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WITHDRAWAL SHEET

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Date: 2/9/98

12660

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Roberts to Richard Hauser re: ABA Free Flow Proposal. 1p.	2/20/86	P5
2. memo	Abraham Sofaer to Fred Fielding re: same subject as above. 1p.	2/10/86	P5
3. memo	Fielding to Sofaer re: ABA draft resolution on Free Flow of Information. 1p.	2/04/86	P5
4. memo	Roberts to Fielding and Hauser re: same subject as above. 2p.	2/04/86	P5
5. memo	Fielding to Sofaer re: same subject as above. 1p. (same text as item 3)	2/04/86	P5
6. memo	duplicate of item 5. 1p.	2/04/86	P5
7. report	Sofaer and Clark to Secretary thru Armacost re: ABA draft resolution on Free Flow of information. (2p., partial), 7p. (p. 6-7)	n.d.	P5
8. memo	Roberts to Fielding and Hauser re: same subject as item 7. 2p.	2/04/86	P5
9. memo	Fielding to Sofaer re: same subject as item 7. 1p. (same text as item 3)	2/04/86	P5
10. memo	Hauser to Judyt Mandel re: Proposed state and Administration Position concerning U.S. Visa Policy. 3p. (memo + tracking worksheet and note)	2/20/86	P5
11. memo	Judyt Mandel to John Poindexter re: proposed state and administration policy concerning U.S. Visa Policy, (w/ notations). 2p.	n.d.	P1, B1 P5

RESTRICTION CODES

CB 12/14/00

Presidential Records Act - [44 U.S.C. 2204(a)]

- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statute [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

WITHDRAWAL SHEET

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
12. profs note	Rod McDaniel to Nicholas Platt re: same subject as item 11. 1p.	n.d.	P4 B1
13. memo	Platt to John Poindexter re: proposed Depart. and Admin. position concerning U.S. Visa Policy. 1p.	2/18/86	P5

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
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- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

THE WHITE HOUSE

WASHINGTON

February 20, 1986

MEMORANDUM FOR ABRAHAM D. SOFAER
LEGAL ADVISER
DEPARTMENT OF STATE

FROM: RICHARD A. HAUSER *Original signed by RAH*
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: ABA Free Flow Proposal

Thank you for your memorandum of February 10, responding to mine of February 4, on possible Administration support for the American Bar Association proposal to repeal or modify 8 U.S.C. § 1182(a)(28). As I noted on February 4, we will defer to the affected agencies on the desirability of supporting the ABA resolution.

I would point out at this time, however, that your proposed revision of 8 U.S.C. § 1182(a)(28) -- exclusion of aliens whose entry "would be detrimental to the national security" -- seems to fall far short of permitting exclusion for foreign policy reasons. Both your previous draft memorandum and the ABA materials indicated that "foreign policy" rather than the more restrictive "national security" standard would be retained as a legitimate basis for exclusion. Any legislative proposal must, of course, go through the formal OMB clearance process.

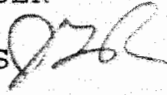
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cc: RAHauser
JGRoberts
subject
chron.

THE WHITE HOUSE

WASHINGTON

February 20, 1986

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS 

SUBJECT: ABA Free Flow Proposal

Abe Sofaer has responded to your memorandum of February 4, which was written in response to Sofaer's original memorandum on the American Bar Association's proposal to repeal the ideological exclusion provision of the McCarran-Walter Act of 1952. I have attached my memorandum for you of February 4, which described the background of this proposal. Your reply to Sofaer deferred to the Secretary of State, Attorney General, and Director of Central Intelligence, but stressed that any repeal of 8 U.S.C. § 1182(a)(28) must not undermine the authority of the United States to exclude aliens for foreign policy reasons. You also suggested that the Administration act on its own rather than simply react to the ABA.

Sofaer, in response, agrees that the Administration should not support any specific ABA language on repeal, but only the ABA's general resolution that aliens should not be excluded solely on the basis of past or current political beliefs or associations or the expected content of an alien's remarks in the United States. Administration support for this resolution would be accompanied by a statement that repeal of 8 U.S.C. § 1182(a)(28) must be accomplished in a manner that does not impair the existing ability to exclude aliens whose presence would be potentially damaging to important national interests. Sofaer attaches proposed language that he believes would accomplish this result. He concludes by asking if the foregoing adequately responds to your concerns, noting that Casey has signed off and he is awaiting word from Meese.

In reply, I would caution Sofaer that exclusion of aliens who "would be detrimental to the national security" -- his proposed revision -- is a far cry from exclusion for foreign policy reasons, which he and the ABA have argued would be retained as a legitimate basis for exclusion.

$$\mathbb{R} \rightarrow F$$

- ☐
- 1 - INCOMING

Name of Correspondent: Abraham H. Kozell

- User Codes:** (A) _____ (B) _____ (C) _____

Subject: ASTA Fee for Proposal

DISPOSITION

ACTION CODES:

- I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

A - Answered C - Completed
B - Non-Special Referral S - Suspended

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments:

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February 10, 1986

MEMORANDUM FOR FRED F. FIELDING
COUNSEL TO THE PRESIDENT

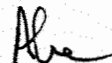
SUBJECT: ABA Free Flow Proposal

Your memorandum of February 4 has led me to devise what I believe is a satisfactory way to deal with the ABA proposal.

First, we have no intention of supporting any specific ABA proposal to modify 8 U.S.C. § 1182 (a) (28). Rather, I will propose to the Secretary that we simply support in principle Recommendation 103 (Tab A), which was specifically revised to address concerns we had expressed over the past several years about previous versions. In doing this, we would make a statement to protect our position. Tab B.

Second, we fully agree that support for the revised Recommendation must not be understood to imply support for any legislative change that might diminish existing Executive Branch powers to exclude aliens who we believe pose a threat to important national interests. In this connection, I have prepared a draft Administration bill (Tab C) that we will circulate to Justice (including INS and the FBI) and the Agency for consideration.

Am I correct in assuming that, with the precautions I have described, we have resolved the concerns that you expressed in your February 4 memorandum? (Bill Casey has already agreed to our proposal, and I am awaiting word from Ed Meese, whose views I will convey to you as soon as I receive them.)


Abraham D. Sofaer

Attachments:

Tab A - Recommendation 103
Tab B - Draft Statement
Tab C - Draft Administration Bill

cc: The Attorney General
Director of Central Intelligence

AMERICAN BAR ASSOCIATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
STANDING COMMITTEE ON LAW AND NATIONAL SECURITY
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that United States law concerning visa denials should conform to the following standard:

An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current political beliefs or political associations or on the basis of the expected content of the person's statements in the United States.

However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or activity in which the government believes they intend to engage, would harm the interests of the United States, including the foreign relations of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country, nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation, nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.

Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28).

American Bar Association

February 1, 1986

Dear Members of the House of Delegates and Board of Governors:

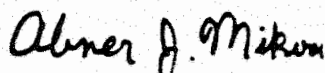
This is to urge your support for the enclosed revised version of Recommendation #103, sponsored by our section and, as of today, the ABA Standing Committee on Law and National Security, when it is considered at the upcoming Midyear Meeting by the ABA House of Delegates and Board of Governors. After one and one-half years of extensive consultations with the U.S. Department of State and other interested ABA and governmental entities, this revised recommendation and report have been substantially clarified and redrafted since their original submission to the House and Board. The recommendation is consistent with numerous previous policies adopted by the House, as well as with recent statements by President Reagan and Secretary of State Shultz, and with our Nation's obligations pursuant to the Helsinki Final Act.

As revised, the recommendation urges that United States law concerning visa denials conform to current practice as described by the State Department by codifying the general principle that the Government should not exclude foreign visitors from the United States solely on the basis of their past or present political beliefs or associations. In so doing, it strikes an important balance between preserving the ability of our Government to deny visas to terrorists and others who threaten the national security or foreign policy interests of our country while at the same time removing an anachronistic statutory provision promulgated during the McCarthy Era (as part of the McCarran-Walter Act) so that visits to the United States by foreign speakers are facilitated when not harmful to our national interests.

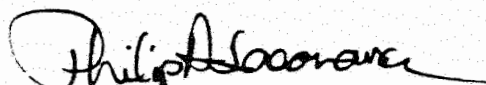
This enclosed revised version deletes parts 1(b) and 2 of Resolution #103 in the bound volume of reports pending before the House. Numerous caveats and exceptions also have been included in the recommendation to make it absolutely clear that nothing being proposed here would prevent our Government from protecting the interests of the United States, seeking reciprocity for the entry of Americans into other countries, or denying entry to aliens during wartime, a national emergency or pursuant to a Presidential proclamation.

Please do not hesitate to contact us, our Section Delegate to the House, Martha W. Barnett, or our Section Liaison to the Board, Samuel S. Smith, if you would like to discuss this matter further. Thank you for your consideration.

Sincerely,



Abner J. Mikva
Chairperson



Philip A. Lacovara
Vice-Chairperson and
Member of the House

Enclosure
0392j

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REPORT

"Expanding contacts across borders and permitting a free exchange or interchange of information and ideas increase confidence; sealing off one's people from the rest of the world reduces it." [President Ronald Reagan, January 17, 1984]1/

"We will never deny physical access to anyone because of the beliefs he or she may espouse." [U.S. Secretary of State George Shultz, January 12, 1986] 2/

"The participating states . . . make it their aim to facilitate free movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating states . . . * * * *

The participating states . . . make it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage cooperation in the field of information and the exchange of information - with other countries . . . " [Helsinki Final Act of 1975]3/

"The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." [Supreme Court in New York Times v. Sullivan]4/

After extensive consultation with interested ABA and governmental entities, this recommendation and report have been substantially clarified and redrafted since their original submission to the ABA House of Delegates in August, 1984. The adoption of this principle would call for a conforming of existing law to current practice as described by the Administration. The resulting statutory change would reflect our Nation's commitment to a free exchange of ideas. It would leave the Government free to continue to deny visas, as it does now, when it believes that granting the visa would lead to harm to the interests of the Nation, including its foreign policy

interests. The appropriate role, if any, of judicial review of visa denials is not addressed by the recommendation.

This recommendation makes it clear that the intent is to preserve the ability of our Government to combat terrorism and otherwise protect the national security and other interests of the United States by denying visas when the interests of the United States, including foreign policy interests, are affected. Numerous caveats and exceptions have been included in the recommendation to make it absolutely clear that nothing being proposed here would prevent our Government from protecting the interests of the United States.

The recommendation at the same time strikes a balance in the interest of preserving the rule of law by urging the removal of an anachronistic statutory provision so that visits to the United States by foreign speakers is facilitated when not harmful to our national interests. The recommendation is also consistent with numerous previous policies adopted by the ABA House of Delegates 5/.

This revised report has also been redrafted to make it absolutely clear that it is not meant to imply any criticism of the Administration, the U.S. Department of State or other governmental entities. In fact, this principle is consistent with current practice as described by representatives of the Administration to congressional committees and to our Section, and with Secretary of State Shultz's recent statement to the PEN conference quoted above. Indeed, this recommendation seeks to preserve as much as possible of our constitutional tradition of permitting our citizens access to information and ideas brought to our shores by citizens of other countries, except where such visits would harm our national interest. This American tradition of generally permitting travel and the exchange of information and ideas across the American border has historically distinguished our society from totalitarian governments.

As President Reagan observed in 1984 and as our Nation observed when it became a signatory to the Helsinki Final Act in 1975, a free exchange of information and ideas -- subject to narrowly defined exceptions to protect certain national interests -- is crucial to the health of our democratic society. Through open and robust debate in the "marketplace of ideas," American citizens inform themselves of policy choices which shape and affect their lives. The flow of persons in and out of the United States is an important part of this exchange.

The problem which this resolution addresses is that current United States law, on its face, provides for the denial of visas to persons solely because of certain political beliefs or current or past memberships or associations. Accordingly, the recommendation would require eliminating the

narrow ideological remnants of the McCarthy era, while permitting the exclusion of aliens whose activities endanger the welfare, safety, security or foreign policy interests of the United States. This principle would safeguard the American public's right to receive ideas from abroad by eliminating barriers to unpopular foreign political beliefs and philosophies, and would support our declared intentions under the Helsinki Final Act. It would permit the continued exclusion of terrorists and others who seek entry to engage in illegal activity or other activity detrimental to American security or whose entry or presence in the United States would be detrimental to the national interest.

Nothing in this recommendation would disturb the provisions of the Immigration and Nationality Act^{6/} which provide clear and necessary authority to exclude aliens who are believed to be coming to the United States to "engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, [or] public disorder, or in other activity subversive to the national security."^{7/} The recommendation also leaves undisturbed that portion of the Act which permits the exclusion of those persons who would come to the United States to engage in "activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."^{8/} Furthermore, this recommendation would leave intact that portion of the Act providing that:

"Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."^{9/}

None of these provisions would be disturbed by the proposed standard.

What would be directly affected by the proposed standard is the so-called "ideological exclusion" provision of the Act. Under this anachronistic statutory provision, promulgated under the McCarran-Walter Act during the infamous McCarthy era and its attendant hysteria, an alien is ineligible to receive a visa to enter the United States whenever, among other grounds, a consular officer or the Attorney General has reason to believe that the alien is an anarchist, a member of a communist or totalitarian party, advocates the doctrines of world communism or the establishment of a totalitarian dictatorship, or belongs to or is affiliated with an organization that publishes or distributes materials espousing such doctrines.^{10/} This provision of the law does not require a finding that the alien's admission,

presence in the United States or activities in the United States would cause injury. The simple fact that an alien holds -- or once held -- any of the enumerated beliefs or belongs or once belonged to a proscribed organization requires exclusion unless a waiver is granted.

These provisions apply to foreign nationals who seek permanent residency, as well as those who wish to enter the United States for short, temporary visits. According to the Immigration and Naturalization Service, 8,000 people from 98 countries are currently restricted from entering this country because of their political beliefs or associations. In 1983, approximately 700 persons were excluded under Sec. 212(a)(28).^{11/} Others simply refuse to apply or to provide information about their political activities.

The McCarran-Walter Act damages our reputation in the world by appearing to suggest a fear of ideas and exclusion of individuals solely because of their beliefs. The American public is also denied access to non-political scholarly and cultural presentations when foreign artists and writers decline to apply for a waiver or receive permission to enter the country too late to engage in planned activities.

In 1977, Congress passed an amendment to the McCarran Act with the specific full purpose of achieving greater compliance with the Helsinki Act's basic principle of freedom of international travel.^{12/} The amendment addresses visa denials based on that section of the Act which denies visas to aliens who are affiliated with a communist or totalitarian party, or a related organization.^{13/} Under the amendment, the Secretary of State must recommend a waiver to the Attorney General to permit such aliens to enter the United States unless the Secretary of State finds and so certifies to both Houses of Congress that the alien's admission "would be contrary to the security interests of the United States."^{14/} However, the effect of this amendment has not been as extensive as some thought it would be. Although it has removed some of the admission barriers, it applies on its face only to the exclusion provisions relating to membership and not to those related to beliefs.

The proposed standard would require -- subject to the enumerated exceptions -- that Section 212(a)(28) not apply to visitors seeking entry into the United States for the purpose of meeting with Americans. The result would be that the Government would be neither required nor permitted to exclude aliens seeking to visit the United States based simply on their current or past political associations or beliefs. Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28). (Since the principle applies only to visitors coming to the United States at the invitation of Americans it would not apply to applications for permanent resident status; they could still be denied on the basis of political beliefs or associations.)

The standard would simply shift the presumption. It makes it clear that this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or other activity in which the Government believes they intend to engage would harm the interests of the United States, including foreign policy interests. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation nor of the Government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.

In testimony before the House Judiciary Subcommittee on Immigration and in a letter by the Legal Adviser of the State Department commenting on an earlier draft of this report, the current Administration has, while not endorsing repeal of Section 28, indicated that its primary concern would be satisfied if it maintained the right to exclude aliens if their visit to the United States would cause injury to the foreign policy or other interests of the United States.^{15/} The proposed standard would not in any way limit this authority. Furthermore, in adopting this principle, the ABA would not be taking any position on whether judicial review of visa denials is appropriate, and if so, under what circumstances.

CONCLUSION

This recommendation recognizes the crucial importance of preserving the ability of our Government to protect our national security, safety, and welfare, while at the same time advocating a limited revision of law to codify the general principle that the Government should not exclude foreign visitors from the United States solely on the basis of their political beliefs. Removing this anachronistic provision of the McCarran-Walter Act would strengthen our constitutional system by ensuring Americans access to foreign ideas and people, making possible a more fully informed and politically sophisticated citizenry.

Respectfully submitted,

Abner J. Mikva, Chairperson
Section of Individual Rights
and Responsibilities

John Norton Moore, Chairman
Standing Committee on Law and
National Security

FOOTNOTES

#1- New York Times, Jan. 17, 1984, at A.8.

#2- New York Times, Jan. 13, 1986, at A.1

#3- Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1975. In order to implement these commitments in the section on "Co-operation in Humanitarian and Other Fields," the Final Act contains a number of specific commitments to facilitate the movement of people and information. See "Inhibiting Public Debate: U.S. Violations of the Helsinki Accords," A Helsinki Watch Report, May 1984.

#4- New York Times v. Sullivan, 376 U.S. 254, 270 (1964), quoting Learned Hand in United States v. Associated Press 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).

#5- Adoption of the recommendation would be consistent with and a logical extension of three previous policies adopted by the Association. In August of 1983, the House of Delegates adopted a resolution recommending to Congress that any legislation which would give the President powers to act in an immigration emergency should protect the right to travel. Further, on two occasions (August 1977 and February 1978), the House urged support for the implementation of the Helsinki Accords, which contain the provisions on freer exchanges of information and movement of persons quoted in the text above.

#6- 8 U.S.C. Sec. 1101 et seq. This statute governs the entry of both visitors and immigrants into the United States.

#7- 8 U.S.C. Sec. 1182(a)(29).

#8- 8 U.S.C. Sec. 1182(a)(27).

#9- 8 U.S.C. Sec. 1182(f).

#10- These "ideological exclusions" provisions are contained in 8 U.S.C. Sec. 1182(a)(28).

#11- Letter from Davis R. Robinson, State Department Legal Adviser to Professor John Norton Moore, July 3, 1984. p.2 (Hereinafter State Dept. Letter).

#12- See 22 U.S.C. Sec. 2691(a).

#13- See 8 U.S.C. Sec. 1182(a)(28).

#14- 22 U.S.C. Sec. 2691(a). The McGovern Amendment supplements a waiver procedure previously existing in the law. When the McCarran Act was initially enacted, Congress recognized that cases might arise where extenuating circumstances justified the temporary admission of otherwise inadmissible aliens under the statute. Thus, under the Act, a consular officer or the Secretary of State has discretionary authority to recommend that an alien's ineligibility to receive a visa be waived, and the Attorney General has the discretionary authority to grant the waiver. 8 U.S.C. Sec. 1182(d)(3).

#15- State Department Letter, p.4.

0341j

General Information Form
To Be Appended to Reports with Recommendations

No. _____

Submitting Entity Sect. of Individual Rights & Responsibilities
Stndg. Committtee on Law & Nat'l. Security

Submitted By Abner J. Mikva, Chairperson, I.R.&R. Section
John Norton Moore, Chair, St.Cm. on Law & Nat. Sec.

1. Summary of Recommendation(s)

This revised version of Recommendation #103 deletes parts 1(b) and 2 of the original Recommendation #103 now appearing in the current bound volume of recommendations and reports pending before the House.

Revised Recommendation #103 attached hereto recommends that United States law concerning visa denials should conform to the following standard:

An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current political beliefs or political associations or on the basis of the expected content of the person's statements in the United States.

However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or activity in which the government believes they intend to engage, would harm the interests of the United States, including the foreign relations of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country, nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation, nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.

Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28).

2. Approval by Submitting Entity.

The original principles underlying this recommendation were approved by the Council of the Section of Individual Rights and Responsibilities on May 11-12, 1984. The report with recommendations printed in the bound volume of House recommendations (#103) was approved for submission to the House of Delegates by the section council on May 3-4, 1985, in Boston, Massachusetts.

Recommendation #103 (revised) attached hereto was approved by the Executive Committee of the IRR Section and the Council of the Standing Committee of Law and National Security pursuant to telephone polls conducted during January, 1986.

3. Background. (Previous submission to the House or relevant Association position.)

Adoption of the recommendation would be consistent with and a logical extension of three previous policies adopted by the Association. In August of 1983, the House of Delegates adopted a resolution recommending to Congress that any legislation which would give the President powers to act in an immigration emergency should protect the right to travel. Further, on two occasions (August 1977 and February 1978), the House urged support for the implementation of the Helsinki Accords, which contain the provisions on freer exchanges of information and movement of persons quoted in the text above.

Initially, a resolution (consisting of four statements of principle) was submitted to the House of Delegates for its consideration in August, 1984, but was withdrawn by the I.R. & R. Section at the request of the Standing Committee on Law and National Security and the Section of International Law and Practice to allow time for further study and negotiation. A similar four-part resolution was resubmitted to the House of Delegates for consideration at the February, 1985, meeting. After consultation with other interested entities, the section agreed to withdraw parts 1, 2, and 4 and only submit part 3 to the House. The House adopted part 3 at the February, 1985, Midyear Meeting. Resubmission of parts 1 and 2 of the original resolution, amended since August, 1984 to reflect certain concerns of other interested ABA entities and U.S. government agencies, took place at the ABA Annual Meeting in July, 1985, but was again withdrawn to allow further consideration by interested entities.

The attached revised version of report and recommendation #103 was written in January, 1986 in response to further suggestions offered by representatives of the Standing Committee on Law and National Security and the U.S. Department of State. Recommendation #103 as printed in the bound volume of reports to the House was identical to the one submitted to the House in July, 1985.

4. Need for Action at This Meeting

Legislation incorporating the principles in this recommendation was introduced in the 99th Congress in May and November, 1985 (See #5 below). Hearings on the legislation will be held early next year (soon after the Midyear Meeting) in the House Foreign Affairs and Judiciary Committees. The U.S. Congressional Commission on Security and Cooperation in Europe will hold its first hearing on February 6, 1986 concerning the issue of U.S. denial of visas on grounds of political beliefs, ideology or foreign policy reasons. Since the ABA does not now have any policies which would allow it to testify on such legislation, it would be timely for the House of Delegates to act on this matter at the 1986 Midyear Meeting.

5. Status of Legislation. (If applicable)

Congressman Barney Frank (D.- Mass.) introduced his bill regarding visa restrictions (H.R. 2361) on May 6, 1985. This bill has fifty-eight bipartisan co-sponsors, and was referred to the House Judiciary Committee. Congressman Howard Berman (D. Calif.) introduced his bill on the second principle (H.R. 3825) on November 21, 1985. This bill has one co-sponsor (Congressman Frank),

and was referred to the House Committee on Foreign Affairs. Hearings on the legislation are planned for 1986 by both the House Judiciary and Foreign Affairs Committees. In the previous Congress, in the House of Representatives, H.R. 5227, which dealt in part with ideological exclusions, was the subject of a hearing on June 28, 1984, in the House Judiciary Subcommittee on Immigration, Refugees and International Law.

6. Financial Information. (Estimate of funds required, if any.)

None

7. Conflict of Interest (If applicable)

None

8. Referrals

A copy of this revised report and recommendation was sent to each member of the ABA House of Delegates and Board of Governors, as well as to the chairpersons of all ABA sections and divisions and the chairs of the Standing Committees on Law and National Security and World Order Under Law, on January 31, 1986. All members of the Council of the Standing Committee on Law and National Security received a copy of the revised recommendation and report in mid-January, 1986 prior to their being polled on whether to authorize co-sponsorship. In addition, a copy of report with recommendation No. 103 as printed in the bound volume of reports to the House was sent to the chairpersons and staff liaisons of each of the ABA's member sections and divisions, as well as to the chair of the ABA Standing Committee on Law and National Security and Standing Committee on World Order Under Law in December, 1985. A copy of this revised version as well as the original version as it appears in the bound volume have also been sent to the directors for the ABA Division of Communications, Governmental Affairs Group, Public Services Group, and Professional Services Group.

9. Contact Person (Prior to Meeting)

Philip A. Lacovara
1201 Pennsylvania Ave., N.W., Suite 300
Washington, D.C. 20004
(202) 626-6262

10. Contact Person (Who will present the report to the House)

Martha W. Barnett, Section Delegate
P.O. Drawer 810
Tallahassee, Florida 32302
(904) 224-7000

1237j

ADMINISTRATION STATEMENT IN SUPPORT OF
ABA RECOMMENDATION #103 (REVISED)
CONCERNING UNITED STATES VISA POLICY

The Administration supports revised Recommendation #103 in principle. We believe that aliens who are invited to speak or otherwise participate in an exchange of ideas in this country should not be denied nonimmigrant visas solely on the basis of past or current political beliefs or political associations, or on the basis of the expected content their statements here. Recommendation 103 reflects Executive Branch policy, in that we do not exclude nonimmigrant aliens from the United States for purely ideological reasons.

In practice, the so-called McGovern Amendment, 22 U.S.C. § 2691, all but eliminated the concerns to which Recommendation 103 addresses itself, since virtually all nonimmigrant aliens who might otherwise be statutorily ineligible for admission to the United States solely because of their political views or associations currently receive routine waivers of ineligibility. We agree, however, that the waiver process made necessary by § 2691 is offensive to many people, and a sterile and wasteful exercise.

Administration support for the principles stated in Recommendation 103 does, of course, not imply support for any specific revision of 8 U.S.C. § 1182 (a)(28). That section must be revised in a way that would preserve the Executive's existing ability to exclude terrorist and other aliens whose presence we believe would be potentially damaging to important national interests.

DRAFT PROPOSED AMENDMENT OF 8 U.S.C. § 1182 (a) (28)
TO CONFORM TO THE PRINCIPLE STATED IN
ABA RECOMMENDATION #103 (REVISED) WHILE PRESERVING
EXECUTIVE BRANCH POWERS TO EXCLUDE
ALIENS IN THE NATIONAL INTEREST

8 U.S.C. § 1182 (a) (28) ...

(J) Any alien who is within any of the classes described in subparagraphs (A), (B), (C), (D), and (E) of this paragraph shall not be ineligible to receive a visa, provided such alien is properly classifiable as a nonimmigrant under Section 101 (a) 15. However, the Secretary of State or the Attorney General may in their discretion deny to any alien or class of aliens the benefits of this subsection if they determine that the entry of such alien or class of aliens would be detrimental to the national security.

THE WHITE HOUSE

WASHINGTON

February 4, 1986

MEMORANDUM FOR ABRAHAM L. SOFAER
LEGAL ADVISER
U.S. DEPARTMENT OF STATE

FROM: FRED F. FIELDING *ORIGINAL SIGNED BY FFF for FFF*
COUNSEL TO THE PRESIDENT

SUBJECT: ABA Draft Resolution on the
Free Flow of Information

This responds to your request for my views on an Administration position with respect to the draft American Bar Association resolution on 8 U.S.C. § 1182(a)(28). I will defer to the members of the Cabinet with substantive responsibility in this area -- the Secretary of State, the Attorney General, and the Director of Central Intelligence. I would emphasize, however, that the affected agencies should independently verify that repeal of 8 U.S.C. § 1182(a)(28) would not affect the ability of the United States Government to exclude aliens for foreign policy reasons.

The ABA background material contends that this is so, but of the alternative provisions they cite, one, 8 U.S.C. § 1182(a)(29), is basically limited to illegal activities, and another, 8 U.S.C. § 1182(f), requires a Presidential proclamation and is difficult if not impossible to apply in individual cases. That leaves only 8 U.S.C. § 1182(a)(27), which on its face permits exclusion of aliens "who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States...to engage in activities which would be prejudicial to the public interest..." I do not know, however, how the courts have interpreted this provision, or indeed if it has been tested. These questions must be carefully addressed before we support a repeal of 8 U.S.C. § 1182(a)(28), since such a repeal would force us to rely on 8 U.S.C. § 1182(a)(27) exclusively in foreign policy cases.

If a decision is made to support repeal or modification of 8 U.S.C. § 1182(a)(28), I question the desirability of doing so solely or principally in the context of ABA proceedings. Rather than letting the ABA control this issue, it would seem preferable to seize the initiative and submit our own proposals to Congress, stealing some thunder from those who hardly support the Administration. This approach would also better enable us to control the specific statutory language of any repeal or modification.

cc: William Casey
Edwin Meese

FFF:JGR:aea 2/4/86
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

February 4, 1986

MEMORANDUM FOR FRED F. FIELDING
RICHARD A. HAUSER

FROM: JOHN G. ROBERTS *JGR*
SUBJECT: ABA Draft Resolution on the
Free Flow of Information

State Legal Adviser Abraham Sofaer has asked you, the Attorney General, and the Director of Central Intelligence for comments as soon as possible on an Administration position on an American Bar Association proposal to repeal the ideological exclusion provision of the McCarran-Walter Act of 1952. That provision, 8 U.S.C. § 1182(a)(28) [Tab A], specifies that aliens who are anarchists, communists, advocates of communism or the violent overthrow of the United States Government, or members of organizations in these categories, are ineligible for visas and may be excluded from the United States. The McGovern Amendment of 1977, 22 U.S.C. § 2691(a) [Tab B], requires the Secretary of State to recommend to the Attorney General that he grant a waiver to an alien otherwise excludable due to membership in a prohibited organization, or, if the Secretary of State determines that the admission of the alien would be contrary to U.S. security interests, to so report to Congress.

According to Sofaer, State has never not recommended a waiver, and Justice has granted waivers in all but one instance. On this basis, Sofaer contends the statutory process is "time-consuming, expensive, and sterile," and that Administration practice is consistent with a repeal of 8 U.S.C. § 1182(a)(28). Sofaer also points out, however, that some 47,000 visas are denied on the basis of 8 U.S.C. § 1182(a)(28) each year. He does not specify how many of the 47,000 go through the waiver process. If a significant percentage do not, then Sofaer's assertion that the provision serves no purpose may be ill-founded.

The ABA Resolution, sponsored by a section chaired by Judge Abner Mikva, recommends amending 8 U.S.C. § 1182(a)(28) so that past or current beliefs or associations, or expected content of an alien's speech, not be the basis for exclusion. According to the ABA discussion draft, an alien could still be excluded if he were believed to be entering the United States to engage in espionage or sabotage, 8 U.S.C. § 1182(a)(29), or activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States, 8 U.S.C. § 1182(a)(27). The ABA draft also notes the President may,

pursuant to 8 U.S.C. § 1182(f), exclude by proclamation aliens or classes of aliens if their entry would be detrimental to U.S. interests.

I do not know if you wish to make a specific recommendation to Sofaer on the merits. I would in any event insist that the officials with responsibility for administering these provisions guarantee that exclusion for foreign policy reasons would be just as readily available (and defensible in court) without 8 U.S.C. § 1182(a)(28) as with it, and not simply take Abner Mikva's word for it. This means that 8 U.S.C. § 1182(a)(27) must be fully usable for foreign policy exclusions, since 8 U.S.C. § 1182(a)(29) is limited to illegal activities, and 8 U.S.C. § 1182(f), involving a Presidential proclamation excluding all aliens or classes of aliens, is unworkable with respect to individual cases. I would also inquire why we are trailing after the ABA on this. If Sofaer thinks repeal of 8 U.S.C. § 1182(a)(28) is a good idea, we should propose it and submit our own bill, rather than simply reacting to what Abner Mikva and the ABA do.

Legislative History. For legislative history and purpose of Pub.L. 96-465, see 1980 U.S. Code Cong. and Adm. News, p. 4419. See, also, Pub.L. 97-241, 1982 U.S. Code Cong. and Adm. News, p. 65.

West's Federal Practice Manual.
Department of State, see § 1.

§§ 2687 to 2696

Codification. Sections 1 to 34 of Act Aug. 1, 1956, c. 841, were designated as "Title I" of such

Act by Pub.L. 97-241, Title II, § 202(a), Aug. 24, 1982, 96 Stat. 287.

§ 2691. Nonimmigrant visas

(a) Applications by excludible aliens

For purposes of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for purposes of encouraging other signatory countries to comply with those provisions, the Secretary of State should, within 30 days of receiving an application for a nonimmigrant visa by any alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such alien, unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate. Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization.

(b) Nonadmission of labor organization representatives of a totalitarian state

This section does not apply to representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state.

(c) Nonadmission of aliens connected with Palestine Liberation Organization

This section does not apply with respect to any alien who is a member, officer, official, representative, or spokesman of the Palestine Liberation Organization.

(d) Waiver recommendations

The Secretary of State may refuse to recommend a waiver for aliens from signatory countries which are not in substantial compliance with the provisions of the Helsinki Final Act, particularly the human rights and humanitarian affairs provisions.

(As amended Aug. 15, 1979, Pub.L. 96-60, Title I, § 109, 93 Stat. 397.)

References in Text. For explanation of the Helsinki Final Act, referred to in subsec. (d), see note under section 3002 of this title.

Codification. Sections 1 to 34 of Act Aug. 1, 1956, c. 841, were designated as "Title I" of such Act by Pub.L. 97-241, Title II, § 202(a), Aug. 24, 1982, 96 Stat. 282.

1979 Amendment. Subsec. (a). Pub.L. 96-60, § 109(1), designated existing provisions as subsec. (a).

Subsecs. (b) to (d). Pub.L. 96-60, § 109(2), added subsecs. (b) to (d).

Reciprocity on Imposition of Travel Restrictions. Section 126 of Pub.L. 95-426, as amended by Pub.L. 98-464, Title X, § 1011 (a)(1), Nov. 22, 1983, 97 Stat. 1061, provided that:

[See main volume for text of (a) and (b)]

[(c) Repealed. Pub.L. 98-164, Title X, § 1011 (a)(1), Nov. 22, 1983, 97 Stat. 1061]

[See main volume for text of (d)]

Legislative History. For legislative history and purpose of Pub.L. 96-60, see 1979 U.S. Code Cong. and Adm. News, p. 982.

§ 2692. Compensation for persons participating in State Department proceedings; availability of funds

Codification. Sections 1 to 34 of Act Aug. 1, 1956, c. 841, were designated as "Title I" of such

Act by Pub.L. 97-241, Title II, § 202(a), Aug. 24, 1982, 96 Stat. 282.

ous territory or adjacent islands, having arrived there on a vessel or aircraft of a nonsignatory line, or if signatory, a noncomplying transportation line under section 1228(a) of this title and who have not resided for at least two years subsequent to such arrival in such territory or adjacent islands;

(25) Aliens (other than aliens who have been lawfully admitted for permanent residence and who are returning from a temporary visit abroad) over sixteen years of age, physically capable of reading, who cannot read and understand some language or dialect;

(26) Any nonimmigrant who is not in possession of (A) a passport valid for a minimum period of six months from the date of the expiration of the initial period of his admission or contemplated initial period of stay authorizing him to return to the country from which he came or to proceed to and enter some other country during such period; and (B) at the time of application for admission a valid non-immigrant visa or border crossing identification card;

(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;

(28) Aliens who are, or at any time have been, members of any of the following classes:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided*. That nothing in this paragraph, or in any other provision of this chapter, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and gov-

ernmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization.

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 786 of Title 50, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization:

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv)

sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subparagraph (G) of this paragraph;

(I) Any alien who is within any of the classes described in subparagraphs (B)–(H) of this paragraph because of membership in or affiliation with a party or organization or a section, subsidiary, branch, affiliate, or subdivision thereof, may, if not otherwise ineligible, be issued a visa if such alien establishes to the satisfaction of the consular officer when applying for a visa and the consular officer finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes, or (ii) (a) since the termination of such membership or affiliation, such alien is and has been, for at least five years prior to the date of the application for a visa, actively opposed to the doctrine, program, principles, and ideology of such party or organization or the section, subsidiary, branch, or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. Any such alien to whom a visa has been issued under the provisions of this subparagraph may, if not otherwise inadmissible, be admitted into the United States if he shall establish to the satisfaction of the Attorney General when applying for admission to the United States and the Attorney General finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and when necessary for such purposes, or (ii) (a) since the termination of such membership or affiliation, such alien is and has been, for at least five years prior to the date of the application for admission actively opposed to the doctrine, program, principles, and ideology of such party or organization or the section, subsidiary, branch, or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. The Attorney General shall promptly make a detailed report to the Congress in the case of each alien who is or shall

be admitted into the United States under (ii) of this subparagraph.

(29) Aliens with respect to whom the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security, (B) engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States, by force, violence, or other unconstitutional means, or (C) join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under section 786 of Title 50:

(30) Any alien accompanying another alien ordered to be excluded and deported and certified to be helpless from sickness or mental or physical disability or infancy pursuant to section 1227(e) of this title, whose protection or guardianship is required by the alien ordered excluded and deported:

(31) Any alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.

Nonapplicability of subsection (a) (25)

(b) The provisions of paragraph (25) of subsection (a) of this section shall not be applicable to any alien who (1) is the parent, grandparent, spouse, daughter, or son of an admissible alien, or any alien lawfully admitted for permanent residence, or any citizen of the United States, if accompanying such admissible alien, or coming to join such citizen or alien lawfully admitted, and if otherwise admissible, or (2) proves that he is seeking admission to the United States to avoid religious persecution in the country of his last permanent residence, whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against such alien or any group to which he belongs because of his religious faith. For the purpose of ascertaining whether an alien can read under paragraph (25) of subsection (a) of this section, the consular officers and immigration officers shall be furnished with slips of uniform size, prepared under direction of the Attorney General, each containing not less than thirty nor more than forty words in ordinary use, printed in plainly legible type, in one of the various languages or dialects of immigrants. Each alien may designate the particular language or dialect in which he desires the examination to be made and shall be required to read and understand the words printed on the slip in such language or dialect.

THE WHITE HOUSE

WASHINGTON

February 4, 1986

MEMORANDUM FOR ABRAHAM D. SOFAER
LEGAL ADVISER
U.S. DEPARTMENT OF STATE

FROM: FRED F. FIELDING *Original signed by RAH for FFF*
COUNSEL TO THE PRESIDENT

SUBJECT: ABA Draft Resolution on the
Free Flow of Information

This responds to your request for my views on an Administration position with respect to the draft American Bar Association resolution on 8 U.S.C. § 1182(a)(28). I will defer to the members of the Cabinet with substantive responsibility in this area -- the Secretary of State, the Attorney General, and the Director of Central Intelligence. I would emphasize, however, that the affected agencies should independently verify that repeal of 8 U.S.C. § 1182(a)(28) would not affect the ability of the United States Government to exclude aliens for foreign policy reasons.

The ABA background material contends that this is so, but of the alternative provisions they cite, one, 8 U.S.C. § 1182(a)(29), is basically limited to illegal activities, and another, 8 U.S.C. § 1182(f), requires a Presidential proclamation and is difficult if not impossible to apply in individual cases. That leaves only 8 U.S.C. § 1182(a)(27), which on its face permits exclusion of aliens "who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States...to engage in activities which would be prejudicial to the public interest..." I do not know, however, how the courts have interpreted this provision, or indeed if it has been tested. These questions must be carefully addressed before we support a repeal of 8 U.S.C. § 1182(a)(28), since such a repeal would force us to rely on 8 U.S.C. § 1182(a)(27) exclusively in foreign policy cases.

If a decision is made to support repeal or modification of 8 U.S.C. § 1182(a)(28), I question the desirability of doing so solely or principally in the context of ABA proceedings. Rather than letting the ABA control this issue, it would seem preferable to seize the initiative and submit our own proposals to Congress, stealing some thunder from those who hardly support the Administration. This approach would also better enable us to control the specific statutory language of any repeal or modification.

cc: William Casey
Edwin Meese

FFF:JGR:aea 2/4/86
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

February 4, 1986

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WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 / 1Name of Correspondent: Abraham D. Sofaer☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: ABA Draft Resolution on the Free Flow of
Information**ROUTE TO:****ACTION****DISPOSITION**

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>CUHOLL</u>		ORIGINATOR	<u>8610/128</u>			<u>1 / 1</u>
		Referral Note:	<u>for F3 signature</u>			
<u>CUAT18</u>		<u>D</u>	<u>8610/128</u>		<u>S</u>	<u>8610/129</u>
		Referral Note:				<u>ASAP</u>
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ACTION CODES:

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TO: The Secretary

THROUGH: P - Mr. Armacost

FROM: L - Abraham D. Sofaer
CA - Joan M. Clark

SUBJECT: ABA Draft Resolution on the Free Flow of
Information

ISSUE FOR DECISION

What position to take on an American Bar Association (ABA) resolution that recommends changes in U.S. laws which currently exclude aliens on purely ideological grounds.

ESSENTIAL FACTORS

Last summer, the ABA's Section of Individual Rights and Responsibilities ("IRR Section") submitted to the ABA House of Delegates a proposed resolution on "the free flow of information and ideas across the American border," together with a supporting report that was highly critical of past and current Executive Branch visa policy. Tab 2. That resolution, which was withdrawn by the IRR Section last July (in the midst of the Beirut TWA hostage incident) under strong Administration and ABA opposition, was resubmitted in December 1985 for consideration at the upcoming ABA winter session in Baltimore early next month.

DRAFT

Following discussions with representatives of the Department and other ABA sections, the IRR Section agreed to substitute a drastically revised proposal that accommodates all of the Department's major concerns and avoids the anti-Administration rhetoric of the earlier draft. Tab 3. In essence, the revised draft would, if adopted, represent formal ABA support for the principle that the U.S. should not exclude (nonimmigrant) aliens solely on the basis of their "past or current political beliefs or associations or on the basis of the expected content of [their] statements in the [U.S.]" -- a position that the Department ^{and the Administration follow} currently ~~applies~~ in practice. At the same time, however, it would recognize and preserve the Executive's broad authority to exclude aliens for substantive reasons, like membership in or affiliation with terrorist groups, involvement in terrorist activity, or potentially serious adverse foreign policy consequences.

Adoption of the resolution would require modification of section 212(a)(28) of the 1952 McCarran-Walter Act -- the so-called "ideological exclusion provision." The Administration labors under the charge -- in the media, the courts and the Congress -- that we exclude and humiliate aliens solely because we disagree with their abstract political beliefs. In fact, we currently deny about ^{47,000} ~~26,000~~ nonimmigrant (NIV) visas each year based solely upon membership in or affiliation with a "proscribed organization". However, all administrations have historically issued waivers in virtually

all such cases. Moreover, since Congress enacted the so-called "McGovern Amendment" (22 U.S.C. §2691) in 1977, the Secretary of State has been required by law to either (i) recommend waivers of this statutory ineligibility to the Attorney General within 30 days of receiving an NIV application or (ii) certify in writing to the House and Senate a determination that the admission of such alien "would be contrary to the security interests of the United States." ^{1/}

No Secretary of State has ever made a McGovern Amendment certification to Congress. This means that the Department (CA/VO) routinely transmits the statutorily mandated waiver recommendation to Justice (INS) in your name, and Justice invariably ^{2/} approves your recommendation. ~~Since waivers are issued in virtually every such case,~~ The result is a time-consuming, expensive, and sterile process. Thus, our current practice is consistent with amending section 212(a)(28) of the McCarran Act as recommended in the IRR Section's resolution.

^{1/} The McGovern Amendment expressly excludes from its coverage aliens who are involved with the PLO and ILO or who are from countries that the Secretary of State determines "are not in substantial compliance with the provisions of the Helsinki Final Act" The proposed resolution would permit us to continue excluding aliens who fall into these categories -- a point we would emphasize to the ABA in our formal comments on the proposal.

^{2/} Although in theory the Attorney General may reject your recommendation, he has only done so once to our knowledge, ~~and~~ ~~that~~ in a case where the aliens could have probably been excluded on some other grounds.

ANALYSIS OF OPTIONS

A. Oppose ABA Resolution.

The resolution has been extensively modified to accommodate significant concerns expressed by the Department. It states reasonable, common-sense principles that would be supported by the media and most Americans, and it will undoubtedly be adopted by the ABA unless the Administration can come up with sound opposing arguments. We have no opposing argument that makes any sense, except for the arguably symbolic value in having a declaration as to the undesirability of certain proscribed organizations on our statute books. Opposition will lend unwarranted respectability to charges that the Administration is engaged in an ideological campaign to deny Americans access to ideas with which the Administration disagrees, and would probably diminish our opportunities to forestall more drastic proposals, measures that could, if enacted into law, do real harm. We could, however, avoid *potential* trouble ~~with conservatism~~ by opposing the resolution's adoption ~~by the ABA~~ on the ground that the present system works well enough.

B. Take no Position Remain Neutral.

Neutrality is the safest course of action. It would be widely preceived as tacit Administration support for the resolution, and would virtually guarantee the Resolution's

passage, especially if accompanied by a statement from us that the statutory change called for would lead to the same result now required by existing legislation and practice. Neutrality ^{however,} would deny us an unparalleled opportunity to seize the initiative for the Administration by taking a principled ~~stand~~ ^{on} ~~approach to~~ the free speech issue. ~~On the other hand, it~~ ^{Furthermore, while neutrality} would be less controversial within the Administration, ~~though~~ it might nevertheless generate charges that State is "soft on communism."

C. Support the Resolution.

This option has significant advantages in that the resolution calls for changes that would confirm existing Department visa practice while simultaneously protecting our fundamental national security and foreign policy interests. It would also enable us to jettison the existing, costly and artificial waiver system.)

(It would at least partially defuse media criticism of our visa policies, might improve our chances for success in litigation, and would permit us to play a constructive role with respect to the development of legislative changes that will be necessary to implement the principle contained in the resolution. Moreover, it would be consistent with the response that the Department of Justice took last year regarding a related ABA resolution to liberalize the Foreign Agents Registration Act.

The downside to this option is that ideologues inside and outside the Administration ^{may} ~~will be tempted to take cheap shots~~ portray ~~the~~ the Department as "soft on Communism". This charge, although easy to refute in terms of logic, could be emotionally and politically explosive. Moreover, we should recognize that our support for the resolution would not eliminate altogether media criticism of, or court challenges to, our visa practices. For these reasons, this option should only be implemented after coordination with Justice and the NSC, and we ^Could proceed in a tentative manner to see if the Administration generally supports the result.

Recommendation:

That you approve Option C, and authorize transmittal of the Platt-Poindexter at Tab 1.

Approve _____

Disapprove _____

Alternatively, that you approve Option B.

Approve _____ Disapprove _____

Attachments:

1. Platt-Poindexter Memo
2. Original Resolution & Accompanying Report
3. Revised Resolution and Accompanying Report

Drafter: L/CA:JHergen

Clearances: HA:RSchifter
PA:BKalb

DISCUSSION DRAFT

1/22/86

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that United States law concerning visa denials should conform to the following standard:

An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current political beliefs or political associations or on the basis of the expected content of the person's statements in the United States.

However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or activity in which the government believes they intend to engage, would harm the interests of the United States, including the foreign relations of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country, nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation, nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.

Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28).

REPORT

"Expanding contacts across borders and permitting a free exchange or interchange of information and ideas increase confidence; sealing off one's people from the rest of the world reduces it." [President Ronald Reagan, January 17, 1984]1/

"We will never deny physical access to anyone because of the beliefs he or she may espouse." [U.S. Secretary of State George Shultz, January 12, 1986] 2/

"The participating states . . . make it their aim to facilitate free movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating states . . .

* * * *

The participating states . . . make it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage cooperation in the field of information and the exchange of information - with other countries . . . " [Helsinki Final Act of 1975]3/

"The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." [Supreme Court in New York Times v. Sullivan]4/

After extensive consultation with interested ABA and governmental entities, this recommendation and report have been substantially clarified and redrafted since their original submission to the ABA House of Delegates in August, 1984. The adoption of this principle would call for a conforming of existing law to current practice as described by the Administration. The resulting statutory change would reflect our Nation's commitment to a free exchange of ideas. It would leave the Government free to continue to deny visas, as it does now, when it believes that granting the visa would lead to harm to the interests of the Nation, including its foreign policy

interests. The appropriate role, if any, of judicial review of visa denials is not addressed by the recommendation.

This recommendation makes it clear that the intent is to preserve the ability of our Government to combat terrorism and otherwise protect the national security and other interests of the United States by denying visas when the interests of the United States, including foreign policy interests, are affected. Numerous caveats and exceptions have been included in the recommendation to make it absolutely clear that nothing being proposed here would prevent our Government from protecting the interests of the United States.

The recommendation at the same time strikes a balance in the interest of preserving the rule of law by urging the removal of an anachronistic statutory provision so that visits to the United States by foreign speakers is facilitated when not harmful to our national interests. The recommendation is also consistent with numerous previous policies adopted by the ABA House of Delegates 5/.

This revised report has also been redrafted to make it absolutely clear that it is not meant to imply any criticism of the Administration, the U.S. Department of State or other governmental entities. In fact, this principle is consistent with current practice as described by representatives of the Administration to congressional committees and to our Section, and with Secretary of State Shultz's recent statement to the PEN conference quoted above. Indeed, this recommendation seeks to preserve as much as possible of our constitutional tradition of permitting our citizens access to information and ideas brought to our shores by citizens of other countries, except where such visits would harm our national interest. This American tradition of generally permitting travel and the exchange of information and ideas across the American border has historically distinguished our society from totalitarian governments.

As President Reagan observed in 1984 and as our Nation observed when it became a signatory to the Helsinki Final Act in 1975, a free exchange of information and ideas -- subject to narrowly defined exceptions to protect certain national interests -- is crucial to the health of our democratic society. Through open and robust debate in the "marketplace of ideas," American citizens inform themselves of policy choices which shape and affect their lives. The flow of persons in and out of the United States is an important part of this exchange.

The problem which this resolution addresses is that current United States law, on its face, provides for the denial of visas to persons solely because of certain political beliefs or current or past memberships or associations. Accordingly, the recommendation would require eliminating the

narrow ideological remnants of the McCarthy era, while permitting the exclusion of aliens whose activities endanger the welfare, safety, security or foreign policy interests of the United States. This principle would safeguard the American public's right to receive ideas from abroad by eliminating barriers to unpopular foreign political beliefs and philosophies, and would support our declared intentions under the Helsinki Final Act. It would permit the continued exclusion of terrorists and others who seek entry to engage in illegal activity or other activity detrimental to American security or whose entry or presence in the United States would be detrimental to the national interest.

Nothing in this recommendation would disturb the provisions of the Immigration and Nationality Act^{6/} which provide clear and necessary authority to exclude aliens who are believed to be coming to the United States to "engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, [or] public disorder, or in other activity subversive to the national security."^{7/} The recommendation also leaves undisturbed that portion of the Act which permits the exclusion of those persons who would come to the United States to engage in "activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."^{8/} Furthermore, this recommendation would leave intact that portion of the Act providing that:

"Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."^{9/}

None of these provisions would be disturbed by the proposed standard.

What would be directly affected by the proposed standard is the so-called "ideological exclusion" provision of the Act. Under this anachronistic statutory provision, promulgated under the McCarran-Walter Act during the infamous McCarthy era and its attendant hysteria, an alien is ineligible to receive a visa to enter the United States whenever, among other grounds, a consular officer or the Attorney General has reason to believe that the alien is an anarchist, a member of a communist or totalitarian party, advocates the doctrines of world communism or the establishment of a totalitarian dictatorship, or belongs to or is affiliated with an organization that publishes or distributes materials espousing such doctrines.^{10/} This provision of the law does not require a finding that the alien's admission,

presence in the United States or activities in the United States would cause injury. The simple fact that an alien holds -- or once held -- any of the enumerated beliefs or belongs or once belonged to a proscribed organization requires exclusion unless a waiver is granted. In vetoing the Act in 1952, President Harry Truman noted that "seldom has a bill exhibited the distrust evidenced here for citizens and aliens alike."^{11/}

These provisions apply to foreign nationals who seek permanent residency, as well as those who wish to enter the United States for short, temporary visits. According to the Immigration and Naturalization Service, 8,000 people from 98 countries are currently restricted from entering this country because of their political beliefs or associations. In 1983, approximately 700 persons were excluded under Sec. 212(a)(28).^{12/} Others simply refuse to apply or to provide information about their political activities.

The McCarran-Walter Act damages our reputation in the world by appearing to suggest a fear of ideas and exclusion of individuals solely because of their beliefs. The American public is also denied access to non-political scholarly and cultural presentations when foreign artists and writers decline to apply for a waiver or receive permission to enter the country too late to engage in planned activities.

In 1977, Congress passed an amendment to the McCarran Act with the specific full purpose of achieving greater compliance with the Helsinki Act's basic principle of freedom of international travel.^{13/} The amendment addresses visa denials based on that section of the Act which denies visas to aliens who are affiliated with a communist or totalitarian party, or a related organization.^{14/} Under the amendment, the Secretary of State must recommend a waiver to the Attorney General to permit such aliens to enter the United States unless the Secretary of State finds and so certifies to both Houses of Congress that the alien's admission "would be contrary to the security interests of the United States."^{15/} However, the effect of this amendment has not been as extensive as some thought it would be. Although it has removed some of the admission barriers, it applies on its face only to the exclusion provisions relating to membership and not to those related to beliefs.

The proposed standard would require -- subject to the enumerated exceptions -- that Section 212(a)(28) not apply to visitors seeking entry into the United States for the purpose of meeting with Americans. The result would be that the Government would be neither required nor permitted to exclude aliens seeking to visit the United States based simply on their current or past political associations or beliefs. Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28). (Since the principle applies only to visitors coming to the United States at the invitation of Americans it would not apply to applications for permanent resident status; they could still be denied on the basis of political beliefs or associations.)

The standard would simply shift the presumption. It makes it clear that this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or other activity in which the Government believes they intend to engage would harm the interests of the United States, including foreign policy interests. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation nor of the Government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.

In testimony before the House Judiciary Subcommittee on Immigration and in a letter by the Legal Adviser of the State Department commenting on an earlier draft of this report, the current Administration has, while not endorsing repeal of Section 28, indicated that its primary concern would be satisfied if it maintained the right to exclude aliens if their visit to the United States would cause injury to the foreign policy or other interests of the United States.^{16/} The proposed standard would not in any way limit this authority. Furthermore, in adopting this principle, the ABA would not be taking any position on whether judicial review of visa denials is appropriate, and if so, under what circumstances.

CONCLUSION

This recommendation recognizes the crucial importance of preserving the ability of our Government to protect our national security, safety, and welfare, while at the same time advocating a limited revision of law to codify the general principle that the Government should not exclude foreign visitors from the United States solely on the basis of their political beliefs. Removing this anachronistic provision of the McCarran-Walter Act would strengthen our constitutional system by ensuring Americans access to foreign ideas and people, making possible a more fully informed and politically sophisticated citizenry.

Respectfully submitted,

Abner J. Mikva, Chairperson

February, 1986
0341j

FOOTNOTES

#1- New York Times, Jan. 17, 1984, at A.8.

#2- New York Times, Jan. 13, 1986, at A.1

#3- Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1975. In order to implement these commitments in the section on "Co-operation in Humanitarian and Other Fields," the Final Act contains a number of specific commitments to facilitate the movement of people and information. See "Inhibiting Public Debate: U.S. Violations of the Helsinki Accords," A Helsinki Watch Report, May 1984.

#4- New York Times v. Sullivan, 376 U.S. 254, 270 (1964), quoting Learned Hand in United States v. Associated Press 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).

#5- Adoption of the recommendation would be consistent with and a logical extension of three previous policies adopted by the Association. In August of 1983, the House of Delegates adopted a resolution recommending to Congress that any legislation which would give the President powers to act in an immigration emergency should protect the right to travel. Further, on two occasions (August 1977 and February 1978), the House urged support for the implementation of the Helsinki Accords, which contain the provisions on freer exchanges of information and movement of persons quoted in the text above.

✓ #6- 8 U.S.C. Sec. 1101 et seq. This statute governs the entry of both visitors and immigrants into the United States.

✓ #7- 8 U.S.C. Sec. 1182(a)(29).

✓ #8- 8 U.S.C. Sec. 1182(a)(27).

✓ #9- 8 U.S.C. Sec. 1182(f).

#10- These "ideological exclusions" provisions are contained in 8 U.S.C. Sec. 1182(a)(28).

#11- 98 Cong. Rec. 8082, 8084 (1952).

#12- Letter from Davis R. Robinson, State Department Legal Adviser to Professor John Norton Moore, July 3, 1984. p.2 (Hereinafter State Dept. Letter).

#13- See 22 U.S.C. Sec. 2691(a).

#14- See 8 U.S.C. Sec. 1182(a)(28).

#15- 22 U.S.C. Sec. 2691(a). The McGovern Amendment supports a waiver procedure previously existing in the law. When the McCarran Act was initially enacted, Congress recognized that cases might arise where extenuating circumstances justified temporary admission of otherwise inadmissible aliens under statute. Thus, under the Act, a consular officer or the Secretary of State has discretionary authority to recommend an alien's ineligibility to receive a visa be waived, and the Attorney General has the discretionary authority to grant a waiver. 8 U.S.C. Sec. 1182(d)(3).

#16- State Department Letter, p.4.

0341j

THE WHITE HOUSE

WASHINGTON

February 4, 1986

MEMORANDUM FOR FRED F. FIELDING
RICHARD A. HAUSER

FROM: JOHN G. ROBERTS *JGR*
SUBJECT: ABA Draft Resolution on the
Free Flow of Information

State Legal Adviser Abraham Sofaer has asked you, the Attorney General, and the Director of Central Intelligence for comments as soon as possible on an Administration position on an American Bar Association proposal to repeal the ideological exclusion provision of the McCarran-Walter Act of 1952. That provision, 8 U.S.C. § 1182(a)(28) [Tab A], specifies that aliens who are anarchists, communists, advocates of communism or the violent overthrow of the United States Government, or members of organizations in these categories, are ineligible for visas and may be excluded from the United States. The McGovern Amendment of 1977, 22 U.S.C. § 2691(a) [Tab B], requires the Secretary of State to recommend to the Attorney General that he grant a waiver to an alien otherwise excludable due to membership in a prohibited organization, or, if the Secretary of State determines that the admission of the alien would be contrary to U.S. security interests, to so report to Congress.

According to Sofaer, State has never not recommended a waiver, and Justice has granted waivers in all but one instance. On this basis, Sofaer contends the statutory process is "time-consuming, expensive, and sterile," and that Administration practice is consistent with a repeal of 8 U.S.C. § 1182(a)(28). Sofaer also points out, however, that some 47,000 visas are denied on the basis of 8 U.S.C. § 1182(a)(28) each year. He does not specify how many of the 47,000 go through the waiver process. If a significant percentage do not, then Sofaer's assertion that the provision serves no purpose may be ill-founded.

The ABA Resolution, sponsored by a section chaired by Judge Abner Mikva, recommends amending 8 U.S.C. § 1182(a)(28) so that past or current beliefs or associations, or expected content of an alien's speech, not be the basis for exclusion. According to the ABA discussion draft, an alien could still be excluded if he were believed to be entering the United States to engage in espionage or sabotage, 8 U.S.C. § 1182(a)(29), or activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States, 8 U.S.C. § 1182(a)(27). The ABA draft also notes the President may,

pursuant to 8 U.S.C. § 1182(f), exclude by proclamation aliens or classes of aliens if their entry would be detrimental to U.S. interests.

I do not know if you wish to make a specific recommendation to Sofaer on the merits. I would in any event insist that the officials with responsibility for administering these provisions guarantee that exclusion for foreign policy reasons would be just as readily available (and defensible in court) without 8 U.S.C. § 1182(a)(28) as with it, and not simply take Abner Mikva's word for it. This means that 8 U.S.C. § 1182(a)(27) must be fully usable for foreign policy exclusions, since 8 U.S.C. § 1182(a)(29) is limited to illegal activities, and 8 U.S.C. § 1182(f), involving a Presidential proclamation excluding all aliens or classes of aliens, is unworkable with respect to individual cases. I would also inquire why we are trailing after the ABA on this. If Sofaer thinks repeal of 8 U.S.C. § 1182(a)(28) is a good idea, we should propose it and submit our own bill, rather than simply reacting to what Abner Mikva and the ABA do.

THE WHITE HOUSE

WASHINGTON

February 4, 1986

MEMORANDUM FOR ABRAHAM D. SOFAER
LEGAL ADVISER
U.S. DEPARTMENT OF STATE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: ABA Draft Resolution on the
Free Flow of Information

This responds to your request for my views on an Administration position with respect to the draft American Bar Association resolution on 8 U.S.C. § 1182(a)(28). I will defer to the members of the Cabinet with substantive responsibility in this area -- the Secretary of State, the Attorney General, and the Director of Central Intelligence. I would emphasize, however, that the affected agencies should independently verify that repeal of 8 U.S.C. § 1182(a)(28) would not affect the ability of the United States Government to exclude aliens for foreign policy reasons.

The ABA background material contends that this is so, but of the alternative provisions they cite, one, 8 U.S.C. § 1182(a)(29), is basically limited to illegal activities, and another, 8 U.S.C. § 1182(f), requires a Presidential proclamation and is difficult if not impossible to apply in individual cases. That leaves only 8 U.S.C. § 1182(a)(27), which on its face permits exclusion of aliens "who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States...to engage in activities which would be prejudicial to the public interest..." I do not know, however, how the courts have interpreted this provision, or indeed if it has been tested. These questions must be carefully addressed before we support a repeal of 8 U.S.C. § 1182(a)(28), since such a repeal would force us to rely on 8 U.S.C. § 1182(a)(27) exclusively in foreign policy cases.

If a decision is made to support repeal or modification of 8 U.S.C. § 1182(a)(28), I question the desirability of doing so solely or principally in the context of ABA proceedings. Rather than letting the ABA control this issue, it would seem preferable to seize the initiative and submit our own proposals to Congress, stealing some thunder from those who hardly support the Administration. This approach would also better enable us to control the specific statutory language of any repeal or modification.

cc: William Casey
Edwin Meese

FFF:JGR:aea 2/4/86
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

February 20, 1986

MEMORANDUM FOR JUDY M. MANDEL
DEPUTY DIRECTOR
INTERNATIONAL INFORMATION POLICY
NATIONAL SECURITY COUNCIL

FROM: RICHARD A. HAUSER *Original signed by RAH*
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Proposed State and Administration
Position Concerning U.S. Visa Policy

You have asked for our views on a State Department proposal to support an American Bar Association resolution to the effect that aliens should not be excluded from entry on the basis of political beliefs or associations or the expected content of their speech. We have previously advised State that we will defer to the affected agencies -- in particular, Justice and CIA -- on the desirability of supporting the resolution. As we advised State, however, any change in 8 U.S.C. § 1182(a)(28) must not detract from the Government's authority to exclude aliens for foreign policy reasons. Any Administration statement or legislative proposal must be carefully analyzed to ensure it meets this test.

In my view, the statement proposed by the State Department is inadequate. The last sentence states we could not support any change in 8 U.S.C. § 1182(a)(28) "that would derogate from current ability to exclude terrorists and other aliens whose presence the Executive concludes would be potentially damaging to important national interests." State and ABA memoranda on this issue, however, have stressed that any change need not infringe on our ability to exclude aliens for "foreign policy reasons," a more flexible standard.

I would change the above-quoted language to "that would derogate from current authority to exclude terrorists or any other aliens whom the Executive concludes should be excluded for foreign policy reasons."

RAH/JGR:jmk
cc: RAHauser
JGRoberts
subject
chron.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 / 1Name of Correspondent: Judy Mandel☐ MI Mail Report

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Subject: Proposed State and Administration Position
Concerning U.S. Visa Policy

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<u>CUAT18</u>	<u>C</u>	<u>86102120</u>		<u>S</u>	<u>86102121</u>
	Referral Note:				<u>ASAP</u>
		<u>1 / 1</u>			<u>1 / 1</u>
	Referral Note:				
		<u>1 / 1</u>			<u>1 / 1</u>
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2/20

NATIONAL SECURITY COUNCIL

To: Fred Fielding
From: Judy + Mandel

May we please have
your comments/reaction
to the attached as
soon as possible.



Washington, D.C. 20520

February 18, 1986

MEMORANDUM FOR VADM JOHN M. POINDEXTER
THE WHITE HOUSE

SUBJECT: Proposed Department and Administration Position
Concerning U.S. Visa Policy

On February 10 the ABA House of Delegates unanimously adopted Resolution No. 103 (rev.) supporting the principle that aliens invited to the U.S. "to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current political beliefs or political associations or on the basis of the expected content of the person's statements in the [U.S.]." The Resolution calls for the revision of that provision of the 1952 McCarran-Walter Act that currently permits the exclusion of aliens for purely ideological reasons e.g., current or past membership in the Communist Party. 8 U.S.C. § 1182 (a)(28).

The Resolution essentially reflects current visa policy, and takes into account our national security and foreign policy concerns. Bill Casey and Ed Meese have reviewed the Resolution and agree that the Department and the Administration should support it in principle.

8 U.S.C. § 212 (a)(28) currently mandates that we declare about 47,000 aliens ineligible each year for admission to the U.S. solely because of their beliefs or associations. However, because of another law (22 U.S.C. § 2691), we routinely issue waivers to virtually all these aliens. This process is wasteful, subjects the Administration to unfounded charges of ideological censorship, hurts us in court, the Congress and the media, and serves no important national interest. We are satisfied that by expressing support for the principle of Resolution 103 we can reduce waste and criticism, as well as influence legislative changes in a manner that will best protect essential national security and foreign policy interests. Support for Resolution 103 could generate baseless assertions that the Administration is "soft on Communism." We believe we can easily refute such charges.

In light of the above, the Department intends to issue the attached Statement.

Nicholas Platt

Nicholas Platt
Executive Secretary

~~CONFIDENTIAL~~

Memorandum to Nicholas Platt

From: Rod McDaniel

Subject: Proposed State Department and Administration
Position Concerning U.S. Visa Policy

NSC concurs with the Department's proposed statement, and with the position outlined in you memo of February 18 on this subject.

In view of the many questions that will be raised by the Department's proposed statement, State, working with the Department of Justice, the INS and the CIA, should prepare additional guidance for use by Administration spokesman explaining current procedures and practices, reemphasizing that the statement would not weaken our ability to exclude those who are truly dangerous or potentially harmful to our interests. The package of additional guidance should be cleared by the concerned agencies, including the NSC, and made available to their spokesmen at the time the statement is to be released.

DECLASSIFIED
NLS F97-06711 #1
BY MSH NARA DATE 6/7/00

~~CONFIDENTIAL~~

Attachments:

Tab 1 - Resolution 103 (revised) and Accompanying Report

Tab 2 - Draft Statement

February , 1986

STATEMENT IN SUPPORT OF THE
AMERICAN BAR ASSOCIATION'S
FEBRUARY 10 RESOLUTION CONCERNING
UNITED STATES VISA POLICY

THE DEPARTMENT OF STATE AND THIS ADMINISTRATION STRONGLY SUPPORT THE PRINCIPLES EXPRESSED IN THE ABA'S RESOLUTION OF FEBRUARY 10 REGARDING UNITED STATES NONIMMIGRANT VISA POLICY.

THIS ADMINISTRATION IS COMMITTED TO THE PROPOSITION THAT ALIENS WHO ARE INVITED TO SPEAK OR OTHERWISE PARTICIPATE IN AN EXCHANGE OF IDEAS IN THIS COUNTRY SHOULD NOT BE DENIED NONIMMIGRANT VISAS SOLELY ON THE BASIS OF PAST OR CURRENT POLITICAL BELIEFS OR POLITICAL ASSOCIATIONS, OR ON THE BASIS OF THE EXPECTED CONTENT OF THEIR STATEMENTS HERE. IN THIS REGARD, THE RESOLUTION REFLECTS CURRENT ADMINISTRATION POLICY NOT TO EXCLUDE ALIEN SPEAKERS FROM THE UNITED STATES FOR PURELY IDEOLOGICAL REASONS.

WE BELIEVE THAT THE CURRENT RESOLUTION REPRESENTS A RESPONSIBLE AND PRAISEWORTHY STATEMENT OF FUNDAMENTAL NATIONAL PRINCIPLE THAT COULD ALSO RESULT IN SIGNIFICANT INCIDENTAL ADMINISTRATIVE ECONOMIES WITH RESPECT TO THE VISA PROCESS. FOR EXAMPLE, SUCCESSFUL IMPLEMENTATION OF THE RESOLUTION WOULD ENABLE US VASTLY TO SIMPLIFY THE CURRENT CUMBERSOME AND EXPENSIVE PROCEDURE UNDER WHICH WE PROCESS APPROXIMATELY 47,000 WAIVERS EACH YEAR.

WE ALSO AGREE WITH THE ABA'S REJECTION OF MORE EXTREME PROPOSALS IN THIS AREA THAT WOULD NOT HAVE SERVED THE NATIONAL INTEREST. IN PARTICULAR, WE NOTE THAT THE ABA DECLINED TO SUPPORT PREVIOUS VERSIONS OF RESOLUTION 103 THAT WE BELIEVE WOULD HAVE SUBSTANTIALLY WEAKENED THE EXECUTIVE'S ABILITY TO EXCLUDE ALIENS FROM THIS COUNTRY ON NATIONAL SECURITY AND FOREIGN POLICY GROUNDS.

OUR SUPPORT FOR THE RESOLUTION DOES NOT IMPLY SUPPORT FOR ANY SPECIFIC CHANGE IN EXISTING LAW. IN PARTICULAR, WE COULD NOT AGREE TO ANY CHANGE TO 8 U.S.C. § 1182 (a)(28) THAT WOULD DEROGATE FROM CURRENT ABILITY TO EXCLUDE TERRORISTS AND OTHER ALIENS WHOSE PRESENCE THE EXECUTIVE CONCLUDES WOULD BE POTENTIALLY DAMAGING TO IMPORTANT NATIONAL INTERESTS.

AMERICAN BAR ASSOCIATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
STANDING COMMITTEE ON LAW AND NATIONAL SECURITY
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that United States law concerning visa denials should conform to the following standard:

An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current political beliefs or political associations or on the basis of the expected content of the person's statements in the United States.

However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or activity in which the government believes they intend to engage, would harm the interests of the United States, including the foreign relations of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country, nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation, nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.

Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28).

REPORT

"Expanding contacts across borders and permitting a free exchange or interchange of information and ideas increase confidence; sealing off one's people from the rest of the world reduces it." [President Ronald Reagan, January 17, 1984]1/

"We will never deny physical access to anyone because of the beliefs he or she may espouse." [U.S. Secretary of State George Shultz, January 12, 1986] 2/

"The participating states . . . make it their aim to facilitate free movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating states . . .

* * * *

The participating states . . . make it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage cooperation in the field of information and the exchange of information - with other countries . . . " [Helsinki Final Act of 1975]3/

"The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." [Supreme Court in New York Times v. Sullivan]4/

After extensive consultation with interested ABA and governmental entities, this recommendation and report have been substantially clarified and redrafted since their original submission to the ABA House of Delegates in August, 1984. The adoption of this principle would call for a conforming of existing law to current practice as described by the Administration. The resulting statutory change would reflect our Nation's commitment to a free exchange of ideas. It would leave the Government free to continue to deny visas, as it does now, when it believes that granting the visa would lead to harm to the interests of the Nation, including its foreign policy

interests. The appropriate role, if any, of judicial review of visa denials is not addressed by the recommendation.

This recommendation makes it clear that the intent is to preserve the ability of our Government to combat terrorism and otherwise protect the national security and other interests of the United States by denying visas when the interests of the United States, including foreign policy interests, are affected. Numerous caveats and exceptions have been included in the recommendation to make it absolutely clear that nothing being proposed here would prevent our Government from protecting the interests of the United States.

The recommendation at the same time strikes a balance in the interest of preserving the rule of law by urging the removal of an anachronistic statutory provision so that visits to the United States by foreign speakers is facilitated when not harmful to our national interests. The recommendation is also consistent with numerous previous policies adopted by the ABA House of Delegates 5/.

This revised report has also been redrafted to make it absolutely clear that it is not meant to imply any criticism of the Administration, the U.S. Department of State or other governmental entities. In fact, this principle is consistent with current practice as described by representatives of the Administration to congressional committees and to our Section, and with Secretary of State Shultz's recent statement to the PEN conference quoted above. Indeed, this recommendation seeks to preserve as much as possible of our constitutional tradition of permitting our citizens access to information and ideas brought to our shores by citizens of other countries, except where such visits would harm our national interest. This American tradition of generally permitting travel and the exchange of information and ideas across the American border has historically distinguished our society from totalitarian governments.

As President Reagan observed in 1984 and as our Nation observed when it became a signatory to the Helsinki Final Act in 1975, a free exchange of information and ideas -- subject to narrowly defined exceptions to protect certain national interests -- is crucial to the health of our democratic society. Through open and robust debate in the "marketplace of ideas," American citizens inform themselves of policy choices which shape and affect their lives. The flow of persons in and out of the United States is an important part of this exchange.

The problem which this resolution addresses is that current United States law, on its face, provides for the denial of visas to persons solely because of certain political beliefs or current or past memberships or associations. Accordingly, the recommendation would require eliminating the

narrow ideological remnants of the McCarthy era, while permitting the exclusion of aliens whose activities endanger the welfare, safety, security or foreign policy interests of the United States. This principle would safeguard the American public's right to receive ideas from abroad by eliminating barriers to unpopular foreign political beliefs and philosophies, and would support our declared intentions under the Helsinki Final Act. It would permit the continued exclusion of terrorists and others who seek entry to engage in illegal activity or other activity detrimental to American security or whose entry or presence in the United States would be detrimental to the national interest.

Nothing in this recommendation would disturb the provisions of the Immigration and Nationality Act^{6/} which provide clear and necessary authority to exclude aliens who are believed to be coming to the United States to "engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, [or] public disorder, or in other activity subversive to the national security."^{7/} The recommendation also leaves undisturbed that portion of the Act which permits the exclusion of those persons who would come to the United States to engage in "activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."^{8/} Furthermore, this recommendation would leave intact that portion of the Act providing that:

"Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."^{9/}

None of these provisions would be disturbed by the proposed standard.

What would be directly affected by the proposed standard is the so-called "ideological exclusion" provision of the Act. Under this anachronistic statutory provision, promulgated under the McCarran-Walter Act during the infamous McCarthy era and its attendant hysteria, an alien is ineligible to receive a visa to enter the United States whenever, among other grounds, a consular officer or the Attorney General has reason to believe that the alien is an anarchist, a member of a communist or totalitarian party, advocates the doctrines of world communism or the establishment of a totalitarian dictatorship, or belongs to or is affiliated with an organization that publishes or distributes materials espousing such doctrines.^{10/} This provision of the law does not require a finding that the alien's admission,

presence in the United States or activities in the United States would cause injury. The simple fact that an alien holds -- or once held -- any of the enumerated beliefs or belongs or once belonged to a proscribed organization requires exclusion unless a waiver is granted.

These provisions apply to foreign nationals who seek permanent residency, as well as those who wish to enter the United States for short, temporary visits. According to the Immigration and Naturalization Service, 8,000 people from 98 countries are currently restricted from entering this country because of their political beliefs or associations. In 1983, approximately 700 persons were excluded under Sec. 212(a)(28).^{11/} Others simply refuse to apply or to provide information about their political activities.

The McCarran-Walter Act damages our reputation in the world by appearing to suggest a fear of ideas and exclusion of individuals solely because of their beliefs. The American public is also denied access to non-political scholarly and cultural presentations when foreign artists and writers decline to apply for a waiver or receive permission to enter the country too late to engage in planned activities.

In 1977, Congress passed an amendment to the McCarran Act with the specific full purpose of achieving greater compliance with the Helsinki Act's basic principle of freedom of international travel.^{12/} The amendment addresses visa denials based on that section of the Act which denies visas to aliens who are affiliated with a communist or totalitarian party, or a related organization.^{13/} Under the amendment, the Secretary of State must recommend a waiver to the Attorney General to permit such aliens to enter the United States unless the Secretary of State finds and so certifies to both Houses of Congress that the alien's admission "would be contrary to the security interests of the United States."^{14/} However, the effect of this amendment has not been as extensive as some thought it would be. Although it has removed some of the admission barriers, it applies on its face only to the exclusion provisions relating to membership and not to those related to beliefs.

The proposed standard would require -- subject to the enumerated exceptions -- that Section 212(a)(28) not apply to visitors seeking entry into the United States for the purpose of meeting with Americans. The result would be that the Government would be neither required nor permitted to exclude aliens seeking to visit the United States based simply on their current or past political associations or beliefs. Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28). (Since the principle applies only to visitors coming to the United States at the invitation of Americans it would not apply to applications for permanent resident status; they could still be denied on the basis of political beliefs or associations.)

The standard would simply shift the presumption. It makes it clear that this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or other activity in which the Government believes they intend to engage would harm the interests of the United States, including foreign policy interests. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation nor of the Government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.

In testimony before the House Judiciary Subcommittee on Immigration and in a letter by the Legal Adviser of the State Department commenting on an earlier draft of this report, the current Administration has, while not endorsing repeal of Section 28, indicated that its primary concern would be satisfied if it maintained the right to exclude aliens if their visit to the United States would cause injury to the foreign policy or other interests of the United States.¹⁵ The proposed standard would not in any way limit this authority. Furthermore, in adopting this principle, the ABA would not be taking any position on whether judicial review of visa denials is appropriate, and if so, under what circumstances.

CONCLUSION

This recommendation recognizes the crucial importance of preserving the ability of our Government to protect our national security, safety, and welfare, while at the same time advocating a limited revision of law to codify the general principle that the Government should not exclude foreign visitors from the United States solely on the basis of their political beliefs. Removing this anachronistic provision of the McCarran-Walter Act would strengthen our constitutional system by ensuring Americans access to foreign ideas and people, making possible a more fully informed and politically sophisticated citizenry.

Respectfully submitted,

Abner J. Mikva, Chairperson
Section of Individual Rights
and Responsibilities

John Norton Moore, Chairman
Standing Committee on Law and
National Security

FOOTNOTES

#1- New York Times, Jan. 17, 1984, at A.8.

#2- New York Times, Jan. 13, 1986, at A.1

#3- Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1975. In order to implement these commitments in the section on "Co-operation in Humanitarian and Other Fields," the Final Act contains a number of specific commitments to facilitate the movement of people and information. See "Inhibiting Public Debate: U.S. Violations of the Helsinki Accords," A Helsinki Watch Report, May 1984.

#4- New York Times v. Sullivan, 376 U.S. 254, 270 (1964), quoting Learned Hand in United States v. Associated Press 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).

#5- Adoption of the recommendation would be consistent with and a logical extension of three previous policies adopted by the Association. In August of 1983, the House of Delegates adopted a resolution recommending to Congress that any legislation which would give the President powers to act in an immigration emergency should protect the right to travel. Further, on two occasions (August 1977 and February 1978), the House urged support for the implementation of the Helsinki Accords, which contain the provisions on freer exchanges of information and movement of persons quoted in the text above.

#6- 8 U.S.C. Sec. 1101 et seq. This statute governs the entry of both visitors and immigrants into the United States.

#7- 8 U.S.C. Sec. 1182(a)(29).

#8- 8 U.S.C. Sec. 1182(a)(27).

#9- 8 U.S.C. Sec. 1182(f).

#10- These "ideological exclusions" provisions are contained in 8 U.S.C. Sec. 1182(a)(28).

#11- Letter from Davis R. Robinson, State Department Legal Adviser to Professor John Norton Moore, July 3, 1984. p.2 (Hereinafter State Dept. Letter).

#12- See 22 U.S.C. Sec. 2691(a).

#13- See 8 U.S.C. Sec. 1182(a)(28).

#14- 22 U.S.C. Sec. 2691(a). The McGovern Amendment supplements a waiver procedure previously existing in the law. When the McCarran Act was initially enacted, Congress recognized that cases might arise where extenuating circumstances justified the temporary admission of otherwise inadmissible aliens under the statute. Thus, under the Act, a consular officer or the Secretary of State has discretionary authority to recommend that an alien's ineligibility to receive a visa be waived, and the Attorney General has the discretionary authority to grant the waiver. 8 U.S.C. Sec. 1182(d)(3).

#15- State Department Letter, p.4.

0341j

General Information Form
To Be Appended to Reports with Recommendations

No. _____

Submitting Entity Sect. of Individual Rights & Responsibilities
Stndg. Committtee on Law & Nat'l. Security

Submitted By Abner J. Mikva, Chairperson, I.R.&R. Section
John Norton Moore, Chair, St.Cm. on Law & Nat. Sec.

1. Summary of Recommendation(s)

This revised version of Recommendation #103 deletes parts 1(b) and 2 of the original Recommendation #103 now appearing in the current bound volume of recommendations and reports pending before the House.

Revised Recommendation #103 attached hereto recommends that United States law concerning visa denials should conform to the following standard:

An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current political beliefs or political associations or on the basis of the expected content of the person's statements in the United States.

However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or activity in which the government believes they intend to engage, would harm the interests of the United States, including the foreign relations of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country, nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation, nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.

Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28).

2. Approval by Submitting Entity.

The original principles underlying this recommendation were approved by the Council of the Section of Individual Rights and Responsibilities on May 11-12, 1984. The report with recommendations printed in the bound volume of House recommendations (#103) was approved for submission to the House of Delegates by the section council on May 3-4, 1985, in Boston, Massachusetts.

Recommendation #103 (revised) attached hereto was approved by the Executive Committee of the IRR Section and the Council of the Standing Committee of Law and National Security pursuant to telephone polls conducted during January, 1986.

3. Background. (Previous submission to the House or relevant Association position.)

Adoption of the recommendation would be consistent with and a logical extension of three previous policies adopted by the Association. In August of 1983, the House of Delegates adopted a resolution recommending to Congress that any legislation which would give the President powers to act in an immigration emergency should protect the right to travel. Further, on two occasions (August 1977 and February 1978), the House urged support for the implementation of the Helsinki Accords, which contain the provisions on freer exchanges of information and movement of persons quoted in the text above.

Initially, a resolution (consisting of four statements of principle) was submitted to the House of Delegates for its consideration in August, 1984, but was withdrawn by the I.R. & R. Section at the request of the Standing Committee on Law and National Security and the Section of International Law and Practice to allow time for further study and negotiation. A similar four-part resolution was resubmitted to the House of Delegates for consideration at the February, 1985, meeting. After consultation with other interested entities, the section agreed to withdraw parts 1, 2, and 4 and only submit part 3 to the House. The House adopted part 3 at the February, 1985, Midyear Meeting. Resubmission of parts 1 and 2 of the original resolution, amended since August, 1984 to reflect certain concerns of other interested ABA entities and U.S. government agencies, took place at the ABA Annual Meeting in July, 1985, but was again withdrawn to allow further consideration by interested entities.

The attached revised version of report and recommendation #103 was written in January, 1986 in response to further suggestions offered by representatives of the Standing Committee on Law and National Security and the U.S. Department of State. Recommendation #103 as printed in the bound volume of reports to the House was identical to the one submitted to the House in July, 1985.

4. Need for Action at This Meeting

Legislation incorporating the principles in this recommendation was introduced in the 99th Congress in May and November, 1985 (See #5 below). Hearings on the legislation will be held early next year (soon after the Midyear Meeting) in the House Foreign Affairs and Judiciary Committees. The U.S. Congressional Commission on Security and Cooperation in Europe will hold its first hearing on February 6, 1986 concerning the issue of U.S. denial of visas on grounds of political beliefs, ideology or foreign policy reasons. Since the ABA does not now have any policies which would allow it to testify on such legislation, it would be timely for the House of Delegates to act on this matter at the 1986 Midyear Meeting.

5. Status of Legislation. (If applicable)

Congressman Barney Frank (D.- Mass.) introduced his bill regarding visa restrictions (H.R. 2361) on May 6, 1985. This bill has fifty-eight bipartisan co-sponsors, and was referred to the House Judiciary Committee. Congressman Howard Berman (D. Calif.) introduced his bill on the second principle (H.R. 3825) on November 21, 1985. This bill has one co-sponsor (Congressman Frank),

and was referred to the House Committee on Foreign Affairs. Hearings on the legislation are planned for 1986 by both the House Judiciary and Foreign Affairs Committees. In the previous Congress, in the House of Representatives, H.R. 5227, which dealt in part with ideological exclusions, was the subject of a hearing on June 28, 1984, in the House Judiciary Subcommittee on Immigration, Refugees and International Law.

6. Financial Information. (Estimate of funds required, if any.)

None

7. Conflict of Interest (If applicable)

None

8. Referrals

A copy of this revised report and recommendation was sent to each member of the ABA House of Delegates and Board of Governors, as well as to the chairpersons of all ABA sections and divisions and the chairs of the Standing Committees on Law and National Security and World Order Under Law, on January 31, 1986. All members of the Council of the Standing Committee on Law and National Security received a copy of the revised recommendation and report in mid-January, 1986 prior to their being polled on whether to authorize co-sponsorship. In addition, a copy of report with recommendation No. 103 as printed in the bound volume of reports to the House was sent to the chairpersons and staff liaisons of each of the ABA's member sections and divisions, as well as to the chair of the ABA Standing Committee on Law and National Security and Standing Committee on World Order Under Law in December, 1985. A copy of this revised version as well as the original version as it appears in the bound volume have also been sent to the directors for the ABA Division of Communications, Governmental Affairs Group, Public Services Group, and Professional Services Group.

9. Contact Person (Prior to Meeting)

Philip A. Lacovara
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(202) 626-6262

10. Contact Person (Who will present the report to the House)

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1237j

The Writer and Freedom



United States Department of State
Bureau of Public Affairs
Washington, D.C.

Following is an address by Secretary Shultz before the Poets, Playwrights, Essayists, and Novelists (PEN) International Conference, New York City, January 12, 1986.

I was in Cartagena, Colombia, last month, for the annual meeting of the Foreign Ministers of the Organization of American States, a group not especially known for the elegance of its prose, and certainly not much of literary note was going on while I was there. Two days after I left, however, the *New York Times* correspondent reported from Cartagena that:

...scantly dressed women danced the rumba, a local politician made a speech about love and death, proud relatives toasted the author's fortune with rum, and, in the steaming tropical port where it is set, Gabriel Garcia Marquez's new novel was launched.

Probably all you writers have experienced something like that kind of reception for your work. But when Stanford University published my latest book, nobody in Palo Alto even did the foxtrot.

A book that tries to explain economic policy beyond the headlines certainly is not a poem or a novel; it's not far from an essay, though. But I recognize that I'm not standing here today simply because of my achievements as an essayist. Indeed, I can only regard Norman Mailer's invitation to me as another shining example of that charitable spirit for which New York literary circles have long been famous. But it

wasn't until I read the *New York Times* on Friday that I realized that I've become the latest PEN controversy. In Norman's world, that's a high form of flattery—and that's how I take it. And I salute you for taking this decision in favor of free speech.

In the few minutes I have here, I want to presume to make a few comments not only in my present official role but also from the standpoint of some other aspects of my experience.

Nearly every field of knowledge emulates—or ought to emulate—literary models of analysis, persuasion, and explanation. Clarity, insight, illumination—these are the qualities at the very heart of every serious intellectual endeavor. Literature is a first order, leading intellectual endeavor. If mathematics is the Queen of Sciences, literature surely is the King of the Humanities.

In my own field—economics—like literature, we think and analyze with metaphor and seek to persuade through considerations of analogy, symmetry, and the beauty of the argument. Even statistics can be figures of speech.

All this leads me to two observations: first, Ken Galbraith deserves to be a member of PEN, despite the fact that he once wrote a novel about diplomacy; and, second, that I regard the creative literary writer as an individual of primary importance for the entire range of thought, culture, and human existence.

So I am pleased and honored to be here. It has been a long while since the International Conference of PEN has been held in the United States. America is proud to have you here. Diversity, debate, contrast, argumentativeness are what we as a people thrive on. So, as individuals, each of you is truly welcome here. And PEN as your collective spirit and organization is welcome as well, for the larger and noisier PEN has become, the more it has been able to do for freedom around the world.

Freedom—that is what we are all talking about and why we are here. And the writer is at the heart of freedom. There is no more striking image of freedom than the solitary writer, the individual of imagination, creativity, and courage, imposing through language the perceptions and prescriptions that can illuminate and, perhaps, change the world. The writer needs freedom, but the writer also is the creator of freedom. No government or ideological system has ever yet succeeded in stopping the writer, although some are trying very hard.

That is why the theme of this Congress is a serious one, and I would like to say something about it.

As you recognize, there is often a built-in tension between the aims of the writer and the very concept of the state. The state aims to provide social order, and the writer aims to create an imaginative order of his own. Sometimes their relations are amicable, and the tension can be creative rather than

oppressive. In an enlightened society, the writer is free to pursue his thoughts, to offer new visions.

At other times, relations between the writer and the state may be strained, even hostile. And when the state falls short, as it is bound to do, writers and intellectuals become its most articulate and forceful critics—the conscience of society. Here in America, the literary vision of the 1940s and the 1950s—both black and white—affected public attitudes and perceptions in ways indispensable to the epic political and social achievements of the civil rights movement of the 1960s.

But the conflict between the writer and the state can assume vastly different forms. One of the first responsibilities of intellectuals everywhere is to think clearly, to make distinctions. That responsibility is especially serious when it comes to thinking about politics. It seems to me that if the history of the 20th century teaches anything, it is the intellectual and moral hazards of personifying “the state,” of divorcing “the state” from its historical and social particulars. That abstraction is morally hazardous because it ignores the fact that states everywhere are governed by individuals who are responsible for their actions. And it is intellectually hazardous because it glances over a number of distinctions between states—distinctions that are crucial to any meaningful reflections about politics and art.

There are countries in which writers know that if their art appears to threaten the political fortunes of their rulers, they may be silenced, imprisoned, even killed. Equally tragic, there are countries in which writers choose to aid the apparatus of repression.

By contrast, there are other countries—and I’m proud to say that the United States is one of them—where writers can speak, write, and publish without political hindrance. Their freedom to criticize the state is the true measure of their independence. To me, the vindication of free societies is the outspokenness, even the obstreperousness, and the self-evident vitality of the artists and intellectuals of the free nations—indeed, in the presence of many of you here and in the very existence of this organization.

So there is a difference. It would be ironic if intellectual freedom were appreciated only in countries where it didn’t exist, and taken for granted, or even deprecated, in the countries where it thrives. Freedom is what we are here

to talk about, freedom of thought, of expression, freedom from official censorship or private intimidation.

To those who speculate that creativity forged in the crucible of totalitarianism is greater than that in politically free but culturally commercialized societies, I say the answer always is individual freedom. And serious people know the difference between freedom and its absence. To declare one’s alienation without distinction is to abdicate judgment, analysis, differentiation, wisdom. It is to risk marginality and estrangement from the roots of traditional and community life that nourish the creative imagination. It can be a recipe for irrelevance.

Freedom is real, and it works. In fact, one of the most powerful trends in the world favors freedom. In recent speeches, and in Moscow and Geneva, I have spoken on the reality that the industrial age is coming to an end. In some places, it is over. The economy of the future will be based more and more on information technologies. And the creative flow of information requires freedom—freedom of thought and communication. Ideology has nothing to do with this; it is just a fact of life.

The societies that will succeed in these years to come will be those that let ideas, people, and capital resources move freely, that encourage entrepreneurship and experiment. Regimes that try to stifle the new information technologies may find themselves falling behind economically, and if they permit them, they risk losing their monopoly control over information and ideas. They probably won’t have a choice. It is impossible to stop technological change by political fiat.

It is the democratic societies that have grasped the plain fact that the source of economic vitality is individual creativity and not the state. Countries where the flow of information is intrinsic to the political system and its principles will have the advantage.

Democratic societies understand that cultural vitality springs from individual creativity and not from the state. But information is one thing; knowledge is another. Data and wisdom are not the same.

Emerson said that the scholar is our society’s “delegated intellect. In the right state he is man thinking,” said Emerson. To me, intellect joined with imagination and creativity is achieved in the situation of “man writing.” This means books: novels, poetry, plays, criticism, essays.

In the computer age, reading and writing will not become obsolete, as many have so facetiously asserted. In this

era of other arts—film, dance, painting, music—there is no escaping the reality that our culture is built upon, and relies upon, the written word. As Jorge Luis Borges has said, “Books will never disappear. It is impossible for it to happen. Of all mankind’s diverse tools, undoubtedly the most astonishing are his books. If books were to disappear, history would disappear. So would men,” he said.

Indeed, the awesome power of the writer resides in the fact that it takes only paper and pencil to do it. No apparatus, consensus, or license is required. Traditional Chinese tales tell of the village papercatcher, the one designated to go about gathering up any stray scrap of paper with writing on it that might be blown along the alleys by the wind—not for the purpose of cleaning up litter, but because writing was precious, and one single piece of paper might be found to contain an enlightening thought which, however fleeting, must not be lost.

That is why, to me, the horror at the core of George Orwell’s 1984 is the suggestion that a tyranny might someday arise that could deprive the individual even of the simplest tools of pen and paper. And that is why I am proud to represent an Administration that more than any in this century is committed in philosophy and in fact to reducing the intrusion of government into the lives, minds, and livelihood of the individual.

And I would like to say, in that connection, particularly since the McCarran-Walter Act and its administration have been raised so forcefully at the beginning of this session, to make a comment about that, a considered comment.

The United States is the most open society in the world. Of course, we are not perfect, and I know that some of your members have been particularly aggravated by problems some writers have had in obtaining visas as a result of the McCarran-Walter Act of 1952.

This Administration is committed, and I am personally committed, to protecting free expression of all political ideas. We agree with PEN’s charter when it states that: “Literature, national though it be in origin, knows no frontiers.” In fact, we would apply this principle to all forms of expression. America’s dedication to the principle is unsurpassed in the world today.

I’ve taken very seriously my Department’s role in reviewing proposed visa denials that could affect free ex-

pression. It has never been the approved policy of the United States to deny visas merely because the applicant wants to say that he disapproves of the United States or one of its policies.

I realize that errors may be made from time to time, particularly in the acts of administration. But we have learned over the years how to build protections into the decisionmaking process to ensure that the value of free expression is given due weight. The fact is that in the course of this Administration a significant change in policy has occurred. When a writer or artist seeks a visa for the purpose of speaking or lecturing or performing in the United States, the administration of the Act now involves the strong presumption against denying access for foreign policy reasons. No denial is ever based on a person's abstract beliefs.

I want to make it clear, however, that we will deny personal access to people who aim to undermine our system through their actions, who are likely to engage in proscribed intelligence activities, or who raise funds or otherwise assist our enemies. We are careful in reaching such a conclusion about any writer or other artist, irrespective of his or her relative fame. But occasionally we do so conclude. While those judgments are made by

human beings and are, therefore, fallible, they are made in good faith and consistent with established policies concerning our national interests; but we will never deny physical access to anyone merely because of the beliefs he or she intends to espouse.

I think this Administration's policies and protective procedures are now working well. And this gathering is only one of many recent testaments to our commitment to maintain the free marketplace of ideas.

I also agree with your Congress' catalogue when it says that:

The minimum contract between the state and the citizen is for the maintenance of order: To provide for the common defense and diplomacy, to administer justice, to look to the equality of opportunity and the distribution of income, and to manage a sound currency.

That's about it, in my view. Governments around the world should be criticized in direct proportion to the extent to which they go beyond those functions. So I put it to you that we have more in common than you think.

Let us remember today those writers who exist in states where the typewriter or mimeograph are regarded

as dangerous weapons, where writers have no independent right to publish, and where a free press has no free access. Let us work to support the solitary writer in a suppressive society. Let us take heart that many governments and their censors have found that it is not so easy to stop all the writers, every last solitary individual with a pen and paper or typewriter and friends who will smuggle out what he or she writes.

The writer will be the last to be stifled. The writer will always be with us, testing the limits and expanding the horizons of his society.

I am optimistic about the future. As the world gets smaller, the importance of freedom only increases. The yearning for freedom is the most powerful political force all across the planet. You are among its champions. You can be proud of what you have done for that cause.

And don't be so surprised by the fact that Ronald Reagan and I are on your side. ■

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