or Mexico in possession of "border crossing card[s]," refugees, permanent resident aliens returning from visits abroad, in transit passengers, parolees, and tourists from designated countries under a pilot program established by IRCA § 313. Under the Visa Waiver Pilot Program for Certain Visitors, tourists from designated countries seeking entry for 90 days or less may conditionally receive a waiver of the visa requirements in section 212(a)(26)(B) of the INA. INA § 217, 8 U.S.C. § 1187. The Attorney General and Secretary of State jointly designate pilot program countries on the basis of low nonimmigrant visa refusal rates for nationals of those countries. INA § 217(c), 8 U.S.C. § 1187(c). Designated countries began with the United Kingdom and Japan, then France, Italy, the Netherlands, Sweden, Switzerland and West Germany. Section 201 of The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, will revise and extend the program. *See generally* IMMIGRATION AND NATURALIZATION SERVICE, TRAVEL WITHOUT A VISA: A GUIDE FOR THE TRAVEL INDUSTRY (1988). For observations about the program, *see infra* text accompanying note 367.

14. Joint Order of the Department of State and the Department of Labor, July 26, 1917, in Laws Applicable to Immigration and Nationality 1042 (1953). *See also* Public Safety Act of June 20, 1941, ch. 209, 55 Stat. 252 (1941–42) (repealed 1948), which directed consular officers during World War II to deny a visa to any alien who sought entry into the United States to engage in activities that would endanger the public safety.

15. 22 C.F.R. §§ 41.101, 42.61. Applicants residing in Taiwan must apply to an office of the American Institute in Taiwan.

16. *Id.* § 42.61(a) (1990).

17. *Id.* §§ 41.101(a), 42.61(a).

18. Pederson, *Representing Clients Before Consular Posts in the Context of Consular Absolutism,* in II IMMIGRATION AND NATIONALITY LAW, 42ND ANNIVERSARY SYMPOSIUM OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION 296, 314 n.6 (1988).

a personal appearance before a consular officer of the home district.[19] A visa section where an application is filed, other than in the applicant's home district, normally cables or writes the home district, if feasible, for background information.[20] In this way inter-consular communications about an applicant help detect questionable cases of visa shopping or multiple-consulate shopping.

Although the State Department does not encourage out-of-district visa shopping, it does encourage consular officers to exercise common sense in processing out-of-district applicants in order to help implement a fundamental policy of giving all aliens an opportunity to apply. State Department policy explicitly presumes that consular officers will seldom reject applicants merely on the basis of non-residence in a particular district.[21] Consular posts do not always comply with this policy, however. As an important example, the Vancouver, Canada post has at times virtually closed its doors to orphan and other non-resident alien applicants, and has barred or attempted to bar the accessibility of attorneys to the process. The post's reason seems to have been simply to avoid a backlog of applications.[22]

Related to visa or consulate-shopping is the subissue of consular officer-shopping. Within a single visa section of an embassy or consulate abroad, consular officers sometimes establish reputations for either leniency or harshness. Applicants therefore attempt to learn which officers are more apt to issue visas, and try to arrange themselves in line for an adjudication or otherwise set things up for processing by a relatively lenient officer. Rules providing for greater uniformity or consistency among officers would be a check on this localized version of visa shopping.

An "advance parole" program ensures orphan applicants and others residing in the United States a right of return after they have traveled to a third country to interview. The program thereby assures foreign authorities that, if they allow a third country national to apply for a visa in a U.S. embassy or consulate, the applicant will be able to return to the United States afterward. To be eligible for the program, an applicant must show both that he or she cannot return to the home

19. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, *reprinted in part in* 3 IMMIGRATION LAW AND PROCEDURE, App. J-472, note N3.1; App. J-474, note N.3 (C. Gordon & S. Mailman eds. 1990) [hereinafter FOREIGN AFFAIRS MANUAL].

20. *Id.* at App. J-473, notes PN3.2–3.5.

21. *Id.* at App. J-471, note N2.1.

22. Telephone interview with Robert A. Free, Visa Practice Committee, American Immigration Lawyers Association (Jan. 6, 1989), and documents from Mr. Free concerning a complaint to the Visa Office of the Department of State from the Washington State Chapter, American Immigration Lawyers Association (on file with the *Washington Law Review*).

district and that the third country where a consular interview based on "physical presence" is to take place will bar admission without a "guarantee" that the applicant will be allowed to reenter the United States after the interview.[23]

An alien may apply for either an immigrant visa (for permanent residency) or a nonimmigrant visa (for temporary residency). The issuance of either type of visa is subject to grounds for exclusion ("qualitative restrictions") that have been said to constitute "a magic mirror, reflecting the fears and concerns of past Congresses."[24] Intending immigrants are also subject to numerical limitations and preferences ("quantitative restrictions"), whereas nonimmigrants are generally subject to qualitative restrictions and a classification system.[25] An applicant is presumed to be an immigrant "until he establishes to the satisfaction of the consular officer"[26] entitlement to nonimmigrant status. The burden of proving eligibility for either type of visa is on the applicant.[27]

If the applicant is seeking an immigrant visa or, sometimes, a nonimmigrant visa, that person (the "beneficiary") must also be sponsored by a close relative who must be either a U.S. citizen or permanent resident alien, or an actual or potential U.S. employer. The sponsor then files a petition with the Immigration and Naturalization Service (INS) of the Department of Justice to establish either the requisite family relationship or, after acquiring labor certification, the appropriate work relationship. On approval of this petition, the INS transmits the papers to the appropriate embassy or consulate abroad as a prerequisite to the visa application.[28] Although consular officers are primarily responsible for applying grounds of exclusion, they may also redetermine the validity of the family relationship described by the applicant.[29] Because the issuance of immigrant visas per year is

23. Immigration and Naturalization Service (INS), Operations Instruction 212.5(c), INS Memorandum, Feb. 20, 1987 (on file with the *Washington Law Review*).

24. Lennon v. INS, 527 F.2d 187, 189 (2d Cir. 1975).

25. An immigrant may qualify as an immediate relative or special immigrant, without an annual ceiling on numbers. If not, he or she must qualify under a preference category based on a family or employment relationship with the United States. INA § 203(a)(1)–(a)(7), 8 U.S.C. § 1153(a)(1)–(a)(7) (1988) (as modified by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978). The Act for the first time imposes a numerical limit on a nonimmigrant classification (H). *Id.* § 205.

26. INA § 214(b), 8 U.S.C. § 1184(b).

27. INA § 291, 8 U.S.C. § 1361.

28. INA § 204(a)–(b), 8 U.S.C. § 1154(a)–(b).

29. 22 C.F.R. § 42.41, 42.43 (1990).

numerically limited by law, applicants are also subject to a fairly complicated numerical control system.[30]

Consular officers have exclusive authority within the Department of State to issue or deny a visa; even the Secretary of State cannot reverse their decisions.[31] Immigrant and nonimmigrant applicants alike have the burden of proving to the satisfaction of the consular officer that they are eligible to receive a visa. Consular discretion, however, is explicitly limited. The consular officer may deny a visa only when he or she knows or has "reason to believe"[32] that the applicant is ineligible to receive a visa. "Reason to believe" requires that "a determination [be] based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible."[33] Therefore, the "satisfaction of the consular officer" is defined by a reasonable person standard, according to which the officer has substantial, but limited discretion. The State Department's Foreign Affairs Manual guides, but does not control, consular discretion during the adjudication of an application for a visa. Consular officers adjudicate an application by requesting documentation and interviewing the applicant, if physical appearance has not been waived by regulatory law.[34]

An interview with the consular officer is the "most significant part of the immigrant visa issuing process."[35] Normally, the adjudication of an application for an immigrant visa is objective and formal, the family relationship or labor certification either exists or it does not, and the applicant either overcomes the grounds for exclusion or does not. The greatest number of refusals of immigrant visas involve either insufficient documentation[36] or the likelihood that the applicant will become a public charge.[37]

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30. *See* VISA REPORT, *supra* note 1, at 123 app.

31. INA § 104(a), 8 U.S.C. § 1104(a)(1). *Cf.* Wolf, *supra* note 6, at 1876–79 (global comparison of discretion to permit or refuse entry). *But see infra* text accompanying notes 278–79 (discussing the use of para-consular assistants and Civil Service visa examiners).

32. INA § 221(g), 8 U.S.C. § 1201(g).

33. 22 C.F.R. § 40.6 (1990).

34. The consular officer may waive the requirement of a personal appearance for children under 14, foreign and international organization officials and diplomats, some temporary visitors, transits, aircraft crewmen, and otherwise in the national interest or because of an applicant's experience of hardship or other unusual circumstances. 22 C.F.R. § 41.102.

35. FOREIGN AFFAIRS MANUAL, *supra* note 19, at App. J-721, note PN6.

36. INA § 221(g), 8 U.S.C. § 1201(g). See VISA REPORT, *supra* note 1, at 110–11 for gross statistics on ineligibilities during 1988. *See also* Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 SAN DIEGO L. REV. 887, 906 (1989).

37. INA § 212(a)(15), 8 U.S.C. § 1182(a)(15). See VISA REPORT, *supra* note 1, at 110–11 for statistics on visa denials during 1988. *See also* Wildes, *supra* note 36.

Adjudication of an application for a nonimmigrant visa, which is typically very quick, necessarily relies on a determination of an applicant's intentions and good faith, so as to ensure that the applicant will leave the United States before a visa expires.[38] In making this determination, critical factors may include family employment and financial ties at home as well as any unsuccessful previous attempts by the applicant to obtain an immigrant visa.[39] During the adjudication, a face-to-face interview between the applicant and a consular officer is critical; the applicant's documentation is of marginal importance. Most refusals of nonimmigrant visas are made under sections 221(g) and 214(b) of the INA,[40] the latter for failure to overcome the presumption that the applicant is an intending immigrant, that is, that the alien does not intend to return home from the United States upon the expiration of his or her visa. Applicants may overcome this presumption by showing family or socio-economic ties to the local community that are sufficiently strong to persuade the consular officer that their projected stays in the United States will be temporary. A nonimmigrant visa "shall be considered refused"[41] if an applicant fails to execute an application after being informed by the consular officer of a ground of ineligibility.[42]

On approval of an immigrant visa, a consular officer issues completed Forms OF-230 (Application for Immigrant Visa and Alien Registration), and OF-155A (Immigrant Visa and Alien Registration).[43] INS approval of these forms and issuance to the alien of the well-known "green card" (Alien Registration Receipt Card, Form I-551) indicate the applicant's compliance with requirements of the INA and can serve as a sort of work permit and reentry document.[44] On approval of a nonimmigrant visa, the consular officer will stamp a visa into the applicant's passport for either a single entry or multiple entries. The INS will later staple an endorsed Form I-94 (Arrival-Departure Record) into the passport.[45] Form I-94 is intended to be surrendered upon the alien's departure from the United States.

38. T. ALEINIKOFF & D. MARTIN, *supra* note 2, at 272.

39. C. GORDON & E. GORDON, IMMIGRATION AND NATIONALITY LAW 3-38 (student ed. 1980).

40. 8 U.S.C. §§ 1184(b), 1201(g). *See also* Wildes, *supra* note 36.

41. 22 C.F.R. § 41.121(b) (1990). The terms "refused" and "denied" are used interchangeably in this study.

42. INA § 212(a), 8 U.S.C. § 1182(a).

43. 22 C.F.R. § 42.73.

44. T. ALEINIKOFF & D. MARTIN, *supra* note 2, at 276.

45. *Id.* at 272.

Issuance of a visa is, however, no assurance of permission to enter the United States. A visa is, instead, more of a clearance to request admission by the INS at the border or other port of entry. Thus, prior to the applicant's entry, a consular officer or the Secretary of State may revoke an immigrant's visa "in his discretion."[46] Second, a "double-check" system subjects an alien to a de novo inspection and determination of admissibility by the INS at the border or other port of entry.[47] Only about three percent of all visas are cancelled, according to estimates by consular officers with whom the author spoke.

It seems strange that issuances of visas, but generally not denials, are subject to redetermination. The INS may detain any arriving alien for further inquiry if he or she does not appear "to be clearly and beyond a doubt entitled to land" in the United States. After limited exclusion proceedings, the INS may issue an exclusion order barring the alien from entry.[48] An alien can be refused entry—"kickbacked" in INS-consular jargon—for reasons that the consular officer may have overlooked, excused or could not have known. Many, if not most, "kickbacks" are seeking to enter with a nonimmigrant tourist visa. The INS might kick back an alien for a number of reasons that would have been difficult, if not impossible, to establish in the embassy or consulate: having no money or return tickets; having only one change of clothing; having drugs in a suitcase; having mostly American-label clothes, but no computerized record of previous visas (showing probability, in some circumstances, of past illegal entry); having no proof of home residence; being in possession of a driver's license issued in the United States (again, showing a sign of past undocumented residence); or even expressing intent to reside in an area characterized by the presence of undocumented aliens, coupled with other suspicious aspects. The INS records a kickback on Form I-275 (Notice of Visa Cancellation or Border Crossing Card Voidance).

The "reentry doctrine"[49] requires aliens to submit to border checks and face refusal of entry each time they travel abroad and return to the

46. INA § 221(i), 8 U.S.C. § 1201(i).

47. INA § 221(h), 8 U.S.C. § 1201(h).

48. INA §§ 235(b), 236, 8 U.S.C. §§ 1225(b), 1226.

49. United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933). In Rosenberg v. Fleuti, 374 U.S. 449 (1963), the Supreme Court narrowed the doctrine to allow reentry if a trip abroad was "innocent, casual, and brief" and therefore not "meaningfully interruptive" of the alien's permanent residence in the United States. *Id.* at 461–62. Section 315(b) of IRCA amends section 244(b) of the INA, 8 U.S.C. § 1254(b), by adding the following codification of the *Fleuti* rule: "An alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . if the absence . . . was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence."

United States, as if they were entering the country for the first time. In practice, few aliens with visas are excluded at the border or other port of entry.

An alien may thus be subject to exclusion by a consular officer, by an immigration inspector at the border or other port of first entry, or by an inspector when he or she attempts to reenter the United States after a trip abroad. An issue of exclusion may also arise in deportation proceedings, during an attempted adjustment of status, or in naturalization proceedings.

The INS may waive most of the grounds[50] for excluding nonimmigrants and, in exceptional circumstances, "parole"[51] them into the United States despite an unwaivable ground of exclusion. Parole may be granted, for example, to enable an alien to obtain urgent medical care, to enable the alien to appear as a witness in criminal litigation, or after an alien is detained, to provide for his or her release pending an exclusion hearing.[52] Even if a parolee is already in the United States, the law limits constitutional protections as if he or she were an excluded alien at the border.

The McGovern Amendment of 1977[53] placed a burden on the Secretary of State to overcome a presumption that a waiver of a denial under section 212(a)(28) of the INA should be granted in instances where the denial was based on membership in or affiliation with certain subversive organizations.[54] Without a waiver, this provision excluded anarchists, communists, advocates of "world communism" or "totalitarian dictatorship," violent overthrow of government or other stipulated subversive doctrines, or anyone affiliated with subversive organizations. The Amendment directed the Secretary of State to recommend to the Attorney General a waiver of ineligibility unless the Secretary certified to Congress that admission of the alien would be contrary to the security interests of the United States.[55] Subsequent

50. *See* INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A). The legislative history indicates the intent of Congress to admit otherwise ineligible persons "for humane reasons and for reasons of public interest." S. REP. No. 1137, 82d Cong., 2d Sess. 12 (1952). The three non-waivable provisions exclude aliens engaging in activities "prejudicial to the public interest," spies and saboteurs, and Nazi criminals. 8 U.S.C. § 1182(a)(27), (29), (33).

51. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5).

52. For a good summary of this practice, see D. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 11 (1987).

53. Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, § 112, 91 Stat. 848 (1977) (amending 22 U.S.C. § 2691(a) (1976)).

54. 8 U.S.C. § 1182(a)(28) (1988).

55. *See* Mann, *supra* note 4 at 420-22; Wash. Post, Apr. 15, 1989, at A8, col. 1 (denial of visas to permit two heads of state, Fidel Castro and Daniel Ortega, to speak to the American Society of Newspaper Editors).

qualifications of the McGovern Amendment and a broad interpretation of the "security interests" exception in it limited its scope somewhat, and the Immigration Act of 1990 repealed the underlying grounds for exclusion and hence the Amendment, too.[56]

II. THE REVIEW PROCESS

A. Introduction

Informal and non-reviewed decisionmaking dominates administrative process.[57] Controlling administrative discretion appropriately is often difficult. Tight constraints may inhibit bureaucratic creativity, initiative, enthusiasm for the job, and capacity to render justice in the individual case, whereas loose constraints may encourage arbitrariness and inequality.[58]

Like other government employees, consular officers make millions of decisions at the taxpayers' expense that are generally unconstrained by formal review processes. What makes consular visa denials so distinctive is their impact on individual lives and aspirations, on freedom of movement, on family reunification, on an individual's economic potential, and quite often, on the lives of American friends, relatives, and prospective employers. What makes visa denials so controversial is that both administrative and judicial review of visa denials by consular officers is very limited. Courts seldom review denials, and administrative review is significantly curtailed by section 104(a) of the INA.[59] That section provides a limited role for the Secretary of State in administering and enforcing the Act and related laws "except those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas."[60] An interpretation of this language that has in effect largely insulated consular denials of visas from administrative and judicial review will be discussed later;[61] it suffices here to note that this provision seems to have been designed

56. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978).

57. K. DAVIS, ADMINISTRATIVE LAW TEXT 88, 91 (3d ed. 1972).

58. *See* Shumavon & Hibbeln, *Administrative Discretion: Problems and Prospects,* in ADMINISTRATIVE DISCRETION AND PUBLIC POLICY IMPLEMENTATION 1–9 (Shumavon & Hibbeln eds. 1986).

59. 8 U.S.C. § 1104(a).

60. *Id.* This section *reversed* a requirement of review by the Secretary of State. *See, e.g.,* Public Safety Act of June 20, 1941, *supra* note 14 ("[I]n any case in which a diplomatic or consular officer denies a visa or other travel document under the provisions of this Act, he shall promptly refer the case to the Secretary of State for such further action as the Secretary may deem appropriate.")

61. *See infra* text accompanying notes 90–92, 97–98, 106, 127–28, 148, 160, 164, 240–41, 337–38.

rather narrowly to insulate consular discretion only from supervision by the Secretary of State, except as otherwise provided by law.

Well-defined checks on consular discretion, just as elsewhere within government, seem appropriate. To err is only human. A number of personal factors may influence an officer's exercise of discretion and help explain errors and differences among officers, including rates of visa denial. These personal factors include tenure of service, personal background, availability of time to make decisions, effect of intermediaries and peer pressure, attitudes toward management and applicants, career objectives, and the promotion system.[62] These factors may either inhibit competence or encourage compliance with policy expectations. They may also provide incentive to avoid errors, and to correct errors when they occur, to the extent that the concept of "error" makes sense in the highly discretionary context of the visa process.

If anything, the system encourages consular officers to issue rather than refuse visas in close cases, which typically involve nonimmigrant applicants. Because issuances, unlike denials, are rarely reviewed internally by supervising officers, and are therefore subject mostly to the double-check by the INS at the border or port of entry, issuing visas is relatively risk-free for career-minded consular officers.[63] They do receive reports on aliens to whom they have issued visas and who are later "kicked back" at the border by the INS, but such cases are relatively uncommon for any single consular officer. A high level of discretion may thereby tend, overall, to favor applicants.

Despite the apparently large scope of consular discretion, the law provides significant constraints. The values it serves are accountability of consular officers, uniformity or consistency of decisions among the officers and visa sections, and due process for applicants and petitioners. The law attempts to maximize these values at various levels of formality. Substantive rules confine and structure discretion[64] by identifying and attributing relative weight to various factors. The INA, its regulations, and State Department guidelines provide substantive and procedural rules, as do other textual sources, including intra-consulate rules and procedures, policy statements, findings and reasons.

62. *See* Study, *Consular Discretion in the Immigrant Visa-Issuing Process,* 16 SAN DIEGO L. REV. 87 (1978).

63. *Id.* at 107 (quoting one consular officer as saying, "[t]he nice thing about our job is that if you issue the visa you can't make a mistake. It is only when you refuse that you've made a mistake").

64. On confining and structuring discretion, see K. DAVIS, *supra* note 57, at 93–99.

For example, the regulations and interpretative and procedural notes to the regulations confine and structure discretion to determine whether aliens will become "public charges" after entry into the United States. This has been a particularly controversial provision of the law because it requires consular officers to make highly speculative predictions. Documents help guide the determination, however. Thus, although affidavits of support from United States citizens or resident aliens are of questionable utility, a sworn job offer from a prospective, known, and creditable employer in the United States may help establish eligibility, whereas an applicant's reliance on documentation showing expected income below the poverty guidelines will almost certainly be a disqualifier. Departmental notes encourage consular officers to elicit and consider such documentation from the applicant as proof of ownership of real estate, stocks and bonds or other property, insurance policies, posted bonds and bank deposits.[65] Although visa sections occasionally establish minimum deposits, the controlling question is not whether the applicant maintains a fixed sum on deposit, but whether, taking account of his or her total estate and income potential, the applicant can avoid becoming a public charge.[66]

A myriad of other provisions and guidelines attempts to confine and structure consular discretion. Information systems, ranging from consular files to the sophisticated Automated Visa Lookout System (AVLOS) and National Automated Immigration Lookout System (NAILS), with information on millions of aliens, assist and constrain consular discretion. Textual guidance is, however, necessarily and often deliberately so general as to invite disagreement on interpretation and construction. A more formal process of guidance and review is therefore essential.

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65. FOREIGN AFFAIRS MANUAL, *supra* note 19, at App. J-78, note N3.

66. *Id.* at J-77, note N2.1. For example, the Visa Section Chief of one consulate explained that the impression that an applicant

> must have a substantial bank account to qualify for a visa is not correct. The Immigration and Nationality Act states that all persons applying for admission to the United States are presumed to be immigrants until they prove otherwise. Applicants can overcome this presumption by demonstrating economic solvency and strong ties to their home country. One means of demonstrating solvency is with a bank account, but other factors, such as employment and strong family ties here in Mexico are equally important. In general, applicants must be able to show sufficient ties to their home country to insure that they plan to return.

Letter from Celio F. Sandate, Chief, Visa Section, Consulate General of the United States of America, Guadalajara, Mexico, to the author (June 4, 1985) (on file with the *Washington Law Review*).

In considering the alternatives for a better elaborated process, it is important to recognize that the process of reviewing consular discretion begins with an application, not with the issuance or denial of it. So defined, the review process by its very existence helps control the initial exercise of discretion by holding consular officers accountable to some extent. Moreover, key actors in the process, who are primarily interested in correcting error after the fact, may also help avoid error by their informal participation or influence before a decision is reached. These actors include supervising officers, the Visa Office in the Department of State, the Secretary of State despite section 104(a) of the INA, the INS, occasionally the Attorney General, legislators, private organizations, attorneys, the media, administrative tribunals (indirectly), and the courts.

An adequate review process should seek to maximize three values typically served by legal constraints on administrative discretion. These are accountability of consular officers, uniformity or consistency of determinations among officers and visa sections, and due process for applicants and petitioners.

B. Non-Judicial Aspects

1. Informal, Unofficial Checks

The media and private organizations, as part of an informal mechanism of review, constrain consular discretion. "Visa fixers" and other lay consultants, sometimes representing religious and other non-governmental groups, "do a thriving business and are a continuing source of irritation to consular officers."[67] Fixers are often viewed as unnecessary intermediaries who, for a fee imposed on unsophisticated applicants, waste the time of the officers. They are most visible in Mexico and other locations near their headquarters or bases of operations in the United States.

Attorneys may also play a significant role in review, particularly in helping to ensure due process and more efficient management of visa applications,[68] but their accessibility to the visa system can be a significant problem. Neither the INA nor its regulations ensure an applicant's access to counsel during consular adjudication. Thus, each visa section is free to define for itself the limits of attorney representation, including whether the attorney may enter the consular premises, be

67. Study, *supra* note 62, at 150.

68. The Visa Office in the State Department has acknowledged that "[i]n the sometimes complex world of visas, a good attorney can prepare a case properly, weed out 'bad' cases, and alert applicants to the risks of falsifying information." 67 INTERPRETER RELEASES 950 (1990).

present during the adjudication, be permitted to speak on behalf of the applicant, be permitted to discuss the case with the consul, or represent the applicant effectively in requesting reconsideration of a visa denial.[69]

Often, therefore, attorneys have to get their feet in the door of an embassy or consulate and then persuade the consul to allow them more extended participation in the process. This requires attorneys to devote time and energy to personal letters, telex messages, phone calls and personal visits in order to be effective participants in the process of visa issuance. Overcoming the suspicions or even hostility of consular officers may be crucial. Consular policy generally is to reply to all written communications and to return phone calls whenever time permits.

2. *Congressional Inquiry*

Stateside petitioners and other family members and friends of immigrant and nonimmigrant applicants routinely enlist congressional inquiries in particular cases. Typically, such official inquiries elicit prompt, though not necessarily sympathetic, responses prepared by the refusing officer and edited by a reviewing officer. Inquiries signed by members of Congress, rather than their staff members, are given special attention.[70]

3. *Internal Review Procedures*

By law, a consular officer who has refused to issue a visa must inform the applicant of the legal basis for the decision.[71] Similarly, after issuing a "quasi-refusal," that is, prior to filing a formal application, the consular officer must explain to a potential applicant the legal

69. Pederson, *supra* note 18, at 297; *supra* text accompanying note 22.

70. Study, *supra* note 62, at 109; interviews with consular officers, *infra* text in paragraph preceding note 283.

71. 22 C.F.R. §§ 41.121(b), 42.81(b) (1990). Department procedures are quite specific. The denying officer must take care not to encourage any false expectations. FOREIGN AFFAIRS MANUAL, *supra* note 19, at App. J-849, note PN1.2. The officer must be sensitive, but firm:

> Some officers understandably are, or try to be, very sympathetic, but that too can create problems. If a tone of authority is not evident, the applicant may misunderstand the officer's intentions and believe the visa might still be issued. (In some societies, such a situation might be interpreted as an invitation to a bribe.)
>
> The consular officer should aim for a measured, sympathetic but firm style which will convince the ineligible applicant that the treatment accorded was fair. The consular officer should refer to pertinent statements of the applicant, written or oral, or to a conviction, medical report, false document, previous refusal, or the like, as the basis of the refusal. The officer should then explain the law simply and clearly.

Id. at App. J-849, note PN1.1(m).

basis for an advance determination of probable ineligibility.[72] If the ground(s) cannot be overcome by the presentation of additional evidence, the principal consular officer or a designee "shall review the case without delay, record the review decision, and sign and date the prescribed form."[73] If, however, the ground(s) of ineligibility can be overcome by the presentation of additional evidence, the applicant may attempt to do so within stipulated periods of time during which the refusal is deferred.[74] If the officer or designee does not concur in the refusal, he or she may either refer the case to the Visa Office within the State Department for an advisory opinion or reverse the refusal.[75] Reference of a case to the Visa Office is largely a discretionary procedure, usually reserved by the officer for cases where correct interpretation of the law may be uncertain. The principal consular officer or designee at a particular post will usually confer with the refusing officer before overruling the latter or referring a case to the Visa Office.[76] One formal limitation in the process, however, is the lack of a requirement of notice to the applicant about a referral of his or her papers to the Visa Office, nor any requirement that the applicant be entitled to a hearing by the reviewing officer.

In the case of an immigrant visa, the applicant has yet another opportunity for review. If, within one year of a refusal, an applicant "adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be reconsidered".[77]

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72. 22 C.F.R. §§ 41.121(c), 42.81(c); FOREIGN AFFAIRS MANUAL, *supra* note 19, at App. J-850, note PN2.1.

73. 22 C.F.R. § 41.121(c).

74. 22 C.F.R. §§ 41.121(c), 42.81(c).

75. *Id.; see infra* text accompanying notes 80–85, 337–43 (discussing the Visa Office).

76. Department of State procedures require this consultation, as follows:

> Although the regulations indicate only two possible actions for a reviewing officer who disagrees with a refusal—submission of the case to the Department or personal assumption of responsibility by reversing the refusal—the reviewing officer should discuss the case fully with the refusing officer before taking either action. The principles of good management require that the junior officer be involved in any action possible bearing on the junior officer's judgment and performance. Also, in the course of discussion the reviewing officer may become aware of additional facts which the refusing officer did not make clear in the refusal worksheet.
>
> Most important, the junior officer will learn more about the visa function and the application of some of the more complicated laws and regulations in visa work. Ideally, any differences will be worked out in the discussion and the refusing officer, not the reviewing officer, will take whatever action is necessary. Only if there is no resolution should the reviewing officer take the actions specified in 22 CFR 42.81(c), and then only after the refusing officer has been informed what the action will be and why.

FOREIGN AFFAIRS MANUAL, *supra* note 19, at App. J-849–50, note PN1.3.

77. 22 C.F.R. § 42.81(e).

Although the integrity of this internal review process is open to question and cannot work, of course, in a one-person visa section, the possibility of reversal by a supervising officer, who may also have promotion and other personnel authority, helps confine and structure consular discretion. "A number of consular posts have demonstrated a commitment to provide meaningful review,"[78] particularly at larger posts, principally by permitting applicants or their attorneys to present additional evidence at each stage of a visa proceeding. Typically, applicants know that they can return repeatedly to present additional evidence. It is estimated that they are eventually successful in almost fifty percent of all immigrant cases after initial refusal and in sixty percent of all cases after refusal for insufficient documentation.[79]

4. Review By the Visa Office

A principal or alternate consular officer, but not a denied applicant, may refer a case to the Visa Office in the Bureau of Consular Affairs of the State Department, or the Department itself may request a consular officer in a specific case or class of cases to submit a report on a visa refusal or refusals.[80] The Visa Office has jurisdiction to consider only substantive, not procedural issues. In some cases, this kind of limited review by the Visa Office is required by law. These cases include refusals on the ground of a sham marriage, drug trafficking, fraud or willful misrepresentation in procuring a visa or entry into the United States (under the "rule of probability") and commission of a political crime.[81]

The first step in review by the Visa Office is to consult with the consul in charge of the pertinent visa section. The particular visa applicant, who is not consulted, may not even know that the Visa Office is reviewing the case. After the Visa Office has completed its review, it issues an Advisory Opinion. This Opinion is binding on all interpretations of law so long as it complies with opinions of the Attorney General,[82] but is advisory only on factual issues.

78. Pederson, *supra* note 18, at 314.

79. Study, *supra* note 62, at 109, 105 n.103 & text accompanying n.104.

80. 22 C.F.R. §§ 41.121(d), 42.81(d).

81. Remarks by H. Edward Odom, Federal Bar Association, 9th Annual Immigration Seminar (May 19, 1988) [hereinafter Federal Bar Association Seminar] (on file with the *Washington Law Review*).

82. 22 C.F.R. §§ 41.121(d), 42.81(d). The issue of compliance with opinions of the Attorney General is central to the pending case of Garcia v. Baker, No. 90C2585 (N.D. Ill. May 4, 1990) (complaint on file with the *Washington Law Review*).

Consular officers generally comply with advisory opinions on matters of law,[83] but they may question an Opinion. If so, they must resubmit the case to the Department with an explanation of any proposed action that is contrary to the Opinion. Practitioners regard this process of review as fair and honest but time-consuming,[84] while many consular officers regard review by the Visa Office as either a nuisance or a means of delaying a case.[85] Advisory opinions are potentially very useful, but only marginally significant in practice today.

5. Administrative Appeals

Taking account of these procedures, it is no longer correct to conclude that "[t]he limited administrative review [of visa denials] currently available provides no independent check on consular officers"[86] or that the latter are "free from the control of a superior reviewing body."[87] The review process discussed thus far is routine and fairly well structured, helping to check errors after the fact, as Section IV indicates, and avoiding them in the first place by virtue of its very existence.

Internal administrative review and Visa Office review might seem to function in a manner that approximates more formal processes of administrative review. Possible bias inherent in the physical proximity of consular officers to their reviewing superiors, and bureaucratic unity between them, can be exaggerated by skeptics of the internal review process. Such bureaucratic unity exists in other agencies as well. For example, until 1983 special inquiry officers (or "immigration judges," as they have come to be known) were co-employees of the same unit of the Department of Justice, the INS, as that of the officers whose decisions they reviewed. Of course, intra-consular review and more formal INS processes of review are not exactly the same. Although the intra-consular process discussed thus far plays an important role, it is certainly not the equivalent of an INS review board. It

83. Study, *supra* note 62, at 111.

84. Remarks by Jan Pederson, Federal Bar Association Seminar, *supra* note 81. There are, of course, differences of opinions among practitioners on the process. The confidentiality of the process is particularly controversial.

85. "I always used the referral system for tactical reasons when I wanted to delay a stinking case, but never when I really wanted an informed opinion. The bureaucracy is too slow and also is too removed from the scene." Letter from Charles Stuart Kennedy, Director, Foreign Affairs Oral History Program, Georgetown University, to the author (Feb. 18, 1989) (on file with the *Washington Law Review*).

86. *Developments in the Law—Immigration Policy and the Rights of Aliens,* 96 HARV. L. REV. 1286, 1360 (1983) [hereinafter *Developments*].

87. *Hearings Before the President's Commission on Immigration and Naturalization, House Comm. on the Judiciary,* 82d Cong., 2d Sess. 1575, 1578 (1952).

lacks many of the formalities of bilateral due process and it is ad hoc. Practices among consulates vary substantially. Thus, two aliens with identical problems of eligibility for a visa but applying in different consular districts may receive dissimilar treatment. Although a lack of uniformity may be a problem even in more formal processes of administrative review, it is particularly characteristic of the intra-consular review process. Most importantly, although some immigration decisions by INS officers are not appealable administratively, most are appealable,[88] whereas there is no formal, extra-consular means for administrative review of visa denials. Even so, intra-consular review of visa denials provides *some* check on discretion.

The immunity of consular discretion from more formal administrative review is unusual within the federal government.[89] The legal basis for this deviation from the normal practice of formal administrative review is primarily a construction of section 104(a) of the INA, which precludes the Secretary of State from the administration or enforcement of "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas."[90] The precise legislative intent behind this language is unclear. Congress may have wished to protect the Secretary of State from complaints by foreign officials unable to obtain visas; section 104(a) enables the Secretary to disclaim responsibility for a politically delicate exclusion by explaining that he has no power to review the denial. Alternatively, Congress may have been concerned that the Department would be deluged, given the number of prospective petitioners for review. The legislative purposes are, however, mostly speculative. Probably the quoted language in section 104(a) was intended not to immunize visa determinations from review, but rather to confirm by implication the power of the Attorney General, rather than the Secretary of State, to undertake the review.[91] When the INA was enacted in 1952, Congress voted to reject an amendment to this provision that would have provided for an

88. T. ALEINIKOFF & D. MARTIN, *supra* note 2, at 92. *See* Appendix A (diagrams depicting avenues of administrative and judicial review under the immigration laws); MARTIN, *supra* note 52, at 104–05.

89. It is, of course, not unusual in other legal systems, but British law, by contrast, provides for both administrative appeal and judicial review of visa denials. *See* S. LEGOMSKY, *infra* note 128, at 145 n.16; UNITED KINGDOM IMMIGRANTS ADVISORY SERVICE, ANNUAL REPORT 1987–88, at 2, 19 (1989) [hereinafter cited as UKIAS REPORT].

90. 8 U.S.C. § 1104(a) (1988).

91. *See* SENATE JUD. COMM., REVISION OF IMMIGRATION AND NATIONALITY LAWS, S. REP. NO. 1137, 82d Cong., 2nd Sess. 7 (1952). On the overall intent of Congress to limit reviewability to avoid administrative and judicial burdens, see SENATE JUD. COMM., THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 1515, 81st Cong., 2nd Sess. 622 (1950).

administrative board to hear appeals of visa denials. Although the amendment failed, a House committee report emphasized that the Secretary of State would have "ample authority to provide . . . for a system of cooperation between consular officers stationed abroad and the Department, so as to be able to advise and assist such officers in reaching their decision [sic] in more complex individual cases pending before them."[92]

C. Judicial Review

1. General Considerations

Courts regularly take jurisdiction to consider a wide range of immigration issues.[93] The current trend is toward exercise of jurisdiction in a wider variety of circumstances.[94]

Courts are specifically empowered to undertake habeas corpus proceedings as the "sole and exclusive remedy" for appeal of orders excluding aliens upon their arrival at the border or other port of entry

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92. H.R. REP. No. 1365, 82d Cong., 2d. Sess. (1952), *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1688.

93. In addition to adjudications concerning deportation orders and INS orders of exclusion at the border or other port of entry,

> review proceedings can be brought to question such matters as the following: denials of visa petitions, registry, benefits under the agricultural workers program, waivers for exchange visitors, denial of parole to crewmen, and adjustment of status, denial of approval for a school qualified to accept nonimmigrant students, or withdrawal of such approval, change from one nonimmigrant status to another, denial of a labor certification, improper seizure or retention of the alien's passport, denial of extension of temporary stay, of asylum claim, claim of arbitrary, discriminatory, and unconstitutional action in bringing deportation proceeding when prosecutive discretion usually exercised to withhold deportation proceedings in similar cases, exclusion from a list of companies authorized to conduct immigration medical examinations, and breach of immigration bond.

C. GORDON & E. GORDON, *supra* note 39, at 8-40 (footnotes omitted).

94. One commentator notes:

> With limited exceptions, practically all final administrative determinations under the immigration and nationality laws are now subject to review in the courts. This was not always so. In the early days of federal immigration law enforcement, the courts maintained a reserved attitude, regarding immigration as a subject which the Constitution had committed largely to the legislative judgment of Congress. The attitudes of both Congress and the courts have changed over the last few decades and both are now more hospitable to judicial review in this field. In each of the last few years, literally hundreds of reported decisions on immigration and nationality issues have been handed down by the federal courts.

Roberts, *Judicial Review of Immigration Issues: Analysis and Forecast,* in II IMMIGRATION AND NATIONALITY LAW, 41ST ANNIVERSARY SYMPOSIUM OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION 441 (1987).

of the United States.[95] The theory underlying habeas corpus proceedings is that anyone arriving at the border in United States territory is subject to being taken into physical custody even if that person is later released on bond, paroled, or made subject to a deportation order.[96] The formal process involves administrative review by a special inquiry officer (immigration judge), with a right of appeal. Courts have taken jurisdiction notwithstanding INA provisions that exclusion and deportation proceedings shall be "final."[97]

Judicial review of consular (as opposed to INS) discretion, however, has been very limited. Controversy about reviewing visa denials centers on an inference of judicial non-reviewability drawn from section 104(a) of the INA and questionable interpretations of the Administrative Procedure Act (APA)[98] and scattered but important judicial decisions that limit reviewability.[99] Thus, if an applicant is refused a visa, his or her rights of judicial review are extremely restricted.

2. *Requirements of the Administrative Procedure Act*

Section 701(a) of the APA codifies a common law presumption that the actions of governmental agencies are subject to judicial review. *Rusk v. Cort*[100] established the APA's applicability to State Department decisions, and *Brownell v. We Shung,*[101] to exclusion orders of the INS or Attorney General. In 1961 Congress expressly confirmed the latter presumption of review under then APA section 10(a) by providing in INA section 106 for review in federal district court of exclusion orders "by habeas corpus proceedings and not otherwise."[102] This provision applies only to INS exclusions after an alien presents himself at the border, so that consular discretion to deny visas before that event remains outside the express scope of INA section 106.

95. INA § 106(a)(9), 106(b), 8 U.S.C. § 1105(a)(9), 1105(b) (1988). Judicial review of final exclusion orders requires exhaustion of administrative remedies. INA § 106(c), 8 U.S.C. § 1105a(c).

96. 28 U.S.C. § 2241(c) (1988); INA § 106(b), 8 U.S.C. § 1105a(b). But see the requirement under the Visa Waiver Pilot Program for Certain Visitors, INA, *supra* note 13, at § 217, that eligible aliens must waive "any right to review or appeal . . . of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States." *Id.* § (b)(4)(A).

97. *See* Brownell v. We Shung, 352 U.S. 180, 185 (1956); Estep v. United States, 327 U.S. 114, 122 (1946).

98. Ch. 324, 60 Stat. 237 (1946), *repealed and replaced by* Government Organization and Employees Act, Pub. L. No. 89-554, §§ 551–59, 701–06, 80 Stat. 378 (1966), 5 U.S.C. §§ 551–59, 701–06 (1988) [hereinafter APA].

99. *See infra* text accompanying notes 123–59.

100. 369 U.S. 367 (1962).

101. 352 U.S. 180 (1956).

102. Pub. L. No. 87-301, 75 Stat. 683 (1961) (codified at 8 U.S.C. § 1105a(b)).

Under the APA there are only two exceptions to the reviewability of agency action, namely, when "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."[103] In order to determine judicial reviewability of visa denials under the APA, it is necessary to examine each of these two exceptions.

With reference to the first exception—when "statutes preclude judicial review"—the INA simply does not do so. Nor does any other federal legislation. Non-reviewability or limited reviewability is court-made law. It is a judicial construct, a legal fiction and, in effect, a violation of the APA. During congressional consideration of the INA, the record of debate discloses only one objection to judicial review, as opposed to several objections to consular non-reviewability.[104] During related consideration of a provision on deportation orders, both of the co-sponsors of the INA attempted to assure their colleagues that the APA applied. Although Senator McCarran opposed a specific appellate mechanism that was eventually adopted for reviewing cases other than visa denials, he did not oppose the right of appeal itself.[105]

One might infer, however, that the absence of any expression in the INA to apply the APA to visa denials implied an intent to insulate them from the APA. One might also infer that the insulation of visa denials from external administrative review under section 104 of the INA implies insulation from judicial review as well. These inferences, however, are inconsistent with the express intent of section 701(a) of the APA, that judicial review will be presumed, as a matter of the common law, except when a statute precludes review. Section 559 provides even more precisely that a "[s]ubsequent statute may not be held to supersede or modify [the Act] except to the extent that it does so expressly."[106] The INA, as "subsequent legislation," therefore cannot be properly interpreted to establish non-reviewability by implication.

In *Abbott Laboratories v. Gardner,*[107] the Supreme Court, without qualification, confirmed that the APA *presumes* judicial review unless Congress otherwise precludes it. "Exceptions from the . . . Administrative Procedure Act are not lightly to be presumed."[108] Review is precluded only if there is *clear and convincing evidence* that an Act of

103. 5 U.S.C. § 701.

104. 98 CONG. REC. 4431 (1952) (statement of Rep. Graham).

105. 98 CONG. REC. 4416, 5625–26, 5778–79 (1952).

106. 5 U.S.C. § 559.

107. 387 U.S. 136 (1967).

108. Marcello v. Bonds, 349 U.S. 302, 310 (1955), *quoted in* Brownell v. We Shung, 352 U.S. 180, 185 (1956).

Congress specifically prohibits it rather than simply failing to authorize it, or that Congress by implication has clearly intended to prohibit review.[109] Congress *could have* created an exception to the APA to bar judicial review of visa denials, but never did so.

A variation on the non-reviewability-by-implication argument is that the pre-APA, common-law practice was intended to constitute an exception to section 701(a) of the APA. Accordingly, judicial non-reviewability of consular discretion to deny visas would be a special exception to the APA, despite sections 559 and 701(a), because the courts had established a common law rule of non-reviewability prior to the enactment of the APA. Therefore, one might infer that the rule was a sort of built-in common law exception to the more general common law presumption of review that was later incorporated into the APA.[110] Aside from the questionability of this construction under a literal reading of sections 559 and 701(a) of the APA, Congress restated the prevailing rule requiring review without noting or incorporating the purported exception. The only intended qualifications are the exemptions which Congress specifically provided in the statute. Congress therefore appears to have resisted the dead hand of non-reviewability.

Also, in *Abourezk v. Reagan,*[111] which addressed a challenge to a visa refusal on ideological grounds under the INA, a federal appeals court emphasized its duty to focus on questions of statutory construction so as to avoid a need for constitutional construction if at all possible. In applying the "cardinal principle" of *Ashwander v. Tennessee Valley Auth.,*[112] the court acknowledged a judicial duty to try to inquire "whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided."[113] Thus, a simple construction of the APA avoids posing any constitutional issues that might be presented by an aberrant line of common law. It would seem, therefore, that the dead hand of the pre-APA common law past ought to be ignored.

Nevertheless, section 701(a) of the APA was amended in 1976 to include language that might seem to restore the dead hand of non-reviewability. The amended language provides that "[n]othing herein

109. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 n. 4 (1986); Rusk v. Cort, 369 U.S. 367, 379–380 (1962); Heikkila v. Barber, 345 U.S. 229, 237 (1953).

110. *See, e.g.,* Pena v. Kissinger, 409 F. Supp. 1182 (S.D.N.Y. 1976).

111. 785 F.2d 1043 (D.C. Cir. 1986), *aff'd per curiam,* 484 U.S. 1 (1987) (3–3 decision). For subsequent history, see City of New York v. Baker, 878 F.2d 507 (D.C. Cir. 1989).

112. 297 U.S. 288 (1936).

113. 785 F.2d at 1052 (quoting 297 U.S. at 348) (brackets in original).

. . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground."[114] The term "other limitations on judicial review" might be read to confirm the common law exception. The amendment, however, was not intended to have this effect. Instead, it is part of a larger revision of the APA to remove governmental immunity as a bar to judicial review. It was "not intended to affect or change defenses other than sovereign immunity".[115] The language quoted above therefore serves only to confirm common restrictions on judicial review, such as dismissal for lack of standing, failure to state a cause of action, or failure to exhaust administrative remedies.[116] The language of the 1976 amendment therefore does not foreclose judicial review; quite the contrary, the full amendment was intended to ensure greater accountability by opening the courts further to actions against the government.

The second statutory exception to the common law presumption of review, which was codified in section 701(a) of the APA, action "committed to agency discretion," was further elaborated in *Citizens to Preserve Overton Park Inc. v. Volpe.*[117] That decision limited the exception to situations where "there is no law to apply,"[118] either by pre-APA practice or an absence of legislative action. In *Heckler v. Chaney,*[119] the court added that the APA precluded judicial review under the second exception of section 701(a) where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[120] The INA, however, provides specific enough requirements, together with customary international law and a long trail of jurisprudence, leaving no doubt about the existence of meaningful standards.

Just as there is no rule without a remedy, so there is no review without a plaintiff. The APA provides for standing, too. In *Association of Data Processing Service Organizations v. Camp,*[121] the Supreme Court confirmed that section 702 of the APA authorizes suit by a person who suffers a "legal wrong because of agency action or [who is] adversely affected or aggrieved by agency action within the meaning of

114. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 702, 90 Stat. 2721, 5 U.S.C. § 702 (1988).

115. H.R. REP. No. 1656, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6132.

116. *Id.; see also* 2 C. KOCH, ADMINISTRATIVE LAW AND PRACTICE 217 (1985).

117. 401 U.S. 402 (1971).

118. *Id.* at 410.

119. 470 U.S. 821 (1985).

120. *Id.* at 830.

121. 397 U.S. 150 (1970).

a relevant statute."[122] In sum, although the INA does not confer a right of action to challenge a visa denial, the APA, more importantly, does.

3. Case Law to the Contrary

Because no federal statute has ever explicitly precluded judicial review of consular determinations, they are therefore subject to the APA's provisions for judicial review. There is, however, a puzzling line of cases that suggests the contrary.

Two appellate opinions of the 1920s, long before enactment of the APA, ushered in the notion that discretion exercised by consular officers in denying visas is not judicially reviewable. *United States* ex rel. *London v. Phelps*[123] cryptically observed in dicta that the court lacked "jurisdiction" to review the denial of a visa, without explaining what was meant by that term—a "gratuitous afterthought" in one commentator's words.[124] *United States* ex rel. *Ulrich v. Kellogg*[125] presumed non-reviewability and a broad consular discretion in the absence of any affirmative provisions in the 1924 Immigration Act[126] for "official review." This negative pregnant also contributed later to the interpretation of section 104(a) of the INA that infers judicial non-reviewability from a confirmation of consular authority. Thus, in the absence of any express stipulation of judicial authority, INA section 104(a) has been interpreted to preclude judicial review even though, at most, it suggests *administrative,* rather than judicial, non-reviewability.[127] None of these three bases for non-reviewability, lack of "jurisdiction," preclusively broad consular discretion, nor the absence of an affirmative authorization of judicial review, should have survived the APA.[128]

The timidity of the judicial system in these two cases is explained by the force of a "plenary power" doctrine that the Court long ago fashioned. This doctrine has been applied to require judicial deference to

122. 5 U.S.C. § 702 (1988).

123. 22 F.2d 288, 290 (2d Cir. 1927), *cert. denied,* 276 U.S. 630 (1928).

124. Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability,* 52 N.Y.U. L. REV. 1137, 1143–44 (1977).

125. 30 F.2d 984 (D.C. Cir.), *cert. denied,* 279 U.S. 868 (1929).

126. Immigration Act of 1924, ch. 190, 43 Stat. 153, 8 U.S.C. § 203 (1946 & Supp. III 1950) (repealed 1952).

127. *See* SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION & AMERICAN IMMIGRATION LAWYERS ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES (Feb. 1989) (report in support of a recommendation regarding amendments to legislation and regulations establishing a system for review of visa denials) (on file with the *Washington Law Review*).

128. *See* S. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 146–49 (1987).

Congress or to executive action under congressional authority. In the Court's 1895 pronouncement of the doctrine:

> the power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.[129]

The Court reaffirmed this plenary power of Congress in 1909 when it wrote that "over no conceivable subject is the legislative power of Congress more complete than it is [over the admission of aliens]."[130]

After these pronouncements of the plenary power doctrine, the apotheosis of Congress and the genuflection of the courts continued. Judicial decisions made clear that the powers of Congress, inherent in sovereignty, were so "plenary" as to void ordinary constitutional protection. Accordingly, Congress alone was responsible for defining and implementing first amendment, due process and other rights affecting the "privileges" of aliens. *United States* ex rel. *Knauff v. Shaughnessy*[131] and *Shaughnessy v. United States* ex rel. *Mezei*[132] established that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[133] "[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government."[134] The remarkable result in *Mezei* was to deny reentry to an alien after a two-year visit abroad, even though he had resided in the United States for twenty-five years.

In *Galvan v. Press,*[135] a deportation case, Justice Frankfurter indicated his misgivings about the Court's refusal to place constitutional limitations on the plenary power of Congress to control immigration. "But," he wrote, "the slate is not clean. . . . Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. . . . We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors . . . ."[136] The full slate to which he referred included two lines of authority. First, the "yellow peril" cases of the late nineteenth and

129. Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895), *quoted in* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972).

130. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

131. 338 U.S. 537 (1950).

132. 345 U.S. 206 (1953).

133. 338 U.S. at 544.

134. *Id.* at 543.

135. 347 U.S. 522 (1954).

136. *Id.* at 531.

early twentieth century[137] upheld the right of Congress to exclude entire nationalities for essentially racist reasons. Second, the somewhat mystical concept of a sovereign's inherent powers, as transmogrified into a separation-of-powers doctrine of constitutional law, has deterred many courts from reviewing the constitutionality of decisions by either of the political branches of the federal government.[138] These lines of authority help explain the inclination of the courts to view visa denials as nonreviewable *despite* the apparent policy of Congress to render them judicially reviewable under the APA.

In *Kleindienst v. Mandel,*[139] the Supreme Court indicated a limited role for the courts in reviewing visa denials. There, several Americans and a Belgian Marxist, Mandel, challenged the Attorney General's refusal to waive denial of a visa to Mr. Mandel that had been based on section 212(a)(28)(D) and (G)(v) of the INA (advocating or teaching communism).[140] The American plaintiffs claimed that the Attorney General's action violated their first amendment rights to hear lectures by Mr. Mandel in the United States. The Court, deciding in favor of the government, held that refusal to waive a visa denial was nonreviewable *if,* as here, the government had acted "on the basis of a facially legitimate and bona fide reason."[141] In *Mandel,* the reason given was the applicant's abuse of visa privileges during previous trips to the United States.

Unfortunately, *Mandel* is quite ambiguous. To be sure, the *Mandel* test seems clear: when the Executive's reasons for a waiver denial are "facially legitimate and bona fide . . . the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the first amendment interests of those who seek personal communication with the applicant."[142] In context, however, it is unclear whether the Court considered this case to be reviewable only because it involved a first amendment issue, that is, an issue involving specially protected constitutional guarantees. It is also unclear whether reviewability is available after *Mandel* in all cases involving the exercise of executive discretion, or just those involving waiver

137. *See* Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny,* 100 HARV. L. REV. 853 (1987).

138. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

139. 408 U.S. 753 (1972); *accord* Centeno v. Shultz, 817 F.2d 1212 (5th Cir. 1987), *cert. denied,* 484 U.S. 1005 (1988).

140. 8 U.S.C. § 1182(a)(28)(D), (a)(28)(G)(v) (1988).

141. 408 U.S. at 770.

142. *Id.* Fundamental rights, such as those under the first amendment, seem to provide a particularly strong rationale for judicial reviewability. Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985), *aff'd,* 845 F.2d 1111 (1st Cir. 1988).

denials. Finally, it is unclear whether the American plaintiffs had standing to bring the action whereas a non-resident alien alone would not have had standing. The court created two new issues: what was meant exactly by the new standard "that was remarkably deferential to the administrators,"[143] and whether an absence of any consular justification for a visa denial could withstand judicial attack.

Mandel has aroused considerable commentary, some of which has misinterpreted it to confirm the notion of judicial non-reviewability even though it clearly upheld the right to review under some circumstances. Because the decision is rather fuzzy around the edges, it leaves more questions than it resolves about the extent to which visa denials are reviewable.

Mandel, however, clearly reiterates the "plenary power" of Congress to control immigration, and thereby immunize most executive decisions from judicial scrutiny. The plenary power doctrine has gone through five historical stages:[144] (1) federal law preempts state laws excluding aliens; (2) federal exclusion statutes are justified under the commerce clause; (3) plenary power is inherent in sovereignty; (4) (shifting from issues involving an allocation of power within the federal system to the judicial role in vindicating civil rights and liberties), judicial inquiry is barred in such cases; and (5) ("the snowballing phase"), judicial inquiry is barred because the slate is not clean, so that the court is helpless to vindicate individual rights in the face of the plenary power doctrine.

Where does that leave the law today? *Mandel* has two facets. On the one hand, the opinion contributed to the snowballing effect of the plenary power doctrine by encouraging judicial abstention. Without much elaboration several lower court decisions have therefore precluded review of consular discretion.[145] Two cases merit comment because they were at least based on statutory interpretation rather than a mindless deference to an unexpressed "will" of Congress. In *Loza-Bedoya v. INS*[146] the court relied on section 221(a) of the

143. D. MARTIN, *supra* note 52, at 108.

144. S. LEGOMSKY, *supra* note 128, at 179–211, 217–19.

145. City of New York v. Baker, 878 F.2d 507 (D.C. Cir. 1989); Centeno v. Shultz, 817 F.2d 1212 (5th Cir. 1987), *cert. denied,* 484 U.S. 1005 (1988); Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970 (9th Cir. 1986); Ventura-Escamilla v. INS, 647 F.2d 28, 30 (9th Cir. 1981); Rivera de Gomez v. Kissinger, 534 F.2d 518 (2d Cir.), *cert. denied,* 429 U.S. 897 (1976); Burrafato v. United States, 523 F.2d 554 (2d Cir. 1975), *cert. denied,* 424 U.S. 910 (1976); Pena v. Kissinger, 409 F. Supp. 1182 (S.D.N.Y. 1976); Hermina Sague v. United States, 416 F. Supp. 217 (D.P.R. 1976).

146. 410 F.2d 343 (9th Cir. 1969).

INA,[147] which, however, merely establishes the routine authority of consular officers to issue visas, but does not preclude review of their decisions. In *Licea-Gomez v. Pilliod,*[148] the court relied in part on section 104(a) of the INA,[149] which precludes review by the Secretary of State, even though the provision's terms do not refer to the courts.

On the other hand, *Mandel*'s "facially legitimate and bona fide reason" test has encouraged limited reviewability. After all, the courts did in fact review *Mandel* itself, and the foreign applicant was at least a nominal co-plaintiff. Thus, the plenary power doctrine may be going through a sixth stage[150] that is beginning to stall the movement of the "plenary power" snowball, or even melt it.

In *Fiallo v. Bell*[151] the Court considered the constitutionality of INA definitions of "child" and "parent"[152] that had the effect of preventing unwed fathers of citizens and illegitimate children of male citizens from relying on the blood connection to obtain immigrant visas. In view of two discriminatory distinctions, gender and legitimacy, the Court assumed its "limited judicial responsibility"[153] to review the case. The quoted language, ungenerous as it might seem, is nevertheless significant as an important counterpoint to the incantation in the same opinion of the *Stranahan* dictum ("over no conceivable subject is the legislative power of Congress more complete than it is [over the admission of aliens]").[154]

Despite *Fiallo*'s clear deference to Congress, its recognition of a "limited judicial responsibility" has been read to allow review of the constitutionality of the INA provisions upon which particular visa denials at issue were based[155] and the validity of departmental regulations structuring and confining the visa process.[156] None of these cases, however, directly addressed the issue of the reviewability of consular discretion.

Several recent cases suggest a trend toward a more direct, though still limited, review of visa denials under the APA, particularly where

147. INA § 221(a), 8 U.S.C. § 1201(a) (1988).

148. 193 F. Supp. 577 (N.D. Ill. 1960).

149. INA § 104(a), 8 U.S.C. § 1104(a).

150. *See* S. LEGOMSKY, *supra* note 128, at 211–17.

151. 430 U.S. 787 (1977).

152. INA § 101(b)(1)–(b)(2), 8 U.S.C. § 1101(b)(1)–(b)(2).

153. 430 U.S. at 793 n.5.

154. *Id.* at 792 (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

155. *See, e.g.,* Martinez v. Bell, 468 F. Supp. 719 (S.D.N.Y. 1979).

156. *See, e.g.,* Mulligan v. Schultz [sic], 848 F.2d 655 (5th Cir. 1988); Friedberger v. Schultz [sic], 616 F. Supp. 1315 (E.D. Pa. 1985).

first amendment or other fundamental rights are implicated.[157] The question no longer is *whether* courts may review visa denial issues, but *to what extent* they may properly do so.

How far does *Mandel*'s standard of a "facially legitimate and bona fide reason" extend? What are the present contours of judicial reviewability? At the very least, the Supreme Court has indicated that the government must demonstrate a "facially legitimate and bona fide reason" for refusing to waive a visa denial, whenever a United States citizen brings action for injury to fundamental, constitutionally protected rights resulting from the government's refusal to issue a visa to a foreign applicant. Beyond that, the trail to the courthouse is rather poorly blazed. In practice, the *Mandel* standard offers an uncertain measure of constitutional protection. Some courts appear to have accepted "almost any reason the government offers,"[158] so long as it is not patently absurd, while other courts have scrutinized visa denials more carefully.[159] Section III provides further guidance along the trail to formal review.

III. AN ANALYSIS OF ARGUMENTS AGAINST REVIEW

Visa denials by consular officers are reviewable in a relatively informal manner, and in fact are regularly reviewed according to the managerial techniques and limited appellate procedures that have just been summarized. More formal and definitive procedures for reviewing visa denials, however, are severely limited. Administrative appeal, ordinarily routine in other spheres of administrative law, is limited primarily by section 104(a) of the INA,[160] and adjudication is limited primarily by an inference drawn from section 104(a) and the plenary power doctrine despite the clear authority of the APA to the contrary.

157. Abourezk v. Reagan, 785 F.2d 1043, 1050–51 (D.C. Cir. 1986) (APA authorizes suit by "aggrieved" groups and individuals who suffer "injury in fact" by reason of being denied the opportunity to hear a foreign speaker who has been refused a visa), *aff'd per curiam,* 484 U.S. 1 (1987) (3–3 decision). For subsequent history of this case, see City of New York v. Baker, 878 F.2d 507 (D.C. Cir. 1989). *See also* Harvard Law School Forum v. Shultz, 633 F. Supp. 525, 528 (D. Mass.) (issue of visa denial to official of the Palestinian Liberation Organization is justiciable and plaintiffs are entitled to a preliminary injunction "to enjoin the Secretary of State from prohibiting [the PLO official] from participating in [a scheduled] debate" in the United States), *vacated without published opinion,* 852 F.2d 563 (Table) (1st Cir. 1986); Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985) (non-resident alien herself has "symbolic" standing and residents have actual standing to complain on first amendment grounds against refusal of visa to the alien, a prospective speaker), *aff'd,* 845 F.2d 1111 (1st Cir. 1988).

158. Note, *First Amendment Limitations on the Exclusion of Aliens,* 62 N.Y.U. L. REV. 149, 164 (1987).

159. *See* cases cited *supra* note 157.

160. 8 U.S.C. § 1104(a) (1988).

The case law does not inspire confidence that a "limited judicial responsibility" alone will serve the process very readily. Justice Frankfurter's observation that the slate is not clean offers a good description of the past and present, but a poor prescription for the future.

What is the margin for expanded reviewability within the present framework? Is the law apt to develop substantially on the basis of indirect challenges to consular discretion and the consideration of "facially legitimate and bona fide reason(s)" for visa denials? What if the slate were cleaned up? Why has Congress not mandated review? To help answer these and other questions, this section and the first portion of Section V focus on the principles and policies that have been invoked to limit reviewability and to explain the apparent reluctance of Congress to provide explicitly for review. It is essential to take account of constitutional, international legal, and practical dimensions of reviewability to define a realistic set of alternatives to guide legal development.

Although section 104(a) of the INA has been interpreted to be sufficient by itself to proscribe most administrative review outside visa sections of embassies and consulates, issues of judicial reviewability would surround administrative review even in the absence of section 104(a). Thus, if the INA were amended to provide for administrative appeals outside visa sections, the following discussion would remain relevant.

A. Rationales for Limiting Reviewability

The two decisions during the 1920s that first struggled to articulate limitations of reviewability appear, in tandem, to have been based on three reasons: the court's lack of "jurisdiction," preclusively broad authorization by Congress of consular discretion, and the absence of affirmative authorization of judicial review.[161] Although these reasons have not been controlling in later cases, they have been influential. Each merits further consideration.

1. Lack of Jurisdiction

Although the APA does not provide an independent basis of adjudicative jurisdiction, section 279 of the INA[162] provides for federal dis-

161. United States *ex rel.* Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir.), *cert. denied,* 279 U.S. 868 (1929); United States *ex rel.* London v. Phelps, 22 F.2d 288 (2d Cir. 1927), *cert. denied,* 276 U.S. 630 (1928). *See supra* text accompanying notes 123–28 (discussing *London* and *Ulrich*).

162. 8 U.S.C. § 1329.

trict court jurisdiction over all civil and criminal causes of action arising under "Title II-Immigration" of the Act, which includes the provisions for issuing and denying visas.[163] Section 104(a) of the INA should be considered irrelevant. In practice, the provision does not even seem to constrain the Department of State, through the Visa Office, from reviewing consular decisions for errors of law, nor from rendering binding opinions on points of law. If section 104 explicitly immunizes consular discretion to deny visas from the administrative supervision of the Secretary of State and yet the Visa Office supervises those decisions to a limited extent, it is difficult to argue that the provision can be used to preclude judicial review, which is not even mentioned in the section. Furthermore, the requirement that officers have "reason to believe"[164] in the ineligibility of applicants, in order to deny them visas, is premised by department regulations on a "reasonable person" standard[165] that actually invites judicial interpretation. Also, section 103(a) of the INA[166] establishes that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling" in the "administration and enforcement" of the Act. The implication is that, notwithstanding the discretion given to consular officers under section 104 of the INA vis-a-vis the Secretary of State, the Attorney General may retain competence to review. Finally, the courts ordinarily have general competence over federal questions under 28 U.S.C. § 1331.

2. *Preclusively Broad Discretion of Consular Officers*

The INA itself confines and structures consular discretion by its qualitative and quantitative provisions for issuing visas. Moreover, departmental regulation provides that "[a] visa can be refused only upon a ground specifically set out in the law or implementing regulations."[167] Application of such legal language and of the reasonable person standard would have little or no force without judicial review. Most importantly, the APA's insulation from judicial review of action committed to agency discretion "requires either a statutory intent to withhold review or a judicial determination that review would be impractical or improper."[168] There has been no such express intent.

163. Within Title II, INA § 221(g), for example, provides criteria for consular discretion to deny a visa. *See also* S. LEGOMSKY, *supra* note 128, at 147 n.31.

164. INA § 221(g)(3), 8 U.S.C. § 1201(g)(3).

165. 22 C.F.R. § 40.6 (1990).

166. 8 U.S.C. § 1103(a).

167. 22 C.F.R. § 40.6.

168. S. LEGOMSKY, *supra* note 128, at 148 (citing K. DAVIS, *supra* note 57, and other authority).

Whether review would be "impractical or improper" is a more difficult question.

3. *Absence of Affirmative Authorization of Judicial Review*

The APA *presumes* jurisdiction, subject to "clear and convincing evidence"[169] of any contrary intent by Congress to preclude it. The only possible evidence might be acquiescence by Congress in judicial determinations that it has not authorized review, but this is insufficient to circumvent the explicit authority of the APA.

This rationale survived the APA and influenced the interpretation of the INA that has inhibited judicial reviewability of visa denials. It is argued, mistakenly, that the courts are not authorized to review visa denials, because section 104(a) of the INA precludes direct supervision of visa denials by the Secretary of State and because the same section does not otherwise grant supervisory authority.

B. *Plenary Powers Revisited*

The plenary power doctrine, largely replacing earlier rationales, establishes that governmental interests, not the genus of a right, determine the standard of (very limited) review over visa denials by consular officers.[170] It has always been controversial. In one of the formative cases, Justice Brewer wrote:

> This doctrine is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practice of other nations to ascertain the limits?[171]

Questions about the doctrine remain. Although it is hard to dispute that a court may acquire jurisdiction over an immigration issue "only by acts of Congress"[172] and not by "an act of God,"[173] there is some-

169. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986); Rusk v. Cort, 369 U.S. 367, 380 (1962).

170. For an excellent analysis of the plenary power doctrine, see Legomsky, *Immigration Law and the Principle of Plenary Congressional Power,* 1984 SUP. CT. REV. 255.

171. Fong Yue Ting v. United States, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting).

172. Te Kuei Liu v. INS, 645 F.2d 279, 285 (5th Cir. Unit A May 1981), *vacated and remanded on other grounds sub nom.* W.Y. Moberly, Inc. v. United States, 825 F.2d 391 (Fed. Cir. 1987).

173. *Id.*

thing mystical or transcendental about the concept of plenary power itself as a judicially created means of refusing to review an issue.

The courts have given essentially four reasons for the doctrine: plenary power is inherent in sovereignty; the political question doctrine requires the courts to defer to political authority; admission to the United States is a privilege, not a right, and therefore provides no requirement of court review; and Congress, if it wanted, could do as it pleases to govern activity abroad because neither the Constitution nor the courts have extraterritorial authority over the government's conduct abroad. Each of these reasons merits analysis.

1. The "Inherent Sovereignty" Rationale

Are plenary powers to control immigration "inherent in sovereignty?" That is, does international law confer on states an unlimited right to exclude aliens? If so, then the doctrine, as it has shaped the reviewability of visa denials, becomes a matter solely of constitutional law in a strictly domestic sense. The political question doctrine which covers the proper allocation of powers among the branches of government and the scope and extent of constitutional protections of individuals would then become central considerations. If, however, international law imposes limitations on a state's exclusion of aliens, the "plenary" powers of Congress and the Executive are qualified. The question then becomes whether such a rule of international law has been incorporated into domestic law, thereby constraining Congress, requiring execution by consular officers and other authorities, and encouraging though not mandating normal review by the courts.

International law, in fact, limits sovereignty. Even if, arguably, a state derives powers that inhere in sovereignty, "[s]overeignty is not a matter of absolutes."[174] The Supreme Court has made clear that "the United States has a vital national interest in complying with international law."[175]

It is often forgotten that the opinions in the *Chinese Exclusion Case* and its progeny,[176] which first formulated the doctrine of a plenary power of Congress, inherent in sovereignty, to exclude aliens, qualified

174. Remarks by Guy Goodwin-Gill, Senior Legal Advisor, U.N. High Commission for Refugees, 1986 PROC. AM. SOC'Y. INT'L L. 96, 112 (1988).

175. Boos v. Barry, 485 U.S. 312, 323 (1988).

176. Chae Chan Ping v. United States, 130 U.S. 581 (1889), is the most important of several Chinese and Japanese exclusion cases of the same era. Nishimura Ekiu v. United States, 142 U.S. 651 (1892), converted the power of exclusion from one "incident in sovereignty," as defined by *Chae Chan Ping*, into one "inherent in sovereignty." 142 U.S. at 659; *see also* Fong Yue Ting v. United States, 149 U.S. 698 (1893).

the doctrine.[177] It is important to note, also, that both the *Chinese Exclusion Case* and *United States v. Curtiss-Wright Export Corp.*,[178] which established the inherent powers of the President in foreign affairs, were premised not on some categorical imperative of state sovereignty, but on the proper role of nation-states in the international system. Such issues of provenance and correct interpretation are, however, relatively insignificant because the absolutist version of the plenary power doctrine is more fundamentally flawed: it ignores international law.

International law establishes a qualified duty to admit aliens.[179] Although a state clearly has a right to exclude aliens, the more impor-

177. *See* Nafziger, *The General Admission of Aliens Under International Law,* 77 AM. J. INT'L L. 804, 825–28 (1983). For example, the *Chinese Exclusion Case* acknowledged that all governmental powers "are . . . restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations." 130 U.S. at 604. The proposition that a state has a right to exclude any or all aliens, as a matter of its inherent sovereignty, is incorrect for several reasons. The author has summarized these reasons as follows, beginning with a reminder that authority for the proposition qualifies it considerably. Thus,

> [J]uristic writing relied on to support the proposition requires legitimate reasons for exclusion in individual cases, such as necessity or self-preservation. States have customarily admitted aliens and have at times considered themselves bound to justify exclusion on grounds of public safety, security, public welfare, or threat to essential institutions. Although some courts may have characterized the practice of admission as a voluntary waiver of the right to exclude or a self-imposed limit on the exercise of the right, it is reasonable to regard the practice and the accompanying justification as recognition of a qualified duty to admit some aliens in some circumstances. Moreover, commonly cited judicial opinions and related authority, at least in English-language sources, are unconvincing; they often misinterpret other authority, contradict contemporaneous statements of *opinio juris,* and rest on questionable, often racist presumptions. The international significance of migration and the interdependence of states lend support to the argument that the general admission of aliens should not be regarded as an untrammeled discretionary power within the exclusive domestic jurisdiction of states. Therefore, although a state has no duty to admit all aliens who might seek to enter its territory, [it has] a qualified duty to admit aliens when they pose no danger to the public safety, security, general welfare, or essential institutions. . . . Admittedly, this formulation is so broad as to permit expansive discretion by states, but affirming it may encourage states, in their mutual interest, to develop more precise rules, principles, and procedures to govern the general admission of aliens.

Nafziger, *supra* at 804–05.

178. 299 U.S. 304 (1936).

179. Nafziger, *supra* note 177, at 845; Boswell, *Rethinking Exclusion—The Rights of Cuban Refugees Facing Indefinite Detention in the United States,* 17 VAND. J. TRANSNAT'L L. 925, 943, 953, 954, 969 (1984). A leading expert has observed that since the early 1970s there has been an "increasing penetration of international law" into state practice concerning migration. Therefore, he writes in the second edition of his treatise, "[l]ess space is devoted to dispelling the notion that the control of nationality and migration falls within the reserved domain [of sovereign discretion]. The qualifications that need to be made to that assertion are now so clear that they speak for themselves." R. PLENDER, INTERNATIONAL MIGRATION LAW xiv (2d ed. 1988).

tant question is the extent of that right.[180] It is neither plenary, on the one hand, nor insignificant on the other. Even those jurists who recognize no limited right of entry ask whether "the regulation of entry must not at least be made subject to control for arbitrariness."[181]

The general content of a state's qualified duty to admit aliens is quite clear. Under customary international law, a state may legitimately exclude aliens only if, individually or collectively, they pose a danger to its public safety, security, general welfare, or essential institutions.[182] The United States, for example, can and does routinely exclude individual aliens who pose specific threats, which are defined under the INA as grounds of ineligibility. The United States also can and does exclude aliens collectively if their numbers pose an aggregate danger to the general welfare, as reflected in preference quotas for immigrant visas.

It is very important to resist the notion that a sovereign state has an unlimited right to exclude aliens and that this right is somehow, mystically, "inherent in sovereignty." States unquestionably may control immigration and exclude aliens, but their right to do so is not unlimited. Failing to acknowledge the obverse, qualified duty to admit aliens inhibits international cooperation in controlling immigration and rationalizing national exclusionary laws. Even though international custom, in the face of sovereignty, clearly reveals a long-established practice of states to admit *some* aliens, the notion of unlimited sovereignty dies hard. That notion does not, however, accurately describe the general practice of states, as a matter of complying with the law (*opinio juris*). The notion of unlimited sovereignty has nevertheless had the unfortunate effect of discouraging international cooperation in controlling human migration and, more importantly for the present discussion, it explains the troublesome, transmogrified doctrine of plenary power. It may be possible sometime to reverse the *Chinese Exclusion Case* as a racist relic,[183] but that would be of less

180. "No one doubts that states have, in accordance with international law, a right both to exclude and to expel foreign nationals. What may be disputed, however, are the absoluteness of those rights, their extent, and the modalities of their application." Remarks of Guy Goodwin-Gill, *supra* note 174, at 96.

181. *See* Wolf, *supra* note 6, at 1886.

182. Nafziger, *supra* note 177, at 846; *see also* Justice Marshall's statement that "[g]overnment may prohibit aliens from even temporary admission if exclusion is necessary to protect a *compelling governmental interest. Actual threats to the national security, public health needs, and genuine requirements of law enforcement are the most apparent interest that would surely be compelling.*" Kleindienst v. Mandel, 408 U.S. 753, 783–84 (1972) (Marshall, J., dissenting) (emphasis added).

183. *See* Westen, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin,* 101 HARV. L. REV. 511, 522–23 (1987).

significance than affirmatively acknowledging the qualified duty of states to admit aliens.

To return to the specific issue of visa denials, consular officers must execute the law, including international law, which is, purely and simply, federal law.[184] Thus, they have an obligation to ensure that, individually or collectively, rejected applicants for visas pose a danger to the public safety, security, general welfare, or essential institutions of the United States. In effect, Congress has assimilated much of this rule into the INA. Discretion to make visa determinations has been confined and structured by the INA and State Department regulations, but a margin of consular discretion remains that should be constrained by the rule of customary international law.

It might nevertheless be argued that Congress has never explicitly implemented this rule of international law. Thus, even if the United States as a sovereign is bound by the rule, neither consular officers, administrative agencies, nor courts are likewise bound inasmuch as they are not directly subject to international law. This argument, consistent as it is with the dualist approach[185] to international law that dominates constitutional theory, nevertheless fails because the rule is indeed binding on decisionmakers under constitutional law.[186] A self-executing rule of customary international law requires no special act of Congress to bind the courts and political branches. In an Advisory Opinion concerning the obligation of the United States to arbitrate a dispute, the World Court confirmed "the fundamental principle of international law that international law prevails over domestic law."[187] Although ordinarily the dualist approach would distinguish international obligations from domestic enforceability of them, the World Court's reference in that case was to a "domestic" act of Congress that potentially affected relations with resident aliens, by pur-

184. For example, INA § 101(a)(17), 8 U.S.C. § 1101(a)(17) (1988) defines "immigration laws" to include "*all* laws [without qualification], conventions and treaties of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens" (emphasis added). An immigration judge has ruled that customary international law is binding on the INS and the Board of Immigration Appeals, as well as the judicial branch. *In re* Santos, Nos. A29-564-781, A29-564-785, A29-564-801, at 6, 7 (Immig. Ct. D.C. Aug. 24, 1990). *See also* Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans: Constitutional, Statutory, International Law, and Human Considerations,* 62 S. CAL. L. REV. 1733, 1761 (1989).

185. *See* J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 69–70 (9th ed. 1984). The dualist approach views international and municipal (domestic) legal systems as distinct, though interrelated.

186. *See infra* text accompanying notes 190–201.

187. Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12, 34 (Advisory Opinion of April 26); *accord, id.* at 42 (Separate Opinion of Schwebel, J.).

porting to close down their mission to the United Nations. Although the Advisory Opinion did not explicitly reach the issue of a state's competence to execute a law domestically that would violate international law, the World Court had earlier declared that "the principles and rules concerning the basic rights of the human person" impose obligations *erga omnes* on states—that is, obligations to the international community as a whole.[188] As early as the eighteenth century the jurist Emerich de Vattel, who influenced the framers of the Constitution, confirmed that states must "fulfil the duties of humanity toward strangers."[189] It follows that states have an obligation to the international community, *erga omnes,* to ensure that their laws do not violate such important human rights as the qualified duty to admit aliens. Domestically, the federal government must fulfill the international duty directly, *erga omnes,* without the kind of agreement with another state or states that ordinarily might be seen to require special implementation by act of Congress. Constitutional practice also supports the direct applicability of international rules as federal law. In the earliest days of the Republic, international law was deemed to be "part of the law of the land to be ascertained *and administered,* like any other, in the appropriate case."[190] Thus, "[d]uring the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law."[191] Later, in 1865, an opinion of the United States Attorney General confirmed the practice that "the law of nations [is] a part of the law of the land . . . Hence Congress may define those laws, but cannot abrogate them . . . [they

188. Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application 1962) (Belg. v. Spain), 1970 I.C.J. 4, 33 (Judgment of Feb. 5).

189. E. DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS lx–lxi (J. Chitty ed. 1863). This reflects the first hundred years of United States policy. For example, the Burlingame Treaty of 1868 between the United States and China provided as follows:

> The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents.

Treaty Concerning Trade, Consuls, Religious Toleration and Emigration, July 28, 1868, United States-China, art. V, 16 Stat. 739, T.S. No. 48.

190. Dickinson, *The Law of Nations as Part of the National Law of the United States,* 101 U. PA. L. REV. 26, 26 (1952) (emphasis added).

191. Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980) (citing 1 W. BLACKSTONE, COMMENTARIES 263–64 (1765–69)).

bind] the departments and citizens of the Government, though not defined by any law of Congress."[192]

In *Paquete Habana*,[193] the United States Supreme Court established that "[i]nternational law is part of our law," that is, the supreme law of the land, regardless of whether it takes the form of a treaty, custom, or general principles. International law is federal law. *Paquete Habana* provided specifically that international law

> must be ascertained *and administered* by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . .[194]

The last sentence of this famous rule has been controversial. Courts and commentators have argued that international custom can be rejected domestically by a prior or subsequent controlling act of the federal government.[195] This interpretation, however, accords with neither the text, context, nor the precise holding of *Paquete Habana.* Instead, the correct interpretation of the words "[f]or this purpose" is that they refer to the process of ascertaining the content of the international law upon which "questions of right" depend. Thus, courts are obligated to consult treaty law or other federal authority. If this search fails to locate the applicable rule of *international* law, the courts must turn to international custom to do so.[196]

Because custom continues until it changes, it is reasonable to conclude that it is constantly "re-enacted," that it is not automatically superseded by a later-in-time enactment by Congress, let alone by executive fiat.[197] Judicial decisions from the period of *Paquete*

192. 11 OP. ATT'Y GEN. 297, 299–300 (1865), *quoted in* Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom,* 28 VA. J. INT'L L. 393, 418 (1988). *Accord* Boswell, *supra* note 179, at 966.

193. 175 U.S. 677, 700 (1900), *quoted without qualification in* First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983); *see also* Note, *supra* note 184, at 1762.

194. 175 U.S. at 700 (emphasis added).

195. Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988); T. FRANCK & M. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 113 (1987).

196. *See* Sweeney, *Quousque Tandem o Paquete Habana* (Letter to the Editor-in-Chief), 81 AM. J. INT'L L. 637, 639–40 (1987).

197. *See* Paust, *supra* note 192, at 441. For a recent recognition by an immigration judge that both judicial and executive branches are bound by customary international law, see *In re* Santos, *supra* note 184, at 6, 7 ("[T]he Executive Office of Immigration Review has a special obligation to

Habana decision support this interpretation.[198] Moreover, the "later-in-time" rule of positive enactment, as between a statute and conflicting international custom, presumes the availability of reparations to compensate for non-fulfillment of international obligations as a result of a nullity by later enactment. Where no such reparations are made to other sovereigns, as in most immigration cases, the later-in-time rule is arguably inoperable because a state cannot use its domestic law as an excuse to avoid its international obligations.

Even states of the Union accept the binding role of customary international law. Thus, for example, rules of evidence incorporate an unqualified version of *Paquete Habana* for purposes of pleading and proving international foreign law,[199] and, according to state common law, "international law is a part of the law of every state which is enforced by its courts without any constitutional or statutory act of incorporation by reference . . . [and is] legally paramount whenever international rights and duties are involved before a court having jurisdiction to enforce [it]."[200]

It might be argued that the qualified-duty-of-states rule needs further elaboration to be suitable for domestic implementation. The rule is, however, no less precise than many rules of international law requiring further elaboration by governments within a margin of discretion that is unavoidable in the decentralized global system. Thus, the rule has all the hallmarks of legitimacy: determinacy, symbolic validation, coherence and, in practice, adherence by nation-states.[201]

In sum, the United States may exclude aliens only if, individually or collectively, they pose a danger to the public safety, security, general welfare, or essential institutions. *Although this rule does not itself mandate reviewability of visa denials, it does challenge a basic premise of non-reviewability—the plenary power of Congress, inherent in sovereignty, to exclude any or all aliens—that best explains judicial self-limitations to review visa denials.* As the law of the land, the rule binds the Executive branch, arguably confers justiciable rights on injured persons, and engages the subject matter jurisdiction of federal courts. Thus, congressional power and executive action to exclude aliens are both limited, at least by the margin of additional responsibility

follow the law . . . including international law. Indeed, the Board [of Immigration Appeals] has interpreted and been bound by international law on numerous occasions.") *Id.* at 7.

198. *See, e.g.*, The Schooner Jane, 37 Ct. Cl. 24, 29 (1901); The Ship Rose, 36 Ct. Cl. 290, 301 (1901); The Schooner Nancy, 27 Ct. Cl. 99, 109 (1892).

199. *See, e.g.*, ALASKA R. EVID., Evidence Rules Commentary, Rule 202(c) (1988).

200. Peters v. McKay, 195 Or. 412, 426, 238 P.2d 225, 231 (1951).

201. *See* Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 712 (1988).

entailed in the qualified duty of states to admit aliens. In practical terms, limited judicial responsibility should include reviewability of visa denials that contravene the qualified duty.

Even if the courts cannot or will not begin with a clean slate of this sort, they have a duty under the long-heeded rule in *Murray v. Charming Betsy*[202] to construe statutes, including the INA, so as to comply with international law. Thus, for example, the *Mandel* test of a "facially *legitimate* and bona fide reason" to support executive discretion under the INA would seem to require a showing that, to be "legitimate," even only "facially" so, a visa denial must be consistent with conventional and customary international law.

2. *The Political Question Doctrine*

We have seen that any plenary power of Congress must be derived from the Constitution and not from some transcendental concept of inherent sovereignty. Judicial reliance on that concept alone, as it grew out of the *Chinese Exclusion Case* and its progeny, would be unsatisfactory.[203] Even if it were possible to justify an unlimited right to exclude aliens under a concept of "inherent sovereignty," which it is not, a logical leap is necessary to establish that the judiciary must therefore defer to Congress.

A more convincing theory is that because immigration includes foreign elements by definition, and immigration-related decisions may affect foreign affairs, all decisions to exclude aliens are political questions that have been entrusted to the political branches of the government, not the judiciary.

There is merit to the contention that issues of excludability may affect foreign relations and judicial review may thereby usurp the foreign affairs powers of the political branches. If the courts do not act consistently with foreign policy, their acts may potentially embarrass the state in its conduct of foreign affairs. National security is a legitimate consideration, best managed by the political branches of government. Although it is questionable whether the Border Patrol should be characterized as fighting on the "Front Lines," as bumper stickers printed by the federal government have proclaimed, immigration nevertheless has national security significance. Thus, the decision to

202. 6 U.S. (2 Cranch) 64, 118 (1804).

203. *See* Comment, *Immigration and the First Amendment, supra* note 4, at 1912. "Reliance on the *Chinese Exclusion Case* is a bit like reliance on *Dred Scott v. Sandford* or *Plessy v. Ferguson.* Although the Supreme Court has never expressly overruled the *Chinese Exclusion Case,* it represents a discredited page in the country's constitutional history." Shapiro, *supra* note 4, at 942.

exclude Yasser Arafat from speaking at the United Nations,[204] although it may have violated United States obligations, was clearly of the sort that raised significant political and security issues[205] that were arguably nonjusticiable.

This is not to say, however, that immigration issues normally affect foreign relations. Neither the foreign relations power nor the political question doctrine should be debased further by applying them to immunize all visa denials from review. It is doubtful, for example, whether an elderly but healthy Australian's desire to visit her relatives in Los Angeles, or the similar desires of even a hundred such applicants for a visa, would raise genuine issues of foreign policy under normal circumstances. The smaller the world gets, the less plausible are arguments based on the political question doctrine. The rule in Arafat's case should not be generalized to render all visa denials nonreviewable.

The political question doctrine should not be controlling in determining the reviewability of visa denials because the doctrine is not compelling. First, the original intent of the Constitution did not embrace *inherent executive* powers.[206] The Constitution is a dynamic document, requiring interpretation in the light of constitutional practice. Modern interpretation, however, does not bolster the doctrine.

Second, the political branches have themselves allocated much decisionmaking about immigration to the Department of Justice, not to the Department of State. Impliedly Congress has concluded that a large number of immigration-related decisions do not involve foreign affairs and therefore should not be insulated from court review. Do even the political branches know what are "foreign affairs" in these days of global movement of persons and property?

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204. N.Y. Times, Nov. 27, 1988, at A1, col. 6; *id.*, Nov. 28, 1988, at A1, col. 4; Recent Developments, *International Agreement: United Nations Headquarters Agreement—Dispute Over the United States' Denial of a Visa to Yasir Arafat,* 30 HARV. INT'L L. J. 536 (1989).

205. *See* Recent Development, *supra* note 204, at 536–40. Yasser Arafat was apparently unable to overcome grounds for excluding him as a terrorist under INA § 211(28)(F), 8 U.S.C. § 1181(28)(F) (1988). The link between his status as leader of the Palestinian Liberation Organization (PLO) and the term "terrorism" is the controversial Anti-Terrorism Act of 1987, 22 U.S.C. §§ 5201–5203 (1988). *See* United States v. Palestinian Liberation Org., 695 F. Supp. 1456, 1472 (S.D.N.Y. 1988). The court referred to the legislation as the "*Anti-PLO* Terrorism Act of 1987," *Id.* at 1460, n.12 (emphasis added). *See also* Mendelsohn v. Meese, 695 F. Supp. 1474 (S.D.N.Y. 1988). In executing this Act of Congress, Secretary of State Shultz evidently refused to waive the grounds of ineligibility after a more or less formalistic visa denial by a consular officer in Tunis. Telephone interview with Cornelius D. Scully III, Head of the Office of Legislation, Regulations & Advisory Assistance, Bureau of Consular Affairs, U.S. Department of State (Dec. 13, 1988) (notes on file with the *Washington Law Review*).

206. *See* L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 30 (1988).

Third, if visa decisions are essentially political and foreign policy sensitive, why did Congress choose to insulate them under section 104(a) of the INA from review by the *secretary of state*?

Fourth, even if a particular visa denial is of foreign policy significance, it is likely to provoke a foreign complaint *only if* the issue is deemed to be nonjusticiable. It is highly unlikely that a foreign government would complain on the basis that court action might allow one of its citizens to obtain a visa, once it had been denied. This might be the case, for example, if the visa applicant came from a source country with strict emigration controls. The policy of the United States against such controls, however, not to mention international law, would be sufficient to overcome objections of a foreign government in most if not all such cases. In any event, only an exceptional case, like the case of Yasser Arafat, could legitimately fall within the political question doctrine, without stuffing all visa denial cases into that already overloaded category.

Fifth, to the extent that review, or even the prospect of review, generally encourages the issuance of visas, a foreign policy objective of promoting international travel to this country is advanced. The Executive has not only "stressed the importance of facilitating international travel," but has instituted a number of procedures to "expedite the necessary action."[207]

Finally, not all issues involving or impinging upon foreign affairs are political questions. According to *Baker v. Carr*,[208] it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[209] The classification under *Baker v. Carr* of what is nonjusticiable requires a "discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."[210] None of the six political question considerations[211] would seem to require courts to defer routinely to consular discretion. Criteria and principles under *Baker*

207. VISA REPORT, *supra* note 1, at 1.

208. 369 U.S. 186 (1962).

209. *Id.* at 211.

210. *Id.* at 217.

211. Namely,

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

v. Carr are quite capable of distinguishing justiciable from nonjusticiable issues.

Given that courts regularly review a vast array of immigration decisions, even though they all might be seen to possess some "foreign affairs" dimension, there is no compelling reason to carve out an exception for visa denials. Courts should always give *some* deference to administrative agencies in the absence of statutory provision to the contrary. As the Supreme Court wrote in *INS v. Abudu,* however, "*all* adjudications by administrative agencies are to some degree judicial and to some degree political."[212] The real question is not whether a particular case is justiciable, but what the standard of review should be. The political question doctrine might then be reserved for those few cases where the court has concluded that, for an identifiable foreign policy or national security reason, applying the normal standard of review would intrude unconstitutionally in the political domain.[213]

One final note: the APA contains a foreign affairs exception that excludes intergovernmental matters of an international nature from its rule-making requirements.[214] It is clear, however, that immigration rules do not fall within this exception such as to justify only a limited reviewability or non-reviewability of denials under the rules.

3. *The Right/Privilege Distinction*

The old distinction between a right and a privilege presents another plausible rationale for unusual judicial deference to consular discretion and for a denial of standing to prospective plaintiffs. Thus, in *United States* ex rel. *Knauff v. Shaughnessy,* the Supreme Court held that admission into the United States is a privilege "granted to an alien *only* upon such terms as the United States shall prescribe."[215] Aliens were thereby excluded without a hearing because they had no constitutional rights. The era of constitutional history that attempts to distinguish a right from a privilege, however, is past. The Supreme Court, in *Goldberg v. Kelly,*[216] refused to give any practical effect to this anachronistic distinction. Too often, analysis under the right/privilege distinction was tautological—a particular value was a privilege because it had been established to be one—rather than functional.

Id. at 217. *See* Note, *First Amendment Limitations on the Exclusion of Aliens, supra* note 4, at 185–91.

212. 485 U.S. 94, 110 (1988) (emphasis added).

213. *See* Legomsky, *supra* note 170, at 263–64, 268.

214. 5 U.S.C. § 553(a)(1) (1988).

215. 338 U.S. 537, 542 (1950) (emphasis added).

216. 397 U.S. 254 (1970).

Calling a relationship with something of value a "right" as opposed to a "privilege" is mere labeling. Today, the concept of legitimate expectations generally prevails over the semantic distinction.[217] To the extent that the distinction may have survived in one exclusion case,[218] it has been reduced to dictum.

4. The Extraterritoriality Argument

An argument related to the right/privilege distinction is that the Constitution, with its provisions for the judiciary and the Bill of Rights, does not apply abroad. Legislation governing the visa process abroad, as well as visa decisions by consular officers, are thus exempt from constitutional constraints. This argument persists even though *Mandel* itself permitted a non-resident alien to challenge a visa denial abroad. The territorial restriction is generally premised on two theories: that in the international system states maintain competence to apply their law only within their own territory, and that the Lockean concept of a constitution as a social contract between citizens and their government thereby denies rights to non-resident aliens.

The first theory is no longer valid. Within limits set by international law, states regularly extend their authority abroad on several internationally accepted bases of jurisdiction.[219] No international legal barrier constrains the extension of constitutional protections abroad so long as they do not violate the domestic jurisdiction of another state. In *United States v. Verdugo-Urquidez,*[220] the Supreme Court implied

217. For an interesting comparison of English and American law, see Riggs, *Legitimate Expectation and Procedural Fairness in English Law,* 36 AM. J. COMP. L. 395 (1988).

218. Landon v. Plasencia, 459 U.S. 21 (1982); *see also* Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much,* 35 STAN. L. REV. 69, 72 (1982) (constitutionally-derived distinctions based on existence or not of a "life, liberty, or property" interest are analogous to the right/privilege distinction).

219. *See, e.g.,* L. BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 297–315 (1986).

220. 110 S. Ct. 1056 (1990). The decision not to extend the fourth amendment extraterritorially was based on historical and semantic construction, given that "not every constitutional provision applies to governmental activity [abroad]." *Id.* at 1062. The Court's statement that it is not open to it "to endorse the view that every constitutional provision applies wherever the United States Government exercises its power," *id.*, was vigorously challenged in a dissenting opinion on a theory of mutuality related to the *imposition* of U.S. laws extraterritorially. Thus, according to the dissent, if the U.S. purports to extend its laws abroad, it must live up to them abroad as well. *Id.* at 1068 (Brennan, J., and Marshall, J., dissenting). "What is most disturbing in the plurality's opinion is the ahistorical suggestion that the constitutional structure of the United States was meant to have as its beneficiaries only U.S. citizens and resident aliens. While this is true of political rights, it is manifestly not true of rights that exist under a general law of nations." Highet & Kahale, *International Decisions,* 84 AM. J. INT'L L. 742, 753 (1990).

that, although the fourth amendment did not protect a non-resident alien from a search by American authorities operating abroad, some constitutional rights do extend extraterritorially to protect aliens abroad. The federal government may, and does, apply the Constitution abroad to govern its daily routine and to protect non-resident aliens from government action.[221] As in *Mandel,*[222] non-resident aliens, though physically located abroad, apparently have standing to join U.S. plaintiffs in challenging their exclusion.

The social contract theory of the Constitution is also dubious. Under this theory, the Constitution represents the will of the people to establish a limited form of government, rather than a bargaining away of their rights.[223] As David Hume noted,[224] the social contract theory and its rationale for allegiance cannot explain why, in practice, aliens are subject to local law, including a Constitution to which they could not have freely consented, and yet are not entitled to rights derived from these sources of law. Of course, a state may make decisions about the applicability of its laws to aliens and may regularly exclude them, within the limits of international law. Related questions of constitutional authority should not be decided by social contract theorizing, however, but by direct constitutional interpretation.

Finally, it should be noted that protection under the APA is not limited geographically. The APA speaks in terms of "any person," *not* "any citizen" or "any person physically present in the United States."[225] The first cases struggled to find justifications for nonreviewability in jurisdictional terms. A lack of jurisdiction was as hard to justify then as it is today.

Thus, the plenary power doctrine is illogical and increasingly subject to attack. Even proponents of the doctrine would recognize that Congress has never barred the courts from reviewing visa denials and should expect that the courts will undertake review.

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221. *See, e.g.,* Reid v. Covert, 354 U.S. 1 (1957); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); United States v. Tiede, 86 F.R.D. 227 (1979); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976); Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States,* 20 VA. J. INT'L L. 741 (1980); Stephan, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens,* 19 CONN. L. REV. 831, 834–45 (1987).

222. 408 U.S. 753 (1972).

223. *See* Comment, *Immigration and the First Amendment, supra* note 4, at 1914.

224. Hume, *Of the Original Contract,* in SOCIAL CONTRACT 145, 156–57 (E. Barker ed. 1970).

225. *See* Estrada v. Ahrens, 296 F.2d 690, 694 (5th Cir. 1961).

C. *Positive International Law*

International law establishes not only a customary, qualified duty to admit aliens, but certain obligations under treaties, executive agreements, and other formal instruments of international law. Some of these can be adjudicated, others lack the teeth of justiciability. Section 101(a)(17) of the INA defines the term "immigration laws" to include "all laws, conventions and treaties of the United States."[226] A complete list of these instruments lies outside the scope of the instant analysis. Some of them, however, are worth mentioning. They include the following instruments: bilateral treaties of establishment, investment treaties, and friendship, navigation and commerce treaties that provide for a mutual extension of national treatment to traders and investors; multilateral treaties, such as the United Nations Headquarters Agreement, that require access of diplomats to international organizations with headquarters in the United States; the U.S.-Mexican Joint Statement that requires cooperation in controlling the flow of undocumented aliens;[227] the Helsinki Accords[228] that prompted the McGovern Amendment and otherwise imposed obligations to facilitate family reunification and transnational marriages within the region of Europe and North America; and the Protocol to the Convention related to the Status of Refugees.[229] Important instruments that are not binding on the United States include a number of bilateral and regional agreements, particularly the European instruments on freedom of movement and labor,[230] and the treaty between the United Kingdom and China that defines the new immigration law of Hong Kong.[231] While none of these instruments obligates any state to accept particular numbers of aliens, they all impose important require-

226. 8 U.S.C. § 1101(a)(17) (1988).

227. Agreement on Illegal Entry of Migratory Workers, July 18, 1973, United States-Mexico, Joint Statement, 26 U.S.T. 1724, 1727–28, T.I.A.S. No. 8131.

228. Conference on Security and Co-Operation in Europe: Final Act, *reprinted in* 14 INT'L LEGAL MATERIALS 1292 (1975) [hereinafter Accords]. Although arguably not legally binding in themselves, the Accords provide a comprehensive, morally compelling expression of norms that, by influencing state behavior, may constitute *lex ferenda. See* Nafziger, *The Right of Migration Under the Helsinki Accords,* 1980 S. ILL. L.J. 395 (on state obligations under the Accords).

229. Protocol Relating to the Status of Refugees, done on Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

230. *See* Oellers-Frahm, *The Contribution of the Council of Europe to the Legal Position of Aliens,* in Frowein & Stein, *supra* note 6, at 1725, 1729–30; Stein & Thomsen, *The Status of the Member States' Nationals Under the Law of the European Communities,* in Frowein & Stein, *supra* note 6, at 1775, 1791–93; Plender, *supra* note 6, at 542–46.

231. Agreement on the Future of Hong Kong, Sept. 26, 1984, United Kingdom-China, art. XIV and Explanatory Notes, § XIV, Draft *reprinted in* 23 INT'L LEGAL MATERIALS 1366, 1377–78, 1388 (1984); 24 INT'L LEGAL MATERIALS 1185 (1985) (providing further information on status of the Agreement).

ments and good faith obligations to cooperate, and thereby encourage the issuance of visas under various circumstances stipulated in the instruments.

D. Practical Considerations

Although none of the justifications for non-reviewability or sharply limited reviewability of visa denials is persuasive in itself, it might be argued that taken together they at least rationalize a practice that has been fairly stable over time. Therefore, as time passes and Congress revisits the process, practical rather than doctrinal considerations are apt to be influential.

The judiciary is understandably skeptical about the weight to be given practical considerations when "fundamental rights are involved."[232] Although "[p]rocedure by presumption is always cheaper and easier than individualized determination,"[233] administrative convenience by itself is not a persuasive justification for cutting the corners of individual claims. Practical considerations are, however, highly influential in shaping legislative or administrative reform.

Several practical considerations have played an important role in forestalling legal reform. These considerations run through the general debate on reviewability as well as interpretations of the "committed to agency action" wording of the APA and other specific provisions of the law. They fall into three general categories: the freedom of consular officers to perform their functions; the feasibility of more formal, outside review; and the expectations of applicants.[234] These categories of practical considerations correspond roughly to the three basic values of review: accountability, uniformity or consistency, and due process.

1. Merits of Freeing Consular Officers from Outside Review

a. Expertise of Consular Officers

Consular officers are well trained, representing one of the most carefully selected, career-groomed corps of government, the Foreign Service. Consular officers possess high levels of competence and morale. Most officers have had special training in the visa process and are familiar with the characteristics and idiosyncracies of the local cul-

232. Fiallo v. Bell, 430 U.S. 787, 813 (1977).

233. Stanley v. Illinois, 405 U.S. 645, 656–57 (1972).

234. The first two of these categories are proposed and discussed in Note, *supra* note 124, at 1157–64.

ture. They generally have an experienced eye for fraud and chutzpah[235] by applicants.

On the other hand, to err is human and any exercise of discretion is potentially fallible. That is why the decisions of other agencies of government are subject to review despite their expertise. Consular interpretation of such terms as "public charges" and "reason to believe" are necessarily subjective, and guidelines are not always effective in promoting uniformity or consistency.[236] To the extent that errors are avoidable, the prospect of review would also encourage accountability. It would encourage consular officers to maintain a high level of care and commitment to applying the law correctly. Few officers would relish reversal by an outsider.

More importantly, a belt-tightening budget restricts the scope and efficacy of consular expertise. Many consulates are so financially hard-pressed that they cannot devote much time and expert judgment to a single applicant. "Batching" or group processing of applications in the same class may be necessary. On-line interviews of applicants for nonimmigrant visas average a minute or less because of severe budget constraints that spread on-line officers very thinly. Officers have little time to carefully investigate documents and employment letters and may rely heavily on income, property, and other guidelines without undertaking a more effective, case-by-case appraisal of applicants. Similarly, supervising officers often do not have enough time to review each visa denial thoroughly.[237] Spot checks or random samplings of

235. *See, e.g.*, Grimes, *Chutzpah by a Visa Applicant*, STATE, May 1988, at 12.

236. One study reported that:

> Departmental efforts to structure consular officer discretion under the public charge provision have been minimal and sometimes confusing . . . .
>
> The guidelines and policy statements existing under the public charge provision have met with mixed success. Some consular officers are flexible in accordance with stated policy. Others are inflexible and rely too heavily on the income poverty guidelines . . . .
>
> The conclusion is that consular officers exercise a large amount of discretion to issue or refuse immigrant visas under the public charge provision. Major Departmental policies are contradictory, so an officer is free to rest a decision on the policy of flexibility or on the presumption of ineligibility. Either policy is acceptable. Key terms are ill-defined, so a consular officer may decide for himself what constitutes public assistance, who are dependent family members, and whether a head-of-household applicant may immigrate without his family. Indeed, two consulates [the authors visited] have opposite policies on the latter issue. Income documentation requirements are inexact, so an officer may request an extensive array of financial evidence, yet disbelieve it.

Study, *supra* note 62, at 124–25.

237. These problems have persisted for some time. *See id.* at 108, 112, 116, 148.

> Typically, the refusing officer writes a few sentences explaining the grounds of ineligibility on the refusal sheet and attaches any relevant documents supporting the refusal. If an applicant is refused a visa on the ground that he is likely to become a public charge, for

denials are often the only alternative. Binding decisions on interpretations of the law by the Visa Office, congressional inquiries, and other intra-departmental processes of review, though important, are too sporadic to substitute for careful review within the consulate. Thus, budget constraints lead to a need for outside review. Internal review procedures are deficient, not because the working relationship between consular and reviewing officers is too cozy to ensure an objective review, but because too little time and money is available for a thorough review of all denials.

b. Governmental Interests

Efficient and effective management of the visa process would seem to require speed and finality, insulation of *initial* policymaking from judicial review, and uniformity or consistency of decisions.[238] These normal considerations of public administration might appear to be especially significant in the specific context of consular activity because of possible foreign policy implications of visa decisions. It is questionable, however, whether the foreign dimension of consular decisions should routinely set them apart from other types of administrative decisions, such as domestic decisions to locate state penitentiaries or nuclear power plants on the Canadian or Mexican border. In any event, review of consular determinations simply applying the INA to the facts in a particular case would not seem to involve "an initial policy determination of a kind clearly for nonjudicial discretion."[239] Nor is the need for a quick decision necessarily strong enough to overcome the need for a more deliberate, potentially correct decision. Delay of a final visa denial to allow for review is not likely to cause the kind of problem that delay of a more truly political decision, such as whether to suspend trade and tariff concessions, is apt to entail.

The need for uniformity or consistency of decisions justifies either greater regulatory control over consular discretion or review of consular decisions. Of these, the former might help alleviate the need for the latter. Regulation is direct, less costly, and potentially helpful to the consular officers in making decisions. Thus, many consular practices require greater regulation: the accessibility of attorneys or other applicant representatives to the review process; the hospitality to third-country, "orphan" applicants; the extent of pre-screening of

example, the consular officer might attach to the refusal sheet a copy of the applicant's job offer as evidence of inadequate income.

Id. at 108 n.124.

238. *See* Note, *supra* note 124, at 1157.

239. Baker v. Carr, 369 U.S. 186, 217 (1961).

applicants; the duration of interviews; the extent of review of visa denials by supervising officers; the capacity of denied applicants to reapply repeatedly; and the timelines for reapplications.

More uniform guidelines and regulations would assist officers in different consulates to reach consistent decisions, thus establishing uniform interpretations of national immigration policy and law. Processes should allow room for local discretion and even experimentation in some cases. Eventually, however, more uniform procedures and practices among the consulates would obviate most of the need for review.

The government has an interest not only in encouraging good exercise of consular discretion, but also in avoiding fraud and illegal migration by applicants. Ironically, the present system may encourage both by rendering an alien's status reviewable after a fraudulent or illegal entry into the United States, but not necessarily after a legitimate application and denial without illegal entry. This anomaly may encourage applicants to misrepresent or withhold information from a consular officer in the hope of getting a more formal review after illegal entry, or encourage applicants to avoid the visa process altogether. The prospect of review at the visa issuance stage might encourage prospective immigrants to do it the right way, beginning with a forthright visa application at the consulate.

2. *Feasibility of More Formal, Outside Review*

Whether the review process is administrative or judicial may affect its feasibility, but most of the critical arguments for or against reviewability apply in either case. Administrative and judicial review should be seen as two segments of the legal continuum. This section, however, will note whenever the type of dispute resolution might make a difference.

a. *Volume of Prospective Appeals*

The prospect of overburdening the State Department or clogging the courts has been cited as an important justification for non-reviewability.[240] Today, perhaps, it is *the* major practical justification, and at least partially explains INA section 104's mysterious insulation of visa denials from supervision by the Secretary of State. It has been used to support an inference against judicial review drawn from that provision. The volume of appeals is, of course, a serious consideration. Consulates issue close to a million visa denials every year. It is diffi-

240. S. REP. NO. 1515, *supra* note 91.

cult to estimate what percentage of denied applicants would take advantage of judicial review if it were available. At a time when the federal courts are already overburdened, authorizing judicial review of all visa denials would therefore be quite risky. On the other hand, barring all judicial review seems unnecessary to avoid court congestion. Any burden to the government could be controlled to a large extent by the standard of review selected.[241]

Moreover, specialists have argued that the volume of appeals of visa denials would be small.[242] Only a small proportion of denied applicants are likely to seek judicial review. Unlike deportation cases, where aliens already in the United States may have some incentive to file frivolous court actions to obtain delay,[243] the visa applicant waiting to enter the United States has nothing to gain from delay. Further, financial costs are associated with judicial review, particularly when the alien must arrange for filing from abroad.

The likely demand for judicial review is reflected in the exclusion cases. In fiscal year 1984, for example, thousands of aliens were excluded at United States entry points. Yet, only twenty-seven aliens in that year exercised their statutory right to obtain judicial review of their exclusion orders, and only ten of these were non-asylum petitioners.[244] Significantly, these petitioners had already traveled to the United States, often at great expense. Visa applicants would seem even less likely to have actions brought on their behalf in court.

If the burden on the judicial system were still deemed to be excessive, Congress might limit the categories of visas from whose denials appeal could be taken. Thus, only family reunification cases, national security cases,[245] or cases where the applicant has a "real stake"[246] or

241. *See* Note, *A Case for Judicial Review of Consular Visa Decisions,* 22 STAN. J. INT'L L. 363, 373–74 (1986). *See supra* text accompanying note 91 for a discussion of the legislative intent of INA § 104(a).

242. *See, e.g.,* Paparelli & Tilner, *supra* note 3, at 1033 (noting a 13-year experience of low volume in appeals of labor certification denials).

243. Even in this instance, however, there are constraints on taking any advantage of a delay pending deportation. *See* 8 U.S.C. § 1105a(a) (1988); Haitian Refugee Center v. Smith, 676 F.2d 1023, 1032–33 (5th Cir. 1982), *overruled,* Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984), *aff'd,* 472 U.S. 846 (1985).

244. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process,* 71 IOWA L. REV. 1297, 1402 (1986).

245. Note, *National Security Visa Denials, supra* note 4, at 741.

246. Bernsen, *Consular Absolutism in Visa Cases,* 63 INTERPRETER RELEASES, May 2, 1986, at 388, 391; Paparelli & Tilner, *supra* note 3, at 1032–33 (proposing review of all immigrant visa denials and nonimmigrant visa denials "except refusals to alien crewmen and aliens seeking entry merely to tour or transit the U.S. . . . review is reserved for the relatively small number of cases in which the alien has a genuine stake in gaining admission, i.e., the cases in which meaningful review is most urgent or important"; the excluded categories constitute "over 80% of all

"high stake"[247] in obtaining a visa might be reviewable. Gradual inclusion of nonimmigrant visa denials in a review process might begin with a pilot program involving a single class or two of visas, such as treaty trader and treaty investor visas. In any event, the effect of appeals on the caseload of administrative and court systems is unclear. Thus, the system-burdening factor may argue for caution, but does not require timidity in experimenting with more substantial administrative and judicial review of visa denials.

b. Adequacy of the Record

Baker v. Carr, which offers the classic formulation of the political question doctrine, recognized that access to governmental information as a practical and functional consideration, is a legitimate factor in determining justiciability of a particular issue.[248] A serious problem under present budgetary constraints is that the record available for either administrative or judicial appeal would be very limited. On-line consular officers must state reasons for visa denials,[249] but often have too little time to record much more than a citation of authority for a denial, with perhaps a few scribbled words of factual explanation. Sometimes consular notations are scarcely legible. If the issue on appeal is whether an officer has applied the law to the facts, but that officer had too little time to write up the facts or to communicate them clearly and legibly, what can an administrative appeals board or court review? With more time and resources to create a clearer, more complete record for appeal, much of this problem would dissolve. Under present budgetary circumstances, it might be unfair to sustain an appeal on the basis of an inadequate record, and yet it also seems unfair to applicants to allow the characteristic inadequacy of a consular refusal sheet to inhibit a more adequate review process.

In evaluating the adequacy of the record of a visa denial, the credibility and demeanor of applicants are often determinative factors. Although administrative tribunals seldom defer to assessments of credibility by executive officials, such assessments play a particularly important role in the visa process; by definition, applicants are generally unable to appear in the United States. Courts of law are, however, less inclined than administrative tribunals to defer to official assess-

nonimmigrant applications"); *see also* sources cited *supra* note 124; Baker v. Carr, 369 U.S. 186, 217 (1961); H.R. 2567, *infra* note 353, § 225(a)(4), (d)(2).

247. Martin, *Mandel, Cheng Fan Kwok, and Other Unappealing Cases: The Next Frontier of Immigration Reform,* 27 VA. J. INT'L L. 803, 812–13 (1987).

248. 369 U.S. 186, 217 (1969).

249. 22 C.F.R. §§ 41.121(b), 42.81(b) (1990).

ments of credibility and demeanor. Thus, a substitute for those assessments is required.

Voice recordings on cassette tape might substitute for the parsimonious and sometimes cryptic written records of consular adjudications. Such recordings, however, involve two problems. First, recording an adjudication could interfere with its integrity: the existence of the process itself might encourage both applicants and officers to rehearse and perform as they might not otherwise. Voice recordings do not, of course, convey live images, which are ordinarily critical in determinations of an applicant's credibility and demeanor. Videotapes would largely resolve this problem,[250] but do not appear to be politically feasible at this time because of strong opposition by the consular corps.

c. Efficacy of Discretion

The visa process necessarily relies on judgmental factors of an applicant's demeanor and credibility, as well as evolving circumstances in the local socio-economic environment. These factors argue for a relatively limited standard of review of consular discretion (as opposed to more objective issues of law and fact), such as whether a denial was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[251]

The court in *Abourezk v. Reagan*[252] adopted guidelines for determining the standard of review that the Supreme Court had previously announced in *Chevron, U.S.A. v. Natural Resources Defense Council.*[253] A court must first attempt to determine congressional intent. This analysis begins with the statute, but may include legislative history and administrative practices. Thus, past consular practices may play an important role in statutory interpretation of such open-textured terms as "public charges." If the court finds a specific intent, it enforces it regardless of the consular officer's interpretation. If, however, Congress does not appear to have had specific intent, perhaps deliberately leaving the resolution of an issue to consular discretion, "the agency's interpretation should be accorded great deference and invalidated only if it is not a 'reasonable accommodation of conflicting

250. Telephone interview with Angelo A. Paparelli, Member of the American Immigration Lawyers Association (AILA) Board of Governors, formerly Issue Manager for Consular Review and Vice-Chairperson, Visa Office Liaison Committee, AILA (Nov. 25, 1988) (notes on file with the *Washington Law Review*).

251. Administrative Procedure Act § 706(2)(A), 5 U.S.C. § 706(2)(A) (1988). *See infra* text accompanying notes 306–08.

252. 785 F.2d 1043 (D.C. Cir. 1986), *aff'd per curiam,* 484 U.S. 1 (1987) (3–3 decision).

253. 467 U.S. 837 (1984).

policies that were committed to the agency's care by the statute.' "[254] Despite this deference, the need for some degree of consular discretion does not bar review, either administratively or in the courts.

d. Standing of Appellants

The few visa denial cases that courts have decided might be read to limit standing to American appellants,[255] either as petitioners for an alien applicant's visa or as parties otherwise injured in fact by a visa denial, as in the case of an applicant invited to speak to an American audience. Courts have, however, included non-resident aliens, as in *Mandel,* either as actual or symbolic co-plaintiffs with citizens or permanent resident aliens. If reviewability is not limited to claims brought by citizens or permanent resident aliens, the territorial barrier might seem to pose a serious problem. How would applicants denied a visa effectively pursue a claim in the United States if the subject of their claim also denies them access to an appellate board or court? Exclusion-at-the-border cases are distinguishable in that they involve proceedings in habeas corpus "and not otherwise" under section 106(b) of the INA. That is, an alien's presence at the border gives the government theoretical "custody" over the alien. A habeas corpus action would therefore be inappropriate as a basis for review of a consular official's denial of a visa.

Limitations on the types of prospective cases subject to review would, of course, affect the issue of standing. Thus, if reviewability is limited to "high stake" cases, standing is similarly limited.

e. Confidentiality

Section 222(f) of the INA[256] provides that the "records" of the Department of State and of diplomatic and consular officers "pertaining to" the issuance or refusal of visas are to be "considered" confidential. Whether this language was intended to cover individual applicants and refusals or only statistics and other aggregate records of an office is unclear, although it may have been intended to cover both. A reasonable construction of the language in terms of foreign policy interests and sensitivities that underlie the administration of the INA might limit the scope of the protection to aggregate records. Some individual dossiers of national security significance, such as that

254. 785 F.2d at 1053 (quoting *Chevron,* 467 U.S. at 845).

255. *E.g.,* Fiallo v. Bell, 430 U.S. 787 (1977); Kleindienst v. Mandel, 408 U.S. 753 (1972); Ali v. INS, 661 F. Supp. 1234, 1246 (D. Mass. 1986).

256. 8 U.S.C. § 1202(f) (1988).

of Yasser Arafat, might require protection as well. Moreover, it seems reasonable to construe the language simply as a means of protecting documentation from access by unauthorized third persons. Confidentiality therefore primarily ought to protect applicants, whether or not they are more generally protected abroad by the Bill of Rights. For clarification, section 222(f) might be amended to provide for the release of records for administrative and judicial review.

A particular problem has been the nonavailability of advisory opinions by the Visa Office. The Freedom of Information Act (FOIA),[257] amending the APA, seems to require disclosure of the opinions to visa applicants,[258] but the Visa Office has invoked exemptions to FOIA to justify its refusal to inform applicants of the contents of opinions. The opinions are denominated either national security-sensitive,[259] protected by the INA,[260] or privileged as a form of intra-agency communication.[261]

Section 225(f) of the INA does allow the Secretary of State discretion, apparently as another exception to section 104(a), to make certified copies available to a court, which must "certif[y] that the information contained in such records is needed by the court in the

257. Pub. L. No. 90-23, § 1, 81 Stat. 54 (1967) (codified as amended at 5 U.S.C. § 552 (1988)).

258. The Court in John Doe Agency v. John Doe Corp., 110 S. Ct. 471, 475 (1989), summarized the broad scope and importance of the FOIA, as follows:

> This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA. "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973), *superseded by statute as stated in* Phillippi v. CIA, 655 F.2d 1325 (D.C. Cir. 1976). The Act's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Department of Air Force v. Rose*, 425 U.S. 352, 360–61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976), quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978). *See also United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). There are, to be sure, specific exemptions from disclosure set forth in the Act. "But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361, 96 S.Ct. at 1599. Accordingly, these exemptions "must be narrowly construed." *Ibid.* Furthermore, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B).

259. 5 U.S.C. § 552(b)(1).

260. *Id.* § 552(b)(3). The applicable "statute" under FOIA § (b)(3) to which the Visa Office refers, is INA § 222(f), 8 U.S.C. § 1202(f); *see supra* discussion at text accompanying notes 256–57.

261. 5 U.S.C. § 552(b)(5).

interest of the ends of justice in a case pending before the court."[262] Presumably, the applicant would then have access to the record on review.

The INA contains at least one major exception to the presumption that an applicant should have access to the record. Section 235(c)[263] provides for a summary exclusionary proceeding for security reasons following an exclusion order, "without any inquiry or further inquiry by a special inquiry officer." Accordingly, the applicant may be denied access to the factual basis or procedural protections to which he or she would otherwise be entitled.[264] Summary or other in camera review proceedings may be necessary in some national security cases, but the procedure can easily be overused or abused in the absence of clearer guidelines on the scope of a national security exception to due process.

f. Costs

The cost burden on the government of improvements in the review process would, of course, depend on their scope and the extent to which some of the cost could be shifted. Financial costs are hard to estimate, but might be moderately high for an administrative review board. For example, in 1983, a bill would have provided $20 million for the first year of an administrative review system to handle appeals from refused visa applicants, with a staff of administrative law judges and an Appellate Immigration Board.[265] The Asylum Policy and Review Unit, which advised the INS to reconsider thirty-five denials and referred another thirty-five cases for reversal by officials, cost about $750,000 in its first year.[266]

User or "appeal" fees might defray the costs of providing more visa examiners and a limited administrative review board. Such fees, however, may discriminate against applicants on the basis of wealth and are not entirely consistent with the federal policy of encouraging travel to the United States. Fee waivers could be granted at least to some of the tired, the poor, and the homeless.

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262. 8 U.S.C. § 1202(f). The State Department also makes available some information to the INS, for example, to be used in visa petition revocation proceedings. *See* United States Department of State, Cable No. 89-State-028963, 66 INTERPRETER RELEASES 149, 159 (1989) (Ref: A 84 STATE 213718 B 85 STATE 283796).

263. 8 U.S.C. § 1225(c).

264. The scope, validity, and applicability in individual cases of this extraordinary provision were incidentally at issue in Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989).

265. S. 2222, 97th Cong., 2d Sess., § 125 (1982).

266. N.Y. Times, Dec. 21, 1988, at A18, col. 1 (national ed.).

Another type of cost is psychological, namely, the threat and perceived nuisance that review might present to already overburdened consular officers. Nobody likes to be overruled. Moreover, little love is lost between attorneys and consular officers. The aversion of some officers to further involvement of attorneys is understandable. Still, experienced foreign service officers have minimized the psychological cost and were openminded about the possibility of a modest formalization of the review process. They acknowledged that the guidance and encouragement of greater uniformity that review could provide might make their work easier.[267]

3. *Expectations of Applicants*

Applicants' expectations about the issuance or denial of visas and the adequacy of the review process are of at least some relevance in considering the need for a more formal review process. If applicants do not expect review, it is arguably less necessary. If, however, they expect review and it would be reasonable, it is in the national interest to attempt to protect this country's reputation for due process. The United Kingdom, for example, provides formal administrative review of visa denials.[268]

Unfortunately, little is known about the varying expectations of different nationalities. Most British and Japanese nationals expect to get visas, whereas other Asians and Mexicans expect greater difficulty. Given the rather low rate of refusals, the majority of applicants may not be surprised. Even if they are, their expectations may be conditioned by skepticism about patterns of administrative practices and decisions of their own governments. On the other hand, an efficient and generous system of visa issuance by the local government may foster expectations of generosity or reciprocity by the United States.

IV. FIELD OBSERVATIONS AND INTERVIEWS

A. *Introduction*

Is there a need for changes in the review process? Theoretically, if consular officers always made the right decisions, no review would be needed. There is also a tolerable margin of error. If, however, some review is necessary, how adequate is the existing process? To recapitulate, it consists of intra-consular review; unofficial monitoring and pressuring by attorneys, the media, non-governmental organizations,

267. *See infra* Section IV (field observations and interview by the author).

268. S. LEGOMSKY, *supra* note 128, at 145.

and American petitioners on behalf of applicants; congressional inquiries; advisory opinions by the Visa Office, some binding, some not; departmental waiver procedures; and very limited judicial review. What would be the benefits of an expanded review process, perhaps providing applicants and petitioners greater access to administrative or judicial review? Would these benefits offset the costs?

In order to answer these questions and see the consular and informal review procedures first hand, the author conducted six sets of field observations and interviews. These took place in 1988 and 1989 at United States consular posts in Guadalajara, Mexico City, Shanghai, London, Warsaw and Krakow. The locations were selected on the basis of the relatively high volume of applications at those posts, the relative importance of all of them in the immigration process, variations among them in types of applicants, the author's ability to comprehend adjudications in Spanish at the Mexican locations, the opportunity in London to investigate a visa waiver pilot program for British tourists, and the author's already established itinerary for other purposes to the Chinese, Polish, and British locations. The author interviewed consular officers at each post; independently communicated with applicants in Guadalajara, Krakow, and Shanghai; attended visa adjudications in Guadalajara and Mexico City; and monitored four reviews of visa refusals in Shanghai. Before arrival at the two Mexican posts and Warsaw, the author sent copies of a ten-year old study of consular discretion[269] in order to indicate some questions for discussion. Subsequent discussion at the three posts centered on whether the process of visa issuance, denial, and review had changed, and, if so, how and to what extent.

The author also interviewed several practitioners during a conference on immigration law[270] and communicated with various spokespersons of the American Immigration Lawyers Association (AILA).[271] These inquiries produced a number of insights and stimu-

269. Study, *supra* note 62. This study consisted of interviews at consulates in Canada and Mexico and the results of a questionnaire that had been sent to consular officers. Although responses to the questionnaire were reported, there is no indication of the number or the extent of responses.

270. Federal Bar Association Seminar, *supra* note 81.

271. The author sought specific guidance on the following issues, most of which arose from an AILA study, Paparelli & Tilner, *supra* note 3: the implications for review of a lack of funding for the visa process; the feasibility of reviewing the notes of consular officers which are often hastily written under extreme time pressures; the definition of a "genuine stake," to distinguish denial cases meriting review from those not meriting review; the appropriateness and the implications for the national interest of excluding from review certain tourist and transit visa applicants; the national security and foreign policy implication of denying visas to Mexican applicants; the remoteness of a proposed administrative review board in Washington from the

lated new questions that are reflected throughout this study.[272] The summary that follows is by no means scientific, but "impressions are experience."[273]

B. General Observations of the Visa Process

Consular officers and their superiors are typically well educated, trained in the visa process, and hard-working. The Foreign Service Institute provides three levels of consular training in the visa process. The Basic Consular Course, for all first-tour officers, takes twenty-six days, about one-half of which is devoted to visa-related training. Most officers in the consular cone, or career specialization, typically as they come "off-line" into supervisory positions in their third tour of duty, voluntarily attend an Advanced Consular Course. This course lasts three to five weeks and includes a somewhat heavier concentration of training in visa processing. Finally, in a typical year the Institute conducts four overseas, regional workshops to further train and present updated procedures to both consular officers and national employees. The Institute estimates that an average of sixty to seventy officers attend these workshops each year.[274]

On-line officers, usually at lower levels of the diplomatic corps and sometimes referred to affectionately as "munchkins," neither wish nor foresee many years in such work. They do, however, view the work as important, challenging, and unequaled as an opportunity for developing language and interpersonal skills. Although on-line work is tiring, particularly during the mornings when most adjudications take place, morale is quite high.[275] Several officers talked enthusiastically about

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consular exposure to local cultures; the efficiency and efficacy of having attorneys present at consular adjudications; the influence of administrative review on the objectivity of consular officers (it is much easier, if not hassle-free, for consular officers to issue visas than to deny them); cost versus benefit for aliens of delays and expenses in the administrative review process, given the opportunities simply to reapply; and the alternative of abolishing visas and relying on residence and work permits, departure controls, and other controls of aliens. *See, e.g.*, telephone interview, *supra* note 22.

272. A summary of the author's interviews in London may be found in Section V, *infra* text following note 367. Unless otherwise indicated, field notes and specific references to dates and personnel are on file with the author.

273. H. JAMES, THE ART OF FICTION (1888). Furthermore, "[t]he law is the last result of human wisdom acting upon human experience for the benefit of the public." S. Johnson, *quoted in* 1 JOHNSONIAN MISCELLANIES 223 (G. Hill ed. 1897).

274. Telephone interview with John Ratigan, Director, Consular Training, Foreign Service Institute (Jan. 5, 1989) (notes on file with the *Washington Law Review*).

275. These observations indicate considerable improvement in the twelve years since the Study, *supra* note 62, which suggested that consular officers were poorly trained and reported that "[i]n Mexico, most consular officers are disappointed and frustrated with their work." *Id.* at 137. The Study quoted one officer as stating: "[o]ur work is a farce. I think the [State]

their work and, during the author's on-line observations, appeared eager to discuss and explain their decisions. It was obvious that they took pride in developing psychological insights about the applicants, in trying to make the process as objective and scientific as possible, and in efficiently reaching decisions.

Officers work to comply with department standards of etiquette.[276] When local authorities complained about one post's "rude" treatment of applicants, the post responded as follows:

> We do process quickly because we are striving to run an efficient, cordial operation, and we want to allow everyone who shows up at the door, same day access. The fact is that we have many applicants. But we get through our line every day.[277]

This explanation reflects a general practice. The lines of applicants are often formidably long per consular officer. To get through the line, visa sections may do a limited amount of "batching" or group processing of the same class of applications. They may also pre-screen applications, particularly to determine that each applicant understands the basic process and possesses whatever documentation may be required or useful. In London, applications are generally reviewed by mail; a denied applicant may then request an interview, which typically lasts about five minutes. In Mexico City, "rovers" pass through the "barn" of waiting applicants, checking their documentation and dividing them into three groups: the fast lane of applicants who can expect to get visas within one-half hour, those with little or no possibility of success, and the "uncertains," who represent a majority of the applicants. All posts discourage excessive documentation that might lead

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Department realizes this and that's why we don't get promoted, or enough resources, or enough manpower. It's a nothing job." *Id.* at 139.

276. For example, Department Notes provide the following guidance to consular officers:

> Consular officers should make every effort to conduct visa interviews fairly and sympathetically. Any semblance of cross-examination, assumption of bad faith or entrapment must be avoided.

FOREIGN AFFAIRS MANUAL, *supra* note 19, at App. J-473, note N2 (nonimmigrants) and App. J-720, note N1 (immigrants).

> (m) Convey Refusal in Sympathetic but Firm Manner—The manner in which visa applications are refused can be very important in relations between the post and the population of the host country. Consular officers must be careful not to appear insensitive.

Id. at App. J-849, note PN1.1(m).

> If it appears to the consular officer that the facts involved make eventual issuance unlikely, care should be taken not to encourage the applicant to undertake useless effort and expense to reactivate the case.

Id. at App. J-849, note PN1.2. *But see supra* text accompanying note 22.

277. Office of the American Consul General, U.S. Embassy (Warsaw), Issues Affecting Work in Poland 1, August 22, 1988 [hereinafter Issues] (on file with the *Washington Law Review*).

to a paper chase. One reviewing officer indicated his preference to rely on oral rather than written evidence whenever possible because of the greater reliability of personal appearance as opposed to written, often fraudulent, documentation.

The length of applicant interviews among the posts ranged in average length from seven to fifteen minutes for immigrant visas and thirty seconds to eight minutes for nonimmigrant visas. This range can be explained partly on the basis that at the "one-minute posts" the adjudications were primarily of first-timers, whereas at the "eight-minute posts" the adjudications were primarily of repeaters or "overcomers." Most of the scores of interviews the author witnessed were handled very efficiently.

Although typically separated from each other by partitioned cubicles, on-line officers did not work in a vacuum. Supervising officers were present, making spot checks and monitoring the process. All of the supervising officers had served on-line and seemed to understand the problem of having to make quick decisions about nonimmigrant visa applicants on the basis of often skimpy documentation and nondescript personal appearances.

Consular officers made use of local employees to conduct investigations, including repeated phone calls to verify employment status of applicants for nonimmigrant visas. American nationals other than consular officers also conducted a variety of more official functions. These nationals, often spouses of diplomatic-consular officers, are generally trained on the job. As a cost measure, they interviewed most of the applicants for visas under IRCA's Special Agricultural Workers (SAW) program[278] and handled normal adjudications at another post. The use of these "para-consular assistants" or "mustangs," as they are also known, is sometimes controversial. Under the INA and departmental regulations, only consular officers may issue or refuse visas.[279] Consulates justify this apparent circumvention of regulations by explaining that the chief of the visa section or the responsible officer ultimately stands behind or overrules the decisions, so that the use of para-consular assistants is more of a clerical delegation than a delegation of responsibility. Given the time and budget constraints, however, the decisions by the mustangs can be determinative.

278. Determination of Agricultural Labor Shortages and Admission of Additional Special Agricultural Workers, INA § 210A, 8 U.S.C. § 1161 (1988).

279. INA § 291, 8 U.S.C. § 1361; 22 C.F.R. § 40.1(d) (1990) (definition of a "consular officer"); *id.* §§ 41.111, 41.121, 42.71, 42.81; *see also* Study, *supra* note 62, at 98, for a 10-year-old comparison of this practice.

The State Department is also experimenting with the use of civil service visa examiners to supplement consular officers in processing immigrant visa applications in Ciudad Juarez, Mexico. The border location enables the State Department to cut costs by hiring bilingual residents of El Paso to commute across the border to do the work.[280]

During adjudications, on-line and supervising officers occasionally consulted the computerized look-out systems, the Foreign Affairs Manual, and other departmental memos. The officers indicated that the Manual provides essential guidelines, but does not help them with a number of highly discretionary aspects of adjudication. One officer pointed out that she is very much on her own in drawing the proper inferences from the demeanor and other personal clues of applicants. Officers recognized that their decisions were often somewhat subjective and that mistakes were bound to happen.

The situations which may confront a consular officer during an interview are endless. What follows are just a few of the situations the author witnessed. An applicant excessively decked out from head to belt-line and wrist in tacky jewelry: is she overcompensating for limited personal circumstances or does she just like tacky jewelry? A soccer team, invited to play in a tournament against American teams, consistent with important cultural objectives of United States foreign policy: what to do when two but only two members of the team, which had been practicing for a long time together, appeared to be ineligible for nonimmigrant visas? A mother, ill with cancer, sought to visit an only daughter in the United States whom she had not seen in a year, who could not return home easily, and who had access to medical care not available to her mother at home: would the mother ever return if she received a nonimmigrant visa?

C. Informal Statistical Analysis

Given the need of consular officers to exercise considerable discretion, it is not surprising that the rates of refusal can vary among consular officers, even at a single post. During a sample day at one post in Mexico, five on-line officers adjudicated 630 nonimmigrant visa applications. Their individual acceptances, rejections and rates of acceptance follow:

280. STATE, Dec. 1988, at 9.

Officer	Acceptances	Rejections	Total	Rate/Acceptance
1	56	81	137	41%
2	22	80	102	22%
3	90	130	220	41%
4	66	55	121	55%
5	30	20	50	60%
	264	366	630	42%

The nonimmigrant acceptance rates thus varied on a single day at this one post from a low of 22% to a high of 60%. This reflects just one day at one post. Of interest, nevertheless, is both that the acceptance rates vary considerably among the officers and that the highest acceptance rate (60%) was that of the reviewing officer.

Acceptance rates, adjusted to take account of visas eventually issued to initially unsuccessful applicants, varied substantially among consular districts from a high of 99:7% for Mauritania and Naha, Japan down to a range between 48% and 84% overall, for the high-volume posts in Mexico, China, and Poland that the author visited.[281] Among the posts in Mexico, the simple and adjusted rates of acceptance for Mexico City were 81.1% and 84.1%, respectively, whereas in Guadalajara, the rates were 55.6% and 59.4%, respectively. Interestingly, the figures for other posts in Mexico tended to cluster around either the national average or the Guadalajara figure. Each of these figures reflects about the same (3–4%) adjustment to take account of "refusal overcomes," but the acceptance rates otherwise varied dramatically.

In Poland, the nonimmigrant visa acceptance rates were remarkably uniform: 48.4% in Warsaw, 50.5% in Poznan, and 50.9% in Krakow. Also remarkable is that, of the six posts visited, those in Warsaw and Krakow, only a few hours apart, had the most divergent procedures in the following respects: the required waiting period between time of refusal until eligibility for reconsideration (one year in Warsaw, on appointment in Krakow); the average length of time for an adjudication (2 minutes in Warsaw, 7–8 minutes in Krakow); and pre-screening (none in Warsaw for lack of funding, pre-screening for proper documentation in Krakow). An officer concluded flatly that such inconsistencies among the posts in Poland were "no problem." To a great extent, the uniformity of acceptance rates among the posts confirms her conclusion. The inference is that reasonable variations in procedures do not have much, if any, effect on rates of acceptance for nonimmigrant visas.

281. U.S. DEPARTMENT OF STATE, VISA WORKLOAD REPORT FOR FISCAL YEAR 1987.

Another inference is that, inasmuch as the rates among the three consulates in Poland are remarkably similar, they tend to verify the average rate for all three of the posts. This is not to say that mistakes do not happen—each of the posts could be making the same high percentage of mistakes, for example—but the figures do suggest that, using different personnel and procedures, the posts have semi-independently arrived at rates that, because of their similarity, validate the processes that were used. In Mexico, however, the range of acceptance rates is somewhat more divergent, perhaps because of demographic rather than administrative factors. The more prosperous and "professional" areas, such as Hermosillo and Mexico City, where trade and investment representatives and the intelligentsia tend to be concentrated, have higher rates of visa acceptances. Conversely, a higher rate of applications at the other posts came from poor, rural backgrounds. This, however, is all very impressionistic and speculative. More comprehensive figures from the field merit further analysis.

At the Shanghai post, a comparison of the issuance rates for student visas (which represent 33% of all applicants for visas) and exchange visitor visas (8% of all applicants) shows a lopsided distribution.[282] The acceptance rate for student visas is 33%, whereas the acceptance rate for exchange visitor visas is 90.4%. The author was told that most of the exchange visitor refusals (9.6%) would eventually be converted into issuances. What explains this discrepancy? Most students are more or less on their own, whereas exchange visitors have the endorsement and sometimes the sponsorship of Chinese or American institutions. Exchange visitors enjoy a presumption that, unlike students, they are likely to return home before the expiration of their visas. Thus, not surprisingly, rates of acceptance vary substantially among nonimmigrant classes, in China as elsewhere.

D. Review Process

All of the posts reported that they orally explain the bases for denials to all refused applicants. Generally, all six posts indicated that they received relatively little pressure to reverse visa denials from attorneys or members of Congress, but tried to respond promptly to them. They acknowledged that letters personally signed by members of Congress received particular attention. Although the Mexico City consulate estimated that it received an average of five congressional inquiries a day, the norm per post is closer to one inquiry per week.

282. Statistics were collected on-site at the consular post (notes on file with the *Washington Law Review*).

The posts experience considerably more pressures from American petitioners, sponsors, and other family members. The consulate in Krakow devotes a portion of each Tuesday and Thursday afternoon to interviews with these Americans. The officers attempt to explain the reasons for denials and offer the visitors an opportunity to present new information on behalf of Polish applicants. If a visitor is persuasive, the consulate may agree to reconsider an application. "Refusal overcomes" were treated routinely and taken seriously at all posts the author visited. One reviewing officer reported that interviews on reconsideration of immigrant denials and "overcome" attempts by immigrant and nonimmigrant applicants were never limited in time, even at his very busy post. In Warsaw, the United States Ambassador reported that applicants who had been denied tourist visas and were encouraged to reapply for work-related visas seldom did so.[283] It was unclear to the consular officers why refused applicants did not avail themselves of this opportunity. This experience suggests that a refused applicant should be required to exhaust reasonable alternatives proposed by a refusing consulate before being allowed to pursue an appeal outside the visa section of the consulate.

All four visa refusals that the author monitored were later reversed by reviewing officers. Reviewing officers reversed three of these refusals after oral clarification of factors that indicated the applicant's probable intent to depart the United States on schedule; one of the cases involved a second personal appearance by the applicant. The reviewing officer reversed the fourth refusal following production of additional documentation pertaining to the applicant's financial circumstances. The author's limited experience is certainly not definitive, but does tend to show the efficacy of the internal review process in consulates.

Consular officers generally avail themselves of the review process in the Visa Office only when required. Few consular officers viewed the Visa Office favorably; several objected to the inferior quality of regulations and dispatches prepared by the Office. Visa Office routing is largely off the consular road map. On the other hand, consulates take the required process of internal review seriously, contrary to the contention that the process is subjective, disingenuous or sloppy because of the close working and living conditions, often in isolated circumstances, between on-line and reviewing officers.[284]

283. *Opinions,* POLITYKA, Warsaw, Aug. 20, 1988, *translated in* Issues, *supra* note 277 (on file with the *Washington Law Review*).

284. Bernsen, *supra* note 246, at 389–90.

Lack of funding creates personnel shortages that may require a supervising officer to go on-line and therefore sacrifice time otherwise available for the prescribed review. Often, time is available only for spot-checking. At two of the posts visited, the internal review of denials was therefore accelerated, allowing the supervising officer time to ponder only a random sample of each on-line officer's daily set of refusals. One senior officer indicated a need for clearer, uniform standards for internal review.

None of the officers was enthusiastic about the prospect of more formal processes of administrative and judicial review, but several complained about the quality of Visa Office review under present circumstances. One officer concluded that "external review" would not be "feasible." Another officer considered more formal review to be potentially "unwieldy." One officer, emphasizing the effect more formal review of nonimmigrant refusals might have on the morale and work attitudes of on-line officers, stated that it "would turn the junior officer corps into a corps of deponents." The same officer did, however, acknowledge that more formal administrative and judicial review of *immigrant* visa denials, at least, might be feasible. Such review, he suggested, would be "cut-and-dried" and "probably not a huge burden on the government or taxpayers," although provision for such review would first need to resolve some thorny issues, such as who would be entitled to review and whether foreign applicants would have standing in court.

E. Past, Present and Future

Twelve years ago, a study of consular discretion concluded that "[b]y and large, most officers perform well under difficult circumstances. If officers misapply the law, it may be because no one corrects their errors."[285] The study made a number of recommendations, centering on improvements in management accountability. What was evident then is evident today, although the blanket speculation that errors occur because "no one" is available to correct them is questionable. In sum, consular exercise of discretion, within the time constraints, appears to be intelligent, informed and fairly well-structured and confined.

The internal review process is a good deal better today than it was ten years ago,[286] but there is room for improvement. Regulations and other dispatches prepared by the Visa Office must be improved to offer

285. Study, *supra* note 62, at 160.

286. Note, for example, the following observations:

better guidance to consular posts. More expanded external review, beyond Visa Office opinions, waivers of eligibility by the Secretary of State, and very limited judicial review, seems advisable. The benefit would not be the avoidance of all error nor necessarily a more efficient visa process. Instead, the benefit would be to improve the capacity of the process to overcome the three most unfortunate consequences of non-review or perfunctory review: mistakes; the appearance of a form of "consular absolutism" that is hard to justify and harmful to the visa process; and a lack of uniform decisionmaking among the consulates, that is, a failure to respond to similarly situated applicants in essentially the same way.[287] From the viewpoint of the bar:

> most consular officers are undoubtedly honorable and well-intentioned. Honor and good intentions, however, are small consolation to the alien who is mistakenly refused a visa, and to the United States citizens, residents, and entities who depend on the alien's admission. Despite a genuine need, or even a statutory entitlement, to be admitted to the United States, the alien who is denied a visa is left remediless in the face of mistaken or unlawful action by a consular official.[288]

Not only the applicants, but the visa sections, too, would benefit from a strengthened review process. Even the most competent, well-disposed consular officers might benefit from further guidance and a "second opinion."

It is not advisable, however, to provide for more extensive review, whether internal or external, without considering the cost of increased consular staffing. Funding would provide supervisors with more time and resources for internal review, making the daily, on-line routine more manageable and less hectic for consular officers and minimizing the need for external review.

V. ALTERNATIVES

What is to be done? Analysis indicates that there is room for improving the process of reviewing visa denials by consular officers. Although the current processes work reasonably well, they do not

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Yet, this Study indicates that Departmental guidelines are often vague and ill-defined. Different consular officers and consulates interpret the law, the regulations, and the guidelines in vastly dissimilar ways. Indeed, two officers may reach opposite determinations on the same question of fact and law. The system of checking these determinations is inadequate to ensure the uniform application of the law. Review at the post is often cursory and sometimes deferred. Visa refusals occasionally pass completely unchecked. Aliens who are refused visas have little recourse.

Id. at 152.

287. *Developments, supra* note 86, at 1361.

288. Paparelli & Tilner, *supra* note 3, at 1033.

fully satisfy any of the three basic values of review, namely, accountability, uniformity or consistency, and due process. This section first considers the possibility of relying on jurisprudential developments, then considers other alternatives for improving both informal and formal stages of the review process, and concludes with a brief caveat about four uncertainties along the path to reform. These uncertainties include: the pace and extent of jurisprudential developments; more adequate funding of visa sections and the review process; the political feasibility of expanding administrative and judicial review; and statutory drafting skill.

A. Jurisprudential Developments

1. The International Legal Framework

Courts could extend the review process along a number of different lines. The first might be to establish expectations about consular discretion more squarely within the framework of international custom. The basic rule of international law, which as custom is "part of our law,"[289] establishes a qualified duty to admit aliens. Accordingly, the government may exclude aliens only if, individually or collectively, they pose serious danger to public safety, security, general welfare, or essential institutions.[290] Although this rule does not prescribe specific national means of implementation, justiciability, or enforceability by individuals, it is nevertheless significant, for it encourages states to define a proper margin of responsibility, in cooperation with other states and out of obligation to the global community. It also eliminates endless semantic debate about whether entry is a right or a privilege (to the extent that this distinction is valid anymore, entry is a qualified right), whether constitutional protections extend extraterritorially (they do insofar as consular decisions are subject to the rule), or whether Congress has plenary power, inherent in sovereignty, to exclude aliens without judicial intervention (it does not). In short, reliance on the international legal rule can bring the judiciary out of the "cataleptic trance" that the "mere mention" of the word "immigration" induces.[291]

Acknowledgment of a state's qualified duty to admit aliens may seem radical because it challenges the easy assumption that states may do as they please. The rule, however, is really quite modest. It is generally reflected in United States practice under the INA's immi-

289. Paquete Habana, 175 U.S. 677, 715 (1900).

290. *See supra* text accompanying notes 179–83.

291. Legomsky, *supra* note 170, at 306.

grant preference quotas and would not necessarily result in an expanded issuance of nonimmigrant visas. The rule's cutting edge would not be useful in demolishing immigration controls or in tearing a hole in the nylon, tortilla, and other curtains at the border. Instead, its cutting edge can create a greater awareness of responsibility and sense of human solidarity, and offer members of Congress and consular officers alike another tool for standardizing alien eligibility to receive visas. The rule may also assist consular officers to avoid excessively subjective determinations of ineligibility in individual cases, particularly when examining and reviewing applications for nonimmigrant visas. Whatever the difficulties may be in implementing the rule, it is incumbent on decisionmakers to try to apply it in good faith.

2. *The Appropriate Standard of Judicial Review*

In the words of the Supreme Court, all administrative adjudications are "to some degree judicial and to some degree political"[292] and immigration issues can be especially foreign policy-sensitive. It is clear, therefore, that the courts are expected to defer to some extent to the political branches when interpreting the INA and reviewing exercise of consular discretion under the INA. Deference, however, is a matter of degree. In reviewing consular discretion, the appropriate level of deference can be expressed in the standard for review, rather than in a rule of non-reviewability that is unnecessary and difficult to justify.

a. *The* Mandel *Test*

The intended scope of the *Mandel* test of a "facially legitimate and bona fide reason" for an immigration decision is anything but clear.[293] It can be narrowly limited, on the one hand, to waiver cases raising first amendment issues under section 212(a)(28) of the INA,[294] or it can be more broadly applied to all visa denial cases involving congressional delegation of a "conditional exercise of [the power to exclude] to the Executive."[295] Assuming a broad scope, the depth of judicial scrutiny is subject to two interpretations. According to the "superficial" test, courts defer to consular discretion so long as a result appears to be *facially* rational, that is, so long as the reasons stated for

292. INS v. Abudu, 485 U.S. 94, 110 (1988).
293. Shapiro, *supra* note 4, at 936; *supra* text accompanying notes 139–45.
294. 8 U.S.C. § 1182(a)(28) (1988).
295. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

the denial on the Visa Control Card (10F-224B) bear a "reasonable relation to a proper legislative purpose [as expressed in the INA]."[296] According to this interpretation, a mere citation of the grounds for exclusion, such as "§ 214(b)" or "§ 221(g)," on the Visa Control Card is sufficient to avert court review. On the other hand, an irrational notation such as "applicant has a punk hairdo" would not in itself be sufficient.

Such a de minimis reading of the *Mandel* test, however, raises several problems. First, the Department of State itself requires thorough elaboration of the grounds for exclusion. In addition to noting the applicable INA section on the Visa Control Card, consular officers must "[i]nform the alien orally of the provision(s) of law on which the refusal is based and of any exception provided by law under which administrative relief is available."[297] The officer must also furnish a refused alien with a written explanation of the refusal, "explaining the ground(s) of ineligibility and the steps, if any, which may be taken to overcome the refusal."[298] Further, "[t]he explanation should be complete and set forth the facts which led the consular officer to determine that the cited section(s) apply to the applicant's case."[299] For example, a denial under section 221(g) of the INA on the basis of insufficient documentation requires a precise identification of the missing documents.[300]

A second problem with a de minimis reading of the *Mandel* test is that the *Mandel* court upheld the denial of a waiver of ineligibility because of a specific, departmental finding that the applicant had violated the terms of earlier visas issued to him.[301] In light of this finding, *Mandel* might be viewed as a rather innocuous decision. Finally, a superficial test of reviewability would be wholly inadequate in the majority of nonimmigrant visa denials that rely on one of the catch-all grounds—for example, sections 214(b) and 221(g) of the INA—that are barely descriptive. Thus, the *Mandel* test seems to prescribe a more than superficial scrutiny of the exercise of consular discretion, as subsequent decisions suggest. "[A] growing judicial consensus that visa denials based on an applicant's political views are not 'legitimate'

296. Nebbia v. New York, 291 U.S. 502, 537 (1934) (the rational basis test of constitutionality).

297. FOREIGN AFFAIRS MANUAL, *supra* note 19, at App. J-846, note PN1.1(a).

298. *Id.* at App. J-847, note PN1.1(b).

299. *Id.*

300. *Id.*

301. Kleindienst v. Mandel, 408 U.S. 753, 758–59, 769 (1972).

or 'bona fide' within a system of true expression" has emerged since *Mandel.*[302]

A preferred interpretation of the *Mandel* test would be to require deeper scrutiny by the courts.[303] To be sure, the term "facially" would seem to constrain the courts from assessing the wisdom or advisability of a denial.[304] For example, a consular officer need not justify an exclusion on the basis that the applicant "has too few assets" to avoid the likelihood of becoming a public charge after entry. On review by the courts, a finding that such an applicant was a model human being, worked hard and always turned over his earnings to his spouse would be irrelevant, as would a finding that an applicant could quickly overcome his impoverished condition.

To be "legitimate," the stated reason for a denial need only be within a margin of discretion under statutory, constitutional, and international law. This requirement overlaps the "abuse of discretion" standard. As a basis for determining "legitimacy," the "qualified duty" rule of international law could be more precisely expressed in legislation, by establishing acceptable levels of migration to the United States through a national absorptive capacity, and by providing for modification of those levels under certain circumstances. Accordingly, an alien could be excluded, for example, if those who overstay their visas become a serious problem, or the country reaches its absorptive capacity of temporary workers, or the number of elderly and infirm are straining national health and welfare support systems. The "bona fide" requirement, to whatever extent it is independently significant, calls into question only stated reasons that appear on their face to be disingenuous, vindictive, or the like.

In sum, a broad application of the *Mandel* test can be construed to comport, at least minimally, with the "abuse of discretion" test for judicial review under the APA. Preferably the courts would limit *Mandel* narrowly to a particular class of waiver denials, or relegate the text to the dustbin of bad decisions. That may not, however, be a realistic prospect, given the force of *stare decisis.*

302. Shapiro, *supra* note 4, at 938.

303. *See* Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985), *aff'd,* 845 F.2d 1111 (1st Cir. 1988). Whether a plaintiff loses on the merits according to a superficial standard or because the courts deny jurisdiction according to the plenary power doctrine might not seem to make any difference to a losing plaintiff. It may, however, "make some difference to the ultimate development of a sound body of law." T. ALEINIKOFF & D. MARTIN, *supra* note 2, at 209.

304. *See* Comment, *Immigration and the First Amendment, supra* note 4, at 1906.

b. Alternative Standards

Although consular officers are required to explain their reason(s) for applying a particular ground for exclusion, some grounds for exclusion are understandably so broad and dependent on quick judgments by consular officers that an appropriate standard of review must defer to some extent to consular discretion.[305] With respect to a few grounds, it is even appropriate to apply a wholly deferential standard of review. For example, in a few cases the exigencies of foreign policy or national security might on their facts require courts to apply the political question doctrine. Most issues of review and reviewability, however, arise out of consular determinations under open-textured provisions of the law that require the exercise of substantial discretion. A standard of review must therefore incorporate a rational relationship between a determination and evidence of ineligibility in the form of stated facts.

The most obvious alternative for reviewing consular *discretion,* as opposed to the law or facts, is the APA standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[306] On review of a consular denial, a federal court could find an abuse of discretion, for example, if no evidence supports the decision or if its interpretation of the law appears to be improper or incorrect.[307] Similarly, courts have found abuse of discretion in other immigration contexts when, for example, an official failed to exercise discretion at all, failed to provide reasons for a decision, ignored relevant considerations, or departed inexplicably from normal policies.[308]

3. Standing to Complain

> The law of standing cannot be made easy. It is as complex and varied as the law of who may sue to remedy what wrongs across the entire domain of law. Questions of who may sue in various settings share certain common characteristics. But to think, or pretend, that a single law of standing can be applied uniformly to all causes of action is to produce confusion, intellectual dishonesty, and chaos.[309]

305. U. S. COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 48 (1980).

306. APA § 706, 5 U.S.C. § 706 (1988).

307. *See, e.g.,* Song Jook Suh v. Rosenberg, 437 F.2d 1098, 1102 (9th Cir. 1971) (superseded by statute as stated in Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982)).

308. Legomsky, *Political Asylum and the Theory of Judicial Review,* 73 MINN. L. REV. 1205, 1212 (1989).

309. Fletcher, *The Structure of Standing,* 98 YALE L.J. 221, 290 (1988).

Developing a substantive framework of law and standards for review is of limited help to a refused applicant in the absence of standing to compel review. Applicants denied a visa are, by that fact, unable physically to bring an action in the United States.

In interpreting the APA, the courts have fashioned rules that would provide limited standing to American citizens to complain of injury to them resulting from denial of a visa to an alien. In *Association of Data Processing Service Organizations v. Camp,*[310] the Supreme Court applied section 702 of the APA to establish that persons have standing if they are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"[311] and if they have suffered "injury in fact."[312] Standing, therefore, is no longer limited to those who claim an injury to legal rights; claimants need only show some kind of injury *in fact,* economic or otherwise.[313] Any American who has a strong enough relationship with an alien to file a petition for an immigrant visa on the alien's behalf would seem to be entitled to standing. Thus, all applicants in the immigrant preference categories are indirectly protected by a limited judicial reviewability of action taken on the petition filed on their behalf. In nonimmigrant cases, the post-*Mandel* line of first amendment-related decisions provides for limited standing of American citizens—relatives, prospective or actual employers, educational institutions, and so on—to complain on behalf of foreign applicants. Beyond such vicarious standing, the road to the courtroom is poorly charted.

Although non-resident aliens can bring legal action in federal and state courts, that capacity is meaningless if they are unable to obtain a visa to enter the country. The rules of standing do not explicitly protect the rights of aliens to complain about visa denials effected abroad, although *Mandel* itself and a few other cases have tacitly allowed standing to non-resident aliens, at least as symbolic parties. Archaic notions that aliens possess only a privilege and not a right to a visa, and that constitutional protections do not extend abroad, have encouraged the courts' reluctance to allow aliens standing to complain about visa denials. Courts, and others, also fear opening the floodgates to litigation if applicants are given standing to sue in such cases. These considerations explain why the limited jurisprudence generally denies standing in nonimmigrant visa denial cases unless the applicant

310. 397 U.S. 150 (1970).

311. *Id.* at 153.

312. *Id.* at 152; *accord* Abourezk v. Reagan, 785 F.2d. 1043, 1050 (D.C. Cir. 1986), *aff'd per curiam,* 484 U.S. 1 (1987) (3–3 decision).

313. 397 U.S. at 154.

can show a strong affiliation with the United States, such as recent residence in this country[314] or membership in a class of primarily resident plaintiffs.[315] Thus, in demonstrating the requisite connection with the United States, applicants for immigrant visas are apt to have an easier time than applicants for nonimmigrant visas.[316] Indeed, the INA's preference system for intending immigrants is based on connections that would also provide a fair and reasonable basis for standing, namely, on family reunification and the interests of American employers in foreign labor.

Mendelsohn v. Meese,[317] one of two companion cases concerning the status of the PLO Mission to the United Nations,[318] shifts the analysis of standing in a manner that is relevant to this study. In *Mendelsohn,* the court inquired whether United States citizens had standing to challenge the constitutionality of the Anti-Terrorism Act, which would allegedly deny them first amendment liberties to engage in advocacy for the PLO by closing the PLO's Permanent Observer Mission to the United Nations.

The court explicitly found the "findings of standing"[319] in *Allende* and *Abourezk* to be "unpersuasive."[320] In those cases, the court explained, the excluded aliens "had a personal stake in the outcome of the litigation;"[321] this dictum provides a basis for granting standing to any non-resident alien who can show injury in fact, resulting from denial of a visa by a consular officer. In *Mendelsohn,* by contrast, the court decided that the advocates themselves had standing, but not those whose only interest in the litigation involved their alleged "listening" rights under the first amendment.[322] The court interpreted *Mandel* to limit standing to plaintiffs who would be deprived of the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning . . . . The fact that a person has a first amendment interest does not require a finding that he has standing."[323] Thus, the standing issue called for a determination not of whether the

314. *See, e.g.,* Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961).

315. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972) (by implication); Silva v. Bell, 605 F.2d 978 (7th Cir. 1979); Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985), *aff'd,* 845 F.2d 1111, 1114 n.4 (1st Cir. 1988) (non-resident alien was a "symbolic party").

316. Note, *supra* note 124, at 1154–55.

317. 695 F. Supp. 1474 (S.D.N.Y. 1988).

318. *See supra* notes 204–05.

319. 695 F. Supp. at 1479 n.5.

320. *Id.*

321. *Id.*

322. *Id.* at 1478–79.

323. *Id.* (quoting Kleindienst v. Mandel, 408 U.S. 753, 765 (1972)).

plaintiffs' "own rights of free speech are violated," but whether "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[324] *Mendelsohn,* therefore, shifts the *Mandel* analysis of standing away from a focus on vicarious injury to residents to the more immediate injury to alien applicants. Arguably, the effect of this shift could be to undermine the standing of citizens and resident aliens to complain, without establishing the standing of foreign applicants to bring an action themselves. This interpretation of the opinion, however, seems misplaced. First, the opinion acknowledges that even affected "listeners" (or, analogously, Americans deprived of the presence of aliens in exclusion cases) *might have* a "personal stake" in litigation sufficient to be entitled to standing.[325] Second, the court acknowledged that the non-resident aliens denied a visa in *Allende* and *Abourezk,* and hence others denied visas, *did* have standing by virtue of injury resulting directly from the denial.[326]

This requirement of a personal stake in the litigation is consistent with section 702 of the APA. In one or another form, the requirement might be implanted in visa review jurisprudence. Otherwise, the road to the courtroom, to whatever extent it has been charted, will remain overgrown with tangled precedent. The "injury in fact" test is otherwise difficult, if not impossible, to apply objectively,[327] and other very generalized rules of standing are likewise misleading or obfuscating.

In the absence of much constitutional authority on the issue of standing in visa denial cases, the best solution might be one of statutory and regulatory liberalization and clarification.[328] A straightforward, statutory approach to standing would then bring the analysis full circle to the jurisprudential reality of the plenary power doctrine, the political question doctrine, visas-as-privileges-not-rights, and the non-applicability of constitutional protection to non-resident aliens.

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324. *Id.* at 1479 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).

325. *Id.*

326. *Id.* at 1479 n.5.

327. *See* Fletcher, *supra* note 309, at 231.

328. For example:

> I do not suggest that standing decisions will become easy or noncontroversial if the suggestions made here are followed. Many will remain highly controversial, for they are often critically important decisions about which there is and sometimes can be no complete agreement. But the argument will be focused, as it should be, on the particular statutory or constitutional provision at issue. If the general structure of standing law is seen in the way suggested here, the confusion and obfuscation that have haunted standing law for the past several decades will diminish and, in time, may subside to the amount inescapably present in a legal system that makes significant changes through its judiciary.

Id. at 291.

The current articulation of these constraints is in part the product of the questionable common-law structure of standing. Because the constraints have no clear constitutional justification, Congress could enact legislation to overcome them and to provide for standing. Proposed "Immigration Exclusion and Deportation Amendments of 1987" would have provided standing to specific classes of plaintiffs in visa denial cases, based on national security grounds.[329] Any United States citizen or permanent resident alien would have had standing in a federal district court "who intends to meet in person with, or hear in person, an alien" and who has been denied that opportunity because an alien has been denied a visa.[330]

B. Internal Procedures for Review

Besides the tortuous path of jurisprudential developments, other avenues are available for extending review of consular discretion. Bureaucratic justice, reliant on administrative discretion, may at times be preferable to a more formal review process. Current evidence indicates that visa sections of consulates and embassies conform to a bureaucratic model of administrative justice.[331] That is, the consular process is active, investigatory, generally attuned and responsive to conflicting values, and accuracy-oriented. Although consular officers seek a rational basis for their determinations, however, their exercise of discretion inevitably relies to some degree on intuition, common sense and sheer experience—and mistakes can happen.

The Select Commission on Immigration and Refugee Policy, finding deficiencies in the present system of reviewing consular discretion, recommended improvements in the internal review process rather than establishment of a new administrative body within the State Department.[332] The Commission also recommended increased review by the Department of those consular operations that elicited frequent complaints or appeared to depart from established policy.[333] Thus, the Commission recommended a strengthening of limited internal and external checks on consular discretion. All denials should be carefully

329. H.R. 1119, 100th Cong., 1st Sess. § 2(b) (1987).

330. *Id.*

331. For a discussion of the bureaucratic model of administrative justice, see J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 171–72 (1983).

332. U.S. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT AND RECOMMENDATIONS 255 (1981) [hereinafter REPORT OF THE SELECT COMMISSION].

333. *Id.*

reviewed by a supervising officer. Section IV of this Article confirms the advisability of doing so.

As a further check on the process, the State Department might establish regulations or other minimum requirements for access by attorneys at each stage of decisionmaking. At a minimum, the requirements should provide for prompt response by the posts to communications from attorneys, and for some means of ensuring that attorneys and their client-applicants can conveniently meet on-site with each other. There is also a need for greater uniformity of practice among the consulates.

C. *External Administrative Review (Outside the Refusing Visa Section)*

No bright line divides administrative and judicial review.[334] They must be viewed together. Constituent parts of the review system are not only "incredibly complex," in the words of a veteran immigration judge,[335] but interrelated. Greater access to external administrative review can deter more disruptive, time-consuming and expensive review by the courts, and a proven track record of administrative competence could eventually encourage the courts to defer to bureaucratic justice. Such deference would occur not because of some transcendental construct of plenary legislative power or because of precedent, but because of judicial confidence in the administrative process.[336] Judicial review requires an exhaustion of administrative remedies.

Court have interpreted section 104(a) of the INA to bar administrative review outside the visa section of an embassy or consulate and thereby forestalled proposals to create a board within the Department to review visa denials.[337] In fact, however, the Visa Office, through its advisory opinions, and the Secretary of State, through his waiver authority,[338] do review denials. Eliminating this provision in section 104(a) is not a very radical step. More problematic is the design of an effective and efficient process of external administrative review.

As one alternative, the role of the Visa Office could be substantially expanded. That office issues a modest number of advisory opinions, which are binding as to questions of law but not as to questions of fact. Although a consular officer is quite likely to be the best judge of the

334. Legomsky, *supra* note 244, at 1299.

335. Address by William R. Robie, Chief Immigration Judge, United States Department of Justice, Federal Bar Association Seminar, *supra* note 81.

336. Verkuil, *supra* note 10, at 1206.

337. 8 U.S.C. § 1104(a) (1988); *see supra* text accompanying notes 59–61.

338. *E.g.*, 22 C.F.R. § 41.2 (1990).

facts, a process is needed to strongly discourage abuses of discretion and patterns of mistakes.

Beyond expanding the role of the Visa Office, other options include: refinement of departmental regulations and the guidelines found in the Foreign Service Manual;[339] closer monitoring of visa denials and review of field office operations and practices, as recommended by the President's Select Commission on Immigration and Refugee Policy;[340] and substantially greater use of authority to request refusal reports from embassies and consulates.[341]

Although the Visa Office flatly opposes any proposals for administrative or judicial review,[342] some form of review seems inevitable. As a start, the Visa Office might randomly sample denials, with an eye toward identifying significant departures from normal interpretations and exercises of discretion. The Department might also experiment with volume thresholds. A below-average volume of requests for advisory opinions from a particular consulate would trigger a requirement that the consulate forward all, or a random sample, of the next batch of denials. The Visa Office would then issue opinions on each of these. In view of the probability of an increased workload, it might be advisable to continue binding consular officers only on opinions of law. Finally, the Visa Office might intensify efforts to collect cases from the field, in order to issue further guidance and generally develop more uniform or consistent exercise of discretion among consulates. The Visa Office might select particularly troublesome issues, resulting in divergent determinations, for particular attention.[343] Sections 214(b) and 221(g) of the INA commend themselves for such special attention. Above all, the Visa Office should be encouraged to abandon its obdurate refusal to support or even consider proposals for administrative or judicial review.

The cloak of confidentiality should be lifted from advisory opinions.[344] Although the exemption to protect the national defense or

339. For historical perspective on these efforts, see U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 305, at 48.

340. *See* REPORT OF THE SELECT COMMISSION, *supra* note 332, at 255.

341. *See* 22 C.F.R. §§ 41.121(d), 42.81(d) (1990).

342. *See* U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 305, at 48 n.23. Cornelius D. Scully III, Head of the Office of Legislation, Regulations and Advisory Assistance in the State Department's Bureau of Consular Affairs, reiterated this opposition to any proposals for review. Telephone interviews with Cornelius D. Scully (Apr. 5 & 11, 1989) (notes on file with the *Washington Law Review*). Such opposition poses a serious obstacle in the path of reform.

343. *See* Study, *supra* note 62, at 158.

344. *See supra* text accompanying note 256.

foreign policy might remain,[345] most applicants ought to have access to advisory opinions immediately upon issuance.

As another alternative, the State Department might establish a centralized review process within the Department but outside the Visa Office.[346] As precedent, proposals to establish such a board typically cite the two-member Board of Appeals on Visa Cases during World War II. That Board reportedly handled 22,600 appeals in less than four years of operations and overturned 26% of the visa denials it

345. 5 U.S.C. § 552(b)(1)(A) (1988).

346. The first Board of Visa Appeals was apparently proposed in 1952 in congressional debate about the McCarran-Walter Act. *See* Study, *supra* note 62, at 158 n.462. In 1969, Senator Edward Kennedy proposed the establishment of a visa review board as follows:

> Section 104 of the Immigration and Nationality Act, 8 U.S.C. § 1104 should be amended by adding at the end thereof the following new subsection:
>
> (g)(1) There is hereby established within the Bureau of Security and Consular Affairs a Board of Visa Appeals (hereafter referred to in this subsection as the 'Board'), to be independent of the Visa Office. The Board shall consist of five members to be appointed by the Secretary of State, who shall designate one member as Chairman. The practice and procedure before the Board shall be in accordance with this subsection and, subject to paragraph (4), such regulations as the Secretary of State may prescribe.
>
> (2) Upon petition -
>
> (A) by any citizen of the United States claiming that an alien outside the United States is entitled to (i) a preference status by reason of a relationship to the petitioner described in paragraph (1), (4), or (5) of section 203(a), or (ii) an immediate relative status under section 201(b), or
>
> (B) by any alien lawfully admitted for permanent residence claiming that an alien outside the United States is entitled to a preference status by reason of the relationship to the petitioner described in paragraph (2) of section 203(a), the Board shall have jurisdiction to review any determination of a United States consular officer refusing an immigration visa, or revoking an immigrant visa issued, to any such alien outside the United States who has applied for classification as a preference immigrant described in any such paragraph or as an immediate relative. Each alien shall be informed of the review procedure available under this subsection when a determination refusing or revoking an immigrant visa to him is made by a consular officer. No petition for review may be filed with the Board more than sixty days after the date of notification to an alien of the making of the determination with respect to which review is sought.
>
> (3) Any review by the Board under this subsection shall be conducted solely upon the basis of the visa application and any other suppporting documents submitted in connection with such application by or on behalf of the alien concerned, and any other documents, materials, or information in the possession of and considered by the consular officer, together with any briefs, memoranda, or arguments submitted in writing by or on behalf of the alien. No alien, solely by virtue of a petition for review by the Board under this subsection, shall be entitled to entry or admission into the United States.
>
> (4) The decision of the Board in each case shall be in writing and shall be communicated to the petitioner and the alien concerned. Decisions of the Board under this subsection shall be final and conclusive on all questions of law and fact relating to the issuance or revocation of a visa and shall not be subject to review by any other official, department, agency, or establishment of the United States; but, nothing in this subsection shall be construed to limit the application of section 221(d).

S. 3202, 91st Cong., 1st Sess. § 3, 115 CONG. REC. 36,967 (1969) (statement of Sen. Kennedy).

reviewed.[347] How much time did that afford for each case? On the assumption of 250 workdays per year per officer, each enjoying a two week vacation, and seven hours a day to devote to the cases, the Board had 14,000 hours at its disposal to review and write up decisions, or about thirty-seven minutes per case, going non-stop. That might clearly be inadequate for a peacetime board.

As the British experience suggests, however, the volume of appeals of visa denials might be small.[348] As assurance, some proposals for a review board would limit reviewability to denials of only certain classes of visas. The most modest alternative would draw a line between immigrant visas issued under the preference categories, which would be reviewable, and nonimmigrant visas, which would not. Presumably the family and employment interests expressed in the preference categories establish heightened individual interests, closer affiliations with the United States, and hence greater governmental interests in issuing a visa.

Distinguishing among classes of nonimmigrant visas presents difficult problems. To the extent that distinctions would be drawn not on the basis of the nature of the right but rather the government's foreign affairs interest in a particular case or category of cases, such proposals are consistent with the current ideology of reviewability. It is uncertain, however, what constitutes a strong enough governmental interest to immunize one particular class or category of visa denials, but not another. What about tourist visas? Would the government's express economic and cultural interest in promoting tourism permit tourist visa denials to be insulated from review? Would denial of a visa to a person dying of cancer to enable her to visit Disneyland be reviewable, but not a young person's desire to travel around the United States on vacation?

Ideological and non-security grounds for exclusion have posed dilemmas. One might think that denials premised on these grounds should be the most immune from review. Ironically, however, it is the very sensitive ideological and national security-oriented denials under section 212(a)(27)–(a)(29) of the INA[349] that in recent years have wound up in the courts because of volatile first amendment issues. Indeed, the proposed Immigration Exclusion and Deportation

347. 133 CONG. REC. E2211 (daily ed. June 2, 1987) (statement of Rep. Gonzalez).

348. On the British experience, see UKIAS REPORT, *supra* note 89, at 2; on the United States experience with administrative review and other kinds of immigration decisions, see *supra* text accompanying notes 244–47.

349. 8 U.S.C. § 1182(a)(27)–(a)(29) (as modified by the Immigration Act of 1990, Pub. L. No. 101-649, §§ 601, 603, 104 Stat. 4978).

Amendments of 1987 would have singled out national security-based denials for judicial review.[350] Clearly, individual interests must be balanced against those of the government,[351] but the weighing is not easy.

One proposal would have created a comprehensive, independent United States Immigration Board, whose final decisions would have been binding on "all administrative law judges, immigration officers, and consular officers."[352] The Gonzalez Bill[353] would have created a visa review board within the State Department. That board would have reviewed visa denials of all special immigrants, immediate relatives, preference category aliens, and a number of classes of nonimmigrants.[354] The Bill would have given the board the authority to overrule a visa denial and require the issuing officer promptly to issue the visa.[355] The Gonzalez Bill is a good point of departure for establishing a visa review board within the Department. Its somewhat narrow definition of the scope of review over nonimmigrant visa denials might seem somewhat arbitrary, but a cautionary, selective approach of this sort offers a basic orientation for exploring uncharted territory.

Perhaps the place to begin is with a pilot program involving a single class or two of nonimmigrant visas. The class of treaty traders and investors might be optimum because of a low volume of applicants, the economic importance of the visas, and the technical difficulty of interpreting and applying the law.

Section (e) of the Gonzalez Bill contains an escape clause that would enable any member of the Board, official, or employee of the federal government to refuse to disclose confidential information that in his or her judgment "would be prejudicial to the public interest, safety or security."[356] This clause could swallow the review process. Moreover, it might encourage consular officers to reverse the presumption under international law that admissions will be normal *unless* the requisite threat is apparent. Instead of having to identify a specific threat to the nation in a particular case, a consular officer would possess a wide margin of discretion to insulate denials from administrative review.

350. H.R. 1119, *supra* note 329, at § 2(b).

351. *See* Verkuil, *supra* note 10, at 1149.

352. Immigration Reform and Control Act of 1983, S. 529 & H.R. 1510, 98th Cong., 1st Sess. § 122a (1983); *see also* S. 3202, *supra* note 346, at § 3(g).

353. H.R. 2567, 100th Cong., 1st Sess. (1987).

354. *Id.* at § 225(a)(4).

355. *Id.* at § 225(d)(2).

356. *Id.* at § 225(e).

Whatever the precise structure or location within the government, a review board should seek to maximize the three values of accountability of consular officers, uniformity or consistency of determinations among officers and visa sections, and due process for applicants and petitioners. The British experience in allowing appeals of visa denials provides one model. The several immigration-related boards within the United States Departments of Justice and Labor offer other models.

Mathews v. Eldridge[357] established that the sufficiency of procedures under the Due Process Clause varies with the circumstances, but that courts must consider the type and magnitude of the individual's interest at stake, the risk of an erroneous deprivation of that interest as a result of a particular procedure, and the burdens and benefits of heightened procedural safeguards. The *Mathews* approach would therefore balance the government's interest in excluding classes of aliens against a visa applicant's interest in being protected against an erroneous or unfair denial.

Goldberg v. Kelly[358] lists ten minimum ingredients to satisfy the requirement of a fair hearing, administrative or judicial. The *Goldberg* menu provides a convenient, though by no means mandatory, list of procedural ingredients for a visa review board: timely and adequate notice; confrontation of adverse witnesses; oral presentation of arguments and evidence; cross-examination of adverse witnesses; disclosure to the claimant of opposing evidence; the right to retain an attorney; a determination on the record of the hearing; a statement of reasons for the determination; an indication of evidence relied on; and an impartial decisionmaker.

A visa review process outside consulates, following the model of an exclusion hearing, might include all of the above ingredients except an opportunity for cross-examination, confrontation of adverse witnesses, and oral argument. Provision might be made, however, for a well-defined range of interrogatories. Unlike an exclusion hearing, the process should provide for effective notice, but not necessarily for cross-examination. In exceptional cases involving sensitive issues of national security significance, confidential material might be presented and reviewed in camera. The refused applicant, who by definition could not enter the United States to be present in the proceedings, might be represented by a petitioner, legal counsel, or other designated representative. The applicant and local petitioner would be given

357. 424 U.S. 319, 334–35 (1976).
358. 397 U.S. 254, 267–71 (1970).

access to the record of consular adjudication, and the latter could present further oral evidence. The board would render a written decision. The most difficult questions relate not to the scope or procedures of the review process, but the accessibility to the process of different classes of applicants and petitioners on behalf of applicants. A first step might be a pilot review process limited to refused applicants for immigrant visas, represented by their petitioners or others, and nonimmigrant visas for treaty traders and investors. If the process operated satisfactorily, it might gradually include refused applicants for other types of nonimmigrant visas.

D. Judicial Review

From the standpoint of the State Department, a visa section, and individual consular officers, an administrative review board might seem to be preferable to judicial review. Administrative review might seem preferable, too, from a more systemic standpoint, so long as the review would "both correct errors in individual cases and enhance quality control of the system generally."[359] Nevertheless, to reconsider an appellate administrative decision, judicial review has its place.

The proposed Immigration Exclusion and Deportation Amendments of 1987[360] would have amended section 279 of the INA[361] to provide for the jurisdiction of federal district courts to review visa denials. Venue would have been proper in any district court "in which the individual resides or in which the individual intended to meet or hear the alien."[362]

Statutory provision for judicial review should require exhaustion of administrative remedies, specify the standing of at least limited classes of citizens and permanent resident aliens, confirm the qualified duty to admit aliens, and prescribe a standard for review under section 706 of the APA.[363] On issues of law, the standard should be an independent statutory interpretion. On issues of fact, courts should apply a substantial evidence test[364] that could be satisfied by reference to the consular's notations and Visa Control Card. Of the options for review of

359. *See* Verkuil, *supra* note 10, at 1182.

360. H.R. 1119, *supra* note 329, at § 2(b).

361. INA § 279, 8 U.S.C. § 1329 (1988) (providing for jurisdiction of the federal district courts).

362. H.R. 1119, *supra* note 329, at § 2(b).

363. 5 U.S.C. § 706 ("scope of review").

364. *See, e.g.*, Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976); Jean v. Nelson, 727 F.2d 957, 976–79 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985); Bertrand v. Sava, 684 F.2d 204, 212–13 (2d Cir. 1982); Knoetze v. United States, 634 F.2d 207 (5th Cir. Unit B), *cert. denied*, 454 U.S. 823 (1981).

discretion, the fairly conservative "arbitrary, capricious" or "abuse of discretion" standard seems most suitable,[365] given the uncertainties *ab initio,* the geographical and political peculiarities of consular discretion, and the possibility that merely providing for reviewability would be viewed as a radical step.

If an administrative review board is established and if judicial standing is given to refused applicants, the preferred route of appeal might be a petition from an adverse ruling of the board to a court of appeals. Otherwise, a denied applicant should probably be allowed to bring an action directly in federal district court.[366] As between the two levels of federal courts, the extent and quality of the normal record available on appeal could be determinative.

E. Other Alternatives

Several other alternatives merit consideration. Although not techniques for review, these proposals would serve to limit the need for review. The State Department might consider reallocating consular personnel and adjusting their workload in order to devote more of the Department's limited resources to on-line adjudications where they are most critically needed, more extensive recordkeeping, and more thorough internal review of visa denials. Several changes would make such reallocation feasible within budgetary constraints.

A first very successful change is the pilot visa waiver program.[367] Gradually, the program could be extended to include nonimmigrant categories other than short-term tourists as well as nationals of countries other than those initially selected. The bases for country designations should be both low nonimmigrant visa refusal rates and, secondarily, high volumes of visa applications. The author's interviews at the United States Embassy in London confirm the merits of this program. During the first six months alone, consular officers issued 140,000 visas in London and 110,000 elsewhere in the United Kingdom. Less than 100 of the tourists were later denied entry by the

365. *See* Note, *supra* note 124, at 1168.

366. *See* Legomsky, *supra* note 244, at 1399.

367. INA § 217, 8 U.S.C. § 1187. *See supra* note 13 for a brief description of the program. Over 3.5 million persons from eight countries were admitted into the United States without visas during the first nineteen months of the program. A report by the Visa Office of the State Department has recommended a three year extension of the program, until September 30, 1994. The Visa Office concluded that the program "has successfully moved toward accomplishing both goals set by the Congress: to improve the use of United States Government resources and to encourage international travel." 67 INTERPRETER RELEASES 867 (1990). Section 201 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, will revise and extend the program.

INS. This low rate of turnarounds suggests that the program relieves consular officers of administrative burdens for visa issuances, without shifting the burden onto the INS. The program has enlisted the cooperation of over 100 major air carriers. Although reports indicate that some tourists under the program have had to wait longer in line for entry at the border or other ports of entry, consular officers respond that the delays are primarily due to longer lines of tourists.

As a second administrative change, the State Department could substitute more civil service personnel within commuting distance from consular posts to conduct pre-screening and limited interviewing of applicants, thereby providing consular officers with more time for record-keeping and internal review of denials. A third change, in order to avoid time wasted on a limited number of cases raising the problem of appropriate venue for visa applications, relates to the problem of "orphan" applications. The State Department might specifically direct all visa-issuing posts to process such applications from third-country nationals, assisted by the advance parole program. Alternatively, the State Department might encourage all posts to process orphan immigrant applications, and specifically designate the following posts: Toronto, Montreal, Vancouver, Tijuana, and Ciudad Juarez. The termination of the Stateside Criteria Program in 1987, which attracted large numbers of aliens in the United States to those nearby posts to have their immigration status adjusted, has provided consular officers at those posts with more time to devote to third-country applicants.

Another alternative for reducing the need for review would eliminate preference categories for immigrant visas and substitute a point-based system whereby an applicant would receive points for various factors, such as family relationship with an American citizen or resident alien, employment potential, health, and so on. Those with the highest number of points within a world-wide quota receive priority to obtain a visa. By providing detailed guidance and confining consular discretion, a point-based system would help avoid the subjectivity of decisionmaking that is often the source of pressures for review. Systems of this sort are in effect in Australia and Canada.

A more radical alternative would experiment with gradually eliminating some classes of nonimmigrant visas altogether, while continuing to require I-94 forms as a means of monitoring and controlling exits and overstays of aliens. Visas would continue to be required for intending immigrants, although even this barrier has been ques-

tioned.[368] Such an experimental program would eliminate most of the current problems, including the issue of reviewability. It might also create new ones. If the rates for any of numerous types of violations—non-return within prescribed times for departure, unauthorized employment, failure to register or re-register, and so on—reached a sufficiently high level, the State Department could reinstitute and extend departure controls and work permits. These techniques, and the supervision by law enforcement officials they might require, would, however, raise troublesome issues of civil liberties. In the past, proposals for permits and national identification cards have not been popular.

A more conservative variation of the "no visa" approach would eliminate visas for immigrants and nonimmigrants in each of several categories—investors, fiancés, students, tourists, and so on—up to certain annual levels, at which point visas would be reinstated as a requirement for all additional nonimmigrants. Up-to-date statistical data could be maintained on the basis of oral inquiries by INS officials at the borders and other ports of entry. The data might, however, be unreliable because of multi-purpose border crossings, indeterminate purposes for particular crossings, or simply mistakes.

F. Uncertainties

The pace of jurisprudential developments will be slow. Funding of consulates has been so limited that training of officers, visa processing, record-keeping suitable for review, and internal review have been understandably restricted. It is unlikely that Congress, under continued pressure to reduce budget deficits, will provide the kind of funding needed to overcome these deficiencies quickly, or that it will readily amend the INA to enable the State Department to establish a visa review board. It is also uncertain to what extent Congress would find it politically feasible to provide for administrative or judicial review. Although the Departments of Justice, Labor and State continue to establish new immigration-related boards of review,[369] none are as

368. *See, e.g.*, The Wall Street Journal, Feb. 1, 1990, at A12, col. 1 ("Our own view remains that the problem is not too many immigrants, but too few. . . . Our view is, borders should be open.").

369. These include, for example, the Asylum Policy and Review Unit (Justice), *see* N.Y. Times, Dec. 21, 1988, at A18, col. 1; the Board of Alien Certification Appeals (Labor); the Exchange Visitor Waiver Review Board (State), for aliens with exchange visitor visas who petition for waivers of the two-year home country residence requirement; and the Board of Appellate Review (State), to review loss of nationality and passport determinations. Congress has also provided for review of denials of seasonal agricultural worker status, adjustment of status under IRCA's legalization program, INS determinations of unlawful employment of

ambitious as a review board that would encompass all visa classes. Finally, the capacity of Congress to draft sound legislation to provide for review is uncertain. The gestation period for preparing legislation in a politically acceptable form does not seem to make much difference. On the one hand, it took Congress ten years of drafting and redrafting in order to enact the IRCA compromise, which has serious defects.[370] On the other hand, it took all too little time for Congress to cobble together an unsuccessful revision of the framework for immigrant visas prior to The Immigration Act of 1990.[371] Taking account of these uncertainties should not deter reform, but rather encourage careful and intelligent planning.

VI. SUMMARY

United States consulates complete the processing of some ten million applications for immigrant and nonimmigrant visas each year. Approximately ninety percent are granted; ten percent are denied. Under current practice, the only official review of a consular official's denial of a visa may be by a more senior officer in the consulate or, on points of law, by the Visa Office in the State Department. The Immi-

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aliens, and alien claims of discrimination related to IRCA. Paparelli & Tilner, *supra* note 3, at 1032.

370. *See, e.g.*, Note, *The Effect of Employer Sanctions on Employment Discrimination and Illegal Immigration*, 9 B.C. THIRD WORLD L. J. 249, 269 (1989):

> The employer sanctions provision of IRCA is a costly one. The cost of the provision in increased employment discrimination far outweighs any minimal deterrent effect that the provision will have on illegal immigration. A society that has made a conscious effort to eliminate race discrimination cannot tolerate such a cost.

For a summary of a report by the United States General Accounting Office that employee sanctions in IRCA have caused widespread discrimination, see 67 INTERPRETER RELEASES, Apr. 2, 1990, at 377; *see also* Kobdish, *The Frank Amendment to the Immigration Reform and Control Act of 1986—A Labyrinth for Labor Law Litigators*, 41 SW. L.J. 667 (1987) (IRCA's anti-discrimination provisions create a field day for attorneys); Merino, *Compromising Immigration Reform: The Creation of a Vulnerable Subclass*, 98 YALE L.J. 409 (1988) (IRCA has created a subclass of undocumented residents who are ineligible for legalization); Hernandez, *Employer Sanctions Should Go*, Christian Sci. Monitor, Apr. 10, 1990, at 18, col. 1; Suro, *False Migrant Claims: Fraud on a Huge Scale*, N.Y. Times, Nov. 12, 1989, at A1, col. 1; Armstrong, *America's Illegal Aliens: They Haven't Gone Home*, Christian Sci. Monitor, Jan. 30, 1989, at 1, col. 3; Howe, *Under the New Law, Illegal Aliens Suffer Much in Silence*, N.Y. Times, Nov. 27, 1988, at A6, col. 1; *Study Hints at Job Discrimination Against Foreign-Looking People*, N.Y. Times, Nov. 20, 1988, at A18, col. 1; Howe, *Study Says Immigration Law Is Leading to Discrimination*, N.Y. Times, Nov. 5, 1988, at A1, col. 5.

371. The bill, S. 2104, easily passed the Senate (88-4), but failed to clear the Judiciary Committee of the House. It was worked out behind closed doors and rushed through the legislative process. The bill appeared to discriminate against some family members and non-English-speaking applicants for immigrant visas. Letters from Sen. Mark O. Hatfield, Minority Chairman, Senate Appropriations Committee, to the author (Nov. 23, 1988 & Dec. 1, 1988) (on file with the *Washington Law Review*).

gration and Nationality Act has been read to preclude administrative review, and the courts, with a few exceptions, have declined to review visa denials.

Immigrant visas are available to persons with close family relationships to United States citizens and residents or with particular abilities or skills that are needed but not otherwise available in the United States. Nonimmigrant visas are available in a long list of classes, ranging from tourists to students to certain types of business personnel to diplomats.

Whatever the visa category or class, important interests are clearly at stake. These interests are not just those of the applicants themselves, but also of citizens and residents of the United States who are sponsoring the applicant or have some other interest in the applicant's presence in the United States. The interests of strengthening the global order and upholding rules of international law are also apparent. These interests warrant a close look at whether initial decisions in this important program of mass adjudication should be more fully reviewable than at present.

Over twenty years ago, Senator Edward Kennedy urged the reestablishment of a board of visa appeals to refine "the application of our belief in human dignity and equal opportunity under law."[372] Three years later, a future Legal Adviser to the Secretary of State proposed the "one small step" of establishing a Board of Visa Appeals. The Board would ensure compliance with immigration law, "upgrading the procedural protections in the visa issuing process . . . streamlining it, and render[ing] it less subject to manipulation for other foreign policy needs."[373] A visa review board is clearly an idea whose time has come, once again.

Federal law and State Department regulations give consular officers substantial discretion in adjudicating visa applications. For example, consular officials exercise absolute discretion in determining whether an applicant may be represented by an attorney or other qualified representative at the visa adjudication interview. Furthermore, although current departmental regulations require that a consular officer's denial of a visa application be reviewed by a more senior officer,[374] budgetary constraints and the high volume of applications at some

372. S. 3202, *supra* note 346, at 36,965.

373. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1364 n.382 (1972) (Abraham Sofaer, then a professor at Columbia University School of Law, served as Legal Adviser in the State Department during the Reagan and Bush administrations.).

374. 22 C.F.R. § 41.121(c) (1990).

posts have resulted in review of only a random sample of denials. Intra-consular review may also be a problem in single-officer posts. Consular posts send a few hundred cases a year presenting significant legal issues to the Visa Office of the State Department for an advisory opinion that is binding only with respect to legal issues. The applicant typically has no notice of this proceeding. Such review affects the results in only a small number of cases because most visa denials are based on a factual determination.

Under customary international law a state may legitimately exclude aliens only if, individually or collectively, they pose a danger to its public safety, security, general welfare, or essential institutions. Current law has, however, been interpreted to limit both administrative and judicial review of compliance with this qualified rule of law. Section 104(a) of the INA[375] is interpreted to exclude even the Secretary of State from the administration or enforcement of "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." This strange provision of the law has thus been read to preclude the establishment of a more formal review mechanism within the State Department. Further, a number of judicial doctrines of varying current legitimacy have served quite consistently to limit the extent of available judicial review. It is therefore important to provide explicitly for both administrative and judicial review.

VII. RECOMMENDATIONS

Despite the high quality of consular training and decisionmaking, it is apparent that a more formal review of consular discretion would be beneficial. The availability of such review not only encourages consistency and care in the initial adjudication, but serves interests of fairness and legitimacy. A review scheme can be crafted that would keep procedure to a minimum, take account of the high volume of visa applications, and avoid over-judicializing the process.

This section offers two alternative sets of recommendations. The first provides more detailed guidance to the Department of State and Congress, whereas the second defers to a greater extent to their discretion in providing for administrative and judicial review of visa denials.

375. 8 U.S.C. § 1104(a) (1988).

A. Detailed Recommendations

The following recommendations are based on analysis of alternatives discussed in Sections III and V for improving the process of reviewing visa denials. Of the four uncertainties that were identified in Section V—the pace and extent of jurisprudential developments, the political feasibility of expanding the review process, statutory drafting skill in doing so, and funding—only the uncertainty of funding has strongly influenced the structure of these recommendations.

1. Present Level of Funding

The following recommendations could be implemented under the present level of funding, including inflationary increases, or a very modest increase in funding.

a. Reallocation of Workloads

The State Department should continue to adjust the workload of consular officers, lessening visa processing and increasing record-keeping and internal review of individual cases.

First, in order to give consular officers more time per case, the State Department should make more use of civil service personnel commuting from the United States to help process visas at consular posts along the Canadian and Mexican borders. The commuting civil servants do not require special housing or allowances and typically receive less compensation than consular officers. Appropriate amendments should be made to the departmental regulations[376] and the Foreign Affairs Manual[377] to clarify the respective roles of these personnel and the authorizing consular officers who would remain responsible for visa issuances and denials.

Second, the State Department should continue to shift consular officers from posts relieved of visa-processing responsibilities as a result of the Visa Waiver Pilot Program to other, high-intensity posts. The Department could thereby reallocate the aggregate activities of consular officers from visa processing to more extensive record keeping of adjudications and internal review of visa denials.

Finally, the State Department should specifically direct all visa-issuing posts to process orphan applications of third-country nationals, assisted by the advance parole program. The Department would thereby effectuate its regulatory mandate.[378] Alternatively, because

376. *See, e.g.*, 22 C.F.R. §§ 41.121, 42.71, 42.81 (1990).

377. *See supra* note 19.

378. *See* 22 C.F.R. 42.61; FOREIGN AFFAIRS MANUAL, *supra* note 19, App. J-471, note N2.1.

the termination of the Stateside Criteria Program in 1987 has provided consular officers at the posts in Tijuana, Ciudad Juarez, Toronto, Montreal, and Vancouver with more time to devote to third-country applicants, the State Department should specifically designate those posts to process orphan immigrant applications, and encourage all other posts to do the same.

b. Representation of Applicants

The State Department should adopt a regulation ensuring attorneys meaningful access to the visa process and participation throughout the process. Providing this check on consular discretion would enhance due process; assist officers by having issues, rules, and principles articulated more formally; and thereby increase the overall fairness and efficiency of the visa process. The Department should gradually adopt uniform rules for increasing applicants' access to attorneys. At a minimum, visa sections should reply promptly to written communications from attorneys and should provide an area within each visa-issuing consulate where applicants can meet with their attorneys during the adjudication stage of the visa process. The Department should also allow attorneys to meet with responsible consular officers at least once during the course of each client's involvement in the process and to argue on behalf of the client at that time.

c. Internal Review

The State Department should expand internal review of denials within consular posts.

Initially, the Department should require consular officers to provide explicit factual and legal bases and reasons for denials. Whether or not the de minimis test of a "facially legitimate and bona fide reason" applies, departmental guidelines should require more than mere statements of determinations, citations of INA provisions under which applicants are excludable, or vague references to political considerations.

The Department should also ensure that supervising officers review all denials, rather than just a random sample of them, even if such review occasionally causes a backlog of applications. Visa denials at a single-officer post would be reviewed by the Visa Office in the State Department.

d. Visa Office Review

The State Department should expand the role of the Visa Office in the review process.

First, the Visa Office should be encouraged to require consulates or embassies registering large numbers of complaints in relation to the volume of visa applications to report to the Office. These consulates or embassies would need to send full documentation of all visa denials until the volume of complaints lessens to an acceptable level. The Office should review those denials for completeness and evidence of reasonableness.

Second, the Department should amend its regulations to remove the cloak of confidentiality from most advisory opinions. If necessary, Congress should amend section 222(f) of the INA[379] to provide explicitly for access by applicants and their attorneys to pertinent advisory opinions and consular records reviewed by the Office. Under such an amendment, only the FOIA exemption for national defense or foreign policy reasons[380] would bar access to advisory opinions.

Third, the Visa Office or the General Accounting Office (GAO) should designate one or two major controversial areas of consular discretion for special study.[381] The Office would analyze reports from visa sections of denials based on these two areas or specific statutory provisions. Based on its analysis, the Office would then prepare advisory opinions and guidelines for inclusion in the Foreign Affairs Manual.[382] This would make consular practices more uniform and consistent.

e. Judicial Reviewability

Congress and the State Department should expand the scope of judicial reviewability.

Initially, Congress should amend section 101(a)(7) of the INA[383] to provide clearly that the term "immigration laws" refers to *all* constitutionally applicable international law, not just treaties and conventions. The Department should amend its regulations to incorporate a reference to the qualified duty of the United States to admit aliens unless they pose serious danger to public safety, security, general welfare, or essential institutions of the United States.

379. 8 U.S.C. § 1202(f).
380. 5 U.S.C. § 552(1)(A).
381. *See e.g.,* INA §§ 214(b), 221(g), 8 U.S.C. §§ 1184(b), 1201(g).
382. *Supra* note 19.
383. 8 U.S.C. § 1101 (a)(7).

Congress should also amend the INA to provide judicial standing in federal district court, according to the normal rules of jurisdiction and venue, to all United States resident petitioners on behalf of immigrant visa applicants, to other United States residents either "with a personal stake in the litigation"[384] or under section 702 of the APA,[385] and as a pilot program to a single class of nonimmigrant visa applicants such as treaty traders and investors.

Furthermore, Congress should amend the INA to provide that a court reviewing a visa denial must comply with section 706 of the APA,[386] and adopt the following standards for review: on issues of law—independent statutory and regulatory interpretation; on issues of fact—substantial evidence; and on issues of discretion—the "abuse of discretion" standard.

f. User Fees

Congress should study the feasibility and merits of users fees to finance improvements in the process of visa issuance and review.

2. Enhanced Funding

The following recommendations are based on a higher level of funding.

a. Visa Review Board

Congress should establish a visa review board within the Department of State, perhaps independent of the Visa Office.

Specifically, Congress should eliminate the following language from section 104(a)(1) of the INA: "[E]xcept those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas."[387] Such an amendment would remove any doubt that Congress and the Department could establish a visa review board.

Congress and the State Department should then use the Gonzalez Bill[388] as a basic framework for the board, but should limit review to immigrant visa denials and a single class or two of nonimmigrant visa denials as a pilot program. Congress and the State Department should also provide standing as set forth in recommendation 1(e) above and substantially narrow the public security and safety exception to

384. Mendelsohn v. Meese, 695 F. Supp. 1474, 1479 n.5 (S.D.N.Y. 1988).
385. 5 U.S.C. § 702.
386. *Id.* § 706.
387. 8 U.S.C. § 1104(a)(1).
388. *H.R.* 2567, 100th Cong., 1st Sess. (1987).

review. The minimal due process requirements for the board should include notice, oral evidence, disclosure of opposing evidence, attorney representation, determination on the record of the hearing, a written statement of reasons for the board's decision, and an impartial decisionmaker.[389]

b. Exhaustion of Remedies

As a prerequisite for judicial review of a visa denial, Congress should require applicants to exhaust administrative remedies available from the board. Congress should also provide an appeal from a decision of the proposed visa review board to the federal courts.

c. Structural Alternatives

Congress should continue to study structural alternatives to the present visa-issuing process. These alternatives, for example, include greater reliance on departure controls and information.

3. Maximum Funding

With substantially greater funding, Congress should expand the scope of the visa review board's authority to include all cases involving denials of nonimmigrant visas.

B. General Recommendations

This set of recommendations reflects a two-pronged approach to administrative review of visa denials. Its aims are to improve review at the consular level and to consider creating a level of centralized administrative review. The suggestions directed toward consular offices are intended to encourage quick, consistent, and cost-effective review that would resolve many of the issues on which review is requested. In a smaller number of cases, a more formal administrative appeal process would be needed and could be made available on a discretionary basis. This set of recommendations also urges Congress to provide specifically for judicial review.

1. Representation of Applicants

The State Department should adopt a regulation ensuring that applicants may be accompanied by an attorney or other authorized representative during the course of the visa application interview process. To the extent practicable, the State Department should take

389. See Appendix B.

steps to reply promptly to communications from applicants or authorized representatives, and to ensure that applicants can feasibly meet with their representatives during the application interview process.

2. Bases and Reasons for Denial

The State Department should require consular officers to provide brief but explicit statements in writing of the factual and legal bases and reasons for denying visa applications.

3. Access to Opinions

The State Department should modify its regulations to allow Visa Office advisory opinions to be made available to applicants and their authorized representatives except where national security or foreign policy reasons dictate otherwise.

4. Internal Review at Consular Posts

The State Department should either comply with its regulation requiring review within a consulate of each denial of a visa application[390] or, for reasons of cost effectiveness, examine alternative, equally effective systems to review visa denials at consular posts. Such a study should be completed in one year. In undertaking the study, the State Department should keep in mind the goal of ensuring consistency in visa adjudications, and consider possible alternatives to address exigencies created by busy consular posts. The Department could, for example, review random samples of visa denials or select certain types of denials for review, such as in visa classes involving relatively complex standards or reflecting comparatively high rates of denial.

5. Formal Administrative Review

An administrative process should be established to review all denials of immigrant visas and certain types of nonimmigrant visas to be designated by the State Department. The review process should require a written petition for review, provide for discretionary review of such petitions, and, where a petition is granted, provide for an expedited review on the paper record with some opportunity to seek leave to present additional written submissions. Congress should delete the language in section 104 of the INA that seemingly precludes the State Department from establishing an administrative entity to review con-

390. 22 C.F.R. § 41.12(c) (1990).

sular visa denials.[391] Upon deletion of the apparent prohibition, the State Department (or Congress) should create a suitable administrative entity within the Department to review consular visa denials. Such an administrative entity might be established either within an expanded Visa Office or as an independent visa review board.

6. Judicial Review

Congress should determine whether there is a need to authorize access to the courts for those adversely affected by denials of visas or certain types of them. If such a need is determined to exist, Congress should consider implementing three guidelines.

First, judicial process should be available only for questions of law, including abuse of discretion.

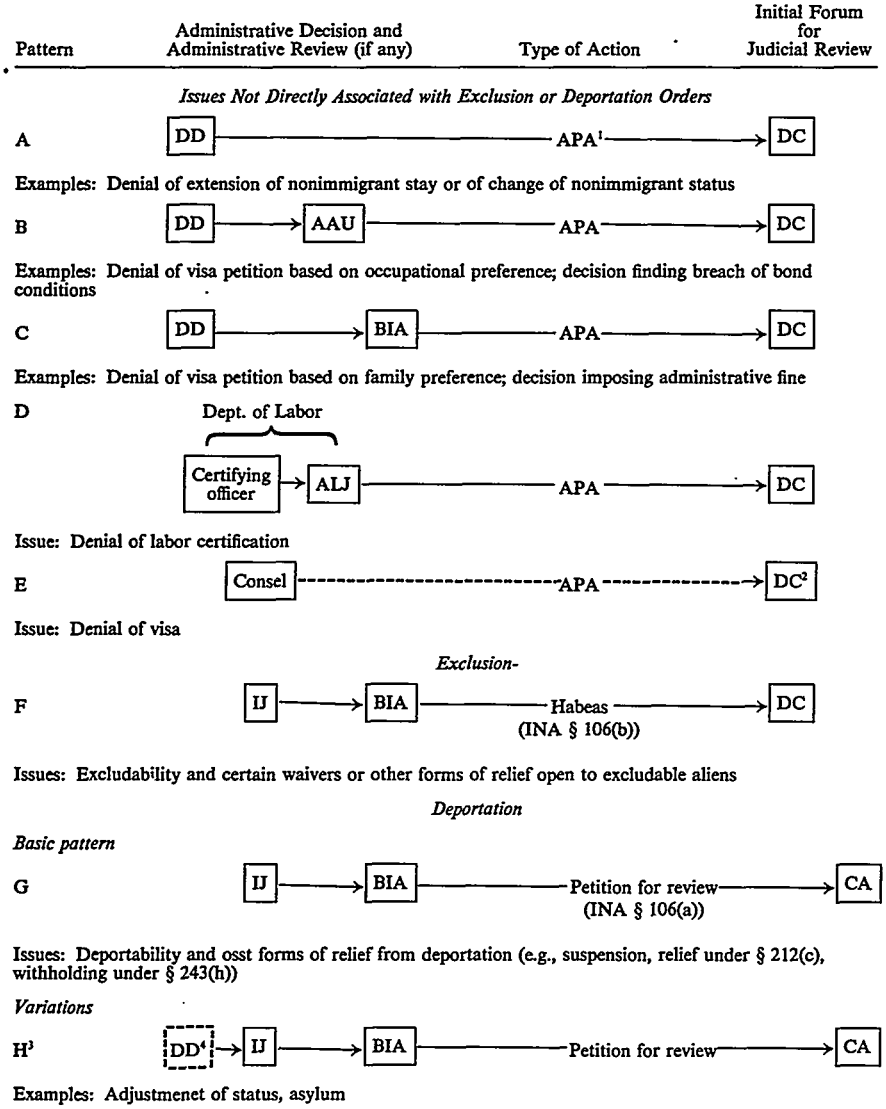
Second, following exhaustion of any administrative remedies, federal district courts should have jurisdiction.

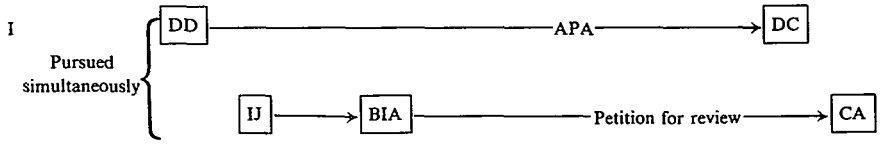
Third, standing should be provided for applicants and for petitioners on behalf of applicants.

391. 8 U.S.C. § 1104(a).

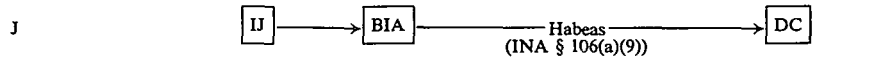
Appendix A

Major Patterns of Adminstrative and Judicial Review Under the Immigration Laws

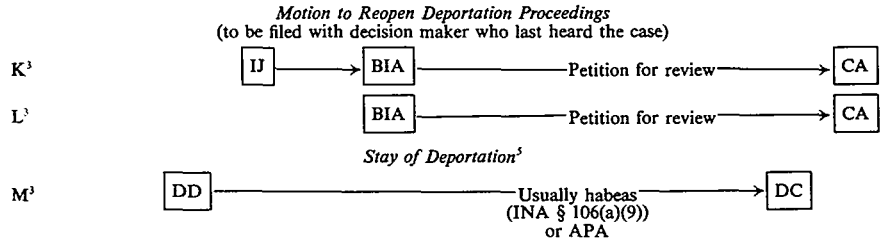




Example: Denial of extension of nonimmigrant status by DD, followed by initiation of deportation proceedings upon expiration of initial admission period



Issues: Courts differ substantially over the range of issues that may be litigated by the district court under § 106(a)(9) and over whether the alien must be in actual physical custody to secure such review. See ch. 8, note 479.



ABBREVIATIONS: DD = District director of the Immigration and Naturalization Service (INS) (includes certain high-volume adjudications now performed by regional service centers); IJ = immigration judge; AAU = Administrative Appeals Unit (exercising authority officially vested in INS associate commissioner for examinations); BIA = Board of Immigration Appeals; ALJ = administrative law judge; DC = U.S. district court; CA = U.S. court of appeals.

[1] Action for declaratory or injunctive relief in accordance with the Administrative Procedure Act (APA); jurisdiction is usually based on Immigration and Naturalization Act (INA) § 279 or 28 U.S.C. § 1331 (1982).

[2] Authority is divided as to permissibility of judicial review.

[3] A similar pattern is possible, but less common, in exclusion cases, in which case the initial forum for judicial review is clearly the district court.

[4] If the benefit has been sought before the DD, the application is renewable before the IJ, who will consider it de novo. But there is ordinarily no requirement that the alien apply to the DD first; in fact, application to the DD may be barred if exclusion or deportation proceedings have already begun. If application is made only to the IJ, consideration of the issue conforms to pattern G.

[5] When a stay is sought in connection with a motion to reopen, application may also be made to the IJ or the BIA. Jurisdiction to review the BIA's denial of a stay (or reversal of an IJ's grant of such a stay) is ordinarily held to lie in the district court, as in pattern M.

NOTE: For a comprehensive description of the review process, including less common patterns not depicted here, and for citations to relevant statutes and regulations, see Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process,* 71 Iowa L. Rev. 1297, 1303-12 (1986).

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Appendix B

Due Process Ingredients by Type of Administrative Review

	FUNCTIONS					
INGREDIENTS	Denaturalization	Deportation	Asylum	Exclusion	Parole/ Detention	Discretionary Decisions
Notice	+	+	−	−	+	+
Confrontation	+	−	−	−	−	−
Oral Argument	+	−	−	−	−	−
Oral Evidence	+	+	+	+	−	−
Cross-Examination	+	+	−	+	−	−
Disclosure of Opposing Evidence	+	+	+	+	+	+
Retaining Attorney	+	+	+	+	+	+
Determination on Record	+	+	−	+	−	−
Statement of Reasons	+	+	−	+	+	+
Impartial Decider	+	+	+	+	+	+

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