In the

Supreme Court of the United States

JOHN M. MITCHELL, Attorney General of the United States, and WILLIAM P. ROGERS, Secretary of State,
Appellants,

vs. No. 71-16

ERNEST MANDEL, et al.,
Appellees.

Washington, D. C.
April 18, 1972

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Washington, D. C.,

Tuesday, April 18, 1972.

The above-entitled matter came on for argument at 1:58 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Appellants.

LEONARD B. BOUDIN, ESQ., Rabinowitz, Boudin & Standard, 30 E. 42nd Street, New York, N. Y. 10017; for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-16, United States against Mandel.

Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court:

This is a direct appeal from a judgment of a three-judge District Court in the Eastern District of New York, holding unconstitutional a provision of the Immigration and Nationality Act of 1952 that excludes from the United States aliens who advocate or whose writings advocate or teach the doctrines of world communism.

The statute involved is set forth at pages 3 and 4 of our brief, and it's composed, as far as this litigation is concerned, of two sections. The first if Section 212(a), which says:

"Except as otherwise provided ..., the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States". And then subdivision (2) says: "Aliens who ... at any time have been members of ... the following classes."

And I will now just combine for simplicity sub-paragraphs (D) and (G) of that; what it says is that aliens

who advocate or whose writings advocate or teach the economic, international, and governmental doctrines of world communism.

Now, at the top of page 4 is another provision, which is referred to as the waiver provision, and what it says is, that in the event of an alien who is otherwise ineligible for admission under the prior sections, of which (28) is one, that alien may be temporarily admitted to the United States after approval by the Attorney General of a recommendation either by the Secretary of State or of the consular office involved that the alien be temporarily admitted, in the discretion of the Attorney General.

So, for this provision to be operative, we need two things. First, there has to be a recommendation for a waiver by either the consular official involved, or the Secretary of State; and, secondly, the Attorney General must grant the waiver in his discretion.

The appellee, Dr. Mandel, is a Belgian citizen, a resident of Brussels, who is a prominent Marxist economist. He is not a member of the Communist Party, but he describes himself as a revolutionary Marxist.

Q He was a what kind of a Marxist, he called himself?

MR. FRIEDMAN: A revolutionary Marxist.

Q It sounded like common market at first, when you --

MR. FRIEDMAN: No, Communist Party. No, he's not interested in the common market. He's a -- he called himself -- the District Court described him as an Orthodox Marxist of the Trotskyist School; apparently he does not agree with some of the views of Russian Communism, but his writings indicate he is trying and seeking to develop a revolution under which the workers will take over control of the government.

Q Is he in academic life or political life or --

MR. FRIEDMAN: Academic life, primarily, it appears. And he's written a book called "Marxian Economics" that is considered a well-known work, and indeed his works are sometimes studied in colleges here.

And we think that under the statute there's no question that he comes within the definition of someone who advocates the doctrines of world communism.

Now, in 1962 and 1968, Dr. Mandel came to this country, pursuant to waviers that had been granted. In the first case, in 1962, he came here as a journalist; and the second year he came here to give a series of lectures.

In the fall of 1969, he again sought a visa in Brussels for the purpose of giving lectures here and attending various meetings in the academic community.

The first application which he filed, he filed two of them in 1969, the application in that case requested a waiver or -- sorry, the recommendation, the questionable

waiver was denied by the State Department in Washington; then later on, in November of 1969, the consul and the State Department recommended to the Attorney General that a waiver be granted to Dr. Mandel. They explained that on the earlier occasion in 1969 they had declined to recommend a waiver because they said that he had engaged in activities beyond the stated purpose of his trip when he came to this country in 1968.

However, the State Department said they subsequently learned that when he made this previous trip to the United States, Dr. Mandel may not have been aware of the fact that he came here pursuant to a waiver of the ineligibility requirement and therefore may not have been aware of the limitation imposed upon his trip to this country. And they also pointed out that Dr. Mandel had given assurances that on this time he will conform to a stateditinerary and purposes.

The Attorney General, acting through the Immigration and Naturalization Service, to whom he has delegated his authority under this statute, denied the waiver.

And the reason is most clearly set forth, I think, in the paragraph at the bottom of page 58 of the record, which was a letter from the Associate Commissioner of Operations of the Immigration and Naturalization Service to Mr. Boudin, Dr. Mandel's counsel. This letter says:

"On his last visit in 1968" --

Q Excuse me, Mr. Friedman, did you say 58 of the Appendix?

MR. FRIEDMAN: 68, I'm sorry. 68 of the Appendix, Mr. Chief Justice.

At the bottom of that page, last paragraph.

"On his last visit in 1968, Mr. Mandel's entry was authorized for a series of academic engagements in the United States. His activities, while here, were much reported to the press and went far beyond the stated purposes of his trip, on the basis of which his admission had been authorized and represented a flagrant abuse of the opportunities afforded him to express his views in this country."

Now, in March of 1970, the complaint in this case was filed. The plaintiffs, Dr. Mandel and six American university professors. The general allegation of the complaint was that the statutory provision directing the exclusion of aliens who advocated the doctrine of world communism was unconstitutional, in violation of the First and Fifth Amendments, and that the waiver provision was similarly unconstitutional.

And the theory, however, is rather interesting, because there's no claim in this case that the plaintiffs are asserting any rights on behalf of Dr. Mandel. They claim they're asserting their First Amendment rights to hear

Dr. Mandel and to discuss -- as they put it in their complaint: Dr. Mandel's exclusion denied them, the American professors, the right to hear Mandel in the universities and other public forums in this country, and to exercise their freedom of academic inquiry by engaging Mandel in an open and face-to-face exchange of information and opinion.

And they now state in their brief at page 14 that they're suing only to enforce their rights and assert none on the part of the invited alien.

A divided three-judge court held the statute unconstitutional, both on its face, and as it applied, entered a declaratory judgment to that effect, and also a preliminary injunction enjoining the Attorney General from refusing to admit Dr. Mandel temporarily on a visa.

Q Mr. Friedman, do you read the judgment of the three-judge court as turning exclusively on constitutional grounds?

MR. FRIEDMAN: I do, Mr. Justice. I do, Mr. Justice. That's the whole theory of it, and, as far as we can tell, the court did not decide any of the other attacks which the plaintiffs made upon this statute.

Q What was the question? I didn't hear it.

MR. FRIEDMAN: The question was whether I read the judgment of the District Court as turning solely on constitutional grounds; and my answer is I do. I think the

opinion makes it quite clear.

The court recognized that although Dr. Mandel himself had no right to enter this country, it concluded that American citizens here have a First Amendment right to hear him and to exchange views with him; and they said this First Amendment right in the plaintiffs must prevail over the government's right to exclude him because the government was excluding him not because he was actually engaging in any dangerous activity but merely because of the views that he advocated.

They then went on to say that, as far as the waiver was concerned, that where the exclusion of the alien impinges on rights protected by the First Amendment, you can't let that, his admission, turn on the discretionary action of the Attorney General. And then, seemingly a little inconsistent with that, went on and said that in any event, since we hold that the government has no right to exclude him at all, it's irrelevant whether or not the discretion was properly exercised.

Now, in the District --

Q Now, under your theory, could a foreign professor who planned to come here to teach Mandel's text, that book you called -- what was it -- Marxist Economic Theory?

MR. FRIEDMAN: Yes.

Q Could he be excluded?

MR. FRIEDMAN: I think if he -- I'm not certain about -- let me just look, if I may, at the statute again.

Q He's coming here to teach this theory in Mandel's book.

MR. FRIEDMAN: I suppose it could be under subsection (G), because it refers to "who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any writte or printed matter." I take it, if he had a copy of Mandel's book in his possession and was going to urge the students to read that, he could be excluded.

But that, of course, is not -- let me make it very clear -- this case, because --

Q Well, I understand that.

MR. FRIEDMAN: Yes. I think it --

Q It's just how far you go, because the court has gone pretty far to let the academic community stand alone in what it wants to teach.

MR. FRIEDMAN: I think the academic community of course has the right to what it wants to teach, and there's nothing, there's nothing at all in this situation that in any way inhibits any of the plaintiffs from teaching any of Dr. Mandel's theory, from discussing any of Dr. Mandel's theories, his works are freely available here. The only question in this case is whether they have a constitutional right to enforce, to force the government to admit Dr. Mandel so they can talk to him face-to-face, so that they can discuss things with him.

The record shows in this case that on one occasion, after he was denied admission, an audience of 1200 people in Town Hall in New York City heard via tape recording the text of the speech he had planned to give there. So his views, his views are freely available to everyone in this country. The only question is whether or not the teachers have a right to hold face-to-face confrontation with a man that Congress has said is ineligible for admission.

Now, as the case was presented to the District Court, the major challenge to this statute was to the constitutionality of the exclusion of this class of alien. But when the case comes to this Court, the appellees have rather dramatically shifted their argument. As I read their brief, they no longer are attempting to defend the decision of the District Court. They now argue, not that the statute is unconstitutional, but that the refusal ofthe Attorney General to grant a waiver was improper.

As I understand the argument, it is that because of the fact that these people want to hear and talk to this man, and because of the fact that they say all he is doing is advocating, and they say they have some First Amendment right to see him face-to-face, therefore it must have been in the public interest for the Attorney General to have admitted this man, and therefore its failure to do so was erroneous.

Now, this --

Q Let me be sure, what has happened to the argument that the statute is unconstitutional because it vests unreviewable authority in the Attorney General? Was that abandoned?

MR. FRIEDMAN: No, that argument has not been abandoned. The argument that has been abandoned is that the statute, on its face, the ban on the admission of aliens who advocate the doctrines of world communism, that that is on its face invalid; that argument, as I understand it, has been abandoned in this Court.

I think they do challenge, they do challenge the contention, the effectiveness of the waiver; but even there, as I understand it, it's not so much that because it vests unreviewable discretion in the Attorney General, as rather that the Attorney General improperly exercised his discretion in this case.

Mr. Boudin will explain more fully, but that's as I read his brief. And this narrow argument is one that was not made in the District Court, one that we think the District Court has very clearly not decided, and one which we think, under the circumstances, is not appropriately open to be made in this Court; if, in fact, this is a consideration, it's one, we think, that should be made on the District Court if the case goes back on remand.

Now, the congressional exclusion of various categories

of aliens has a long history. It goes back almost a hundred years. It began in 1875 with the exclusion of two categories: convicts and prostitutes.

In 1903, the categories of excludable aliens were expanded to include, among others, anarchists, and people who believe in or advocate the overthrow of the government by force or violence.

Progressively, the categories of excludable aliens were expanded, and in 1950, in the Internal Security Act of that year, was a provision comparable to the provision in the present Act, providing for the exclusion of aliens who advocated the doctrines of world communism.

This expansion was based on congressional findings, in the 1950 Act, as to the menace of world communism, as to the dangers that members of the communist movement could come into this country and surreptitiously subvert our institutions.

Now, for almost as long as Congress has excluded categories of aliens of various types, this Court has recognized the broad power of Congress to do so.

Since the Chinese Exclusion case in 1889, this Court has repeatedly recognized and stressed the broad authority of Congress to exclude aliens.

In 1904, almost 70 years ago, in a case called Turner, the Court upheld the power to exclude an anarchist under the statute as it was then written, even though it was willing to

assume for purposes of decision that the anarchist's basic attitude was primarily philosophical rather than actually planning to destroy the government.

As Justice Frankfurter stated for the Court in his opinion in Galvan v. Press some years ago, when we're dealing with the power to exclude aliens we have not merely a page of history but a whole volume. That the right to exclude aliens is inherent in the sovereignty of any nation; it's necessary both to protect the domestic security of the nation and also to aid it in the conduct of foreign relations.

So what the contention comes down to is this, basically, in this case, and I might add, in passing, that appellees themselves, in this Court and the District Court recognized that Mandel, as such, has no right to enter. So what the contantion basically comes down to is this: even though Dr. Mandel himself had no right to enter, the fact that the appellees want to hear him and want to meet with him, gives them a right to compel his admission. In other words, they have greater right to compel his admisaion to this country than he has.

We know of no case that has held or even suggested that this kind of a claim, the right of people, the claim that the people want to hear someone talk, overrides the power, plenary power of Congress to exclude aliens.

Now, the people in this country admittedly have a

First Amendment right to listen to speaking that is going on. They do not, we think, have a right to overrule the settled power of the Congress and force the admission of an alien who belongs to a category that Congress has said is not to be admitted.

The reason we think this statute does not impinge any First Amendment rights ofthe appellees is basically it relates not to speech but to action, it doesn't bar an alien from speaking, it bars the alien from coming in.

Now, of course, obviously, if he can't come in, he can't speak here.

Q Well, he can send tape recordings in.

MR. FRIEDMAN: He can send tape recordings, he can send books -- his books are freely brought in here.

Q Well, I thought your statement was a little too broad --

MR. FRIEDMAN: Oh, I'm sorry, Mr. Chief Justice, he cannot speak in person here. He cannot speak in person.

Q But he could tape --. well, I'll ask you: could they video tape in Brussels and send it over here?

MR. FRIEDMAN: I would see no reason why not. I would see no reason why not.

But this collateral consequence, the collateral consequence of his exclusion, that is, the fact that as a result of that people here cannot meet and speak with him, we

don't think that turns this statute into a law of Congress abridging the freedom of speech within the meaning of the First Amendment.

This Court had a very similar argument presented to it in the case of Zemel v. Rusk, which upheld the authority of the Secretary of State to deny passports to Cuba. In that case, Mr. Zemel said that he wanted to satisfy his curiosity about the state of affairs in Cuba, and that his visit would make him a better informed citizen.

This Court said that the denial of a passport to Mr. Zemel to visit Cuba invaded no First Amendment right of Mr. Zemel. And the reason we think applies easily to this case. This is what the Court said.

To the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition, that is an inhibition on obtaining information about Cuba, then it would be unrealistic to assume that it does not. It is an inhibition of action. There are few restrictions on action which could not be called, by ingenuous argument in the garb of decreased data flow, the right to speak and publish does not carry with it the unrestrained right to gather information.

And we think the same principle applies in this case, the right to speak freely between themselves, the right perhaps to engage in face-to-face dialogue with speakers in this

country does not give them the right to insist that anyone they want to hear can be brought into this country.

So, as far as the holding of the District Court, that the statute is unconstitutional, the ban, we think the basic error of the District Court, I think as demonstrated in the dissenting opinion, was its failure to recognize the broad authority of Congress in this country to exclude aliens of any class.

Now, let me come to the other aspect of the case, the refusal of the Attorney General to waive Dr. Mandel's ineligibility. Now, of course, most of the arguments that I have made previously apply in this situation, too. It seems to us if the appellees have no First Amendment rights to bring him in to hear him, it seems to me equally they have no right, First Amendment right to complain that the Attorney General declined to waive his ineligibility.

Q There is at least this difference, however, the cases to which you've been citing us have all been cases in which Congress in its wisdom, or lack of it, has decided to exclude different kinds of people that want to come to this country. In this case Congress has said ultimately we're just going to leave it up to an officer of the Executive Department, and doesn't that raise something else? I mean you no longer/support that position and rely so much on Congress's power, Congress has just abrogated its power and

left it up to the Attorney General.

MR. FRIEDMAN: Well, I think not, Mr. Justice. First, Mr. Justice, Congress has broadly prohibited admission of aliens --

Q Well, except in fact, and I've seen the figures in the briefs and the papers here, the fact is that the lion's share of these people are let in, because the Attorney General does allow --

MR. FRIEDMAN: Well, if I may just add one qualification, Mr. Justice. The lion's share of those as to whom an affirmative recommendation was made by the consul.

Q As made by --

MR. FRIEDMAN: We don't know if the consul --

Q But here it was made by the Secretary of State? Was it not?

MR. FRIEDMAN: Yes. But if there's -- in the cases where no recommendation is made, then it never gets to that. In those that --

Q Yes, but we're talking about this category, where it's made by the consul or the Secretary of State.

MR. FRIEDMAN: Yes. Well, if I may suggest, Mr. Justice, that the cases I have cited, in addition to recognizing the broad discretion of the Congress to exclude aliens have also correspondingly recognized that the Congress may delegate to administrative officers discretion to decide

whether to admit or exclude a particular area. It's not just that Congress can exclude, Congress can delegate.

I'd like to refer the Court to a case decided some years ago called Jay v. Boyd, which we have discussed in our brief, cited in our brief at page 7 -- that's page 7 of our reply brief.

Q Oh, your reply brief.

MR. FRIEDMAN: Page 7 of our -- that's the little thin brief.

Q I don't think I have it.

MR. FRIEDMAN: But I will expand a little bit on the discussion of Jay v. Boyd that we give in our brief. That was a statute very close to this statute. It provided that the, and I'm quoting now, "the Attorney General may in his discretion" virtually the same language that we have here, "suspend deportation of an alien who otherwise would be deportable."

The statute set up various conditions which had to be met before an alien was eligible for deportation. The question in the case was whether an alien who met those statutory standards would nevertheless be denied suspension of deportation by the Attorney General without a hearing and on the basis of confidential information known only to the Attorney General.

This Court held that the Attorney General could do

that, and the reason the Court gave was that Congress in the statute had left it to the unfettered discretion, as it described it, of the Attorney General to decide in a particular case whether or not to suspend deportation. It pointed out that the Congress in its statute did not provide standards for determining who among qualified applicants for admission should receive the ultimate relief.

That determination is left to the sound discretion of the Attorney General.

The statute says that, as to qualified deportable aliens, the Attorney General may in his discretion suspend deportation. It does not restrict considerations which may be relied upon or the procedure by which the discretion should be exercised; grant thereof is manifestly not a matter of right under any circumstances, but rather in all cases a matter of grace.

And we think that language applies, that principle applies equally to this case. Congress has not specified any standards by which the Attorney General is to decide in his discretion whether or not to grant a waiver of ineligibility. Congress obviously left it to the Attorney General to consider these matters, taking account of all of the myriad of facts that enter into this judgment.

Q Mr. Friedman, if you follow this language in Jay, "unfettered discretion", what are we hearing this case for?

MR. FRIEDMAN: Well, we're hearing this case because, Mr. Justice, the District Court --

Q If it's unfettered, why should the Court be involved in it at all?

MR. FRIEDMAN: Because the District Court has struck down the statute.

Q That's your position here, for which the Court could do nothing.

MR. FRIEDMAN: Well, our position, Mr. Justice, --

Q Isn't that what "unfettered" means?

MR. FRIEDMAN: That's right. This is a matter within the discretion of the Attorney General.

Now, let me say --

Q But did Congress give unfettered discretion?

MR. FRIEDMAN: This Court has said that, Mr. Justice, in Jay v. Boyd. I think Congress can, and many of the decision of this Court recognise that. In dealing with aliens -- in dealing with aliens, where Congress has complete authority to exclude them, Congress, we think, does have the power to say whether you're going to permit an alien of the excludable class to be admitted; that Congress can leave that to the discretion of the Attorney General, and he is free to take into account all the pertinent considerations.

It seems to us that's quite clear what Congress has done in this statute.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Mr. Boudin.

ORAL ARGUMENT OF LEONARD B. BOUDIN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. BOUDIN: Mr. Chief Justice, and may it please the Court:

We begin with two points, one suggested by the questioning of Mr. Justice Marshall, and the other the result of the reference to Jay v. Boyd and "unfettered discretion".

First, this is, of course, a case of a suit by American citizens, American university professors, and Dr. Mandell is in a sense made a plaintiff because he is symbolic of the problem. The real parties in interest, we have conceded from the beginning, are only the American university professors and the institutions which they represent.

Q Well, are they asserting his rights?

MR. BOUDIN: They are asserting their rights, Your Honor, and not his.

Now, the second aspect is the reference to Jay v. Boyd and unfettered discretion. I know of no case, whether it deal with aliens or whether it deals with any other aspect of American law, where unfettered discretion has been upheld by this Court; and in Jay v. Boyd, the problem that was posed there was whether or not, when the Attorney General states that considerations of national security forbid him to state the

reason, the Court will accept the good faith statement of the Attorney General, and we would too if we didn't have the reason stated here that we could challenge.

And in Mintopoulos, where Mr. Justice Harlan did recognize that the suspension of deportation was a matter of grace, he added in the concluding paragraph that the facts in that case show that the Attorney General had not acted capriciously or arbitrarily; and that we don't think that in any case, and particularly one involving the First Amendment, this Court would stand for the proposition that if we had a fact situation -- which we think we can establish here -- where there is arbitrary and capricious denial of First Amendment rights, then such action by the government would be upheld.

Now, the government has pointed out that there seems to be a shift in position here. I may say there may be a shift of emphasis, but our position has been consistent.

In the court below, on behalf of the American plaintiffs, as I say, asserting their First Amendment rights, we took the position very much similar to the one which I happen to have taken in Kent v. Dulles many years before, arguing that the statutes on their face, as applied, were unconstitutional.

The Court will recall that it took a more limited view when the case finally came up, and said that this

statute was not intended to apply because of the First Amendment rights that were involved to the situation there; namely, the denial of passports for political reasons.

But we also took in this case, as Your Honors will see from our complaint, a direct attack upon the Attorney General's action as capricious and as without any foundation, and we did not give up either point when we opposed the appeal here.

What we did was attempt to support the decision on a narrower ground, following the standard practice in this Court of seeking a narrower ground, if it could be done, than declaring a statute unconstitutional.

Q The District Court didn't pass on your alternative, though?

MR. BOUDIN: Now, the District Court didn't pass on our alternative, because the government really didn't give them a chance to. It wasn't our fault, it was the government that said, through an affidavit filed by Assistant U. S. Attorney Baker, this matter was unreviewable. "We decline to give any reason to the District Court."

Had the government given a reason to the District Court, as it now does here, I think the District Court would have then said the action taken was unreviewable. But our rights should not be forfeited two years later, after the litigation began, because they decided to stand on a funda-

mental principle, and not offer any reasons.

Now, let me point the shift of position taken by the government, not because they're inconsistent, but because, as we have done in changes of emphasis, the government has had a perfect right to do it, but they do bear a relationship, because on each one they pose an issue, a proposition upon which we take issue.

In the District Court, as I indicated before, the government said it had an absolute -- the Attorney General had an absolute and unreviewable exercise of discretion. I will address myself to that shortly.

In the main brief here, bearing in mind what the District Court had done in holding the statute, not on its face but as applied to this particular academic situation, was invalid. As applied here, the government took the basic position that the exclusion and deportation cases were an exercise of the sovereign power of the Federal Government, the Congress.

Now, if we had that statute before us, if we were not able to give, as we think we now have been able to give an alternative constitutional interpretation to the statute, and shift the emphasis to the Attorney General's violation of the congressional intent -- which I shall try to establish -- and shift the statute to a position/which the Attorney General has acted arbitrarily, regardless of statutory intent, in

denying the American citizens access to Dr. Mandel here, for these academic discussions, then I would say that even a statute of this kind, for the reasons indicated by the court below and in the O'Brien case would be invalid.

Because I would then argue that there is no substantial legitimate governmental interest in excluding a person of Dr. Mandel's economic and philosophical views. We're not dealing here, remember, with (a)(27) category, we are dealing not with the people who are absolutely forbidden, we're not dealing with the (a)(29) category, with people who violate laws; we're dealing with (a)(27)(D) and (G). We aren't dealing with the other (a)(27) category of those people who Congress considered more activist, namely present or former members of the Communist Party.

And I would then argue that this category of person should not be prevented from meeting with American academicians and universities, where no substantial interest of the government is shown, and where, in the O'Brien case, involving the destruction of draft cards, the Court will remember, the Court did set forth certain tests. And one of them was that there must be a predominating government interest; the other was that the effect -- the Court raised the question of whether the effect was direct or incidental to First Amendment rights. And then came the question of least restrictive means, the test referred to in Shelton, but

used in other words, namely, whether it's essential to a governmental interest in O'Brien.

Now, when the government filed its brief, its reply brief here, which I see apparently some members of the Court have not yet received, the government then went back -- possibly as a result of our brief; and I'm not complaining -- went back to the original assertion which it had made in the District Court of an unlimited and unreviewable exercise of executive discretion.

Except it did one more thing. As a matter of precaution, which it didn't do in the District Court, it gave a reason: the reason, the flagrant abuse of Dr. Mandel's 1968 trip, which I think the Court will realize is superficial and is not agreed to by the State Department, and as persisted in by the government is really -- all I can say is it's a case of bureaucratic, lower bureaucratic stubbornness.

And, as I say, bureaucratic stubbornness because there is no foundation for the argument now made by the Attorney General that what happened in 1968, namely, the fact that at a cocktail party that Dr. Mandel attended and which -- an event occurred at the end, with which he had nothing to do: namely, the selling of posters for French students.

This is basically the flagrant abuse that is relied

on by the Attorney General in this case.

Q How do you compare what the government asserts here with the power of the Attorney General to suspend deportation?

MR. BOUDIN: I think they are quite similar powers.

Q Has that not been supported?

MR. BOUDIN: I think -- it has been supported, but in no case has been supported where the Court has found -- I refer to Jay v. Boyd and Mintopoulos, -- where there has been (a) arbitrary action on the part of the Attorney General, which we think the Court will easily find here, and (b) where the First Amendment rights of American citizens are involved.

That's one of the reasons why we began in this case by conceding that the alien's rights were not involved; they don't have the First Amendment rights.

Q Mr. Boudin, --

MR. BOUDIN: Yes, sir?

Q -- In Jay, the Court did refer to the power of the Attorney General to suspend deportation as unfettered discretion.

MR. BOUDIN: I think it did, Your Honor; but I think it found, as a practical matter, there was no arbitrary action on the part of the Attorney General. In other words, the reasons it gave for withholding information were considered sufficient.

And there is always, in a whole line of cases, beginning with Chinese Exclusion, all the way down to Harisiades and so forth, a statement of the very broad powers of Congress. The question, however, is whether there is in any area an unlimited executive power, something we address ourselves to in our brief, or even an unlimited congressional power.

I would wonder, for example, although I had intended to turn to this in analyzing the executive action, whether a congressional statute which says that a person who is not in an activist class but is a celebrated economist, although of the Marxist school, if Congress had passed a statute saying that the entry into the United States for a brief visit of such a person for the purpose of attending an academic meeting, with Professor Richard Falk of Princeton, would be forbidden because Professor Falk has written, as one of the editors of the American Journal of International Law, articles against our opposition, opposition to the Vietnam War. Is it conceivable that such a statute, despite the plenary power, would not be stricken down and recognized as a violation of the First Amendment rights of Professor Falk?

And I don't want to go into examples, but I'd rather move into the question which I am next directing myself to, and that is the statute itself, and is it susceptible of a constitutional construction which would not give the vast powers to the Attorney General suggested and which in fact

challenges the vast powers.

Q But, before you do that, aren't there a number of Acts by which the Congress has vested in administrative agencies unreviewable power to make certain determinations? I'm thinking of the International Claims Commission for one.

MR. BOUDIN: I think, Mr. Chief Justice, I would distinguish any case -- and I happen not to be familiar with that particular problem; although I have been involved in some litigation which may touch on that -- those don't involve a First Amendment right of an American.

Q Your point links First Amendment with any effort to grant unreviewable powers?

MR. BOUDIN: Exactly.

In other words, in Shelton v. --

Q And in thise case you link it to the First Amendment right of Americans to listen?

MR. BOUDIN: Precisely. I am relying specifically upon three lines of decisions, which this Court has handed down.

The first is the recognition in Shelton v. Tucker, and Mr. Justice Frankfurter's concurring opinion, and Mr. Justice Harlan in Sweezy of the special role of the university. I am warned against being a leadist here by my colleague, but the fact is that the university is very important -- I include schools as well -- in terms of our democratic system.

The second principle I rely upon is a line of decisions which range -- I can't go back much further for the moment -- DeYoung v. Oregon and going up to New York Times v. Sullivan, and of course the Red Lion case, on which I rely specifically.

And that line relates to what may be a cliche, but, if so, it's a fundamental one; namely, the relationship of the First Amendment to the sovereignty of the people as opposed to the governmental sovereignty -- sovereign right, which are here claimed.

And the third line suggested, I think a few minutes ago, is the line of the right to know, which began, at least within my memory, in Martin v. Struthers and moved into the Lamont case, which again involved, I thought, a very great power of the government, to refuse the entry of communist material but which the Court held, referring specifically to Mr. Justice Brennan's concurring opinion, I believe, there, that we were dealing again not with the rights of the communists who were sending the literature but we were dealing with the rights of the receiver.

And I distinguish this case from the cases which involve foreign moneys coming here, or moneys going abroad, or Schilling v. Rogers, the Trading with the Enemy Act cases. I'm dealing exclusively with the question of the First Amendment rights of Americans.

Now, what the government says in response is that it has a right to be arbitrary, the executive says that, because it says Congress has given it this power.

Before I turn again to the congressional power, let say that I think another principle the Court has laid down in Staub and in Shuttlesworth and in Red Lion is that the government cannot be arbitrary; and I don't have before me the precise quotation, where Mr. Justice White made some reference to the limitations upon bureaucratic irresponsibility. I'm not -- that's a very rough paraphrase, of course.

The question, however, is, did Congress intend to give this power to the Attorney General?

Now, the government has said that the statute is read in the way indicated. Let me add to the construction of the statute that there are two kinds of persons involved in eligibility and ineligibility; political ineligibility primarily.

The first is the category on which Congress has passed a complete ban. That's the (a)(27), the (a)(28) and the section (F) where the President has the power to declare people inadmissible.

The second is this (a)(27) category that we are dealing with here, and particularly the (a)(27)(D) and (G).

Now, the question is, did Congress intend to give unlimited power to the Attorney General, or is there some

standard, particularly in the right of the First Amendment situation to which we're directing ourselves here; namely, the American academic situation. Are there any limitations at all?

Well, they can be found not in the statutory language, but they can be found in two or three reports of Congress, cited by us and by the government in our briefs, which Your Honors will see, in which the public interest -- admittedly a difficult concept, but I'm sure it's applied very often in fields not relating to the First Amendment -- in which the Congress stated that it was in the public interest that the Attorney General exercise his discretionary power.

The alternative was also humanity, which I'm not suggesting is involved here; humane reasons.

Now, in addition to that, the statistics, which I think Mr. Justice Stewart pointed out, are really very significant, because in 1969, for example, the critical year here, at least for purposes of this case, about 5,000 recommendations were made by American consulates abroad, for the most part, the Department of Justice, and that very important administrative practice shows that only nine applications were denied by the Attorney General.

And I would guess, there's no basis and the government doesn't have the facts, that those nine were probably not cases, probably not cases in which the Secretary of State himself or a person as important as in the Bureau of Consular

Affairs, thought it important that Dr. Mandel come here, and probably were cases where only consuls were involved, and probably cases where you have the political activist school

Now, I have jumped to the legal analysis here, and to the administrative implementation, urging again that the Court take a narrow view of the powers given here in order to avoid constitutional problems; but I don't want to miss the critical facts which is usual when one meets the government's argument on the law.

The critical facts are that the star here is not Dr. Mandel, who wanted to come here, he is celebrated enough to live in Europe and to receive the respect of other universities, but Dr. Mandel came here in 1968 and delivered lectures before 30 American universities, including Princeton; was invited in 1969 to debate with Professor Galbraith of Harvard at Stanford University, with the administration's approval.

And then followed six other invitations -- many other invitations, of which he accepted six.

It was the Americans who wanted him, not he who wanted to come here particularly.

Now, the applications were denied, and it turns out, if I could short-circuit it, the applications were denied because of this assumption that somehow or other he had technically violated the conditions of his coming here earlier, of the American consul and the State Department

recognizing that this was an error on their part. They had not told them when they gave him the visas that he was politically ineligible, and therefore conditions to his entry attached. He had assumed that he was eligible as had the American academicians, and it was only because he came in, not as an eligible but one who's eligibility was waived that these conditions, which are really very technical and hardly an important State interest, were suggested by the American consul for the first time as a reason for excluding Dr. Mandel, and not making a recommendation to the Secretary of State.

I was then communicated with, not by Dr. Mandel -- I'm not a Marxist, I donz' speek French -- I was communicated by the American academic community, which said: We want this man here and we want to debate with him. We want to engage in --

Q Mr. Boudin.

MR. BOUDIN: Yes, sir.

Q In view of what you say is a tripartite line of cases you rely on, I take it you would feel your case were not as strong if, instead of being college professors who wanted him here, it was just some of his relatives or some friends of his?

MR. BOUDIN: Oh, I think clearly -- I think it is very important that the First Amendment rights of the academicians are involved here. I don't question that at all.

Q Do you suggest --

MR. BOUDIN: I wouldn't be here if I --

Q Do you suggest those weights are greater for academic community people than for others?

MR. BOUDIN: I'm limited, Your Honor, Mr. Chief Justice -- I warned myself about leadism, I'm not sure. I do think, however, that the importance of education, whether it's schools or universities, is such that the Court will treat that aspect very often -- this may be an exception -- will treat that aspect differently than it will treat, for example, Dr. Mandel's desire to deliver a talk to an unlimited American audience, who had not invited him to come here.

And in that sense I think there are gradations, as we saw in the last several cases, they have gradations of rights, of accessibility, for labor reasons; and gradations of First Amendment rights, as each case must be considered on its own.

Now, the Attorney General here, his action, we think, therefore, in the light of what I have said, is of very sparse congressional history, but a very satisfactory administrative practice. We think he's acted arbitrarily and in violation of the First Amendment, as well as in violation of the public interest concept, because Your Honors will recall, in reading the brief, what I have not said, that the Department of State in Washington, when I approached it

and said: representing the academicians, I want a meeting between the university professors and you -- writing to Mr. Eliot Richardson, then Under Secretary of State, because I had known of his interest in freedom of speech from his articles in the Harvard Law Review many years ago, on the Dennis case; I thought he was the right man to write to.

And the response was: We do recognize that this may have been an error on -- a misunderstanding between Dr. Mandel and ourselves; we do recognize the importance of the academic community and its interest in the thing; and finally came the recommendation of the Secretary of State. "Yes, in the interest of freedom of speech and freedoms of opinion, Dr. Mandel should be admitted." And the answer of the Attorney General was: No.

And, as Your Honors have seen me tracing it, No, for no reason; now, No, for a reason.

Now, all of these cases with respect to reviewability as suggested by the Attorney General are not cases in which the Court has denied justiciability. They're cases in which the Court has weighed the factors: War Power, O'Brien and Robel. One for the individual, the other against the individual.

Foreign policy: Zemel.

And they were very real. I argued Zemel. I regrettably lost. But I argued Zemel here, and I urged the

First Amendment rights on the part of Zemel, even though the matter was phrased in terms of this individual curiosity to see what would happen in Cuba.

But there was very strong foreign policy reasons urged by the government before this Court, evaluated by this Court, and upheld by the Court.

Is this technical violation of being at a cocktail party the equivalent of our relations with Cuba, and the precedent in quarantining Cuba in the field of national security? Again Harisiades and all of these cases received very careful analysis from the Court, and the Court was divided of course in many of those cases.

And even in the field of immigration, as I indicated before, the government is quite right in citing Mr. Justice Harlan's one-line statement of the fact of the matter was grace. But quite -- I won't call it delinquent -- in error in failing to give his concluding line: that they did not regard the considerations involved there as being arbitrary and unreasonable and capricious.

And so we there come down to the conclusion of our problem here: (a) no reason given in the court below; (b) no foundation in fact suggested. And the use of the word "flagrant review" -- "flagrant abuse" is really a hyperbole which, I regret to say, the government adopted from an earlier letter sent by one of the immigration officials.

We have here a situation where the opinion of the Secretary of State, which certainly indicates that foreign relations are not affected, because if Dr. Mandel, for example, had been a Soviet -- let us say at the moment -- a Soviet Marxist, and the Soviets were not allowing our economists to come in, or even if we had a position of opposition to the Soviet Government, which we wanted to demonstrate, then this Court would have to weigh the question of whether the First Amendment rights of the academicians and their universities overbalances or doesn't the State Department's decision, and I suspect it would come out against the universities in such a case.

But we have here, based on the history I have given you, whether we're attacking the statute not just as written but as applied. And we attacked in our complaint the action of the Attorney General was frivolous and was unreasonable and without foundation. This is real frivolity.

Q Mr. Boudin, if we follow your theory of this statute, your reading of this statute, any time, would it not then result that any time 100 people signed a petition and said they wanted to hear from some person generally falling in the class of excludable aliens, they would have to be admitted?

MR. BOUDIN: No, I don't think so, sir.

Q You said your people here wanted to hear him.

MR. BOUDIN: I don't think, Your Honor, I think each case is going to depend in the end -- as someone here said earlier in one of the other cases -- on its own facts. We have here a case of scholarly discussion at American universities, recognized by those universities to be important for the education of those people. We don't have an ad hoc group saying -- either sympathetic or not sympathetic -- to Dr. Mandel: We'd like to hear you.

We have the most eminent professors in the most eminent universities, who feel that it's important, as I think we all do, important that there be a counter-discussion, a discussion of the issues here --

Q Mr. Boudin, do you think the government's case would be stronger or weaker if the Attorney General had said, "I'm refusing entry because I don't like his views", just like the statute says?

MR. BOUDIN: Then I think I would be faced with an attack on the statute, and I would have a harder burden; but I would attack the statute on --

Q You mean it's less arbitrary -- it's more arbitrary to give no reason than to give a reason that "I don't like his views"?

MR. BOUDIN: If the Attorney General had said, "I'm following the statute strictly" -- well, I don't think the Attorney General could do that. The Attorney General in each

case is exercising his discretion.

Q Well, his --

MR. BOUDIN: I think the problem you're posing, Mr. Justice, in one in which we're faced with, where the statute says there is an absolute ban; and that would place a burden on me, and I'd have to meet it. It is of course --

Q Well, the statute does authorize exclusion based on views?

MR. BOUDIN: Yes, it does. And I would challenge that. But I don't think that I have to challenge that --

Q And the Attorney General says, "Well, based on my views, I'm going to keep you out; that's why I'm turning you down."

MR. BOUDIN: I think that would be improper, because Congress intended the Attorney General exercise his discretion with respect to the views also.

Congress didn't say --

Q So it's unconstitutional to give him the discretion, but it's unconstitutional for him not to exercise it?

MR. BOUDIN: It depends on how it's exercised. I think the Attorney General in each one of these cases does exercise discretion. I would assume he does so in good faith. And I think our situation is --

Q In fact, I take it you don't think you have to --

I take it you think you can concede that the statute is valid on its face and still win?

MR. BOUDIN: But only -- but only for purposes of winning.

Q I understand that; yes.

MR. BOUDIN: Not for any other purpose, Your Honor.

[Laughter.]

Q That means that every exercise of discretion by an Attorney General under this statute is subject to a judicial review?

MR. BOUDIN: No, I would not say that -- well, the question of what is subject to judicial review and when the Courts will overrule the Attorney General is another problem. Almost everything is subject to judicial review in this country. But tremendous deference is obviously paid to the views of the Congress and even to the Attorney General.

I would say that given a situation where the Attorney General has given a reason, and sometimes giving a reason can be worse than not giving a reason, has given a reason which this Court can say is absolutely absurd is frivolous. And if the Attorney General, for example, had given the reason that I suggested or another one, that Professor Heilbroner, as far as I can recall, is a radical conservative -- at least by Dr. Mandel's standards; a professor of economics had written books criticizing our American economic policy, and he

wanted Dr. Mandel in his university for social research, wanted if Dr. Mandel to come here, it would be frivolous and it would be unreasonable and would be in violation of First Amendment rights to deny his right to access to Dr. Mandel.

I don't think we have to take on the whole statute. I'm perfectly willing to do so. I urged it in the court below. I don't think we have to do so if we can say (a) either that the Attorney General's position is an arbitrary and unreasonable one, and that this Court has never, never upheld a decision in which it said was unreasonable and arbitrary by the Executive Branch; or -- and I said "or" -- we say Congress intended there be some standard here, and that one of the things Congress did not intend is that,because of what I call simply bureaucratic stubbornness, the rights of the American academic community should be rejected.

Q Isn't it also true this Court has never upset a decision to exclude aliens previously?

MR. BOUDIN: I think Your Honor is correct, that the Court has never excluded aliens; but I will say that in no case in the history of this Court, including the Turner case, famous anarchist case argued by Clarence Darrow and Edgar Lee Masters, in this Court, in no case has it been the First Amendment rights of the American citizen that was alleged, they were never the plaintiffs. Poor Mr. Turner, I guess it was Turner, and maybe it's confused with Nat Turner, too --

poor Mr. Turner was the man who was asserting, as an alien, his First Amendment rights.

Well, it's a long time, it's pretty late. I would like to re-argue Turner v. Williams; but it's too late. And if Clarence Darrow failed, I would certainly fail.

MR. CHIEF JUSTICE BURGER: Thank you, Mr.Boudin.

Thank you, Mr. Friedman.

The case is submitted.

[Whereupon, at 2:55 o'clock, p.m., the case was submitted.]

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