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Ideological Exclusion in the Post-9/11 Era: A Case for Increased Judicial Oversight and Recognition of the Right to Hear Speech Note

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Note

IDEOLOGICAL EXCLUSION IN THE POST-9/11 ERA: A CASE FOR INCREASED JUDICIAL OVERSIGHT AND RECOGNITION OF THE RIGHT TO HEAR SPEECH

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Following the terror attacks of September 11, 2001, the George W. Bush Administration actively engaged in a policy of ideological exclusion. During the Bush Administration, the State Department routinely denied visas to foreign nationals whose political views it disfavored. The primary targets of ideological exclusion during the post-9/11 era were members of the Arab and Muslim intellectual communities. Opponents have argued that ideological exclusion violates United States citizens' First Amendment right to hear and debate speech. After offering an extensive background of the history of ideological exclusion in the United States, this Note argues that the Bush Administration's policy of ideological exclusion did, in fact, violate United States citizens' right to hear and debate speech. It then discusses the steps that the judiciary must take in order to create a sustainable policy against ideological exclusion.

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IDEOLOGICAL EXCLUSION IN THE POST-9/11 ERA: A CASE FOR INCREASED JUDICIAL OVERSIGHT AND RECOGNITION OF THE RIGHT TO HEAR SPEECH

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I. INTRODUCTION

During the so-called "War on Terror" that began shortly after the terror attacks of September 11, 2001, the United States government has openly engaged in a campaign of increased security. This policy of increased security has, in turn, entailed a tradeoff of basic individual liberties. To an extent, federal constitutional safeguards have failed to assuage the usurpation of the basic individual liberties of United States *citizens* and *non-citizens* alike. Although the tradeoff of increased security for decreased individual liberties has much precedent in American history, the "ideological exclusion" of Muslim scholars did not become prominent until the latter half of the twentieth century.[1] The United States government engaged in the practice with even more vigor following the terror attacks of September 11, 2001. Using subtly crafted provisions of the United States Patriot Act of 2001, the George W. Bush Administration actively engaged in the exclusion of scholars who espoused political views that challenged American foreign policy during the "War on Terror." The Administration's policy undermined the basic First Amendment civil liberties of United States citizens and non-citizens alike.

The post-9/11 tradeoff of basic liberties for improvements in security has culminated in the reinvigoration of the United States government's "ideological exclusion" of foreign individuals who seek to present ideological perspectives that run contrary to American foreign policy.[2] Although less severe in both gravity and pervasiveness in comparison to the McCarthyism policies of the Cold War era,[3] the post-9/11 exclusion of

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[1] Suzanne Ito, *Time to Retire Ideological Exclusion*, AM. CIVIL LIBERTIES UNION (Jan. 21, 2010, 6:28 PM), http://www.aclu.org/blog/free-speech/time-retire-ideological-exclusion.

[2] *Id.*

[3] *See infra* Part III.

Muslim scholars has ignited anger among a number of civil rights groups.[4] These groups—the American Civil Liberties Union ("ACLU") prominent among them—have argued that the ideological exclusion of foreign Muslim scholars violates the constitutional right of United States citizens to *hear*, *question*, and *debate* speech, as set forth in the First Amendment.[5] Ideological exclusion has also been met with vehement disapproval among members of the legal community.[6] Other scholars have offered the relatively less persuasive—but not entirely misplaced—argument that ideological exclusion violates allegedly anti-American *non-citizens'* First Amendment rights.[7]

By focusing on the role of the judicial and executive branches in the practice of ideological exclusion, this Note examines three important aspects of this debate. Following a brief introduction to the history of ideological exclusion in the United States, this Note discusses whether American citizens do, in fact, have a constitutionally protected right to hear the speech of foreign nationals. Second, it discusses the validity of the claim that the Bush Administration denied entry of foreign nationals on the basis of their respective ideological positions. Finally, the Note critiques the steps that the Obama Administration has taken in redressing the wrongs that the Bush Administration allegedly committed. Although the Obama Administration and a number of federal appellate courts have acted favorably on behalf of opponents of ideological exclusion,[8] a solution to the current problem requires a uniform and definitive ruling that ideological exclusion in its purest form is, in fact, unconstitutional.

This Note offers two potential solutions to the current problem. The first is a broader standard of judicial review. The second is a balancing test in which the judiciary first determines whether the exclusionary policy infringes upon First Amendment rights, and then determines whether that interest outweighs United States security interests. This, in turn, requires a

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[4] It is important to note that ideological exclusion during the Bush Administration was by no means limited to Muslim scholars. There were a number of cases during this period in which the executive either excluded or conditioned the admission of foreign nationals into the United States. *See, e.g.*, Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008) (upholding the executive's exclusion of a Mexican national on the basis that the Consulate "had reason to believe that he was a controlled substance trafficker," which the court determined was "plainly a facially legitimate reason, as it [was] a statutory basis for inadmissibility" (internal quotation marks omitted)). Because this type of exclusion poses an entirely different set of questions, however, the scope of this Note is limited to the exclusion of Muslim scholars who were, or are, excluded in direct relation to the "War on Terror."

[5] *See* Ito, *supra* note 1 (arguing that the practice of ideological exclusion infringes upon United States citizens' right to hear constitutionally protected speech).

[6] *See, e.g.*, Mitchell C. Tilner, *Ideological Exclusion of Aliens: The Evolution of a Policy*, 2 GEO. IMMIGR. L.J. 1, 1–2 (1988) (arguing that exclusion on ideological grounds is, in a sense, an "illegitimate" practice).

[7] *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 999–1000 (2002).

[8] *See infra* Part VI.

higher degree of judicial review over executive decision making in this area.

II. A BRIEF DESCRIPTION OF IDEOLOGICAL EXCLUSION AND THE ARGUMENT AGAINST IT

Ideological exclusion has a long and storied history in United States government policymaking.[9] Ideological exclusion refers to the "routine[] deni[al of] visas to foreign scholars, writers, and artists who . . . hold [certain minority or purportedly hostile] political views."[10] The United States government has historically taken steps—both publicly and privately—to exclude potentially "dangerous" foreign nationals from speaking publicly in the United States.[11] Some of these exclusions—particularly during the Cold War—have taken place in the public eye and with widespread public approval. Others—such as the current exclusion of scholars of the Muslim and Arab world—have taken place far more surreptitiously.

The most recent exclusion of foreign nationals on ideological grounds derives from § 411 of the United States Patriot Act of 2001 ("USA Patriot Act").[12] The USA Patriot Act significantly amended § 212(a)(3) of the Immigration and Nationality Act.[13] Under § 411 of the USA Patriot Act, the United States executive branch may deny the right to a visa to a relatively broad range of foreign nationals seeking entry into the United States.[14] Section 411 further provides that the executive could conclude that an individual is "inadmissible" under § 212(a)(3) of the Immigration and Nationality Act on the grounds that he or she was a member of, or participated in:

> (aa) a foreign terrorist organization, as designated by the Secretary of State under section 219, or

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[9] *See infra* Part III.

[10] *The Excluded: Ideological Exclusion and the War on Ideas*, AM. CIVIL LIBERTIES UNION (Oct. 25, 2007), http://www.aclu.org/national-security/excluded-ideological-exclusion-and-war-ideas.

[11] *See infra* Parts III, V.

[12] Pub. L. 107–56, sec. 411, 8 U.S.C. § 1182(a)(3), 115 Stat. 272, 345–50 (2001). The official title of the USA Patriot Act is the "Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism Act of 2001." Pub. L. 107-56, sec. 1(a), 115 Stat. 272 (2001). For an early account of the USA Patriot Act, see Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 435–53 (2002) (arguing that the Act gives the Attorney General "greater authority" to "detain and deport aliens suspected of having terrorist ties").

[13] Pub. L. 107–56, sec. 411, 8 U.S.C. § 1182(a)(3), 115 Stat. 272, 345–50 (2001).

[14] *See ACLU Challenges Patriot Act Provision Used to Exclude Prominent Swiss Scholar from the United States*, AM. CIVIL LIBERTIES UNION (Jan. 25, 2006), http://www.aclu.org/national-security/aclu-challenges-patriot-act-provision-used-exclude-prominent-swiss-scholar-united- (arguing that the USA Patriot Act provision "prevent[s] United States citizens and residents from hearing speech that is protected by the First Amendment").

> (bb) a political, social, or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities.[15]

Perhaps the most worrisome aspect of the USA Patriot Act provision is its broad scope. By covering such an expansive class of individuals—not only terrorist organizations, but also any individual whom the State Department deems to challenge the United States government's efforts to combat terrorism domestically and internationally—the Act undermines the basic constitutional right of United States citizens to hear protected speech. Georgetown University Law Professor David Cole has pointed to at least two "constitutional infirmities" in the USA Patriot Act legislation: first is the imposition of guilt by association for an individual's association with a "terrorist organization," regardless of his or her connection to violence or terrorist acts; second is the government's use of secret evidence to determine the outcome of legal proceedings concerning a non-citizen's liberty or property, counter to the Confrontation Clause of the Sixth Amendment.[16] As this Note will discuss, it was on these very premises that the Bush Administration deported foreign scholars.[17] Following Congress's ratification of the USA Patriot Act, the Bush Administration's actions confirmed that the amended inadmissibility criteria would be used not only in theory, but also in practice.[18]

Scholars and groups opposed to ideological exclusion rely on the textual and structural foundation of the Free Exercise Clause of the First Amendment. The First Amendment reads, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[19] The argument of opponents of ideological exclusion is weak insofar as it relies on a perceived constitutional right of non-citizen foreign nationals to speech. However, as this Note will discuss, the argument is much more persuasive insofar as it contends that American citizens have the constitutional right to *hear* speech.[20]

III. A HISTORY OF IDEOLOGICAL EXCLUSION IN THE UNITED STATES

The history of exclusion of foreign nationals whose views threaten the

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[15] Pub. L. 107–56, sec. 411, 8 U.S.C. § 1182(a)(3), 115 Stat. 272, 345–46 (2001).
[16] *See* Cole, *supra* note 7, at 966–69, 1000–01.
[17] *See infra* Part V.
[18] *See id.*
[19] U.S. CONST. amend. I.
[20] *See infra* Parts IV–VII.

social fabric and security of the United States reflects a history of panic and fear. The government's fear of tyranny from within and the resulting use of ideological exclusion have taken two distinct paths in American history: in one pattern—perhaps most prominent during the McCarthyism era of the late 1940s to late 1950s—the United States government has openly suppressed ideological dissent.[21] In another, the United States government has used subtle tactics in an effort to discretely suppress what it perceives to be the ideologically dangerous views of foreigners.[22]

When the concept of ideological exclusion is the subject of debate or intellectual discourse, one often discusses prominent Cold War intellectuals, artists, and activists. An editorial published in the *New York Times* in 2009, for example, stated that twenty years had passed since Congress repealed the denial of visas to such prominent figures as "the Colombian novelist Gabriel García Márquez, the Chilean poet Pablo Neruda, and the British novelist Doris Lessing."[23] But the starting point of exclusion based on belief or creed—whether or not such belief was ideological—began more than four hundred years prior to the beginning of the Cold War.

A. *The Colonial Period*

As early as the colonial period, colonists established policies that excluded newcomers who they perceived as "undesirable."[24] Colonists excluded individuals on the basis of both social undesirability—beggars, debtors, and paupers, to name a few—and religious belief.[25] The Massachusetts Bay Colony, for example, discouraged the entrance of individuals "who did not accept its official policy of ecclesiastical domination."[26] Religious groups excluded during the colonial period ranged from Quakers and Catholics to radical religious separatists.[27]

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[21] *See infra* Part III.B.

[22] *See* Tilner, *supra* note 6, at 1 ("On the record, government officials steadfastly deny that the United States follows such [an exclusionary ideological] policy or that aliens are ever excluded on ideological grounds.").

[23] *Visas and Speech*, N.Y. TIMES, Sept. 17, 2009, at A32.

[24] Tilner, *supra* note 6, at 4.

[25] *Id.* at 4, 6–7. At least one scholar has argued that the colonists used banishment and deportation as a means of "rid[ding] itself of thousands of undesirables." James R. Edwards, Jr., Ctr. for Immigration Studies, *Keeping Extremists Out: The History of Ideological Exclusion, and the Need for Its Revival*, BACKGROUNDER, Sept. 2005, at 1, 2, *available at* http://isites.harvard.edu/fs/docs/icb.topic183766.files/Class_Ten_-_National_Security_and_Immigration/EdwardsJr_Keeping_Extremists_Out.pdf.

[26] Tilner, *supra* note 6, at 6.

[27] Edwards, *supra* note 25, at 2. For example, in 1643, the Virginia establishment ordered that Roman Catholic priests be deported within five days after their arrival in the colony. *Id.* The unfavorable treatment of Roman Catholics stemmed from Old World tensions between Roman Catholics and Protestants, as well as the idea that the New World was a location to which religious

Perhaps the most famous and celebrated early colonial banishment was that of Sir Roger Williams from the Massachusetts Bay Colony.[28] In October of 1635, the Massachusetts establishment found the Puritan minister guilty of spreading "newe [sic] [and] dangerous opinions" about religious freedom and separation from the Church of England.[29] The primary means of exclusion during the colonial era was banishment, which may properly be regarded as the colonial equivalent of deportation.[30] There is little to no evidence that any of the colonies banished individuals solely on ideological or political grounds prior to the Declaration of Independence.[31] However, at least one historian has argued that the colonists banished on the grounds of religious disposition at least partially in order to protect the social order.[32] In a critique in support of ideological exclusion,[33] Professor James Edwards notes that early American colonists instituted the system of banishment in order "to preserve and protect the character of the society they and their forefathers paid so high a price to establish."[34] During the course of American history, advocates of exclusionary policies have continued to base their arguments on the exigency of protecting the United States from dangerous outsiders.

B. *The Cold War Era*

One may assume that colonial banishments are mere remnants of another era, far removed from the practice of ideological exclusion in the United States during the late twentieth and early twenty-first centuries. To some extent, this assertion is correct; religious-based deportation no longer serves as a major facet of exclusion jurisprudence. Contrary to popular belief, however, ideological exclusion has occupied a noteworthy position

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dissenters could flee as an escape from religious tyranny in Europe. *See id.* ("[I]t hardly seemed prudent to have established a society for religious dissenters . . . only to allow a hostile takeover by potential persecutors."). The tension between Roman Catholics and Protestants only intensified in the eighteenth century, which was a relatively belligerent period between the Roman Catholic empires of France and Spain, on the one hand, and the English colonies, on the other. *Id.* at 3.

[28] For a general discussion of Roger Williams' background, as well as his banishment, see *Roger Williams Banished: October 9, 1635*, MASS MOMENTS, http://www.massmoments.org/moment.cfm?mid=292 (last visited Jan. 23, 2013) [hereinafter *Roger Williams Banished*].

[29] *Id.*

[30] Tilner, *supra* note 6, at 6. Exclusion was not *limited* to banishment; Edwards notes that other means of exclusion included requirements that ships' captains supply passenger manifests and the imposition of duties or bonds on arrivals adjudged as a threat to public order or a burden on society. Edwards, *supra* note 25, at 2.

[31] *Cf.* Tilner, *supra* note 6, at 6–8 (arguing that, although the colonists did not banish on ideological grounds, they may have *effectively* done so insofar as a religious doctrine "entails adherence to a corresponding political . . . view").

[32] *See Roger Williams Banished*, *supra* note 28 (stating that the banishment of Roger Williams was based on his views' "serious threat to the social order").

[33] Edwards, *supra* note 25, at 1–2.

[34] *Id.* at 2.

in the United States throughout the past century. In fact, ideological exclusion reached its peak during the Cold War.

Perhaps the United States government's clearest and most overt expression of ideological exclusion occurred in 1952, when Congress implemented the McCarran-Walter Act.[35] The origins of the Act reach as far back as the 1930s, when Representative Hamilton Fish called for the outright exclusion of communists in response to the excessively "open and militant" nature of communist activity during the Depression era.[36] Representative Fish and his congressional committee feared the rise of the communist agenda in the United States, particularly in light of the desperate economic conditions of the 1930s.[37] Despite opposition, including a presidential veto, the legislature finally enacted the McCarran-Walter Act in 1952.[38]

The McCarran-Walter Act passed by overwhelming majorities in both the House of Representatives and the Senate.[39] Upon enactment, the law provided thirty-three categories of excludable aliens, nine of which were new.[40] Three grounds for exclusion covered the overlap of security and politics: (1) § 212(a)(27) excluded non-citizens who participated in activities that would be prejudicial to the public interest or public safety; (2) § 212(a)(28) excluded non-citizens who belonged to subversive organizations or taught or advocated political views; and (3) § 212(a)(29) excluded non-citizens who the State Department deemed likely to engage in subversive activities once in the United States.[41] Although Professor Edwards argues that these subsections were "noncontroversial,"[42] they threatened the First Amendment right of Americans to hear and debate speech. Not only were these provisions prejudicial toward the interests of non-citizens, but they were also written in an overly broad manner. At the very least, the legislature should have carved narrower provisions tailored to the specific and particularized security concerns of the executive branch.

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[35] The McCarran-Walter Act is officially known as the Immigration and Nationality Act. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101–524 (1982)). According to one commentator, the years of the McCarran-Walter Act represent the "height" of ideological exclusion. Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 53 (1999). The same commenter notes that although the McCarran-Walter Act was eventually repealed, "its most troubling provisions continue to be applied almost exclusively against aliens of Arab nationality or origin." *Id.*

[36] Edwards, *supra* note 25, at 5 (citation omitted).

[37] *See id.* (discussing congressional momentum to combat Communism during the Depression).

[38] *Id.* at 7.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 7–8.

[42] *See id.* ("This noncontroversial subsection kept out aliens expected to engage in espionage, sabotage, public disorder, or activity that risks national security or use of force or violence to overthrow the U.S. government.").

Instead, the Act could be interpreted to cover *any* immigrant or foreign national. In this way, the provisions denied United States citizens the right to hear and debate the political and ideological perspectives of foreign nationals. This issue has arisen to an even greater extent in the post-9/11 era.[43]

The primary goal of the McCarran-Walter Act was to prevent communist sympathizers from espousing their political views within the United States.[44] The courts generally upheld the application of ideological exclusion under the Act.[45] In fact, Congress made only one serious amendment to the Act; in 1977, the legislature enacted the McGovern Amendment, which permitted the Attorney General "to waive the exclusion of any noncitizen affiliated with an organization proscribed by the United States."[46] Interestingly, Congress carved an exception to the McGovern Amendment that prohibited waiver of the exclusion for members of the Palestine Liberation Organization in 1979.[47] The McCarran-Walter Act was chief among the legislative instruments that resulted in the exclusion of over 8,000 non-citizen aliens originating from ninety-eight countries between 1952 and 1984.[48]

The McCarran-Walter Act and the subsequent exclusion of alleged Soviet sympathizers signaled one of the most alarming aspects of modern ideological exclusion: it caused minority groups to fear intermingling with individuals who shared their own cultural or racial background. Although it is likely that many immigrants during the 1950s and 1960s did, in fact, embrace radical communist principles,[49] many others were punished simply because they sought affiliation with members of their respective racial or cultural groups.[50] Perhaps the simplest means of affiliating oneself with members of one's own racial or cultural group is through membership in organizations. Fear of joining such groups was one likely consequence—intended or not—of the McCarran-Walter Act. In this way, the Act created a major hurdle for immigrants seeking to assimilate into a new way of life in the United States. The post-9/11 exclusion of Muslim

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[43] *See infra* Part V.

[44] Akram, *supra* note 35, at 56. Provisions (a)(27) to (29) of the Act permitted the State Department to exclude or deport communists, anarchists, and members of socialist labor and subversive organizations on the basis of ideological disposition. *Id.*

[45] Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 317 (2002).

[46] *Id.* at 318.

[47] *Id.*

[48] Akram, *supra* note 35, at 56–57.

[49] *See* Edwards, *supra* note 25, at 5 (arguing that it is "plain" from *The Venona Secrets* and actions by the Communist International, or Comintern, that Soviet Communists sought to undermine the United States government politically).

[50] *Id.*

and Arab scholars poses a slightly different, but parallel, problem. Although the exclusion of scholars does not impact their ability to assimilate into a new society, it will likely cause them to refrain from making assertions that they would otherwise make. This may have an even more far-reaching impact; not only does ideological exclusion affect the excluded individual, but it may also adversely impact the ability of United States citizens to hear—and therefore become informed about—the perspectives of foreign scholars.

C. *Beyond the Cold War: Ideological Exclusion and Judicial Review*

Throughout the greater part of the past century, the judicial doctrine of "consular nonreviewability" has been instrumental in protecting legislative enactments used by the executive branch to implement its policy of ideological exclusion. Over the past forty years, federal courts have ruled that executive decisions excluding foreign individuals from entry into the United States are beyond the scope of judicial review.[51] Prior to 1972, however, federal circuit court and Supreme Court decisions often contradicted one another.

The Supreme Court's decision in *Kleindienst v. Mandel*[52] followed a relatively long line of cases in which activist federal judges sought to cultivate a less extensive degree of deference to executive decision making. During the McCarthyism era of the 1950s and 1960s, activist judges promulgated the "meaningful association" exception to ideological exclusion.[53] This exception required that an act of ideological exclusion result from the individual's performance of a *voluntary activity* in support of a Communist government, military, or organization.[54] Unfortunately, the Court's decision in *Mandel* brought judicial activism in this area to a halt.

According to some scholars, opponents of ideological exclusion suffered a major defeat in the Supreme Court's decision in *Mandel*.[55] In

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[51] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (upholding the constitutionality of a statute that delegated to the executive the conditional authority to exclude foreign nationals and declining to address any "First Amendment . . . grounds [that] may [have been] available for attacking exercise of discretion"); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (upholding a congressional statute that similarly granted the executive the authority to exclude foreign nationals for security purposes).

[52] 408 U.S. 753 (1972).

[53] Edwards, *supra* note 25, at 8.

[54] *See id.* (providing various examples of judicial activism, including *Noto v. United States*, 367 U.S. 290 (1961), in which the Supreme Court exonerated a convicted communist sympathizer on the grounds that he merely advocated communist doctrine—not communist action—in the United States).

[55] *See, e.g.*, Edwards, *supra* note 25, at 8–9 (explaining that, in the *Mandel* decision, the Supreme Court denied the non-citizen Belgian socialist relief—despite the fact that the denial was based on mere advocacy for world communist principles—on the grounds that the denial for "facially legitimate and bona fide reasons" fell within the authority of the United States (internal quotation marks omitted)).

Mandel, the Court reviewed the executive's exclusion of a self-proclaimed "revolutionary Marxist" who had been invited to attend a conference at Stanford University and to lecture at a number of other universities in the United States.[56] The Court held that § 212(a)(28) of the Immigration and Nationality Act was constitutional—at least insofar as it vested the Attorney General with the conditional authority to exclude foreign nationals or to prescribe conditions for their entry into the United States.[57] The Court reasoned that the judiciary did not possess the discretion to review these types of executive decisions, regardless of concerns related to abuse of discretion or First Amendment rights.[58] The Court explained its decision to decline to rule on First Amendment grounds:

> [T]he plenary discretionary authority Congress granted the Executive [would] become[] 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.[59]

Commentators refer to the judiciary's decision to decline discretion in this area as the "doctrine of consular nonreviewability."[60] This doctrine, which has held a paramount position in United States jurisprudence for over seventy-five years, stipulates that the judicial branch may not review an executive consular officer's decision to deny a visa to a foreign national.[61] As this Note will discuss,[62] some circuit courts have only recently allowed limited judicial review.

Following the *Mandel* decision, the Supreme Court repeatedly questioned the State Department's broad discretion with respect to ideological exclusion decision making. In *Reagan v. Abourezk*,[63] for example, the Supreme Court reviewed a D.C. Circuit Court of Appeals

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[56] *Mandel*, 408 U.S. at 756–57 (internal quotation marks omitted).

[57] *See id.* at 770 ("[W]hen the Executive exercises this power [to exclude aliens] . . . 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 . . . .").

[58] *Id.*

[59] *Id.* at 768–69.

[60] Margaret Laufman, Comment, American Academy of Religion v. Napolitano, 55 N.Y.L. SCH. L. REV. 1173, 1174 (2011).

[61] *Id.*

[62] *See infra* Part VI.

[63] 484 U.S. 1 (1987).

judgment in favor of a United States Senator from South Dakota who sued the Ronald Reagan Administration's State Department for denying non-immigrant visas to certain non-citizens who were invited to attend conferences or address interested audiences in the United States.[64] On remand, the U.S. District Court for the District of Columbia ruled in favor of the Senator.[65]

Regardless of the reasoning behind the policy of ideological exclusion in the United States, the doctrine raises very serious concerns about the First Amendment rights of American citizens. Furthermore, the very fact that the United States government has, in the vast majority of cases, denied that it excludes foreign nationals on the basis of ideology suggests that such exclusions are in some way wrong. The next section will turn to a discussion of the judiciary's recognition of a constitutionally protected right to hear speech.

IV. THE FIRST AMENDMENT AND THE RIGHT TO HEAR SPEECH

The constitutional right of United States citizens to hear the speech of foreign nationals is of fundamental importance to an analysis of the role of the judiciary. Although it is well known that the First Amendment protects United States citizens from the government's infringement on their own right to voice their opinions, it is less widely understood that the First Amendment protects citizens' right to *hear* the speech of others.[66] In fact, the Supreme Court has consistently recognized such a right of United States citizens to hear speech under the First Amendment. The right of United States citizens to hear speech can and should be applied in the context of Muslim and Arab scholars speaking in public forums in the United States.

The Supreme Court recognized the First Amendment right of United States citizens to hear speech in the landmark case, *Red Lion Broadcasting Co. v. FCC*.[67] Through the administrative rulemaking process, the FCC required broadcast stations to present public issues that were of interest to the general public.[68] It further required the broadcast stations to give each side of the public issues fair coverage.[69] As part of this administrative rulemaking, the FCC delineated an "equal time" rule and a "response to personal attack" rule.[70] The Court upheld both rules.[71] Writing for the

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[64] *The Implications of "*Abourezk v. Reagan,*"* CAPITOL HILL CUBANS (June 11, 2009, 12:18 PM), http://www.capitolhillcubans.com/2009/06/implications-of-abourezk-v-reagan.html.

[65] Edwards, *supra* note 25, at 10.

[66] OFF. OF THE GEN. COUNSEL, CAL. STATE UNIV., HANDBOOK OF FREE SPEECH ISSUES 1 (2009).

[67] 395 U.S. 367 (1969).

[68] *Id.* at 369.

[69] *Id.*

[70] *Id.* at 369–71.

majority, Justice Byron White reasoned that the right of the viewers and listeners to hear speech was of chief importance to the Court's decision:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners*, not the right of the broadcasters, *which is paramount*.[72]

In its analysis in *Red Line Broadcasting*, the Court focused on the right of United States citizens to receive information. The Court's policy rationale for the right to receive information was that individuals should have the freedom and liberty to differentiate between and choose among a variety of sources of information, perspectives, and ideas.[73]

The Court's reasoning in *Red Lion Broadcasting* is highly applicable in the context of Muslim and Arab scholars speaking in the United States. When a court does, in fact, rule on ideological exclusion, it will likely determine whether United States citizens have a right to hear constitutionally protected speech, rather than whether non-citizens have a constitutionally protected right to speak. The *Red Lion Broadcasting* analysis can easily be applied to this case. By excluding Muslim scholars, the United States government is not only forbidding the excluded individuals from speaking; it is also infringing upon the right of United States citizens to hear the excluded individuals speak. This is the most troublesome encroachment of First Amendment individual liberties. The United States government is effectively forbidding United States citizens—the "listeners" of the speech of foreign nationals—from exercising the right to hear.

V. THE CURRENT PROBLEM: IDEOLOGICAL EXCLUSION DURING THE BUSH ADMINISTRATION

While the United States government's practice of ideological exclusion during the late twentieth century targeted communist sympathizers, the policies of the Bush Administration primarily impacted Arab and Muslim scholars. As the following section will discuss, the lack of judicial oversight during the Bush era necessitates further measures that would serve as a check on the executive's ability to exclude individuals who contribute to constructive intellectual and political discourse in the United States.

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[71] *Id.* at 380.

[72] *Id.* at 390 (emphasis added).

[73] *See id.* ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the [Federal Communications Commission].").

From the very outset of the "War on Terror," the Bush Administration "consistently asserted that it has the authority to engage in ideological exclusion."[74] Just six weeks after the terror attacks of September 11, 2001, Congress passed the USA Patriot Act.[75] The USA Patriot Act significantly enhanced the United States government's security interests at the expense of individual liberties.[76] Among other provisions, the Bush Administration benefited from the doctrine of consular nonreviewability, which precludes judicial review of its denial of visas to controversial scholars. Although there were likely many cases of ideological exclusion during the Bush Administration, the cases of two scholars—Professors Tariq Ramadan and Adam Habib—received broad attention from a number of media outlets. Following a discussion of the plight of these individuals during the Bush Administration, the next section focuses on the outcome of those cases during the Obama Administration.

A. *Pre-9/11: Exclusion of Arab and Muslim Scholars in the 1990s*

It is important to note that the ideological exclusion of Arab and Muslim scholars did not begin during the Bush Administration. Rather, the current exclusion of Arab and Muslim intellectuals began at least as early as the late 1990s.[77] In a 1999 Georgetown Immigration Law Journal article, Professor Susan Akram argued that the ideological exclusion of Arab and Muslim scholars was both dangerous and—even more alarmingly—likely to succeed because of the "negative stereotyping equating them with terrorists," their "negligible political muscle," and the "legislative and executive activity directed to silence, exclude, deport and restrict them."[78]

During the Clinton Administration, the State Department used a variety of tactics to exclude Muslim scholars. Not only did Secretary of State Madeleine Albright target Muslim and Arab scholars, but she did so discretely by using classified evidence. By 1999, at least twenty-five immigrants in the United States faced deportation or removal on the basis of "evidence that the Immigration and Naturalization Service . . . refused to disclose" on the grounds that it was "classified."[79] Even prior to the attacks of September 11, 2001, there was a widespread belief among

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[74] Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1556–57 (2010).

[75] USA Patriot Act, Pub. L. 107–56, sec. 1(a), 115 Stat. 272 (2001).

[76] *See* Cole, *supra* note 7, at 966 (stating that the USA Patriot Act seeks to combat terrorism by making non-citizens deportable for activities ranging from associational activity and speech).

[77] Akram, *supra* note 35, at 53–54 (stating that the McCarran-Walter Act's most troubling provisions continued to be applied against Muslim and Arab scholars during the 1990s).

[78] *Id.* at 54.

[79] *Id.* at 51–52.

members of the legal community that the use of such "classified evidence" in deportation proceedings targeted the speech, association, and religious activities of Muslim immigrants, Arab immigrants, and permanent residents of Arab or Muslim origin.[80] Even more disturbing was the adverse impact that the Clinton Administration's tactics had on the right of citizens to hear speech under the First Amendment. Any infringement on the right of individuals to hear speech necessarily decreases public discourse and progressivism. In seeking to further its own interests, the Clinton Administration undermined the ability of citizens and non-citizens alike to speak on issues that were of vital importance to an evolving society. It is likely that the Clinton Administration's failure to understand the need for public discourse played a significant role in cross-cultural misunderstanding between Arabs and Muslims, on the one hand, and United States citizens, on the other. Furthermore, ideological exclusion during the Clinton Administration paved the road for the exclusionary policies of the Bush Administration.

B. *Professor Tariq Ramadan*

Although ideological exclusion was by no means limited to Arabs and Muslims, the "War on Terror" has disproportionately impacted members of these communities. *American Academy of Religion v. Napolitano*[81] was the first major case that challenged the Bush Administration's adverse treatment of non-citizen Muslim and Arab scholars. In *Napolitano*, the organizational plaintiffs challenged the Department of Homeland Security and the State Department[82] regarding the exclusion of Tariq Ramadan, a Swiss-born Islamic scholar who specializes in the integration of Muslim beliefs with Western European culture and society.[83] Ramadan has taken positions on a number of controversial issues. He has argued, for example, that Muslims "can be both fully Western and fully Muslim," and that they "need not simply choose a path of assimilation or a path of isolation."[84] According to some commentators, however, the State Department may have feared Ramadan's familial relation to his "radical" grandfather, Hassan al-Banna, the founder of the Muslim Brotherhood.[85]

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[80] *See, e.g.*, *id.* at 52.

[81] 573 F.3d 115 (2d Cir. 2009).

[82] Francesco Isgro, *Second Circuit Reviews Visa Denial: First Amendment Trumps Consular Nonreviewability Doctrine*, IMMIGR. LITIG. BULL., June–July 2009, at 1, 1.

[83] 573 F.3d at 119. Ramadan has published twenty books and more than seven hundred articles focusing on the integration of Muslim beliefs with Western European culture and society. *American Academy of Religion v. Napolitano–Case Profile*, AM. CIVIL LIBERTIES UNION (Apr. 9, 2010), http://www.aclu.org/national-security/american-academy-religion-v-napolitano-case-profile.

[84] Kirk Semple, *At Last Allowed, Muslim Scholar Visits*, N.Y. TIMES, Apr. 8, 2010, at A29. Semple describes Ramadan as a "polarizing figure in the world of contemporary Islamic studies." *Id.*

[85] *See id.* (describing the Muslim Brotherhood as a "sometimes-violent political group in Egypt").

Prior to August 2004, Ramadan regularly visited the United States as a speaker at the State Department and some of America's most prestigious institutions of higher education.[86] In January 2004, Ramadan accepted a tenured position to teach religion, conflict, and peace building[87] at the University of Notre Dame.[88] The United States embassy subsequently revoked his visa without explanation. It did, however, disclose upon repeated inquiry that it had done so under the USA Patriot Act provision stating that the government may exclude prominent individuals who "endorse or espouse terrorist activity."[89] The executive branch offered a rather attenuated line of reasoning for its denial of Ramadan's visa; it stated that the scholar had given a monetary donation to a Swiss-based charity, which in turn funded Hamas, a militant Palestinian group.[90] Professor Ramadan, however, denied having any knowledge of the connection between the Swiss-based charity and Hamas or any other terrorist-related activities.[91]

The exclusion of Professor Ramadan represents the broad anti-Muslim and anti-Arab position that the Bush Administration took in denying visas to foreign scholars. It was not until 2010, after several months during which Professor Ramadan's visa was withheld, did the Second Circuit overturn the denial of Professor Ramadan's visa.[92]

C. *Professor Adam Habib*

A second example of the Bush Administration's exclusion of Arab and Muslim scholars is the case of Adam Habib, a professor at South Africa's University of Johannesburg.[93] The South African intellectual community regarded Habib as "an expert on issues of democracy, governance, race, and South African politics, public policy, and social movements [and] . . . a vocal critic of various aspects of U.S. foreign policy, including the war in Iraq."[94] The State Department was likely most troubled by Professor Habib's vocal criticism of its foreign policy objectives during the "War on Terror."

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[86] *Napolitano*, 573 F.3d at 119.

[87] Semple, *supra* note 84.

[88] *Napolitano*, 573 F.3d at 119.

[89] *Id.* at 119–20.

[90] *See* Semple, *supra* note 84 ("[Executive o]fficials eventually pointed to Mr. Ramadan's donations of about $1,300 from 1998 to 2002 to a Swiss-based charity that the Treasury Department later categorized as a terrorist organization because it gave money to Hamas, the militant Palestinian group.").

[91] *Id.*

[92] *See infra* Part VI.A.

[93] Patrick Bond, *Shutting the Door on Academic Exchange: The Exclusion of South African Scholar Adam Habib from the United States*, DEMOCRACY & SOC'Y, Spring 2008, at 10.

[94] *American Sociological Association et al. v. Clinton*, AM. CIVIL LIBERTIES UNION (Jan. 20, 2010), http://www.aclu.org/national-security/american-sociological-association-et-al-v-clinton.

Professor Habib, a South African citizen, sought entry into the United States in November 2006. He had been invited to meet with members of the Social Science Research Council, Columbia University, the National Institutes of Health, and the World Bank.[95] Upon his arrival at John F. Kennedy International Airport in New York City, however, the State Department forbade Habib from entering the United States.[96] Professor Habib initially thought that his visa denial erroneously stemmed from his detention as a political prisoner under the South African apartheid regime.[97] However, Habib's assumption was incorrect; the State Department subsequently extended the exclusion to Habib's wife and two sons.[98] Even more alarmingly, the State Department never communicated its *reasons* for revoking the visas of Professor Habib and his family.[99]

Although the ACLU almost immediately challenged Professor Habib's visa denial, the State Department's decision was not overturned until January 2010, when former Secretary of State Hillary Clinton signed an order effectively ending the exclusion.[100] Habib subsequently received a ten-year visa to enter the United States and attended various meetings throughout the country.[101] However, the four-year period during which the State Department denied Professor Habib's visa signals an alarming policy of ideological exclusion.

D. *Other Cases of Ideological Exclusion During the Bush Era*

Although the experiences of Professors Tariq Ramadan and Adam Habib are of primary focus in this Note, it is important to emphasize that their cases merely represent the widespread visa denials that took place during the Bush Administration. Following the events of September 11, 2001, the Bush Administration also denied visas to Carlos Alzugaray Treto, Waskar Ari, John Clark, and Haluk Gerger.[102] Interestingly, the government in these cases—like those of Ramadan and Habib—targeted both teaching about activism *and* mere theoretical teachings about "anti-American" perspectives. Although many questions—including accuracy—

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[95] Gwendolyn Bradley, *Scholars Excluded from the United States*, QUESTIA, http://www.aaup.org/aaup/pubsres/academe/2007/so/nb/excluded.htm (last visited Feb. 2, 2013).

[96] Bond, *supra* note 93, at 10.

[97] Bradley, *supra* note 95.

[98] Bond, *supra* note 93, at 10.

[99] *Id.*

[100] Donald Brown, *State Department Lifts Ban on Scholars Banned from U.S. for Political Views*, AM. CIVIL LIBERTIES UNION (Mar. 22, 2010), http://www.firstamendmentcoalition.org/2010/03/state-department-lifts-ban-on-scholars-banned-from-u-s-for-political-views/. Interestingly, former Secretary of State Clinton effectively ended the exclusion of Professor Ramadan on the same day. These orders occurred during the intermittent period after the Second Circuit had remanded Ramadan's case to the district court and before the case was reheard on the district court docket. *See infra* Part VI.B.

[101] *See* Brown, *supra* note 100.

[102] Bradley, *supra* note 95.

may effectively undermine the non-citizens' positions in some or all of these cases, the alleged widespread use of ideological exclusion during the Bush Administration is cause for concern. These concerns were not addressed until President Barack Obama entered office in 2009.[103] As the following sections will discuss, there is a need for a definitive judicial ruling in each federal circuit that the ideological exclusion of Muslim scholars infringes upon the First Amendment right of United States citizens to hear constitutionally protected speech.

VI. THE OBAMA ADMINISTRATION AND THE FEDERAL COURTS: STEPS MADE AND STEPS NEEDED

During Hillary Clinton's tenure as Secretary of State, the Obama Administration took a number of steps to overturn ideological exclusions that took place during the Bush Administration. In 2010, the ACLU filed two successful actions on the part of American organizations seeking the reversal of visa denials carried out during the Bush Administration: *American Academy of Religion v. Napolitano*[104] and *American Sociological Association v. Clinton*.[105] Furthermore, a more dated—but also better established—line of United States Supreme Court cases have recognized a First Amendment right to "hear, speak, and debate with" a visa applicant.[106] Although the steps that the Obama Administration has taken have been relatively narrow and unrepresentative, these cases provide a solid groundwork for potential future action by the State Department and the courts.

A. *Federal Court Discretion?:* American Academy of Religion v. Napolitano

Although *Napolitano* marked the resurgence of ideological exclusion during the Bush Administration, it also demonstrated the substantial progress that the courts and the Obama Administration have made in overturning ideology-based visa denials. Given Ramadan's reputation as a controversial figure—since his views are not universally regarded as "antagonistic to" American foreign policy *per se*—the ACLU's challenge of the State Department's denial of Ramadan's visa application is critical to an understanding of the strides that the Obama Administration and the federal courts have made in countering the exclusionary policies of the Bush Administration.

In *Napolitano*, the organizational plaintiffs challenged the decision of

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[103] *See infra* Part V.
[104] 573 F.3d 115 (2d Cir. 2009).
[105] *American Sociological Association et al. v. Clinton*, *supra* note 94.
[106] Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

the United States District Court for the Southern District of New York to grant summary judgment in favor of former Secretary of the Department of Homeland Security Michael Chertoff and former Secretary of State Condoleeza Rice.[107] At the appellate level, the appellants-in-error claimed that the exclusion of Ramadan violated their First Amendment right to hear speech.[108] After finding that United States organizations do, in fact, have First Amendment rights at stake when the State Department excludes foreign scholars, artists, and politicians, the United States Court of Appeals for the Second Circuit reversed the district court's ruling.[109] This decision marked a substantial departure from the "hands off" demeanor that many courts displayed during the Bush Administration. Indeed, it signaled a shift from the doctrine of consular nonreviewability to one in which the judiciary takes a more active role in reviewing the potential repercussions that executive actions have on the constitutional rights of American citizens.

The approach that the Court took in *Napolitano* would serve as an effective foundation for future judicial review of visa denials. The significance of the case lies in its two distinct but equally important components. First, the substantive outcome of the case itself—the overturning of the executive's denial of Ramadan's visa—signals a change in the perception of at least one of the federal courts with regard to this issue. The Second Circuit has finally recognized that a visa denial may, in fact, infringe upon—or at least implicate—the First Amendment rights of American citizens and organizations. Second, the ACLU's successful representation of the three organizational plaintiffs in this case—the American Academy of Religion, the American Association of University Professors, and the PEN American Center—suggests that the battleground for adjudication on the issue will center on the constitutional right of *American citizens*—though not necessarily *foreign nationals*—to hear and debate the speech.

The two most obvious shortfalls of *Napolitano* are: (1) it is not binding on courts outside the Second Circuit; and (2) it is difficult to calculate how narrowly or broadly the decision will be interpreted in the future. These factors equate to both unreliability and unpredictability. However, the case also marks a substantial departure from the policies of the Bush Administration and from the doctrine of consular nonreviewability.

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[107] *Napolitano*, 573 F.3d at 117.

[108] *Id.* at 123.

[109] *American Academy of Religion v. Napolitano–Case Profile*, ACLU (Apr. 9, 2010), http://www.aclu.org/national-security/american-academy-religion-v-napolitano-case-profile.

B. *New Administration, Fresh Perspective?:* American Sociological Association v. Clinton

The recent trend toward admission of foreign nationals whose ideological perspectives differ from the American government's stance in the "War on Terror" has not been limited to the courtroom. Since the inauguration of President Barack Obama in January 2009, the State Department has changed its tone with respect to ideological exclusion. Perhaps the most well-known case dealing with this issue was *American Sociological Association v. Clinton*.[110] This action, which the ACLU brought on behalf of the American Sociological Association, challenged the exclusion of Adam Habib, the professor at the University of Johannesburg who had been invited to lecture in the United States.[111] While Habib's case was pending in federal court, however, then Secretary of State Hillary Clinton announced the reversal of the State Department's prior revocation of the professor's visa.[112] Professor Habib subsequently planned to attend various conferences and meetings in the United States.[113]

At least one commentator has labeled the State Department's overturning of the exclusion as a "major victory for civil liberties."[114] While such optimism is both warranted and well founded, it must also be exercised with caution. The following section will discuss the ephemeral nature of former Secretary of State Hillary Clinton's orders. Although it is unlikely that the State Department will again revoke the visas of Professors Ramadan and Habib, it is very possible—perhaps even likely—that the State Department will deny visas in the future.

VII. FROM IMPROVEMENT TO SUSTAINABILITY: THE NEED FOR MORE WIDESPREAD JUDICIAL OVERSIGHT

It is undeniable that the Obama Administration has taken significant steps in an effort to redress the wrongs committed by the Bush Administration with respect to ideological exclusion. Given the political reality of four-year presidential terms, however, even the most uninformed observer can foresee the potent instability of Secretary of State Clinton's orders. Furthermore, only the Second Circuit has affirmatively asserted the right of the judiciary to review the State Department's orders of

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[110] *American Sociological Association et al. v. Clinton*, *supra* note 94.

[111] *See supra* Part V.C (discussing the exclusion of Arab and Muslim scholars stemmed from as early as the late 1990s); *see also* Bond, *supra* note 93, at 10 (stating that Professor Habib had been invited to attend meetings at such influential forums as the National Institutes for Health, the Centers for Disease Control and Prevention, the World Bank, Columbia University, and the Gates Foundation).

[112] Brown, *supra* note 100.

[113] *Id.*

[114] *Id.*; *American Sociological Association et al. v. Clinton*, *supra* note 94.

exclusion.[115] These realities lead to an important question: What steps can be taken to provide accountability in the State Department? The most effective means of providing such accountability would be through closer judicial scrutiny in federal circuit courts throughout the United States. Not only would closer judicial scrutiny overturn past visa denials on First Amendment grounds, but it would also serve as a disincentive for the executive branch to revoke visas in the future.

The central obstacle to curbing the ideological exclusion of Arab and Muslim scholars is the doctrine of "plenary power" in matters concerning immigration.[116] Professor Susan Akram points to two "discrete" aspects of the court's plenary power in ideological exclusion jurisprudence: "(1) that the Constitution does not constrain Congress or the Executive in matters concerning immigration; and (2) that the courts will not review congressional or executive action in the immigration area [sic]."[117] There have been two interpretations of the principle that the Supreme Court promulgated in *Mandel*.[118] One interpretation suggests that the Court applied its plenary review power.[119] The other suggests that it did not.[120] However, any sustainable policy against ideological exclusion—in the current "War on Terror" or otherwise—would require a reassessment of the judicially created plenary power and the *Mandel* decision.

The best approach would be for courts to adopt an amended version of the Second Circuit's interpretation in *Napolitano*. The Second Circuit's approach did not establish a doctrine of broad judicial review; rather, it provided a doctrine of narrow judicial review. Under the Second Circuit's approach, the judiciary simply has the authority to review the effect that exclusion has on the First Amendment rights of American citizens. However, the Court's test should not be limited to the *Napolitano* analysis. Perhaps the most suitable test would be for the Court to pose the following two questions: (1) does the government action infringe upon the First Amendment rights of either the person subject to exclusion or United States citizens?; and (2) if so, how does this balance against the United States government's legitimate policy goal of furthering its security objectives? Ideally, the Court would presume that the individual's First Amendment rights should be protected. Under this approach, the judiciary would likely overrule many of the executive's ideological exclusion

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[115] *See supra* Part VI.A (discussing how the Second Circuit's ruling in *Napolitano* was significant for future judicial review of similar appeals).

[116] Akram, *supra* note 35, at 58. Professor Akram further writes that one can view the doctrine of plenary power as "the hole in the Constitution through which immigrants and aliens fall." *Id.*

[117] *Id.*

[118] *See supra* Part III (discussing the different views of scholars and the judiciary in the aftermath of *Mandel*).

[119] Akram, *supra* note 35, at 60.

[120] *Id.*

decisions that infringe on First Amendment rights. It would likely mend the current system in which there are very minimal means of protecting the constitutionally protected right of American citizens to hear speech and engage in meaningful debate. Courts may also be more willing to assume the role of balancing security interests against First Amendment interests, rather than merely reviewing First Amendment rights regardless of the potential security threat.

There are two possibilities in actions against ideological exclusion. In the first case, the application would be made on behalf of a United States citizen asserting his or her First Amendment right to *hear speech*. The second possibility would be that a non-citizen would apply on his or her own behalf. A non-citizen's application would face a much more difficult burden. In this case, any steps toward judicial discretion require that the courts understand the policy implications of ruling in favor of non-citizens. Professor David Cole provides three reasons for treating non-citizens the same as citizens.[121] First, the Constitution imposes "substantial limits" on tradeoffs of immigrants' liberties for citizens' security.[122] By both domestic and international standards, the basic rights that are at stake in exclusion cases—political freedom, due process, and equal protection of the laws—apply to all persons subject to the laws, rather than citizens alone.[123] Second, a double standard undermines the legitimacy of the United States government both domestically and internationally, and therefore would be counterproductive in both spheres.[124] Legitimacy is important at both the domestic level and the international level, as it leads to greater cooperation among members of both communities. Third, permitting the government to create unfavorable policies for non-citizens establishes precedent for the government's adverse treatment of United States citizens.[125] These policy implications necessitate a type of judicial review that takes into account the propensity of the executive to infringe upon the rights and entitlements of United States citizens and non-citizens alike.

Although well-founded, Professor Cole's arguments are certainly not all-inclusive. One can offer at least two more persuasive policy reasons for abolishing ideological exclusion. The first reason is related to the "melting pot" theory that has been prominent throughout much of United States

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[121] Cole, *supra* note 7, at 957.

[122] *Id.*

[123] *See id.* (arguing that political freedom, due process, and equal protection of the laws are human rights, rather than mere "special privileges stemming from a specific social contract").

[124] *Id.* at 958.

[125] *See id.* at 959 (pointing to the Enemy Alien Act of 1798, which Congress originally meant to apply only to non-citizens, as a precedent for the government's internment and otherwise adverse treatment of Japanese-American citizens of the United States during the Second World War).

history.[126] Throughout most of its history, the United States has accepted conflicting cultural, political, and social viewpoints—regardless of the potential repercussions of such broad tolerance. The open discourse of these political and ideological perspectives suggests that the American "melting pot" theory is not limited to cultural and social integration; rather, it covers various types of thought, including differing sociopolitical viewpoints.[127] Without the presence of differing ideological viewpoints, the "melting pot" will effectively cease to exist. Ideological exclusion serves as a proverbial "wall" between the United States and political discourse. If the government is to continue to accept differing ideological perspectives, it must cease excluding Muslim and Arab scholars on purely ideological and political grounds.

One scholar's recent analysis, favorable to ideological exclusion, ironically generates another policy reason for removing ideological exclusion from the United States government's agenda. According to Professor James Edwards, the exclusion and removal of aliens who exhibit "unwanted characteristics" has become a "traditional American practice."[128] Professor Edwards draws a parallel between past instances of ideological exclusion and the heightened concerns with post-9/11 Islamofascism.[129] He points to the observations of journalist Michelle Malkin:

> The Japanese espionage network and the Islamic terrorist network exploited many of the same immigration loopholes and relied on many of the same institutions to enter the country and insinuate themselves into the American mainstream. Members of both networks arrived here on student visas and religious visas. Both used spiritual centers—Buddhist churches for the Japanese, mosques for the Islamists—as central organizing points. Both used native-language newspapers to foment subversive tendencies. Both leaned on extensive ethnic- or religious-based fundraising groups for support—kais for the Japanese,

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[126] Rogers Brubaker, *The Return of Assimilation? Changing Perspectives on Immigration and Its Sequels in France, Germany, and the United States*, 24 ETHNIC & RACIAL STUD. 531, 531 (2001).

[127] *See id.* at 532 (describing the "melting pot" as covering a wide range of differing perspectives, including: movements to preserve or strengthen regional languages and cultures; Black Power, Afro-Centrist, and other anti-assimilationist movements involving African Americans; gay pride movements; and "an understanding of politics emphasizing the pursuit of putatively universal interests to one emphasizing the recognition of avowedly particularistic identities").

[128] Edwards, *supra* note 25, at 2.

[129] *See id.* at 14 (drawing similarities between past instances of ideological exclusion—including those implemented against Axis agents during World War II and those against Soviet sympathizers during the Cold War—and the exclusion of Arab and Muslim scholars during the Bush Administration).

> Islamic charities for Middle Eastern terrorists. . . . Both aggressively recruited American citizens as spies or saboteurs, especially . . . inside their ethnic communities. Both were spearheaded by fanatics with an intense interest in biological and chemical weapons.[130]

The flaw in Edwards's argument lies in his reliance on what he perceives to be a "traditional American practice." Regardless of whether ideological exclusion is a "traditional American practice"—an assertion that is debatable in itself—the practice is wrongful. Provided that they possess the ability to review the State Department's judgments, the courts should ban the practice of ideological exclusion for posterity—regardless of how often the government has used it in the past. This argument is based on the common sense notion that the mere fact that an action has been taken in the past neither necessitates nor justifies its use in the future.

Professor Edwards further argues that foreign terrorist organizations launched significant operations in the United States both before and after the terror attacks of September 11, 2001.[131] This argument has virtually no bearing on the issue. During the Bush Administration, the State Department excluded foreign scholars from the United States. Very few observers would argue that the State Department should not have the authority to exclude terror organizations in an attempt to prevent them from recruiting or training in the United States. The benefit of exclusion on these grounds is not profoundly *ideological*; rather, the exclusion of terror organizations is a necessary means of fostering *increased national security*.

The actions of the Obama Administration and the Second Circuit are necessary, but not sufficient, steps in the abolition of ideological exclusion in the United States. Even following the decisions by the State Department and the Second Circuit, the actions of the Obama Administration and the courts suggest that, although ideological exclusion must be limited, it is also a necessary national security measure. The courts must take the lead role in abolishing—or at least relinquishing—ideological exclusion. Nowhere is judicial review a more vital component of a free and democratic society than where constitutional rights are at stake.

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[130] *Id.* (quoting Michelle Malkin, *In Defense of Internment: The Case for 'Racial Profiling' in World War II and the War on Terror*, MICHELLEMALKIN.COM (Aug. 3, 2004), http://michellemalkin.com/2004/08/03/in-defense-of-internment-2/).

[131] *See id.* at 14–15 (noting various instances of foreign terrorist organizations' activities in the United States, including a basic terrorist training and recruitment program run by Hamas outside Chicago in 1990).

VIII. CONCLUSION

The Obama Administration has made significant strides in its attempt to retire ideological exclusion. Former Secretary of State Hillary Clinton has been at the forefront of the battle against Bush-era tactics that sought to prevent the spread of "dangerous" perspectives by excluding certain public individuals from the United States. This Note seeks to demonstrate that, while it has taken a number of significant steps, the Obama Administration must continue to take further action to combat the policy. As an ACLU staff attorney with the National Security Project, Melissa Goodman, concisely stated following Hillary Clinton's January 2010 orders: "The Obama administration should now conduct a broader review of visas denied under the Bush administration, reverse the exclusions of others who were barred because of their political beliefs and retire the practice of ideological exclusion for good."[132]

The abolition of ideological exclusion requires action on the part of the legislature, the executive, and the judiciary. First, the legislature must not enact laws that undermine basic individual liberties—regardless of whether the individual is a citizen or non-citizen. Second, under its Article II authority, the executive—the State Department in particular—must follow the lead of former Secretary of State Hillary Clinton, whose actions against ideological exclusion proved very successful. Finally, the judiciary has the most important role to play. It must implement a heightened level of judicial review over the actions of the executive branch. Historically and theoretically, one of the primary roles of the judiciary has been to safeguard the rights of minority groups. Such a responsibility necessitates a heightened level of review with respect to ideological exclusion—regardless of whether national security is at stake.

Too often, factions who oppose the expansion of constitutionally protected rights to non-citizens argue that the implementation of such measures will undermine the security concerns of the United States government. They argue that the importance of security outweighs the importance of individual liberties. Albeit difficult, it is imperative that Americans separate the emotional turmoil they felt following the terror attacks of September 11, 2001 from their perspective on the importance of individual liberties. Even during the most turbulent periods of American history, the United States government and its people have an obligation to respect the basic and fundamental individual liberty of United States citizens to hear and debate the speech.

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[132] Ito, *supra* note 1.