AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 8: Liberalism Divided – Democratic Rights/Free Speech

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

*Ernest Mandel was a Belgium citizen, editor of the Belgium Left Socialist newspaper, and member of the Communist Party in Belgium. He had twice visited the United States in the 1960s on temporary visas. In both cases, however, the U.S. attorney general had allowed the visas to be issued on a discretionary basis even though he had been found ineligible for admittance to the United States on national security grounds. In 1969, he was invited to attend a conference at Stanford University, and was subsequently invited to visit other American universities around the same time, and again applied for a visa. This time the attorney general did not waive the security block, in part because he had deviated from his stated itinerary on his last trip to the United States. Mandel gave his lecture to the Stanford conference by speaker phone.*

*Mandel and the professors who had invited him to the United States then filed suit in federal district court arguing that Mandel’s exclusion from the country violated their First Amendment rights and Mandel’s due process rights. A three-judge panel heard the case, and two of the judges ruled that the professors First Amendment rights had been violated but not Mandel’s rights. The attorney general appealed to the U.S. Supreme Court, which in a 6-3 decision reversed the lower court. The majority concluded that the unreviewable authority of Congress and the executive to exclude aliens from the United States was unaffected by a First Amendment interest in Americans hearing from those aliens.*

JUSTICE BLACKMUN delivered the opinion of the Court.

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It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise.

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In a variety of contexts this Court has referred to a First Amendment right to "receive information and ideas." . . . [I]n *Lamont* v. *Postmaster General* (1965), the Court held that a statute permitting the Government to hold "communist political propaganda" arriving in the mails from abroad unless the addressee affirmatively requested in writing that it be delivered to him placed an unjustifiable burden on the addressee's First Amendment right. This Court has recognized that this right is "nowhere more vital" than in our schools and universities. *Sweezy v. New Hampshire* (1957).

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The Government . . . suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches, and because "technological developments," such as tapes or telephone hook-ups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests . . . we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.

. . . . The Court without exception has sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. . . . We are not inclined in the present context to reconsider this line of cases. . . .

Appellees' First Amendment argument would prove too much. In almost every instance of an alien excludable under § 212 (a) (28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well-known, and the popular. Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under § 212 (a) (28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious. Indeed, it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive.

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In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212 (a) (28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, 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. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.

*Reversed*.

JUSTICE DOUGLAS, dissenting.

Under *The Chinese Exclusion Case,* rendered in 1889, there could be no doubt but that Congress would have the power to exclude any class of aliens from these shores. The accent at the time was on race. Mr. Justice Field, writing for the Court, said: "If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects."

An ideological test, not a racial one, is used here. But neither, in my view, is permissible. . . .

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Can the Attorney General under the broad discretion entrusted in him decide that one who maintains that the earth is round can be excluded? That no one who believes in the Darwinian theory shall be admitted? That those who promote a Rule of Law to settle international differences rather than a Rule of Force may be barred? That a genetic biologist who lectures on the way to create life by one sex alone is beyond the pale? That an exponent of plate tectonics can be barred? That one should be excluded who taught that Jesus when he arose from the Sepulcher, went east (not up) and became a teacher at Hemis Monastery in the Himalayas?

I put the issue that bluntly because national security is not involved. Nor is the infiltration of saboteurs. The Attorney General stands astride our international terminals that bring people here to bar those whose ideas are not acceptable to him. Even assuming, *arguendo,* that those on the outside seeking admission have no standing to complain, those who hope to benefit from the traveler's lectures do.

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As a matter of statutory construction, I conclude that Congress never undertook to entrust the Attorney General with the discretion to pick and choose among the ideological offerings which alien lecturers tender from our platforms, allowing those palatable to him and disallowing others. The discretion entrusted to him concerns matters commonly within the competence of the Department of Justice—national security, importation of drugs, and the like.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

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As the majority correctly demonstrates, in a variety of contexts this Court has held that the First Amendment protects the right to receive information and ideas, the freedom to hear as well as the freedom to speak. The reason for this is that the First Amendment protects a process, in Justice Brandeis' words, "reason as applied through public discussion," *Whitney* v. *California* (1927) and the right to speak and hear—including the right to inform others and to be informed about public issues—are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." . . .

There can be no doubt that by denying the American appellees access to Dr. Mandel, the Government has directly prevented the free interchange of ideas guaranteed by the First Amendment. . . .

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Even the briefest peek behind the Attorney General's reason for refusing a waiver in this case would reveal that it is a sham. The Attorney General informed appellees' counsel that the waiver was refused because Mandel's activities on a previous American visit "went far beyond the stated purposes of his trip . . . and represented a flagrant abuse of the opportunities afforded him to express his views in this country." . . . There is *no* basis in the present record for concluding that Mandel's behavior on his previous visit was a "flagrant abuse"—or even willful or knowing departure —from visa restrictions. For good reason, the Government in this litigation has *never* relied on the Attorney General's reason to justify Mandel's exclusion. In these circumstances, the Attorney General's reason cannot possibly support a decision for the Government in this case. But without even remanding for a factual hearing to see if there is *any* support for the Attorney General's determination, the majority declares that his reason is sufficient to override appellees' First Amendment interests.

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Accordingly, I turn to consider the constitutionality of the sole justification given by the Government here and below for excluding Mandel—that he "advocates and "publish[es] . . . printed matter . . . advocating . . . doctrines of world communism" within the terms of § 212 (a) (28).

Still adhering to standard First Amendment doctrine, I do not see how (a) (28) can possibly represent a compelling governmental interest that overrides appellees' interests in hearing Mandel. Unlike (a) (27) or (a) (29), 780 (a) (28) does not claim to exclude aliens who are likely to engage in subversive activity or who represent an active and present threat to the "welfare, safety, or security of the United States." Rather, (a) (28) excludes aliens solely because they have advocated communist doctrine. Our cases make clear, however, that government has no legitimate interest in stopping the flow of ideas. It has no power to restrict the mere advocacy of communist doctrine, divorced from incitement to imminent lawless action. For those who are not sure that they have attained the final and absolute truth, all ideas, even those forcefully urged, are a contribution to the ongoing political dialogue. The First Amendment represents the view of the Framers that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones"—"more speech." . . .

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The majority recognizes that the right of American citizens to hear Mandel is "implicated" in our case. There were no rights of Americans involved in any of the old alien exclusion cases, and therefore their broad counsel about deference to the political branches is inapplicable. . . .

. . . . Section (a) (28) may not be the basis for excluding an alien when Americans wish to hear him. Without any claim that Mandel "live" is an actual threat to this country, there is no difference between excluding Mandel because of his ideas and keeping his books out because of their ideas. Neither is permitted.

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