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Congress was well aware in passing the 1973 Act, so much of which was aimed at vocational rehabilitation, that "even [if] the maximum employment opportunities for the handicapped [were] fully created, they could not be filled without the ability of handicapped individuals to get to their jobs."¹⁵² Obviously, today more than ever, air transportation is a necessary element in securing and performing many jobs.¹⁵³ So even if transportation *per se* had not been singled out by Congress in section 502 of the 1973 Act, and even if the Act's administrative creation, the ATBCB, had not testi-

fied in favor of giving the broadest possible reading to section 504 in the proceedings below,¹⁵⁴ any fair reading of the Act reveals that maximizing employment opportunities—and therefore minimizing barriers to transportation—for the disabled goes to its very heart.¹⁵⁵ As the comments of the Act's "own" agency put it to the CAB: "Accessible transportation is often the key to a disabled person's employment, education, recreation, and access to social services. Without the right of access to transportation, all other civil rights are meaningless."¹⁵⁶

guage, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." *South-eastern Community College v. Davis*, 442 U.S. 397, 411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980, so that "substantial modifications" in programs of a nursing school were not required in order to accommodate a deaf applicant for admission. *Id.* Relying upon *Davis*, this court has held that regulations that "require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities" are not valid under § 504. *American Public Transit Ass'n v. Lewis*, 655 F.2d 1272, 1278 (D.C.Cir.1981). But we recognized in *Lewis*, as the Supreme Court had in *Davis*, that "the line between impermissible discrimination and optional affirmative action is a fine one," 655 F.2d at 1277, and that a "refusal to take modest, affirmative steps to accommodate handicapped persons might well violate the statute." *Id.* at 1278. In the instant case we are presented with just such modest steps, with an agency so finely attuned to expense that it explicitly eschewed any request for structural modifications, *see supra* note 154, and with an agency so acutely aware of the need for case-by-case decisionmaking that it deferred to the air carrier's discretion and the need for flexibility at every turn. *See supra* notes 59-66 and accompanying text. In *Lewis*, by contrast, the rules in question were acknowledged by the agency itself, in so many words, to be "extraordinarily expensive," (requiring "extensive" modifications of existing systems, including, *inter alia*, accessibility to wheelchairs of every new bus or subway car "regardless of cost," and elevators and other additions to existing subway stations). 655 F.2d at 1278. The case before us is not *Lewis*. In any event, both *Lewis* and *Davis* go to the substantive nature of the regulations and "the kind of burdensome modifications" they may require, *id.* not to the jurisdictional scope of agency rulemaking under § 504.

156. Comments of the Architectural and Transportation Barriers Safety Board, Sept. 5, 1979, J.A. at 146, 147.

152. S.Rep. No. 318, 93d Cong., 1st Sess., reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2076, 2122.

153. As explained by the comments of the United Cerebral Palsy Associations during the CAB's rulemaking proceedings below:

[t]he American people are dependent on air travel for vital opportunities [since] many people must travel by air in order to perform their jobs. Clearly, access to air travel is not a luxury[;] it is vital to anyone wishing to participate in the mainstream of society. J.A. at 166.

154. The ATBCB not only supported PVA's position on the meaning of "federal financial assistance" and the proper scope of section 504, *see* Final Rule, 47 Fed.Reg. at 25,937, but vigorously criticized the CAB's initial decision to deliberately avoid any requirement of structural changes in aircraft. *See supra* note 17 and accompanying text. That decision, the ATBCB argued,

seriously weakens the effect of the services requirements. A disabled person's theoretical right to air travel is meaningless if he or she cannot board the plane, go from the entry to his or her seat conveniently and with dignity, travel about the cabin, and use the lavatory. From our inquiries it is apparent that technology for equipment and alterations to facilitate such access and use does exist, especially in the industrial design divisions of the airlines. We urge the CAB to act quickly to promulgate requirements both for inexpensive retrofitting and for structural design of new aircraft. Comments of United States Architectural and Transportation Barriers Compliance Board before the Civil Aeronautics Board, Sept. 5, 1979, J.A. at 146, 148.

155. This is not to say that section 504 requires profound or extremely costly "affirmative action" in the form, for example, of extensive structural modification of aircraft. *See supra* note 154, and note 17 and accompanying text. In the context of educational programs the Supreme Court has noted that "neither the lan-

We find additional support for our holding today in what might best be termed the need for regulatory consistency and rationality. The CAB's discussion of its section 504 authority, and particularly of its rather sudden reversal of position between 1979 and 1982, was inadequate, vague and contradictory. Not only was its reliance on *Angel* (and that case's misreading of *Gottfried*) misplaced,¹⁵⁷ but even on its own terms the Board's analysis was turgid. Claiming to reject the "restrictive reading of our jurisdiction put forth by the airlines," the Board insisted that it was "adopting an approach . . . that represents a compromise between applying the rule to all carriers and having no rule at all."¹⁵⁸ The form this "compromise" took, of course, was to apply only the general anti-discrimination provisions (Subpart A) to all airlines,¹⁵⁹ while applying the specific, substantive provisions (Subparts B and C) to subsidized carriers only,¹⁶⁰ claiming without any citation to authority that "[t]hose carriers subject only to the general provisions of Subpart A should look to the specific requirements of Subpart B as guidance for meeting their general obligation not to discriminate."¹⁶¹

Respondents are unclear, as the Board was, about the source of the CAB's conclusion that non-subsidized carriers "should look to" Subpart B. They point to the duty

of every air carrier to provide "adequate service" under section 404(a) of the Federal Aviation Act¹⁶² as supplying the "requisite authority to apply general provisions" to non-subsidized carriers.¹⁶³ But they do not—and, we believe, cannot—explain why section 404(a), if it authorizes the application of Subpart A, will not extend to Subparts B and C, which give the general provisions substance and teeth. They do not—and, we believe, cannot—explain what "look to" means, or why it is that, as respondents contend in their brief, "non-subsidized certificated carriers could not ignore the specific requirements applicable to the subsidized carriers."¹⁶⁴ In fact, they could do precisely that if the CAB's view of the scope of section 504 in this case were affirmed by this court.¹⁶⁵

In the proceeding below, the CAB rightly rejected the airlines' assertion that its proposed rules "merely duplicate existing FAA regulations."¹⁶⁶ It correctly characterized the primary purpose of the FAA rules as ensuring passenger safety, reasonably deferred to the FAA's inflight safety expertise where it was appropriate to do so,¹⁶⁷ and noted that its own aim was "not merely to ensure that the disabled are carried safely, but to ensure that they face no unreasonable, nonsafety-related obstacles to travel. To that end, this rule covers issues . . . that are not reached by the FAA rules."¹⁶⁸ The Board's admirable sensitivity

157. *See supra* notes 90-101, 144-147 and accompanying text.

158. Final Rule, 47 Fed.Reg. at 25,937.

159. *See supra* notes 21-29 and accompanying text.

160. *See supra* notes 30-45, 68-78 and accompanying text.

161. Final Rule, 47 Fed.Reg. at 25,937-38.

162. Respondents' Brief at 4; 49 U.S.C. § 1374(a) (1976).

163. 47 Fed.Reg. at 25,937.

164. Respondents' Brief at 11.

165. Even if the specific requirements of Subpart B were considered important interpretive guidelines by courts construing Subpart A's application to all carriers, they would not be agency rules binding airlines with the force of law.

Private suits seeking enforcement of the Subpart B requirements, in actions for both injunctive and monetary relief, might not be available to the vast majority of handicapped persons who must travel by air. *See Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1978); *see also Consolidated Rail Corp. v. Darrone*, — U.S. —, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984). The Subpart C regulations authorizing cease and desist orders and the assessment of civil penalties for noncompliance would not, of course, be in force.

166. Final Rule, 47 Fed.Reg. at 25,938.

167. *See supra* notes 61-63 and accompanying text.

168. Final Rule, 47 Fed.Reg. at 25,938.

ty to the work of other agencies and the need for consistency in removing unreasonable obstacles to travel, however, did not extend far enough. It was aware that regulations of the Department of Transportation already required all certificated carriers to comply with section 504's mandate in the operation of, *inter alia*, ticket counters, boarding devices, and baggage check-in and retrieval.¹⁶⁹ It was aware, indeed, that DOT had relied upon the CAB's earlier assertion of section 504 authority and was now urging the Board to exercise it.¹⁷⁰ Nevertheless, the CAB refused to recognize the full measure of its own authority, leading to the absurd result that handicapped persons are protected from discrimination in air transportation only up to the door of the aircraft—that is, so long as they are not being transported in the air. Our holding today obviates any such nonsensical outcome and vindicates the clear congressional purpose.¹⁷¹

In addition, restoring the scope of section 504 rulemaking authority to the dimensions originally contemplated by the CAB will vindicate that agency's hard and conscientious work in fashioning substantive requirements through these proceedings. The nondiscrimination rules will now actually apply to a meaningful number of handicapped travelers. The specific regulations fashioned with great sensitivity in order to minimize expense and regulatory burden will no longer fall—not only most heavily but *exclusively*—upon those small (subsidized) airlines least able to carry the load. And certain otherwise anomalous aspects of the rules, which appear to have been

drafted sometimes with all carriers in mind, sometimes with only the small, subsidized carriers in mind, can now be rendered more uniform and consistent when, on remand, the regulations are in part repromulgated and applied consistently with this opinion.¹⁷²

Finally, we note that our holding as to the scope of section 504 in the unique context of commercial air transportation is consistent with the recent action of Congress in its Civil Aeronautics Board Sunset Act of 1984.¹⁷³ That statute provides in its section 14, "Access for Handicapped Persons," that the Secretary of Transportation, when exercising authority previously the CAB's,

shall consult with the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973, prior to issuing or amending any order, rule, regulation or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped persons.¹⁷⁴

Of course, to mandate a consultation with the ATBCB is not to mandate an acceptance of its recommendations, which in this case were to require not only a broad reading of section 504 but also affirmative action in the form of the structural modification of aircraft.¹⁷⁵ Still, this recent demonstration of the continuing concern of Congress for the accessibility *not only* of commercial airports *but also* of "commercial air transportation" for handicapped per-

sons is significant.¹⁷⁶ It suggests strongly that the Rehabilitation Act of 1973 was designed and is still intended to protect handicapped air travelers as a matter of law not only before they board an aircraft and after deplaning, but while they are inside the airplane as well. And it reinforces our view that Congress meant and still means handicapped persons to be free from discrimination whenever reasonably possible—not merely when, in the special context of air transportation, handicapped passengers happen to fly a small subsidized airline to a remote town, or are lucky enough to find a large carrier treating them fairly out of courtesy.

B. The Substance of the Rules

[2] As we have already indicated, the record in this case suggests that in its promulgation of specific, substantive regulations the CAB worked conscientiously and, in an area characterized by great individual variability and acute sensitivity, managed reasonably to resolve many difficult problems.¹⁷⁷ This characterization applies equally to the Board's promulgation of the two specific sections of the substantive regulations that petitioners challenge here.¹⁷⁸ However, because certain aspects of the challenged Rule would have been drafted differently if the Board had properly construed the scope of its rulemaking authority under section 504, we remand the

regulations in part for reconsideration in light of today's holding.

1. The Definition of "Qualified Handicapped Person"

Under the CAB's final regulations, only a "qualified handicapped person" is protected by section 504.¹⁷⁹ The statute itself uses the term "otherwise qualified handicapped individual,"¹⁸⁰ which the Supreme Court has defined as "one who is able to meet all of a program's requirements in spite of his handicap."¹⁸¹

In the context of air transportation, the Board's regulation now defines such an individual as a handicapped¹⁸² person

- (1) Who tenders payment for air transportation;
- (2) Whose carriage will not violate the requirements of the Federal Aviation Regulations, . . . or, in the reasonable expectation of carrier personnel . . . , jeopardize the safe completion of the flight or the health or safety of other persons; and
- (3) Who is willing and able to comply with reasonable requests of the airline personnel or, if not, is accompanied by a responsible adult passenger who can ensure that the requests are complied with. A request will not be considered reasonable if—

an earlier phrase designed to minimize "arbitrary or impulsive" reactions by airline personnel resulting in requests "beyond standard practices." Instead, the Amended Final Rule mandates that "requests of airline personnel must be safety-related or necessary for the provision of air transportation to be considered reasonable" for the purposes of the rule. *Id.*

180. 29 U.S.C. § 794 (Supp. V 1981).

181. *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S.Ct. 2361, 2367, 60 L.Ed.2d 980 (1979).

182. See *supra* note 28.

176. Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 380-81, 89 S.Ct. 1794, 1801-02, 23 L.Ed.2d 371 (1969).

177. See, e.g., notes 54-63 and accompanying text.

178. See notes 64-66 and accompanying text.

179. Amended Final Rule, 47 Fed.Reg. at 51,858. As noted *supra* note 64, this definition incorporated minor changes from the Final Rule, in order to accommodate, for example, a "person" who was not a "passenger" (e.g., someone merely seeking information), and in order to clarify

169. See *supra* note 133 and accompanying text.

170. See *supra* notes 134-35 and accompanying text. In commenting upon the CAB's rules, the DOT urged the Board to ensure that "the regulations of both agencies [would] be compatible." J.A. at 76.

171. In addition to its specific transportation-related goals, in 1974 Congress made plain its objective that section 504 "be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result."

S.REP. No. 1297, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6391.

172. See, e.g., *infra* notes 207-11 and accompanying text.

173. Pub.L. No. 98-443, 98 Stat. 1703, 98th Cong., 2d Sess. (Oct. 4, 1984).

174. 98 Stat. at 1711.

175. See *supra* note 154.

- (i) It is inconsistent with this part; or
- (ii) It is neither safety-related nor necessary for the provision of air transportation.¹⁸³

Petitioners contend that by selectively imposing requirements on handicapped persons which are not imposed upon other passengers and prospective passengers, the CAB's definition of "qualified handicapped person" violates section 504. In addition, they argue that the definition lacks objective guidelines or criteria that would limit arbitrary, unreasonable, discriminatory requests or demands by airline personnel.¹⁸⁴

The record reveals, and it is uncontested, that numerous incidents of arbitrary refusals of service and of irrational decisions by airline personnel concerning the qualifications of handicapped individuals have occurred.¹⁸⁵ Unwarranted assumptions and stereotypes have clearly caused airline personnel to discriminate against disabled passengers.¹⁸⁶ Yet, the record suggests that the Board was sensitive to such concerns and others voiced by handicapped individuals and their representatives,¹⁸⁷ and it is far from clear that amending the definition of

"qualified handicapped individual" would provide any remedy more meaningful than that provided by the rules as they now exist.

[3] Decisions involving safety, especially, require the granting of a certain amount of discretion to airline personnel. Individuals differ considerably, sometimes dramatically, in their abilities as well as in their disabilities. What is an unreasonable or unwarranted request when made of one handicapped person may be perfectly legitimate when made of another. Because of the unique nature of every individual, because of the infinite variety of disabling conditions and the varying extent to which they may handicap a particular person, the vesting of some discretion in airline personnel to make case-by-case determinations is unavoidable. This is especially so where, just as individuals differ, so do airlines and aircraft. A wide-bodied jet may present different safety concerns or space limitations than a smaller jet or a much smaller piston-powered aircraft.¹⁸⁸ In this situation, some discretionary decisionmaking on the part of airline personnel is inevitable.

(airline charged with discriminating against passengers who are both blind and deaf by forcing them to travel with a companion).

183. Amended Final Rule, 47 Fed.Reg. at 51,858 (to be codified at 14 C.F.R. § 382.3). This definition is to be applied with respect to the provision of air transportation only. The CAB's definition "with respect to the provision of related services" (such as access to flight information) requires that a handicapped person meet "the essential eligibility requirements for receipt of those services." Amended Final Rule, 47 Fed.Reg. at 51,858 (to be codified at 14 C.F.R. § 382.3(d)). Petitioners do not challenge the legality of the latter definition.

184. PVA Brief at 51; see *supra* text accompanying note 54.

185. See, e.g., Letter from Al Van Nevel to President, Ozark Airlines (May 17, 1979), J.A. at 175 (airline refused to begin flight after discovering five hearing-impaired persons on board); Letter of Marianne J. Cashatt, Director, Special Services, Virginia Department of Rehabilitative Services to CAB (Nov. 12, 1979), J.A. at 69 (on-board attendant required for person who needed no assistance once aboard the plane); see also Washington Post, Dec. 18, 1984, at A-17, col. 2.

186. See, e.g., Comments of National Federation of the Blind to the CAB, J.A. at 174 (blind couple asked to sit on blankets, apparently due to assumption that all handicapped people are incontinent); Letter of Nancy L. Kaye, Ph.D. to Congressman Robert Kastenmeier (March 14, 1980), J.A. at 66 ("airline personnel shouting at me because they believe I am deaf, speaking slowly because I may be mentally impaired and/or using a condescending tone of voice because they assume I am a child . . .").

187. See, e.g., notes 13, 35, 61-63 and accompanying text.

188. As respondents note, even carriers using essentially identical aircraft may utilize alternative design configurations for the plane's interior, for example, utilizing denser seating arrangements or less room for carry-on luggage than their competitors. Respondents' Brief at 37.

Cite as 752 F.2d 694 (1985)

[4] The risk that arbitrary or irrational decisions may occasionally be made, of course, follows the grant of decisional discretion as night follows the day. The final regulations promulgated by the CAB, however, have significantly limited the discretion of airline personnel.¹⁸⁹ For example, section 382.13(a) of the Final Rule creates a presumption that every handicapped person is a "qualified handicapped person unless a carrier has a *reasonable, specific basis* for doubting those qualifications."¹⁹⁰ Moreover,

A carrier shall not refuse transportation to the handicapped person unless an agency or *employee designated* by the carrier to make such determinations and *familiar with the carrier's standards* and procedures for such determinations *reasonably believes on the basis of available information, including any presented by the handicapped person*, that the person is not a qualified handicapped person.¹⁹¹

Section 382.13(e) requires that "[t]he name of the employee designated by the carrier to refuse service or require an attendant . . . shall be made known to ticket and reservation agents, who shall inform any person who requests that name."¹⁹² From the outset, any request made of a handicapped person must be reasonable and either "safety related" or "necessary for the provision of air transportation."¹⁹³ And,

189. This is so despite the fact that, as explained *supra* notes 54-63 and accompanying text, maximum flexibility was granted to airlines in several specific instances. The Board did not, we believe, ever lose sight of the "strong countervailing interest" of the handicapped. See *supra* note 62.

190. Final Rule, 47 Fed.Reg. at 25,949 (emphasis added).

191. *Id.* (emphasis added).

192. *Id.*

193. See *supra* note 179 and accompanying text.

194. Final Rule, 47 Fed.Reg. at 25,948 (§ 382.5(a)); nor may a carrier provide "separate or

of course, no carrier may "[e]xclude a qualified handicapped person from or deny that person the benefit of any air transportation or related services that are available to other passengers . . ."¹⁹⁴

Thus, we are not presented with a case of unbridled discretion but instead with a situation where discretionary, case-by-case decisions are mandatory. We are not presented with a case involving relatively unambiguous distinctions based upon gender or race but instead with the endless complexities of handicapping conditions. And we are not presented with regulations applying to any service—or even any transportation—industry but to a unique industry that carries its clients tens of thousands of feet above the earth at hundreds of miles per hour. Safety and "air transportation" requirements go to the very essence of commercial aviation and must be applied not only to handicapped persons but to all passengers.¹⁹⁵ In its efforts to do so without discrimination, the Board sought to define "qualified handicapped person" in a manner that "removes the subjective aspects of the standard to the maximum extent possible consistent with our need to defer in the first instance to the reasonable judgment of carrier personnel on safety questions."¹⁹⁶ In that regard, it has succeeded. We surely cannot say that "the agency's decision . . . manifests a clear error in judgment,"¹⁹⁷ or that

different" services that are unwanted or unnecessary. *Id.* (§ 382.5(b)); see *supra* notes 23, 24 and accompanying text.

195. See, e.g., *Bargmann v. Helms*, 715 F.2d 638 (D.C.Cir.1983) (emphasizing strong and comprehensive concern of Congress for "maximum possible safety" in the air).

196. Final Rule, 47 Fed.Reg. at 25,939.

197. *Action for Children's Television v. FCC*, 564 F.2d 458, 472 (D.C.Cir.1977); see also *United States v. Allegheny Ludlum Steel Corp.*, 406 U.S. 742, 758, 92 S.Ct. 1941, 1951, 32 L.Ed.2d 453 (1972).

the definition challenged here in any way lacked "a rational basis."¹⁹⁸ Accordingly, petitioners' challenge to the definition is denied. If arbitrary or unreasonable decisions do occur under that definition or the regulations to which it applies, the remedy lies in enforcement proceedings or other corrective action under Subpart C of the Rule.¹⁹⁹

2. The Forty-Eight Hour Notice Requirement

Section 382.15(c) of the CAB's final regulations permits airlines to require all handicapped passengers who will need "extensive special assistance" to notify the airline forty-eight hours in advance of their flight.²⁰⁰ "Extensive special assistance" was defined in the Final Rule as including:

198. *National Small Shipments Traffic Conference v. CAB*, 618 F.2d 819, 826-27 (D.C.Cir.1980) (reviewing court "must affirm the challenged regulations unless we find that the Board's decision was 'arbitrary and capricious,' or in excess of its statutory authority, or adopted without observance of the procedure required by law").

199. This "compliance" subpart of the Final Rule, see *supra* notes 39-45 and accompanying text, modified the original proposal by, *inter alia*, making it

clear that individual complaints will be processed according to the Board's standard enforcement procedures, and that the Board may assess civil penalties or issue an order to cease and desist rather than withdraw financial assistance.

Final Rule, 47 Fed.Reg. at 25,947. Evidently, the Board was concerned that withdrawal of federal subsidies (the only "assistance" it considered at the time) might be too draconian a sanction in certain cases.

"In withdrawing financial assistance," the Board reasoned,

the Board is limited to a suspension or termination of financial assistance to the particular program or activity with respect to which there has been a finding on noncompliance. In the case of a carrier receiving separate subsidies under section 419 of the Act for serving several eligible points, we view this limitation as permitting us to withdraw the subsidy only for the route or routes where the violation occurred. Carriers receiving subsidy under 406 of the Act would not benefit

- (1) Medical oxygen for on-board use;
- (2) Boarding and deplaning assistance using mechanical boarding lifts, aisle chairs, other special equipment, or requiring the presence of more than the usual complement of personnel; and
- (3) Ground wheelchairs at facilities where they are not usually available.²⁰¹

In response to further comment from groups representing the handicapped, the Board amended its Final Rule to prohibit carriers from refusing assistance "on the ground of inadequate notice if the service or equipment is available with the lesser notice given."²⁰² Petitioners nevertheless challenge the forty-eight hour notice requirement as arbitrary, overbroad, discriminatory and inconsistent with the mandate of section 504.²⁰³

from this limitation to the same extent because the financial assistance they receive is intended to help their entire system. Thus, a violation of any part of their subsidy-eligible system may justify the withdrawal of the section 406 subsidy.

Id.

In view of our holding today, this sort of hair-splitting about federal financial assistance to commercial air carriers becomes moot and will be deleted, we assume, on remand. Correspondingly, however, the Board's decision to emphasize that such options as cease and desist orders and the assessment of civil penalties are available to the agency as sanctions of air carriers found to violate the Rule becomes even more important. We assume that denying an offending carrier access to federally-assisted airports in general or to a particular airport on a particular route is likely to be a sanction seldom applied, at the agency's discretion, primarily in egregious cases.

200. Final Rule, 47 Fed.Reg. at 25,949.

201. *Id.* Cf. *supra* note 37 and accompanying text (Proposed Rule).

202. Amended Final Rule, 47 Fed.Reg. at 51,858. The final regulations also indicate that a carrier may not refuse to provide "extensive special assistance" if necessary equipment or personnel can be made available "by reasonable efforts ... without delaying the flight." Final Rule, 47 Fed.Reg. at 25,949 (§ 382.13(d)).

203. See *supra* note 66 and accompanying text.

[5] We disagree. Here again, a balance must be struck between furthering the nondiscriminatory purposes of section 504 and allowing for the practicalities of providing special assistance. As we have noted, the Supreme Court (in the context of education) and this court (in the context of urban mass transportation) have held that extensive, extremely expensive modifications of existing programs may impose such substantial affirmative burdens that they cannot be required under section 504.²⁰⁴ The record reveals that with respect to its advance notice rule, as elsewhere, the Board conscientiously and rationally sought to implement section 504 in a manner likely to be reasonable and effective.²⁰⁵ As a reviewing court, we can require no more.²⁰⁶

Nevertheless, it is clear that when the CAB fashioned this rule, the Board was assuming its application primarily to small air carriers—those least likely to be able to provide special assistance without suffering a substantial financial burden.²⁰⁷ It conceded that "some carriers now provide such services on 24 hours' notice," but ar-

gued that "many, especially smaller carriers, may not be able to do so."²⁰⁸ Respondents expand upon this point by noting the

undue burdens for small airlines operating at small airports or airfields where facilities and equipment are extremely limited. For example, if an airline operates between a number of small facilities that do not receive Federal financial assistance and do not provide ground wheelchairs, it should not be required to maintain a wheelchair at each airport.²⁰⁹

If such reasoning formed the basis of the forty-eight hour notice requirement below, that requirement will, of course, need to be reconsidered on remand. Under our holding today, such small carriers will be a minority of the carriers subject to the regulations implementing section 504. Should the rule be redrafted in accordance, for example, with the comments regarding notice requirements made by both the Architectural and Transportation Barriers Compliance Board²¹⁰ and the Department of Transportation,²¹¹ an exemption may need to be provided for the small carriers.

204. See *supra* note 155.

205. Here the Board was being especially solicitous of the small, subsidized airlines which were, in its opinion at the time, the only carriers to which its regulations would apply. It expressed its concern "that Federal regulatory requirements not be so burdensome that airlines will be discouraged from volunteering to provide essential air service to small communities or be forced out of business altogether." Final Rule, 47 Fed.Reg. at 25,940.

206. See *supra* notes 197, 198 and accompanying text.

207. See *supra* note 205.

208. Final Rule, 47 Fed.Reg. at 25,945.

209. Respondents' Brief at 42, 43.

210. The ATBCB saw "no need to set a time limit on notice that a wheelchair will be needed, as it is a simple matter to have these available. It may be reasonable to require four or five hours' notice when a lift will be needed so that the airport can assure its availability; but in an emergency, where the handicapped passenger

cannot give the required notice, the airline should be required to board the passenger in some manner. We understand the need for advance notice for oxygen and special meals. However, we urge that the notice requirement ... be limited to 24 hours (the notice now required by several airlines such as American and United [and TWA]) It is our hope that when services for the handicapped are more fully integrated into routine air travel, advance notice will become unnecessary." Comments of the Architectural and Transportation Barriers Compliance Board before the Civil Aeronautics Board, *supra* note 156, J.A. at 151, 152.

211. The DOT stated that "the 48 hours advance notice suggested by the Board is unduly long. Provision of wheelchairs would not appear to require any unusual effort or training on the part of airline employees; and many airlines already provide wheelchairs for handicapped passengers during boarding of aircraft, without advance notice ... Any advance notice requirement which may be imposed should be filed by each carrier and justified to the Board as reasonable." Comments of U.S. Department of Transportation before the Civil Aeronautics Board, Sept. 13, 1979, J.A. at 81-82.

3. The Rule on Remand

The Airline Deregulation Act of 1978 provided for the sunset of the Civil Aeronautics Board and the transfer to other agencies, effective January 1, 1985, of those CAB functions that are to continue.²¹² As specified further by the Civil Aeronautics Board Sunset Act of 1984, the vast majority of functions performed by the Board before it ceased to exist have been transferred to the Department of Transportation.²¹³ Among these transferred functions—and substantial enough in the consideration of Congress to have been one of sixteen prominently captioned sections—was the furtherance of “the accessibility of commercial airports or commercial air transportation” to handicapped persons.²¹⁴ On account of our holding today, vacating the CAB’s restrictive reading of its rule-making authority and ordering any regulations promulgated under section 504 to be applied to essentially all air carriers, the DOT will have an opportunity, on remand, to fashion a Nondiscrimination Rule that is consistent with its current regulation of airports, its own understanding of the CAB’s regulatory authority over air carriers as expressed throughout these proceedings, and the intent of Congress.²¹⁵

212. Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.).

213. Civil Aeronautics Board Sunset Act of 1984, Pub.L. No. 98-443, 98 Stat. 1703; see also Notice of Proposed Rulemaking, Transfer of Civil Aeronautics Board Functions to DOT, 49 Fed.Reg. 46,006 (Nov. 21, 1984).

214. See *supra* notes 173, 174 and accompanying text.

215. See *supra* notes 132, 134, 169-176 and accompanying text. The intent of Congress, indeed, will be vindicated in several respects: not only will handicapped persons have greater access to commercial air transportation, but unnecessarily confusing—in some cases duplicative or overlapping, in other cases inconsistent or nonsensical—regulations will be rationalized under the aegis of a single agency.

216. The CAB and other agencies have sometimes seemed reluctant to act upon their statu-

On remand we expect the DOT to act with expedition. We have affirmed the specific provisions of the CAB’s regulations challenged by petitioners. The Department may, as we have indicated, wish to take another look at certain aspects of the Final Rule that appear to have been drafted with small carriers in mind. It may wish then to specify certain exemptions for such carriers if changes are made to reflect the wider applicability of the rules to this nation’s major commercial airlines. Certainly the Department will need to make some non-substantive deletions of language, and it may wish otherwise to economize editorially. By now, however, a dozen years have passed since Congress enacted section 504.²¹⁶ It is time that a handicapped person’s right of reasonable access to nondiscriminatory commercial air transportation had the force of law.

III. CONCLUSION

[6] The regulations promulgated by the Civil Aeronautics Board to implement section 504 of the Rehabilitation Act of 1973 are vacated with respect to the Board’s determination that they could be applied only to air carriers receiving direct money subsidies from the federal government.²¹⁷

ry obligations in this area, requiring prodding from other agencies, the President, and the courts. See *supra* notes 5-12 and accompanying text. In this regard the DOT has been generally more vigorous, as reflected in its regulation of airports, its early willingness to regulate air carriers if the CAB had not asserted its own jurisdiction, and its comments in the proceedings below.

217. In a recent case involving air safety this court similarly found the FAA’s “attempt to limit artificially its regulatory authority . . . unreasonable.” *Bargmann v. Helms*, 715 F.2d 638, 642 (D.C.Cir.1983) (Mikva, J.). We have been presented in the instant case, as we were in *Bargmann*, essentially

with an agency’s refusal to exercise its discretion, based on its belief that it has no power to do otherwise. In this situation, while the agency has the first word on its regulatory jurisdiction, it does not have the last. It is well within the tradition of our review of agency action . . . to make an independent

Cite as 752 F.2d 694 (1985)

They are affirmed in all other respects, but remanded to the Board’s successor agency, the Department of Transportation, with orders to redraft the rules to the extent necessary to apply them to all commercial air carriers in a manner not inconsistent with this opinion.

So ordered.

ON RESPONDENTS’ SUGGESTION FOR REHEARING EN BANC

Before: ROBINSON, Chief Judge, and WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges.

PER CURIAM.

Respondents’ suggestion for rehearing *en banc* has been transmitted to the full Court. A majority of the judges of the Court in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

A dissenting opinion filed by Circuit Judge BORK is attached and is joined by Circuit Judges SCALIA and STARR.

BORK, Circuit Judge, with whom Circuit Judges SCALIA and STARR join, dissenting:

The panel opinion in this case conflicts with the Supreme Court’s decision in *Grove City College v. Bell*. — U.S. —, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984). For that reason, this case should be reheard *en banc*.

In a final rulemaking, the Civil Aeronautics Board (“CAB”) determined that only those airlines receiving a direct subsidy under the Federal Aviation Act are federally assisted within the meaning of section 504 of the Rehabilitation Act, 29 U.S.C.

inquiry into an agency’s allegation that it lacks the statutory authority to act.

Id. at 641 (citations omitted). See also *Exxon Corp. v. FTC*, 665 F.2d 1274 (D.C.Cir.1981); *NAACP v. FPC*, 520 F.2d 432 (D.C.Cir.1973), *aff’d*, 425 U.S. 662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976); *National Org. for Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654 (D.C.Cir.1974).

§ 794 (1982). This court held, however, that all activities of commercial airlines are federally assisted programs or activities because the airlines make use of airports that accept federal funds under the Airport and Airway Improvement Act of 1982. Thus, all airlines, regardless of whether they receive direct federal assistance, are subject to section 504. The court vacated CAB’s rulemaking and ordered CAB to promulgate regulations pursuant to section 504 to be applied to all airlines. Airlines are transformed into “recipients” of federal assistance, according to the panel, because airports and the facilities are “inextricably intertwined” with and “indispensable” to air travel. *Paralyzed Veterans of America v. CAB*, 752 F.2d 694, 712, 715 (D.C.Cir. 1985).

This reading of section 504’s statutory language would make every commercial enterprise a “recipient” of federal aid when it merely makes use of a service or facility that receives any federal assistance. That idea has great potential. Trucking and bus companies use federally constructed and maintained highways, and their businesses are thus inextricably intertwined with a federally assisted program. Many electric companies rely on dams constructed and maintained with federal funds. Without the National Weather Service farmers would be unable to plan, protect, and cultivate their crops in an effective manner. It ought surely to be true that federal funding of federal courts results in the regulation of law firms since courts are inextricably intertwined with and indispensable to lawyering.

It is clear that the panel has not followed the decisions in *Grove City* and *North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). These decisions are especially apposite because they interpret civil rights legislation upon which section 504 was modeled. As the panel opinion recognized, “courts have duly noted the extent to which the language of [section 504 of the

Where, as here, the agency’s own “first word” has been inconsistent—construing its own authority first broadly, then narrowly—this court’s obligation of independent inquiry on review is greater still, and any deference due the agency on the jurisdictional issue is correspondingly minimized.

Act] corresponds to that of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, frequently applying the case law developed in those areas to the resolution of problems arising under the Rehabilitation Act." 752 F.2d at 707 (footnotes omitted).¹

In *North Haven*, the Court concluded that Title IX's reach is limited by its "program-specific" language. The Court rejected an institution-wide approach, as inconsistent with the language and legislative history of the statute. 456 U.S. at 536-38, 102 S.Ct. at 1926-27.

In *Grove City*, the Court again rejected the institution-wide approach and defined "program or activity" by limiting coverage of Title IX to only those "programs or activities" specifically funded by the federal government, even if those programs were part of a larger whole. 104 S.Ct. at 1220-21. The Court held, therefore, that tuition grants to students did not allow the grant agencies under Title IX to regulate all programs at the school. The purpose of tuition grants is to assist the school's financial aid program and that is the only program considered to have received federal funds under Title IX. *Id.* at 1221. Under *Grove City*, the airlines here are clearly

not "recipients" of federal funds. The airports are, and the ground activities of the airlines integral to the operation of the airport may be, subject to section 504. However, the non-airport activities of the airlines, such as in-flight procedures, are outside the scope of that section.²

The panel's attempts to distinguish this case from *Grove City* are wholly unpersuasive. It would unduly extend this dissent, however, to deal with those contentions in detail. The Supreme Court has been over this ground, and we ought to accept, rather than evade, its conclusion.

I would grant the petition.



gram or activity receiving Federal financial assistance....

20 U.S.C. § 1681(a) (1982) (emphasis added).

2. Indeed in previous regulations under Title VI, the Federal Aviation Administration recognized that in the case of aid to airports, the scope of "program or activity receiving Federal assistance" only reached operations at the airport and not air transportation:

(2) The operator of an airport who is the recipient of Federal financial assistance is bound by the conditions and covenants in the conveyance that prohibit, among other things, discrimination for reason of color, race or national origin in admission of the public to waiting rooms, sightseeing areas, sanitary facilities, and any other facilities under the control of the airport operator himself.

14 C.F.R. § 15.5(c)(2) (1968). The successor regulation, 49 C.F.R. Part 21, Appendix A(a)(2) (1984), was expanded to clarify that any activity physically taking place in the airport was covered even if the airlines leased or bought the space.

1. Section 504 provides:

No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

29 U.S.C. § 794 (1982) (emphasis added).

Title VI of the Civil Rights Act of 1964 provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1982) (emphasis added).

Title IX of the Education Amendments of 1972 provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education pro-

Affirmed in part and vacated in part and remanded.

Sandra GARRITY, etc., et al.,
Plaintiffs, Appellees,

v.

John SUNUNU, Governor of the State
of New Hampshire, et al.,
Defendants, Appellants.

Sandra GARRITY, etc., et al.,
Plaintiffs, Appellants,

v.

John SUNUNU, Governor of the State
of New Hampshire, et al.,
Defendants, Appellees.
Nos. 83-1946, 83-1947.

United States Court of Appeals,
First Circuit.

Argued April 4, 1984.

Decided Dec. 27, 1984.

The United States District Court for the District of New Hampshire, Shane Devine, Chief Judge, awarded attorney fees to plaintiffs in a largely successful civil rights class action brought by residents of a New Hampshire state institution which provided services for the mentally retarded, and denied defendants' motion to recover costs incurred subsequent to their offer of judgment, and cross appeals were taken. The Court of Appeals, Levin H. Campbell, Chief Judge, held that: (1) trial court's determination that relief obtained in civil rights class action was not less favorable than defendants' pretrial offer judgment was not clearly erroneous and therefore defendants were not entitled to postoffer costs including attorney fees; (2) District Court did not abuse its discretion in refusing to reduce attorney fees awarded to plaintiffs by amount of time allocated to unsuccessful claims where those claims were sufficiently related, for fee award purposes, to the claims on which success was achieved; and (3) attorney fees could not be recovered for relief sought and granted on a claim exclusively under the Education for All Handicapped Children Act and its New Hampshire counterpart.

1. Civil Rights §13.17(10)

Trial court's determination that relief obtained in civil rights class action brought by residents of state institution which provided services to the mentally retarded in New Hampshire was not less favorable than defendants' pretrial offer judgment was not clearly erroneous and therefore defendants were not entitled to postoffer costs including attorney fees. Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.

2. Federal Civil Procedure §2725

For an offer of judgment to have full effect under rule authorizing award of postoffer costs if judgment finally obtained by offeree is not more favorable than the offer, its terms must be clear. Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.

3. Civil Rights §13.17(18)

In civil rights class action brought by mentally retarded residents of state institution, district court did not abuse its discretion in refusing to reduce attorney fees awarded to plaintiffs by amount of time allocated to unsuccessful claims where those claims were sufficiently related, for fee award purposes, to the claims on which success was achieved.

4. Civil Rights §13.17(18)

Attorney fees could not be recovered for relief sought and granted on one claim exclusively under the Education for All Handicapped Children Act and its New Hampshire counterpart. Education of the Handicapped Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.; N.H.RSA 186-C:1 et seq.

5. Federal Civil Procedure §2737

If a successful pendent state claim shares a common nucleus of operative facts with a fee entitling federal statute, an award of fees for work on the pendent claim might be appropriate.

decided that embrittlement was a substantial issue simply because the problem was "approaching levels of concern."

[2,3] The broader question of whether a particular issue *should* be considered substantial, and thus whether enforcement action is required, must be left to the Commission's discretion. *Porter County Chapter v. Nuclear Regulatory Commission*, 606 F.2d 1363, 1369 (D.C.Cir.1979). We find that the NRC reasonably concluded with respect to Turkey Point Unit #4 that this was not such an issue at this time. As it pointed out in the response to Lorion's letter, the Commission had been studying the pressure vessel problem and had concluded that the risk to public health was very low. It acknowledged that there was the *potential* for problems in the long run, but noted that it was working to correct the matter through an ongoing, plant-specific investigation. *Florida Power and Light*, 14 N.R.C. at 1083. Based on the record, we cannot say that the Commission abused its discretion in refusing to consider Lorion's concerns "substantial," or to institute a licensing procedure.

Petitioner's second claim is that the NRC's rejection of her enforcement request was arbitrary because it failed to consider all the relevant evidence. She argues that two critical documents—which she believes clearly show the danger of the reactor—were never mentioned by the Commission in its response to her letter. In her brief, Lorion also provides a long list of other documents that were available to the Commission, but that either were not mentioned or not discussed in the reply. She suggests that the failure to even acknowledge the evidence means that it was not properly considered, and that the ultimate decision was therefore irrational.

The two crucial documents Lorion cites both purport to show that the steel vessels at Turkey Point are embrittled beyond safe levels. The first is a 1976 report to the NRC, stating that the embrittlement in Unit #4 was both higher than expected and higher than the embrittlement in Unit #3. The second document is the response

by Florida Power to the NRC request for information. In this response, FPL supplied data to show the condition of reactor Unit #4, based on data gathered from Unit #3; the company concluded that it was "more representative" of the conditions at Unit #4 than the Unit #4 data itself. Lorion implies that FPL is trying to camouflage the problems with the #4 reactor by presenting irrelevant evidence.

[4,5] It is true that an agency has a duty to consider all the evidence, and to explain its decision fully. *City of Charlottesville v. Federal Energy Regulatory Commission*, 661 F.2d 945, 950 (D.C.Cir. 1981); *Asarco Inc. v. Environmental Protection Agency*, 616 F.2d 1153, 1159 (9th Cir.1980). It does not necessarily follow, however, that the failure to mention certain evidence means that it was not considered, nor does it follow that an explanation is incomplete unless it dutifully lists all the evidence that the Commission examined. The NRC's denial of a request for a show cause order will be upheld as long as all the necessary factors were *considered*, and provided that the statement of reasons given permits a "rational understanding of the basis for [the] decision." *Consolidated Edison Co.*, 2 N.R.C. at 175; see *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983).

[6,7] The Commission easily met its obligation here. The basis of the NRC's decision was explained in sufficient detail to allow this court to conduct a meaningful review. There will be times, of course, when a reasoned response is impossible without a discussion of contrary evidence, particularly when that evidence is mentioned in the enforcement request. But as long as the Commission's reply fairly addresses the issues raised, the failure to rebut every argument raised by petitioner is not a *per se* abuse of discretion. To require the NRC to mention and analyze every document relevant to a hearing request would completely clog an agency's decisional process. There is nothing in ad-

ministrative law that allows a complainant to filibuster the processes with a huge number of documents.

Lorion's final argument warrants only brief mention. She asks this court to consider the evidence on embrittlement and reverse the NRC's decision; she claims that the overwhelming evidence makes it "impossible" to conclude that no substantial safety issue was presented. This misinterprets our scope of review, and ignores the latitude we must afford the Commission's decisions. Courts are required to give their highest level of deference to decisions involving novel questions at the "frontiers of science." *Baltimore Gas & Electric Co. v. National Resources Defense Council*, 462 U.S. 87, 103, 103 S.Ct. 2246, 2256, 76 L.Ed.2d 437 (1983). The susceptibility of steel reactor vessels to pressurized thermal shock seems to be just such an issue. We would only overturn the Commission's decision if it were completely unsupported by the record; because that is not the case, we decline to substitute our judgment for that of the NRC's. See *Porter County*, 606 F.2d at 1367-70.

CONCLUSION

The NRC provided a reasoned explanation for its decision in this case and thus it did not abuse its discretion by refusing to issue a show cause order. We have considered the rest of petitioner's claims, and find them similarly unpersuasive. We therefore affirm.

It is so ordered.



James ABOUREZK, et al., Appellants,

v.

Ronald Wilson REAGAN, President of the United States, et al.

CITY OF NEW YORK, et al.,
Appellants,

v.

George P. SHULTZ, Secretary of State, et al.

Bruce CRONIN, et al., Appellants,

v.

George P. SHULTZ, Secretary of State, et al.

Nos. 84-5673, 84-5681 and 84-5708.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 23, 1985.

Decided March 11, 1986.

Suits were brought challenging refusal of Secretary of State to issue visas to aliens who plaintiffs, citizens and residents of United States, had invited to come to United States to speak on issues of public concern. The United States District Court for the District of Columbia, 592 F.Supp. 880, Harold H. Greene, J., granted government's summary judgment motion. Plaintiffs appealed. The Court of Appeals, Ginsburg, Circuit Judge, held that: (1) foreign policy concerns rank among national interests, protection of which would justify exclusion of alien seeking entry to engage in activities prejudicial to public interest; (2) case would be remanded for fuller airing of whether exclusion may be based only on "activities" in which alien may be expected to "engage," and not on mere entry or presence; and (3) when alien is member of Communist or anarchist organization, government may exclude alien based upon projected engagement in activities prejudicial to public interest, only if reason for threat to public interest is inde-

pendent of fact of membership in proscribed organization.

Judgment vacated; remanded.

Bork, Circuit Judge, dissented and filed an opinion.

1. Aliens ⇐54.3(1)

District court had subject matter competence over actions challenging denial of four visa requests under § 182(a)(27) of Immigration and Nationality Act [Immigration and Nationality Act §§ 101 et seq., 212(a)(27), 8 U.S.C.A. §§ 1101 et seq., 1182(a)(27)], directing exclusion of alien if Attorney General has reason to believe that alien seeks to enter country to engage in activities prejudicial to public interest, under both its general federal question jurisdiction, and its specific jurisdiction over claims arising under Act. 28 U.S.C.A. § 1331; Immigration and Nationality Act, § 279, 8 U.S.C.A. § 1329.

2. Aliens ⇐44

Immigration and Nationality Act [Immigration and Nationality Act, § 101 et seq., 8 U.S.C.A. § 1101 et seq.] did not itself endow groups, which wished to have certain aliens enter country to speak to them, with right to participate in administrative process regarding denial of visa requests under § 1182(a)(27) of Act, directing exclusion of alien if Attorney General has reason to believe that alien seeks to enter country to engage in activities prejudicial to public welfare. Immigration and Naturalization Act, § 212(a)(27), 8 U.S.C.A. § 1182(a)(27).

3. Aliens ⇐44

Groups, which challenged denial of visa requests to aliens whom groups sought to have entered country to speak to them, had right of action under Administrative Procedure Act [5 U.S.C.A. § 701 et seq.]; groups were "aggrieved" by State Department's denial of visas under § 1182(a)(27) of Immigration and Naturalization Act [Immigration and Naturalization Act §§ 101 et seq., 212(a)(27), 8 U.S.C.A. §§ 1101 et seq., 1182(a)(27)], directing ex-

clusion of alien if Attorney General has reason to believe that alien seeks to enter country to engage in activities prejudicial to public interest. 5 U.S.C.A. §§ 701, 702.

4. Administrative Law and Procedure ⇐665

Section 702 of Administrative Procedure Act [5 U.S.C.A. § 701 et seq.] authorizes suit by persons who suffer "injury in fact" by reason of challenged agency action and are arguably within zone of interest to be protected or regulated under relevant statute. 5 U.S.C.A. § 702.

5. Administrative Law and Procedure ⇐667

Persons who are not materially affected by agency's interpretation of governing law may not successfully invoke Administrative Procedure Act [5 U.S.C.A. § 701 et seq.] to achieve court review.

6. Statutes ⇐220

To override language of statute, indirect evidence of congressional intent, such as acquiescence in judicial construction, must be strong.

7. Aliens ⇐54.3(3)

Statutory language of § 1182(a) of Immigration and Nationality Act [Immigration and Nationality Act, § 212(a), 8 U.S.C.A. § 1182(a)], which lists 33 distinctly delineated categories that conspicuously provide standards to guide executive in its exercise of exclusionary power, channels Secretary of State's discretion so that statutory constraints are judicially enforceable.

8. Statutes ⇐219(6)

Court of Appeals had independent obligation to consider questions of statutory construction in action contesting denial of visa requests under § 1182(a)(27) of Immigration and Nationality Act [Immigration and Nationality Act § 212(a)(27), 8 U.S.C.A. § 1182(a)(27)] which directs exclusion of alien if Attorney General has reason to believe that alien seeks to enter country to engage in activities which would be prejudicial to public interest.

9. Action ⇐6

Action contesting denial of four visa requests under section 1182(a)(27) of Immigration and Nationality Act [Immigration and Nationality Act, § 212(a)(27), 8 U.S.C.A. § 1182(a)(27)], which directs exclusion of alien if Attorney General has reason to believe that alien seeks to enter country to engage in activities prejudicial to public interest, was not moot; reasons for visa denials offered by State Department and accepted by district court indicated that prospect of future denials was genuine, and not merely theoretical, possibility.

10. Statutes ⇐217.4, 219(1)

Court's examination of statutory provision in order to determine whether Congress had specific intent in respect to issue at hand should begin with language of statute, but court may also inspect legislative history and past administrative practice for any light these sources may shed on congressional intent.

11. Statutes ⇐181(1), 219(1)

If court, interpreting statute provision, finds that Congress had specific intent with respect to issue, court stops there and enforces that intent regardless of agency's interpretation; if, however, court finds that Congress had no specific intent, agency's interpretation should be accorded great deference and should be invalidated only if it is not a reasonable accommodation of conflicting policies which were committed to agency's care by statute.

12. Aliens ⇐46

Congress intended foreign policy concerns to rank among national interests, protection of which would justify exclusion of alien under § 1182(a)(27) of Immigration and Nationality Act [Immigration and Nationality Act, § 212(a)(27, 28), 8 U.S.C.A. § 1182(a)(27, 28)], which directs exclusion of alien if Attorney General has reason to believe that alien seeks to enter country to engage in activities prejudicial to public interest.

13. Aliens ⇐54.3(6)

Case challenging denial of four visa applications on basis of § 1182(a)(27) of

Immigration and Nationality Act [Immigration and Nationality Act, § 212(a)(27), 8 U.S.C.A. § 1182(a)(27)], which directs exclusion of aliens if Attorney General has reason to believe that alien seeks to enter country to engage in activities prejudicial to public interest, would be remanded to district court for fuller airing of whether exclusion may be based only on "activities" in which alien may be expected to "engage" and not on mere entry or presence.

14. Statutes ⇐217.3

It is plainly wrong as general matter to regard committee reports as drafted more meticulously and as reflecting congressional intent more accurately than statutory text itself.

15. Statutes ⇐219(3)

Information about congressional acquiescence in administrative construction of statutory language during 34 years since passage of act would rank a significant indicator of legislature's intent.

16. Aliens ⇐44

Three instances of actual visa denials allegedly based on entry rather than activity prejudicial to public interest under § 1182(a)(27) of Immigration and Nationality Act [Immigration and Nationality Act, § 212(a)(27), 8 U.S.C.A. § 1182(a)(27)] did not demonstrate kind of consistent administrative interpretation necessary to give rise to presumption of congressional acquiescence.

17. Aliens ⇐46

Executive may not use § 1182(a)(27), which directs exclusion of alien if Attorney General has reason to believe that alien seeks to enter country to engage in activities prejudicial to public interest [Immigration and Nationality Act, § 212(a)(27), 8 U.S.C.A. § 1182(a)(27)] to evade limitations Congress appended to § 1182(a)(28), governing aliens who are members of Communist or anarchistic organizations. Immigration and Nationality Act, § 212(a)(28), 8 U.S.C.A. § 1182(a)(28).

18. Aliens ⇐46

Purported standard used in distinguishing between § 1182(a)(27) and § 1182(a)(28) of Immigration and Nationality Act [Immigration and Nationality Act, § 212(a)(27, 28), 8 U.S.C.A. § 1182(a)(27, 28)], governing respectively, exclusion of alien believed to be seeking entry to engage in activities prejudicial to public interest, and exclusion of aliens who are members of Communist or anarchist organizations, only when there is reason for exclusion in addition to alien's membership in such organization, is inadequate to prevent former subsection from overwhelming and obliterating latter subsection, and McGovern amendment, which called upon Secretary of State to recommend waiver of ineligibility of alien who belongs to such organization unless Secretary certifies to Congress that admission of alien would be contrary to security interest of United States. 22 U.S.C.A. § 2691(a).

19. Aliens ⇐46

To exclude alien based on perceived bent or proclivities of members of Communist or anarchist organization would contravene core purpose of McGovern amendment. 22 U.S.C.A. § 2691(a); Immigration and Nationality Act, § 212(a)(28), 8 U.S.C.A. § 1182(a)(28).

20. Aliens ⇐46

McGovern amendment was intended to implement United States' promise under Helsinki accords to promote free flow of people and ideas across national borders. 22 U.S.C.A. § 2691(a).

21. Aliens ⇐46

When alien is member of Communist or anarchist organization, so that § 1182(a)(28) of Immigration and Nationality Act [Immigration and Nationality Act § 212(a)(28), 28 U.S.C.A. § 1182(a)(28)], applies, government may bypass that provision and proceed under § 1182(a)(27), governing exclusion based upon anticipated activities prejudicial to public interest, only if reason for threat to public interest, welfare, safety, or security is independent of fact of membership in or affiliation with

proscribed organization. 22 U.S.C.A. § 2691(a).

22. Aliens ⇐46

If alleged government affiliation is presumed because of visa applicant's membership or participation in Communist or anarchist organization, that presumption is not independent of organizational tie so as to permit exclusion of alien under § 1182(a)(27) of Immigration and Nationality Act [Immigration and Nationality Act, § 212(a)(27), 8 U.S.C.A. § 1182(a)(27)], governing exclusion based upon projected activity prejudicial to public interest, rather than § 1182(a)(28), governing exclusion due membership in Communist or anarchist organization. Immigration and Nationality Act, § 212(a)(28), 8 U.S.C.A. § 1182(a)(28).

23. Aliens ⇐44

State Department's criteria for determining when sufficiently independent reasons exist to warrant invocation of section 1182(a)(27) of Immigration and Nationality Act [Immigration and Nationality Act, § 212(a)(27), 8 U.S.C.A. § 1182(a)(27)] governing exclusion of alien based upon projected engagement in activities prejudicial to public interest, must be clear enough to allow courts to fulfill their responsibility to ensure that executive authority respects congressional intent. 22 U.S.C.A. § 2691(a).

24. Federal Civil Procedure ⇐2461

Court may not dispose of merits of case on basis of ex parte, in camera submissions.

25. Federal Civil Procedure ⇐2461

Inspection of materials by judge isolated in chambers may occur when party seeks to prevent use of materials in litigation; if court finds that claimed privilege does not apply, other side must be given access to information, but if court finds that privilege does apply, then court may not rely upon information in reaching its judgment.

Appeals from the United States District Court for the District of Columbia (Civil Action Nos. 83-03739, 83-03741 and 83-03895).

Steven R. Shapiro, with whom Charles S. Sims, Frederick A.O. Schwarz, Jr. and Leonard Boudin were on brief for appellants in Nos. 84-5673, 84-5681 and 84-5708. Susan W. Shaffer also entered an appearance for appellants in Nos. 84-5673, 84-5681 and 84-5708.

Michael Jay Singer, Atty., for appellees. Richard K. Willard, Acting Asst. Atty. Gen., Joseph E. diGenova, U.S. Atty., and Paul Blankenstein, Atty., were on brief for appellees in Nos. 84-5673, 84-5681 and 84-5708. Thomas W. Hussey and Barbara Herwig, Attys., also entered appearances for appellees in Nos. 84-5673, 84-5681 and 84-5708.

Robert B. McKay was on brief for amicus curiae the Committee on Immigration and Nationality Law of the Ass'n of the Bar of the City of N.Y. urging reversal.

Steven P. Quarles was on brief for amicus curiae the American Ass'n of University Professors, et al. urging reversal.

Before EDWARDS, GINSBURG, and BORK, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Dissenting Opinion filed by Circuit Judge BORK.

GINSBURG, Circuit Judge:

This case concerns the scope of the authority Congress accorded to the Secretary of State under the Immigration and Nationality Act of 1952, § 182, 8 U.S.C. § 1182(a)(27) (1982), to deny non-immigrant visas to aliens who wish to visit this country in response to invitations from United States citizens and residents to attend meetings or address audiences here. The district court, granting the government's motion for summary judgment, held that the specific visa denials at issue were within the State Department's statutory and constitutional authority. See *Abourezk v.*

Reagan, 592 F.Supp. 880 (D.D.C.1984). We conclude that the district court incorrectly analyzed the statutory construction issue, and that questions of material fact remain. Accordingly, we vacate the judgment of the district court and remand the case for further proceedings consistent with this opinion.

I.

We describe first the statutory complex and, next, the essential facts of the cases presented for review.

The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* (1982) (Immigration Act or Act), delegates responsibility for regulating the entry of aliens jointly to the Attorney General, the Secretary of State, and United States consular officials abroad. The Secretary of State has the authority to revoke visas, as well as the general responsibility to supervise the issuance of visas by consular officers. See *id.* at § 1104; Brief for Appellees at 4. Section 1182(a) of the Act defines the categories of aliens that the government may exclude from this country. Some of these categories deal with the status of the alien, see, e.g., § 1182(a)(28) (aliens who are members of Communist or anarchist organizations); others concern the alien's activities, see, e.g., § 1182(a)(29) (aliens likely to engage in subversion or espionage); while still others involve the procedural requirements for entry, see, e.g., § 1182(a)(20) (aliens without valid visas and passports).

Subsection (27) of section 1182(a), the provision centrally at issue in this case, directs the exclusion of an alien if the Attorney General has reason to believe that the alien "seek[s] 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." Pursuant to State Department policy, when a consular officer abroad receives a visa request from an individual he believes may be ineligible under subsection (27), the officer forwards the request to the

State Department where the appropriate officials consider it and render binding advice. See 22 C.F.R. § 41.130(c) (1985); Brief for the Appellees at 6-9.¹ If the alien is found to be within the subsection (27) classification, his exclusion is mandatory.

Subsection (28) of section 1182(a) also bears importantly on this case and was inadequately evaluated by the district court. This subsection authorizes the exclusion, *inter alia*, of aliens who are, or at any time have been, "members of ... the Communist Party of the United States, ... the Communist ... party ... of any foreign state, or ... any ... affiliate ... of any such ... party." 8 U.S.C. § 1182(a)(28)(C) (1982). Unlike subsection (27), subsection (28) does not require the Secretary of State to exclude any alien who meets the stated criteria. If the Secretary recommends a waiver of ineligibility, then, in the discretion of the Attorney General, the alien may be admitted. See 8 U.S.C. § 1182(d)(3)(A) (1982).

The McGovern Amendment, 22 U.S.C. § 2691 (1982), addresses the Secretary's implementation of this waiver provision. The Amendment calls upon the Secretary to recommend "the approval necessary for the issuance of a visa" to "any alien who is excludable from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States," unless the Secretary certifies to the Congress that "the admission of such alien would be contrary to the security interests of the United States." *Id.* at § 2691(a).

This appeal involves three actions consolidated in the district court; the actions contest the denial under subsection (27) of four visa requests. In *Abourezk v. Reagan*, No. 84-5673, the plaintiffs are a diverse group of United States citizens—in-

1. Routine name checks are ordinarily made in these cases through United States intelligence agencies. The State Department has acknowledged that "no recommendations were received from the Department of Justice or any of its components" regarding the visa requests involved in this litigation. Affidavit of Lawrence

cluding members of Congress, university professors, journalists, and religious leaders—who had invited Tomas Borge, the Interior Minister of Nicaragua, to speak to them in this country. See Brief of Plaintiffs-Appellants at 9-11. The Nicaraguan government applied to the United States Embassy in Managua for a non-immigrant visa for Borge. After obtaining an advisory opinion from the State Department, the consular officer informed Borge, in late November 1983, that his visa request had been denied pursuant to section 1182(a)(27) of the Immigration Act. See Brief for the Appellees at 9-11.

The plaintiffs in *Cronin v. Shultz*, No. 84-5708, are principally groups interested in nuclear disarmament who had invited Nino Pasti to attend and speak at a rally in Boston. Pasti is a former member of the Italian Senate and former general in the Italian armed forces; he is now a peace activist. See Brief of Plaintiffs-Appellants at 8. Pasti is also a participant in the World Peace Council, an organization which the State Department believes to be controlled by the Soviet Communist Party. See *World Peace Council: Instrument of Soviet Foreign Policy*, FOREIGN AFFAIRS NOTE (Department of State, April 1982), reprinted in Joint Appendix at 144-48. The consular officer in Rome found Pasti ineligible to receive a visa under subsection (28). The officer therefore requested an advisory opinion from the State Department on the possibility of a waiver. In response, the Department informed the officer that Pasti was ineligible under subsection (27). The consular officer thereupon notified Pasti, in mid-October 1983, that his visa request had been denied. See Affidavit of Louis P. Goetz, reprinted in Joint Appendix at 163-64.

In *City of New York v. Shultz*, No. 84-5681, the plaintiffs, the New York City

S. Eagleburger, reprinted in Joint Appendix at 140-41 (affidavit also acknowledges that information supporting visa denials for foreign policy reasons often includes "data and analyses from the United States law enforcement and intelligence communities").

Commission on the Status of Women and several women's studies programs at various universities, had extended speaking invitations to two Cuban women, Olga Finlay and Leonor Rodriguez Lezcano; these individuals have special expertise regarding the status of women and family law in Cuba. See Brief of Plaintiffs-Appellants at 13-14. According to the State Department, both women are members of the Federation of Cuban Women, an organization affiliated with the Communist Party of Cuba. See Affidavit of Louis P. Goetz, reprinted in Joint Appendix at 164-65. Visa applications for the two women were conveyed by diplomatic note from the Government of Cuba. The consular officer in Havana forwarded the visa requests to the State Department and was advised that Finlay and Lezcano were ineligible under subsection (27). He notified them, in early October 1983, that their visa requests had been denied. See Brief for the Appellees at 12-13.²

The plaintiffs filed suit in the district court requesting injunctive and declaratory relief. They argued that the State Depart-

2. On October 4, 1985, acting pursuant to § 212(f) of the Immigration Act, 8 U.S.C. § 1182(f) (1982), President Reagan issued a proclamation suspending the entry into the United States of officers or employees of the Cuban government or the Cuban Communist Party. See Proclamation No. 5377, 50 Fed. Reg. 41329 (1985). If this Proclamation covers Finlay and Lezcano, the President's directive might constitute an independent intervening cause for future exclusions, and thus render the *City of New York* case moot. See *Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979). The current record, however, is inadequate to enable us to determine, dispositively, whether the October 4, 1985, Proclamation would bar the entry of these women. Compare Affidavit of Louis P. Goetz, reprinted in Joint Appendix at 164-65 (stating that Finlay is an official of the Cuban Communist Party and a member of the National Committee of the Federation of Cuban Women and Lezcano, an official of the Federation of Cuban Women), with Affidavit of Olga Finlay, reprinted in Joint Appendix at 216 (stating that the affiant is not a member of the Cuban Communist Party and that the Federation of Cuban Women is not an instrumentality of the Cuban government or the Communist Party) and Affidavit of Leonor Rodriguez Lezcano, reprinted in Joint Appendix at

ment's exclusion of the aliens invited by plaintiffs to speak here exceeded the Department's statutory authority under subsection (27) and violated the plaintiffs' first amendment right to engage in dialogue with these foreign individuals. The district court granted the defendants' request for a stay of discovery pending their filing of a motion for summary judgment. See *Abourezk v. Reagan*, No. 83-3739 (D.D.C. Feb. 8, 1984) (order granting motion for extension of time and protective order staying discovery). After consideration of both the public documents and three classified affidavits submitted by the government for the court's *in camera* inspection, the district judge granted the defendants' motion for summary judgment. The court held that the government's action was within its statutory authority and survived the very limited constitutional scrutiny appropriate in a case concerning the admission or exclusion of aliens. See *Abourezk v. Reagan*, 592 F.Supp. 880 (D.D.C.1984).

II.

The government raises several preliminary objections to the adjudication of these

245 (same). We decline to decide this mootness issue on the scant record before us. The same issues are raised by all three consolidated cases; a finding that *City of New York* has become moot would not relieve this court of the responsibility to decide those common issues. We therefore leave the question of the impact of the President's Proclamation to the district court on remand.

We note, however, that the issuance of this Proclamation provides support for one of the plaintiffs' arguments: even if the court were to find that subsection (27) cannot be applied to bar aliens whose mere entry would threaten United States foreign policy interests, the Executive would not be helpless in the face of such a threat. He may act pursuant to section 1182(f) to suspend or restrict "the entry of any aliens or any class of aliens" whose presence here he finds "would be detrimental to the best interests of the United States." The President's sweeping proclamation power thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a). See Brief of Plaintiffs-Appellants at 40-42. Thus, we need not reject, avoid, or augment the formulation Congress adopted in subsection (27) in order to preserve the President's potency in this area. Cf. Dissent at 1063-64.

claims. The State Department suggests that the district court lacked jurisdiction over the subject matter, that the plaintiffs have no right to contest the visa denials on statutory grounds, and that the case is moot. We find these contentions insubstantial.

[1] The district court had subject matter competence in this case under both its general federal question jurisdiction, *see* 28 U.S.C. § 1331 (1982), and its specific jurisdiction over claims arising under the Immigration and Nationality Act, *see* 8 U.S.C. § 1329 (1982). Section 1329 states that "[t]he district courts . . . shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter [of the Immigration Act]." Section 1182(a)(27) is part of the relevant subchapter. The courts have reasonably inferred from this broad grant of jurisdiction that "clear and convincing evidence" of a congressional intent to preclude judicial review is lacking. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967) (stating, as the general rule, presumption in favor of judicial review of final agency action, absent "clear and convincing evidence" of congressional intent to the contrary); *see, e.g., Karmali v. Immigration and Naturalization Service*, 707 F.2d 408, 409-10 (9th Cir.1983) (interpreting § 1329 as grant of jurisdiction over Immigration Act claims); *Acosta v. Gaffney*, 558 F.2d 1153, 1156 (3d Cir.1977) (same).

We further note, as did the district court, *see Abourezk*, 592 F.Supp. at 883 n. 10, the Supreme Court's disposition on the merits in *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972). In that

3. The Immigration Act and related regulations provide explicitly for the participation of United States family members or employers in visa applications by certain aliens to whom they are connected. *See* 8 U.S.C. §§ 1151-1154 (1982) (immediate relative petitions); 8 C.F.R. § 204 (1985) (same); 8 C.F.R. § 212.8 (1985) (employer petitions). The plaintiffs in this case, however, are neither family members nor employers of the aliens in question. Therefore, they have no right to participate in the administrative process, and no attendant claims for relief, by vir-

case, United States sponsors of a Belgian journalist objected to his exclusion under section 1182(a)(28). Presumably, had the Court harbored doubts concerning federal court subject matter jurisdiction in *Mandel*, it would have raised the issue on its own motion. *See, e.g., Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908).

[2-4] The government also argues that the plaintiffs' statutory pleas may not be entertained; this argument blends objections to plaintiffs' standing and to their ability to state a claim for relief (cause of action). The Immigration Act, we agree, does not itself endow plaintiffs with a right of action.³ But the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1982) (APA), which complements statutes controlling agency behavior, does. Section 702 of that Act, as explained by the Supreme Court in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 152-53, 90 S.Ct. 827, 829-30, 25 L.Ed.2d 184 (1970), authorizes suit by persons who suffer "injury in fact" by reason of the challenged agency action and are "arguably within the zone of interests to be protected or regulated" under a relevant statute.⁴

[5] Persons who are not materially affected by an agency's interpretation of the governing law may not successfully invoke the APA to achieve court review. *See, e.g., Capital Legal Foundation v. Commodity Credit Corporation*, 711 F.2d 253, 259-60 (D.C.Cir.1983). But the plaintiffs in this case are hardly strangers to the matter at issue. Unquestionably, they are "aggrieved" by the State Department's resort to section 1182(a)(27) to keep out people they

tue of these provisions. Nor does any other provision of the Immigration Act explicitly or implicitly authorize the claims in suit. *See Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 (1975).

4. Section 702 affords a right of review to "[a] person suffering a legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1972).

have invited to engage in open discourse with them within the United States. *See* Brief for the Appellees at 20 ("Refusing visas to their alien invitees undoubtedly inhibits plaintiffs' rights to communicate with these individuals in face-to-face discussions on American soil."). The plaintiffs are substantively interested in, and adversely affected by, the Department's interpretation of subsection (27) as it coexists with subsection (28). They are, as the district court observed, at least arguably within the zone regulated by the statute. *See Abourezk*, 592 F.Supp. at 884 n. 10.⁵ They therefore have a cognizable stake in the construction of subsections (27) and (28), a practical interest adequate under section 702 of the APA to secure judicial review of their pleas regarding those provisions. *Cf. Capital Legal Foundation*, 711 F.2d at 259-60 & n. 17.

[6,7] Section 701 of the APA states that "[t]his chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701 (1982). As discussed above, the Immigration Act, far from precluding review, affirmatively provides for it. *See supra* at 1049-50.⁶ Furthermore, the statute does not commit

5. The McGovern Amendment, *see supra* at 1048, adds force to the position that plaintiffs suffered an injury that arguably falls within the zone of interests of the relevant law. *See infra* at 1057-58.

6. The government cites *Block v. Community Nutrition Institute*, 467 U.S. 340, 104 S.Ct. 2450, 2456, 81 L.Ed.2d 270 (1984), as support for the proposition that a history of judicial construction barring review and congressional acquiescence in that construction may override the general presumption favoring review. That proposition, while true, is irrelevant to this case. Unlike the statute in *Block*, the statute in this case explicitly provides for judicial review. *See Block*, 104 S.Ct. at 2457. To override the language of a statute, indirect evidence of congressional intent, such as acquiescence in judicial construction, must be strong. *Cf. Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980) ("Absent a clearly expressed legislative intent to the contrary, [statutory] language must ordinarily be regarded as conclu-

to unguided agency discretion the decision to exclude an alien. The Supreme Court has recently interpreted the "committed to unfettered agency discretion" provision as applicable only "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, — U.S. —, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985). Under this interpretation, the Immigration Act emphatically did not commit the decision to exclude an alien to standardless agency discretion; the statute lists thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power. *See* 8 U.S.C. § 1182(a) (1982). The statutory language thus channels the Secretary of State's discretion and, under *Heckler v. Chaney*, the constraints Congress imposed are judicially enforceable.

[8] In sum, the APA applies to the plaintiffs' challenges; that Act gives them a right of review extending to the statutory as well as the constitutional propriety of the State Department's application of section 1182(a)(27) to exclude the aliens invited by plaintiffs to the United States as speakers and meeting participants. We add, fi-

sive."). Moreover, the *Block* rule is inapplicable to this case because there exists no longstanding judicial practice of refusing to review claims like those raised here. *Cf. Block*, 104 S.Ct. at 2454-56 (holding that statute precludes judicial review of consumers' claims although it allows review of milk handlers' claims). This case involves claims by United States citizens rather than by aliens, unlike *Karmali v. Immigration and Naturalization Service*, 707 F.2d 408 (9th Cir.1983); claims concerning the decisions of State Department officials rather than consular officers abroad, unlike *Castaneda-Gonzalez v. Immigration and Naturalization Service*, 564 F.2d 417, 428 n. 25 (D.C.Cir.1977); and statutory claims that are accompanied by constitutional ones. The defendants have not produced a single case, and the court is aware of none, in which this kind of claim was found to be outside the province of the federal courts. On the contrary, in a case specifically addressing this type of claim, the Third Circuit found that the APA applied and the court reviewed the merits of the claim. *See Acosta v. Gaffney*, 558 F.2d 1153, 1156 (3d Cir.1977).

nally, that in the special circumstances of this case, the court has an independent obligation to consider questions of statutory construction. We should so proceed in order to avoid a constitutional confrontation, if it is possible for us to stop short of that point. See *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). This consideration strongly supports our attention to the plaintiffs' nonconstitutional arguments. We should not reach "[the] constitutional question although properly presented by the record, if there is also present [a statutory construction] ground upon which the case may be disposed of." *Id.* In rejecting the government's demand that we confine review to the consistency of the State Department's actions with the Constitution, we thus observe the "cardinal principle" directing a court first to inquire "whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Id.* at 348, 56 S.Ct. at 483 (quoting *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932)).

[9] Turning to the last of the government's threshold objections, we hold that the case is not moot. The government asserts that the State Department considers each visa application independently and that the present denials in no way bear on the results of any future application that the excluded aliens might make. See Brief for the Appellees at 26 n. 23; Affidavit of

7. This characterization of the government's reasons may be gleaned from publicly available documents. See Affidavit of Lawrence S. Eagleburger, reprinted in Joint Appendix at 141-43 (noting the membership or affiliation of each excluded alien); Affidavit of Louis P. Goetz, reprinted in Joint Appendix at 162-65 (same); see also *Abourezk*, 592 F.Supp. at 888 (giving a general description of the reasons stated in the classified affidavits). This court has also examined the reasons offered in the *in camera* affidavits; they do not decrease our concern over the inaccuracy of the State Department's public representations that these visa denials do not in any way forecast the results of a future application.

8. In addition, the plaintiffs assert that they are suffering a present and continuing harm in the

Louis P. Goetz, reprinted in Joint Appendix at 158. However, the reasons for the visa denials offered by the State Department and accepted by the district court indicate that the prospect of future denials of applications by these aliens is a genuine, and not merely a "theoretical[,] possibility." *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982).

The State Department's dominant reasons for the denials that sparked this litigation do not refer to a particular event in the world whose cessation might induce the government to grant visa requests from the aliens whom plaintiffs invited to speak. Instead, the Department cites the continuing status of these aliens as members of organizations or governments hostile to the United States.⁷ The aliens, whose affiliations apparently have not changed, assert that their interest in entering the United States continues, and the plaintiffs have represented that they still wish to invite these aliens to speak in this country. See Brief of Plaintiffs-Appellants at 9 (Pasti), 13 (Borge), 17 (Finlay and Lezcano). In light of the reasons for the visa denials tendered by the government and relied upon by the district court, these allegations of continuing interest suffice to establish a genuine prospect that the plaintiffs will suffer the same injury in the future. See *Nebraska Press Association v. Stuart*, 427 U.S. 539, 546-47, 96 S.Ct. 2791, 2796-97, 49 L.Ed.2d 683 (1976).⁸ We therefore reach the merits of the plaintiffs' claims.

form of the "chill" that the challenged State Department policy places on their first amendment interest in hearing foreign speakers. United States audiences are reluctant to extend invitations to foreign speakers, plaintiffs urge, for fear that the aliens may be subjected to the embarrassment of being denied a visa on the ground that they pose a danger to the public welfare. Similarly, the alien invitees may be unwilling to accept invitations when the price is to submit to such "ideological scrutiny." See Brief of Amici Curiae American Association of University Professors et al. at 12-13 (presenting examples of chilling effect). In the first amendment area, such "chill" has long been recognized by the courts as a harm independent from the actual application of the challenged statute. See *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940) ("It is not merely

III.

The plaintiffs raise three issues of statutory interpretation. They argue, first, that subsection (27) does not authorize exclusion on the basis of foreign policy concerns, as opposed to issues of "public interest or ... [national] welfare, safety, or security...." 8 U.S.C. § 1182(a)(27) (1982). Second, the plaintiffs contend that subsection (27) allows exclusion only if it appears that the alien's activities in the United States would endanger the public welfare and not if his or her mere presence or entry might do so. And, third, the plaintiffs suggest that the government's interpretation of subsection (27) violates the statute because it renders subsection (28) superfluous and undermines the restrictions Congress has placed on the Executive's use of subsection (28). See McGovern Amendment, 22 U.S.C. § 2691 (1982).

[10, 11] Our approach to statutory interpretation is informed by the guidelines the Supreme Court announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). According to *Chevron*, a court must first examine the statutory provision in question to determine whether Congress had a specific intent with respect to the issue at hand. See *id.* 104 S.Ct. at 2781. This examination should begin with the language of the statute, see *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980), but the court may also inspect legislative history and past administrative practice for any light these sources may shed on congressional intent. See, e.g., *Chevron*, 104 S.Ct. at 2791-92; *Reitig v. Pension Benefit Guaranty Corporation*, 744 F.2d 133, 144-50 (D.C.Cir.1984). If the court finds that Congress had a specific intent with respect to the issue, the court stops there and enforces that intent regardless of the agency's interpretation. See *Chevron*, 104 S.Ct. at 2781-82 & n. 9. If, however, the court finds that Congress had no specific intent,

the sporadic abuse of power by the censor but the pervasive threat inherent in its very exist-

the agency's interpretation should be accorded great deference and invalidated only if it is not a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute...." *Chevron*, 104 S.Ct. at 2783 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)).

[12] Following these guidelines, we conclude, in agreement with the government and the district court, see *Abourezk*, 592 F.Supp. at 885-86, that Congress intended foreign policy concerns to rank among the national interests whose protection would justify exclusion of an alien under subsection (27). The broad language of (27) evinces no intent to restrict the kinds of governmental concerns that would qualify; the subsection speaks of "public interest[,] ... welfare, safety, or security" and places no limitation on these encompassing terms. Only an isolationist view patently inconsistent with the reality of our late twentieth century world could account for a belief that the "public interest" and the "national welfare" were not dependent, in part, on the effective execution of our foreign policy. The court surely should not adopt on its own initiative such a counter-intuitive interpretation of expansive statutory language, and the plaintiffs have identified nothing in the legislative history or administrative practice to suggest that Congress intended to exclude foreign policy concerns from consideration under subsection (27). Because the State Department's interpretation appears fully consistent with congressional intent, we need take this inquiry no further.

[13] The plaintiffs also contend that subsection (27) explicitly authorizes exclusion based only on "activities" in which the alien may be expected to "engage" and not on mere entry or presence. The district court decided this issue for the government. See *Abourezk*, 592 F.Supp. at 884-85. We conclude that it did so on an inadequate record. We therefore remand for a

ence that constitutes the danger to freedom of discussion.").

fuller airing of the activity/mere entry question.

The language of the statute, as the Dissent acknowledges, supports the plaintiffs' interpretation on this issue. Dissent at 9. The provision does not say "persons whose presence in this country would be prejudicial to the interests of the United States are barred from entry." Rather, subsection (27) makes ineligible for a visa those aliens who "seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial" to United States interests. The specific reference to activities would be superfluous, indeed, misleading, if entry or presence alone could justify exclusion. A familiar canon of statutory construction cautions the court to avoid interpreting a statute in such a way as to make part of it meaningless. See 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (4th ed.1984). This basic guide and the plain thrust of the language of subsection (27), we emphasize, weigh heavily against the government's reading.

The terms Congress employed in other subsections on exclusion are also consistent with plaintiffs' interpretation. Section 1182(a) sets out thirty-three separate cate-

gories of excludable aliens; this enumeration demonstrates that Congress could and did clearly distinguish status-based categories from conduct-based categories. See *supra* at 1047. Congress' undoubted ability to draft categories based only on status, when that is the legislature's intention, strengthens the inference that the words "to engage in activities" contained in subsection (27) were not put there inadvertently.

The legislative history on this issue, however, is not a prop upon which plaintiffs can rely. It is terse and tugs in more than one direction. The language of section 1182(a)(27) of the 1952 Immigration Act was taken almost verbatim from section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006 (repealed 1952). The Senate Reports on section 22 seem to assume that both existing law and the proposed section allowed exclusion when the very entry of the alien would be prejudicial to the public interest.⁹ The Conference Committee Report, on the other hand, implies that existing law and section 22 authorize exclusion only on the basis of activities.¹⁰

[14, 15] Given the inconclusive state of the legislative history,¹¹ evidence of con-

would endanger the public safety of the United States.

H.R. REP. NO. 3112, 81st Cong., 2d Sess. 54 (1950), U.S. CODE CONG. SERV. 1950, PP. 3886, 3906.

11. The Dissent finds strongest support for the State Department's reading in the legislative history of a bill enacted in 1941 containing a prescription from which subsection (27) was later derived. Dissent at 1065-66. We do not find the history of the earlier formulation as clear as the Dissent contends it is. On the contrary, one searches all the legislative history in vain for an illustration homing in on the question at issue.

Thus, one can only speculate on what the legislative report participants had in mind when they made their seemingly interchangeable references to "entry" and "activities." Conceivably, as the Dissent presumes, they believed "activity" embraced the "act" of entry. Or, they may have understood "entry" to implicate activities likely to be pursued upon admission. At least as plausibly, their word choices were casual and inadvertent, not motivated or informed by the precise consideration at issue in the instant cases.

In sum, we think it plainly wrong as a general matter, and in this case in particular, to regard

gressional acquiescence (or the lack thereof) in an administrative construction of the statutory language during the thirty-four years since the current act was passed could be telling. Information about such acquiescence, or the absence of it, would rank as a significant indicator of the legislature's will. See *Zemel v. Rusk*, 381 U.S. 1, 8-12, 85 S.Ct. 1271, 1276-1279, 14 L.Ed.2d 179 (1965).¹² Unfortunately, evidence on this point was thin when the district court determined to accept the State Department's interpretation, for that court had stayed discovery pending the government's motion to dismiss. See *Abourezk v. Reagan*, No. 83-3739 (D.D.C. Feb. 8, 1984). The only evidence of administrative practice now in the record consists of conflicting assertions in the affidavits of past and present State Department officials and a sparse collection of illustrations. Compare Affidavit of Louis P. Goetz, reprinted in Joint Appendix at 159-60 (present Deputy Assistant Secretary of State), with Affidavit of Leonard C. Meeker, reprinted in Joint Appendix at 252 (former Legal Adviser to the Department of State).

The illustrations—advanced by the State Department as indicative of an administrative practice of excluding aliens under subsection (27) based on entry or presence alone—include descriptions of three actual visa denials and four examples listed in the State Department Manual. While these illustrations provide some support for the government's position, they are inadequate to enable a court to determine reliably the

committee reports as drafted more meticulously and as reflecting the congressional will more accurately than the statutory text itself. Committee reports, we remind, do not embody the law. Congress, as Judge Scalia recently noted, votes on the statutory words, not on different expressions packaged in committee reports. *Hirschey v. FERC*, 777 F.2d 1, 7-8 & n. 1 (D.C. Cir.1985) (Scalia, J., concurring).

12. There is no possibility of congressional acquiescence in a longstanding judicial construction. The parties have uncovered only two court cases, in addition to this one, concerning the scope of subsection (27). In *El-Werfalli v.*

nature of the general administrative practice under subsection (27).

The Manual offers the following examples of aliens whose visa applications might properly be denied under (27): an alien who might engage in conspiratorial activity against the United States while in the country; an alien who is known to be a member of a terrorist organization; an alien who is associated with a criminal organization; and an alien official who engaged in physical brutality while in power or was associated with a regime that did so. See Brief of Plaintiffs-Appellants at 37 (citing FOREIGN AFFAIRS MANUAL, Pt. II, § 41.91(a)(27), reprinted in 6 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 32-214.18 (1985)). Although the first three examples may be explained in terms of the aliens' probable activity in the United States, the last example, the government argues, embodies the State Department's longstanding view that exclusion under subsection (27) is appropriate when the mere entry of the alien would prejudice foreign policy objectives. In that example, the government is concerned, not about the possibility that the official might engage in physical brutality while in the United States, but about the impact of the very admission of such a person on our foreign policy interests. See Brief for the Appellees at 56 n. 42. This fourth example in the Manual may represent an open assertion of the power to exclude under subsection (27) on the basis of entry alone; such an assertion of authority may warrant the implication of an executive policy, even if the policy is only infrequently applied, and may contribute to a

Smith, 547 F.Supp. 152 (S.D.N.Y.1982), the court held that a Libyan student seeking to enter the United States in order to study airplane maintenance was properly excluded under subsection (27). While such study does not rise to the level of subversive activity, it clearly constitutes an "activity" exceeding mere presence. In *Allende v. Shultz*, 605 F.Supp. 1220 (D.Mass.1985), the court did not reach this precise issue because it held the government's reasons for exclusion inadequate on other grounds. See *infra* note 16. Thus, judicial opinions provide no grounding for the State Department's interpretation.

showing of congressional acquiescence in that policy. See *Haig v. Agee*, 458 U.S. 280, 303, 101 S.Ct. 2766, 2780, 69 L.Ed.2d 640 (1981).

The State Department also offers three instances of actual visa denials that were allegedly based on entry rather than activity and were reported to various members of Congress and committees. In two of the cases the reasons for denial included references to the alien's anticipated activities in the United States. See Second Affidavit of Louis P. Goetz, reprinted in Joint Appendix at 306, 308.¹³ In the third case, however, the State Department appears to have applied the fourth example in the Manual: in that case, former Nazi SS officer Otto Skorzeny was denied a visa under subsection (27) for foreign policy reasons. See *id.* at 306. Thus, there seems to be at least one instance, of which Congress was apprised, in which the State Department actually applied the interpretation of subsection (27) that the government presses in this litigation.

[16] This meager evidence does not demonstrate the kind of consistent administrative interpretation necessary to give rise to a presumption of congressional acquiescence. See *Kent v. Dulles*, 357 U.S. 116, 128, 78 S.Ct. 1113, 1119, 2 L.Ed.2d 1204 (1958) (holding that "scattered rulings ... not consistently of one pattern" are an insufficient basis on which to impute congressional intent). The examples cited by

13. In 1959, 1961, and 1962, the State Department refused a visa to Thomas W.I. Liao, the self-appointed leader of a movement to establish an independent Formosa. The Department found that there was "a clear incompatibility between Mr. Liao's projected activities while in the United States and our foreign policy objectives with respect to Taiwan and the Republic of China." Second Affidavit of Louis P. Goetz, reprinted in Joint Appendix at 306. In July of 1964, the Department also denied a visa to Mme. Ngo Dinh Nhu, the sister-in-law of the late Prime Minister of Vietnam, on the ground that "her expected activities would only serve as a demoralizing influence on the people and Government of Vietnam," which the United States was committed to supporting. *Id.* at 308.

14. The Dissent suggests, and we acknowledge, that such information may be difficult to find or

the State Department, in conjunction with the inconclusive legislative history, however, do cast some doubt on the plaintiffs' interpretation, an interpretation that otherwise seems indicated by the language of the statute. In order to weigh the relative persuasiveness of the two interpretations, the district court needed more information.¹⁴ It should have asked the government to come forward with further examples of the exercise or assertion of power to exclude under subsection (27) on the basis of presence alone; and, in fairness, it should have allowed the plaintiffs sufficient discovery to contest those examples and provide counter-examples.¹⁵

Without thus developing a more substantial record, the district court could not make a secure finding concerning the nature of the administrative practice under subsection (27). And without such a finding, given the inconclusive state of the legislative history and the strength of the plaintiffs' textual argument, the district court's decision in favor of the government's interpretation was premature. We therefore set aside the district court's holding on this issue and remand for the fuller proceedings appropriate prior to resolution of this question of statutory interpretation.

[17] The plaintiffs also contend that the government's interpretation of subsection (27) violates the statute because it effectively swallows up subsection (28) and

inconclusive. See Dissent at 1067-68. Given this record, however, one can only offer guesses, bets, or suspicions about the existence or weight of such evidence. We do not think it proper to prejudge this issue on a barren record and thereby short-circuit the inquiry into congressional intent. The district court, upon fuller consideration, may find the evidence of congressional acquiescence insufficient in quantity or quality, but that judgment, we think, should be made after an examination of the available evidence, not before.

15. We note in this regard that the government has named a few persons to whom visas were denied, allegedly under the authority of subsection (27), and has not suggested that any privilege would shield a further listing of cases in point.

thereby nullifies the restrictions placed by the McGovern Amendment on the use of the latter subsection. We find this argument persuasive. The Executive may not use subsection (27) to evade the limitations Congress appended to subsection (28).

The McGovern Amendment calls upon the Secretary of State to recommend a waiver of ineligibility, and thereby open the way for admission of an alien who belongs to a subsection (28) organization, unless the Secretary certifies to the Congress that admission of the alien would "be contrary to the security interests of the United States...." 22 U.S.C. § 2691(a) (1982). The district judge in this case found that prejudice to foreign policy did not qualify as a "security interest" within the meaning of the McGovern Amendment. See *Abourezk*, 592 F.Supp. at 855; accord *Allende v. Shultz*, 605 F.Supp. 1220, 1225 n.2 (D.Mass. April 2, 1986). The State Department itself appears to have reached the same conclusion. See Brief of Plaintiffs-Appellants, app. B at 2 (letter from Alvin Paul Drischler, Acting Assistant Secretary of State, to George Bush, President of the United States Senate (Oct. 18, 1983)) ("The result [of the McGovern Amendment] has been that the Secretary of State is effectively precluded from acting in such cases on the basis of legitimate foreign policy factors and considerations.").

If the government could use subsection (27) to exclude aliens whose entry might threaten our foreign policy objectives simply because of their membership in Communist organizations, then subsection (28) would be made superfluous and the congressional will expressed in the McGovern Amendment would be nullified. Conversely, the restrictions on subsection (28) must

not be read in a fashion that would rob subsection (27) of its independent scope and meaning. To preserve the significance of both sections, and the congressional intent that guided their adoption, the two sections must not be homogenized or treated as interchangeable parts. See *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633, 93 S.Ct. 2469, 2485, 37 L.Ed.2d 207 (1973) (holding that courts must interpret statutes in such a way as to give effect to all of their provisions).¹⁶

[18] The government argues that it has distinguished the two sections by using (27) only when it has a reason for exclusion in addition to the alien's membership in an organization listed in (28). See Transcript of Proceedings at 38-40, *Abourezk v. Reagan*, No. 84-5673 (D.C.Cir.Sept. 23, 1985). This standard, however, is inadequate to prevent subsection (27) from overwhelming and obliterating subsection (28) and the McGovern Amendment. A reason that is in addition to the fact of membership but not independent of that fact provides an insufficient bulwark against the possibility of Executive evasion of the will of Congress as expressed in the McGovern Amendment.

[19, 20] For example, the broadest generalization about the character or activities of members of a group would be a reason in addition to the bare fact that a particular alien belonged to that group. But to exclude an alien based on the perceived bent or proclivities of members of a subsection (28) organization would contravene the core purpose of the McGovern Amendment. The Amendment was intended to implement the United States' promise under the

16. The district court in *Allende v. Shultz*, 605 F.Supp. 1220 (D.Mass.1985), adopted this view. Finding it "unnecessary ... to scrutinize the parameters of subsection (27)," the court recognized that traditional principles of statutory construction required that "[a]mong the classes of aliens to which subsection (27) does not apply are those which fall squarely within the ambit of one of the other thirty-two statutory

categories...." *Id.* at 1224. "Because subsection (28) directly encompasses Mrs. Allende's membership in [two communist organizations]," the court held that "her affiliation with these organizations is not, in itself, a 'facially legitimate and bona fide' reason for her exclusion within the meaning of subsection (27)." *Id.* at 1225 (quoting *Kleindienst v. Mandel*, 408 U.S.

Helsinki Accords¹⁷ to promote the free flow of people and ideas across national borders. See 22 U.S.C. § 2691(a) (1982); S. REP. NO. 194, 95th Cong., 1st Sess. 13 (1977), U.S. Code Cong. & Admin. News 1977, pp. 1625, 1635. The Amendment fulfills that commitment by assuring that a would-be speaker is not condemned by association with a subsection (28) organization¹⁸ if he is "otherwise admissible." 22 U.S.C. § 2691(a) (1982). A visa denial based on a generalization about the members of a subsection (28) group surely qualifies as the brand of guilt by association Congress sought to check. No reason particular to this alien or to this moment in time distinguishes such a denial; the denial

753, 770, 92 S.Ct. 2576, 2585, 33 L.Ed.2d 683 (1972)).

17. Final Act of the Conference on Security and Co-Operation in Europe, Aug. 1, 1975, Dep't of State Pub. No. 8826 (Gen. For. Pol. Ser. 298), reprinted in 14 I.L.M. 1292 (1975).

18. Nothing in our analysis inhibits the State Department from using a group affiliation to deny visas to members of terrorist groups, see *MANUAL*, *supra* at 20, or organized crime syndicates, see *id.* The McGovern Amendment applies only to the organizations specifically proscribed by the Act and, of the thirty-three categories of excludable aliens, only subsection (28) specifically addresses membership in or affiliation with an organization as the basis for exclusion. The organizations proscribed in (28) are Communist and anarchist groups. See 8 U.S.C. § 1182(a)(28) (1982).

19. The government has offered no evidence of congressional acquiescence in an administrative practice that would alter our view that the legislature did not cast subsections (27) and (28) as interchangeable parts. Indeed, when asked at oral argument, government counsel was unable to identify any case other than this one and *Allende*, 605 F.Supp. 1220 (D.Mass.1985), in which subsection (27) was used to deny a visa to an alien to whom subsection (28) applied. See Transcript of Proceedings at 41-42, *Abourezk v. Reagan*, No. 84-5673 (D.C.Cir. Sept. 23, 1985).

20. The Dissent argues that the McGovern Amendment retains its vitality even without the interpretation we embrace today. Without the McGovern Amendment, subsection (28) would pose a presumptive bar to the entry of any member of a Communist organization. The Dissent points out that the State Department has not explicitly revived that policy of general exclusion, it has *not* determined to exclude

is appropriate for all members at all times because it is simply a condemnation of the group as a whole.¹⁹

[21] We hold that when an alien is a member of a proscribed organization, so that subsection (28) applies, the government may bypass that provision and proceed under subsection (27) only if the reason for the threat to the "public interest[,] ... welfare, safety, or security" is *independent* of the fact of membership in or affiliation with the proscribed organization. Only if such an independent reason exists will the use of subsection (27) leave intact the congressionally mandated restrictions on subsection (28).²⁰

members of those subsection (28) organizations it believes to be affiliated with certain foreign governments. See Dissent at 1072. The Dissent makes the practical prediction that not all subsection (28) organizations will be so affiliated, and therefore finds that the McGovern Amendment is left intact.

The Dissent's analysis, we believe, is flawed in this respect: the issue turns not on practical predictions but on the possession of power. If the State Department's current policy entails the power to achieve precisely the same results as under subsection (28) before the McGovern Amendment, then it is small virtue that those results now can be achieved without explicitly reviving a policy of ideological exclusion. Under the Dissent's interpretation of the statute, the State Department may exclude someone simply by pointing to her membership in a subsection (28) organization; the additional, conclusory assertion that the organization has certain affiliations provides no safeguard because the assertion may be offered in every case and cannot be questioned or reviewed by any court. See Dissent at 1070 n. 4. A statement thus walled off from any effective challenge scarcely qualifies as a reason.

The State Department therefore remains armed with the power to exclude all members of subsection (28) organizations for foreign policy reasons. That is precisely the power the McGovern Amendment was designed to revoke. We conclude that the State Department's approach does not leave the McGovern Amendment intact and that the more stringent standard we adopt is necessary to effectuate congressional intent.

This standard will also leave intact the independent scope of subsection (27). For example, all four of the illustrative applications of (27) in the State Department's *MANUAL*, see *supra* at 1055, would still be appropriate under our view of the respective provinces of the two clauses.

[22] The Dissent finds sufficient reason, separate from the applicants' membership in proscribed organizations, for upholding the government's action under subsection (27). This reason consists of alleged affiliations of the visa applicants with particular governments hostile to the United States (the governments of Nicaragua, the Soviet Union, and Cuba). See Dissent at 1069-71. We do not reject affiliation with a particular foreign government as beyond the pale of subsection (27). However, if the alleged government affiliation is presumed *because* of the applicant's membership or participation in a subsection (28) organization, we would not count that presumption as independent of the organizational tie. In other words, if all members of a proscribed organization were automatically branded "affiliates" of a certain government, that branding would be no more independent of the fact of membership than the generalization about the character or activities of group members to which we earlier referred. See *supra* at

1057-58.²¹ On the other hand, if the State Department pinpoints the alien's official post or action as an official representative of a hostile government as *the* reason for the exclusion under subsection (27) on foreign policy grounds, then the "independent of" organizational membership standard would be met.²²

The State Department, however, has so far obscured its position. It mentioned both subsection (28) organizational affiliations and connections between the visa applicants and certain foreign governments. See, e.g., Affidavit of Louis P. Goetz, reprinted in Joint Appendix at 162-65. But at the same time, the Department volunteered that earlier in the same year (1983), during Borge's incumbency as Interior Minister of Nicaragua, a visa application for his travel to the United States had been approved. *Id.* at 166. Similarly, the Department represented that both Finlay and Pasti "have previously received [non-immigrant visas] and travelled to the United States." *Id.* In short, the Department

which codified an historically demonstrated animosity—does not taint exclusions after the McGovern Amendment's repudiation of that animosity.

22. The Dissent describes our "independent reason" safeguard as ineffective, entirely vulnerable to the power the Attorney General holds: he may deny a visa under subsection (28) despite the Secretary's recommendation of entry. See Dissent at 1073-74. Foreign policy, however, is the Secretary's specialty; it is not the Attorney General's customary field. Our decision, it is true, in no way prevents the Attorney General from venturing into the foreign policy domain. But we expect, as we assume Congress did when it adopted the McGovern Amendment, that instances in which the Attorney General rejects action in the foreign policy realm that the Secretary recommends will be extraordinary. In sum, Congress apparently designed the Amendment with the traditional division of responsibility between the two executive departments in full view. Such divisions of responsibility, and the closely kept balance of powers that results from them, have long been regarded as an effective check on the dissingenuity of individual public officials. See *The Federalist* No. 51, at 344-45 (J. Madison) (P. Ford ed. 1898). So long as the traditional allocation of responsibility between the two departments is maintained, Congress' action and our endeavor to assure its vitality should not be exercises in futility.

21. The Dissent suggests that this interpretation creates a "favored entry status" for communists: members of organizations not included in subsection (28) can be excluded on foreign policy grounds under subsection (27) simply because their membership links them to a hostile foreign government, but members of subsection (28) groups cannot. See Dissent at 1072. The McGovern Amendment was, however, a response to the historically *disfavored* position of subsection (28) organizations. The imaginary Council in the Dissent's hypothetical never suffered from the explicit ideological exclusion embodied in subsection (28) or the extreme and general public hostility that motivated Congress to include that subsection in the Act in 1952. See generally *THE MEANING OF MCCARTHYISM* (E. Latham ed. 1965) (a collection of essays on the causes and effects of McCarthyism).

Congress could reasonably have believed that these special disabilities warranted special precautions where subsection (28) organizations were concerned. If a member of a subsection (28) group poses a threat to national security, she stands on the same footing as a similarly threatening member of any other type of group. But where no such threat is present, Congress determined that a close look is in order, in fidelity with the Helsinki Accords, see *supra* at note 17, before the United States excludes members of subsection (28) organizations. This closer look insures that the longstanding practice of excluding such persons under subsection (28)—

has never squarely advanced as the rationale for exclusion the applicants' government ties rather than their subsection (28) organization membership.²³ Instead, it has taken an "either/or" stance. See *Abourezk*, 592 F.Supp. at 888 (in camera affidavits show that applicants were denied entry "because of their personal status as officials of governments or organizations which are hostile to the United States") (emphasis supplied).

[23] If we were to deem it sufficient, as the Dissent does, for the State Department so to rest on pleas in the alternative, we would shirk our obligation to enforce the congressional direction, which the Dissent acknowledges, see Dissent at 14, to pay genuine heed to the McGovern Amendment. The Department, as the agency charged by Congress with the administration of the statute, of course would retain authority initially to frame criteria for determining when a sufficiently independent reason exists to warrant invocation of subsection (27). The Department's criteria must be clear enough to allow the courts to fulfill their responsibility to insure that the executive authority respects congressional intent, but the precise contours of the "independence inquiry" should be left, in the first instance, to the sound and expert judgment of the State Department. We

23. Perhaps the State Department has shied away from this rationale in part because it is problematic whether all of these aliens have independent affiliations with hostile governments. Tomas Borge clearly has such a connection: he holds a cabinet post in the Nicaraguan government. But some of the other speakers in this case lack such an unambiguous connection to a hostile foreign government. For example, if Nino Pasti has any governmental affiliation, it is to the Italian government, in which he served as both a Senator and a General in the armed forces. See Affidavit of Louis P. Goelz, reprinted in Joint Appendix at 163. Of course, no one—neither the State Department nor the Dissent—argues that Pasti was, or should be, excluded because of a connection to the government of Italy. Instead, the suggestion is that Pasti's affiliation with the Soviet government warrants his exclusion. This alleged affiliation consists, however, solely and simply in Pasti's participation in the World Peace Council, an organization clearly covered by subsection (28)

therefore remand the three consolidated cases so that both the district court and the government may reevaluate these visa denials without the statutory misinterpretation that casts doubt on their previous analyses.²⁴

IV.

We note our grave concern about the district court's heavy reliance upon in camera ex parte evidence when it granted the defendants' motion for summary judgment. That court evaluated the public documentation as "entirely conclusory" and inadequate; it thereupon turned to the classified affidavits and asserted that it found in them information justifying its final disposition. See *Abourezk*, 592 F.Supp. at 886-87. We caution the district court, in the further proceedings this opinion requires, to make certain that plaintiffs are accorded access to the decisive evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests.

[24] It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States

and the McGovern Amendment. See Affidavit of Louis P. Goelz, reprinted in Joint Appendix at 163. Similarly, Leonor Rodriguez Lezcano, so far as the current record indicates, has never held public office in Cuba or actively represented the government of that country. Her affiliation with the Cuban government apparently arises, according to the State Department, because of her participation in the Federation of Cuban Women, a subsection (28) organization. See id. at 164-65. Thus, we do not now comprehend any basis for claiming that these two visa applicants have governmental affiliations independent of their membership in subsection (28) organizations.

24. Because we find that questions remain concerning the State Department's compliance with the statutory requirements, we do not reach the plaintiffs' constitutional claims. We therefore express no opinion about the section of the district court opinion devoted to the analysis of those claims.

courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, in camera submissions. See *In re Application of Eisenberg*, 654 F.2d 1107, 1112 (5th Cir.1981).

[25] Exceptions to the main rule are both few and tightly contained. Most notably, inspection of materials by a judge isolated in chambers may occur when a party seeks to prevent use of the materials in the litigation. When one side, seeking to block consideration of relevant matter, asserts an evidentiary privilege, the court may inspect the evidence in camera and alone for the limited purpose of determining whether the asserted privilege is genuinely applicable. See id. If the court finds that the claimed privilege does not apply, then the other side must be given access to the information; if the court's finding is that the privilege does apply, then the court may not rely upon the information in reaching its judgment. See *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir.1983), cert. denied sub nom. *Russo v. Mitchell*, 465 U.S. 1038, 104 S.Ct. 1316, 79 L.Ed.2d 712 (1984). In either case, no party will be faced—as were the plaintiffs in this case—with a decision against him based on evidence he was never permitted to see and to rebut.

Only in the most extraordinary circumstances does our precedent countenance court reliance upon *ex parte* evidence to decide the merits of a dispute. Our one case in point, *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815 (D.C.Cir. 1984), involved the state secrets privilege, a privilege not invoked in this case. The government pressed acute national security concerns in *Molerio*, and we recognized a large risk that an unjust result would eventuate if the case proceeded without the privileged material. See id. at 825. While we allowed court recourse to the confidential information in *Molerio*, we based that allowance upon proper invocation of the privilege; a demonstration of compelling national security concerns; and public disclosure by the government, prior to any in camera examination, of as much of the

material as it could divulge without compromising the privilege. In addition, the plaintiff in *Molerio* had been accorded considerable discovery of non-privileged materials. See id. at 819; see also *Ellsberg*, 709 F.2d at 63-64.

We mention finally a third class of cases in which in camera inspection may occur: exceptions to the main rule specified by statute. The prime current example is the Freedom of Information Act, 5 U.S.C. § 552 (1982). Even in administering such legislation, however, we have been vigilant to confine to a narrow path submissions not in accord with our general mode of open proceedings. See, e.g., *Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) (requiring the government to create a public index listing privileged documents and providing explanations of the claim of privilege). No statutory scheme permitting closeted inspection of evidence is implicated in this case.

In sum, we expect the district court, on remand, to be mindful of the tight boundaries set in *Molerio* and of the overriding importance of assuring plaintiffs' receipt of the most complete information and explanation permissible.

V.

The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.

Congress, in the legislation at issue, has specified categories of excludable aliens and has qualified the application of one of those categories through the passage of the McGovern Amendment. The State Department must respect the restraints Congress imposed. The district court's conclusion that the congressionally prescribed boundaries had not been transgressed was insufficiently grounded; the court proceed-

ed to judgment without the exploration of administrative practice necessary to an informed decision and it did not adequately advert to the relationship between two statutory provisions. We therefore vacate the district court's judgment. We remand the three consolidated cases for reexamination of the visa denials in question to insure that the challenged government action is within the statutory and constitutional authority of the State Department.

Judgment vacated and cases remanded for proceedings consistent with this opinion.

BORK, Circuit Judge, dissenting:

In these consolidated cases, we review the denial of non-immigrant visas to four applicants who wish to enter the United States—Thomas Borge, Nino Pasti, Olga Finlay, and Leonor Rodriguez Lezcano. The plaintiffs are American citizens who wish to meet with these applicants if they are permitted to enter the United States.

Each of these applications was denied pursuant to 8 U.S.C. § 1182(a)(27) (1982), which requires exclusion of 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." Thomas Borge is the Interior Minister of Nicaragua and a member of the National Directorate of the Sandinista Front for National Liberation. Nino Pasti, formerly a member of the Italian Senate, is an active participant in the World Peace Council, which the State Department characterizes as an instrumentality of the Soviet Union. Olga Finlay and Leonor Lezcano are officials of the Federation of Cuban Women, which, according to

the State Department, is controlled by the Cuban Communist Party. Finlay has served as the Cuban representative to the United Nations Commission on the Status of Women. According to the American official who received their applications, both women were the bearers of Cuban diplomatic passports, and their visa applications were conveyed via diplomatic note from the government of Cuba. Affidavit of Louis P. Goetz, Joint Appendix ("J.A.") at 153-67. The United States government determined that the entry of these applicants would be prejudicial to the public interest, and declined to grant them visas.

Plaintiffs challenge these decisions—and the judgment of the district court upholding their legality—on both statutory and constitutional grounds. They assert that the Executive acted without statutory authority on three grounds: because subsection (27) does not authorize exclusion simply on the basis of foreign policy (as opposed to national security) concerns; because subsection (27) does not authorize the exclusion of an applicant when it is his mere entry, rather than the specific activities in which he intends to engage, that will be prejudicial to the public interest; and because the government's interpretation will effectively nullify 22 U.S.C. § 2691 (1982) (the McGovern Amendment). The majority opinion rejects the first argument and remands on the basis of its analysis of the second and third. The majority therefore does not need to address the plaintiffs' other set of claims—that such authority, if in fact authorized by statute, is unconstitutional both as a violation of the first amendment and as inconsistent with fundamental principles of separation of powers.

While I agree that we have jurisdiction to reach the statutory issues presented,¹ I

688 (1972). They argue, however, that the associational rights sufficient to confer first amendment standing in this case provide no standing to contend that the government lacks statutory authority for the exclusions.

The two sets of claims, however, cannot so easily be broken apart. A court faced with this constitutional challenge must first construe the

disagree with the analysis used by the majority to resolve them, and dissent from the holding of today's decision. Because I conclude that the statute permits what the government has done, I go on to reach the constitutional challenge and conclude that it fails.

I.

The initial issue in this case is one of statutory construction. We are governed, as the majority notes, by the principles articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Court in *Chevron* made clear that a court "must give effect to the unambiguously expressed intent of Congress" if such intent can be gleaned from the statutory language and legislative history. *Id.* 104 S.Ct. at 2781-82. If, however, the statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 2782. The Court went on to note that to approve an administrative construction a court "need not conclude that the agency construction was the only one it permissibly could have adopted ... or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 2782 n. 11. Therefore, where the traditional tools of statutory analysis lead to confused or contradictory interpretations, a reasonable reading of the

statutes to determine whether they authorize what was done and, if so, whether they pass constitutional muster. It would be extraordinary if the court found that the statutes did not authorize the exclusions, thus the first amendment did not invalidate the statutes, but, since the challenge and standing were based on the first amendment, the court was without power to rule the unauthorized exclusions illegal. This would be witty, no doubt, but it smacks too much of the hairsplitting that brought the old rules of common law pleading into disrepute.

When the actions of the executive branch are challenged as violative of constitutional rights, the issue of the scope and source of executive authority necessarily becomes part of the analy-

statute given by the agency charged with its execution must be upheld.

This principle of deference applies with special force where the subject of that analysis is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs. Such authority is fundamentally executive in nature. When a court undertakes to review such decisions, it is "dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20, 57 S.Ct. 216, 220-21, 81 L.Ed. 255 (1936). The Supreme Court has described the exclusion of aliens as "a fundamental act of sovereignty," stating that "the right [to exclude] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). Therefore, in its delegations of power in the area of foreign relations, Congress "must of necessity paint with a brush broader than that it customarily wields in domestic areas," *Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179 (1965), and "[p]ractically every volume of the United States Statutes contains one or more acts ... of Congress authorizing action by the President in-

sis in which a court is required to engage. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), the Supreme Court invalidated President Truman's seizure of a steel mill because it was authorized neither by an explicit grant of power from Congress nor by any inherent Executive power. Had President Truman relied not on his inherent authority but rather upon a statute which did not in fact confer upon him the necessary power, his act would have been invalidated nonetheless. That is the situation the majority thinks may exist here. Whether the majority is right or wrong on the statutory issue, there can be no question that appellants have standing to raise it.

1. Defendants have raised before us, as they did below, the question of whether plaintiffs have standing to mount a statutory challenge to these exclusions. They concede that the Supreme Court has already implicitly decided the issue of whether plaintiffs who wish to meet with excluded aliens have standing to raise a constitutional (first amendment) claim. *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d

spect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 324, 57 S.Ct. at 223. The Immigration and Nationality Act is one such statute; it mandates exclusion in thirty-two separate categories, while preserving in subsection (27), in the broadest of terms, the authority of the Executive to order additional ones.

I have discussed these basic principles at the outset because I do not believe the majority opinion gives them appropriate weight, either when it requires the government to come forward with further examples of prior administrative construction, or when it adopts an overly restrictive interpretation of the McGovern Amendment in order to prevent the Executive from "evading" the terms of that provision.

II.

The majority remands this case to the district court so that more information may be gathered to resolve conflicting claims over prior administrative interpretations of subsection (27). I believe the remand, and the further inquiry, to be unnecessary. The issue around which these claims revolve—whether subsection (27) authorizes denial of a nonimmigrant visa when only the applicant's entry or presence, as opposed to his specific activities, are deemed prejudicial to the public interest—is one that can be fairly resolved on the basis of the legislative history and the record now before us, and I see little to be gained through the taking of further evidence. The legislative reports accompanying subsection (27) and earlier enactments—the present provision traces its lineage to laws passed in 1950 and 1941—made clear that when the entry, presence, or admission of an applicant would be prejudicial to the public interest, that applicant would be ineligible to receive a visa.

When Congress enacts a new statute that repeats the language contained in an older statute, there is a heavy presumption that Congress meant the same thing in each, particularly when the new statute is in part a codification of existing law. See *Doe v. diGenova*, 779 F.2d 74, 82 (D.C.Cir. 1985); *Stribling v. United States*, 419 F.2d 1350, 1352-53 (8th Cir.1969). Accord 2A N. Singer, *Sutherland Statutory Construction* § 53.03, at 554 (Sands 4th ed. 1984). That is the situation with respect to subsection (27).

The Senate and House Reports accompanying the current law, the Immigration and Nationality Act of 1952, indicate that section 1182(a)(27)-(29) incorporated the parallel provisions of the Internal Security Act of 1950, ch. 1024, 64 Stat. 987, along with certain revisions. H.R.Rep. No. 1365, 82d Cong., 2d Sess. 30 (1952), U.S.Code Cong. & Admin.News 1952, p. 1653; S.Rep. No. 1137, 82d Cong., 2d Sess. 10 (1952). Section 1182(a)(27) was derived from section 22 of the Internal Security Act of 1950, which had excluded from admission:

[a]liens who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States....

64 Stat. 1006 (amending Act of Oct. 16, 1918, 40 Stat. 1012, 8 U.S.C. § 137 (1946)). The Immigration and Nationality Act retained that language in its entirety, revising it only by changing "welfare or safety" to "welfare, safety, or security."

As the majority notes, the Senate Report accompanying the Internal Security Act described this paragraph as:

an admixture of existing law and the new provisions of the bill. Under existing law, among the excludable aliens are certain aliens who seek to enter the United States whose entry would be prejudicial to the public interest or would endanger the safety of the United States. The committee has broadened this class of excludable aliens to include those aliens who seek to enter the United

States to engage in activities which would endanger the welfare of the United States.

S.Rep. No. 2369, 81st Cong., 2d Sess. 10 (1950) (emphasis added); accord S.Rep. No. 2230, 81st Cong., 2d Sess. 5 (1950). The Internal Security Act, therefore, was explicitly described as including and broadening existing provisions prohibiting prejudicial entry. This is not a counterintuitive interpretation; it would be surprising if Congress meant to bar aliens who would engage in prejudicial activities, but admit those whose very entry would be prejudicial to the public interest.

The Immigration and Nationality Act incorporated this language, and this interpretation as well. In one of its few specific references to subsection (27), the accompanying Senate Report made mention of: an alien [who] appears to be excludable under paragraph (27), (28) or (29) of section 212(a) as an alien whose entry would endanger the public safety or security of the United States or as an alien who is a member of one of the subversive classes of excludables....

S.Rep. No. 1137, *supra*, at 27 (emphasis added).

This was the interpretation given this language by a prior Congress as well. The language of subsection (27) had its origin in a bill enacted in 1941, which provided:

[t]hat whenever any American diplomatic or consular officer knows or has reason to believe that any alien seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States, he shall refuse to issue to such alien any immigration visa, passport visa, transit certificate, or other document entitling such alien to present himself for admission into the United States.

55 Stat. 252. In a number of respects, this was a more narrowly written provision than the one later enacted as 8 U.S.C. § 1182(a)(27) (1982). First, it did not grant the Attorney General authority to make these determinations; he was not so authorized until an Act of Congress passed in

1948, ch. 338, 62 Stat. 268. Second, the 1941 language referred only to activities endangering the "public safety," while the Immigration and Nationality Act included those "prejudicial to the public interest" and dangerous to the country's "welfare" or "security" as well. Third, the bill enacted in 1941 referred simply to aliens seeking to enter the country "for the purpose of engaging in activities" thought to merit exclusion, while the Immigration and Nationality Act refers to those aliens who seek to enter "solely, principally, or incidentally to engage in [such] activities."

Despite the seemingly more restrictive statutory definition of "activities," the legislative history makes clear that the Congress that enacted the 1941 legislation saw the bill as excluding those whose entry or presence would endanger the public safety. According to the Senate Report:

The purpose of the legislation is to provide means not now afforded by law of keeping out of this country certain aliens, otherwise admissible, whose presence in the United States would be dangerous to the public safety.

S.Rep. No. 386, 77th Cong., 1st Sess. 1 (1941) (emphasis added). That Senate Report was only two pages long and relied for its explanation of the bill primarily upon two pieces of correspondence describing the legislation—one from the Attorney General, and one from the Acting Secretary of State. The letter from the Attorney General described the bill as authorizing

the refusal of visas to aliens whose entry into the United States would endanger the public safety.

Id. (emphasis added). The letter from the State Department described the bill as authorizing

the refusal of visas to aliens whose admission into the United States would endanger the public safety.

Id. at 2 (emphasis added). Similarly, the chief sponsor of the bill, Senator Russell, explained on the Senate floor that the bill purports to confer a power on the members of the Consular Service abroad

which I already thought they had. It merely permits the consuls to refuse visas to aliens whom they know or have reason to believe are persons whose presence in the United States will be inimical to the public interest.

87 Cong.Rec. 4757 (1941) (emphasis added).

It seems evident, therefore, that in making reference to "activities" in this context, Congress has done so with the understanding that the term encompasses entry and presence as well. Standing against these consistent references to "entry" is the Conference Report cited by the majority, maj. op. at 1054 n. 10, which refers to prejudicial "activities." H.R.Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950), U.S. Code Cong.Serv. 1950, pp. 3886, 3906. That part of the Conference Report, however, simply recites, virtually word for word, the language of the statute itself. It provides no additional explanation or elaboration, and does not seek to describe what Congress understood those words to mean. It is the language of the statute itself, which uses the term "activities," that provides the most persuasive support for the plaintiffs' position.

Had we before us nothing but the language of the statute, without any legislative history, I might be inclined to adopt the construction proposed by the plaintiffs. The question would by no means, however, be free from doubt, for it is not at all clear—from the language alone—whether presence within this country can itself be deemed an "activity." In any event, as Justice Harlan has written, "[t]he decisions of [the Supreme] Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for 'literalness may strangle meaning.'" *Lynch v. Overholser*, 369 U.S. 705, 710, 82 S.Ct. 1063, 1067, 8 L.Ed.2d 211 (1962) (quoting *Utah Junk Co. v. Porter*, 328 U.S. 39,

44, 66 S.Ct. 889, 892, 90 L.Ed. 1071 (1946)) (other citations omitted). When Congress has repeated again and again that it enacted these words with an understanding that they required the exclusion of aliens whose entry would be harmful, I think it necessary to conclude that the sharp dichotomy between "entry" and "activities" that is urged upon us is incompatible with congressional intent. And to the extent that this question is regarded as close, I find controlling both the teaching of *Chevron* and the deference Congress and the courts have traditionally accorded Executive determinations in matters pertaining to foreign relations.

This remand is therefore unnecessary. The majority finds it "conceivable" that the repeated references to entry in the legislative history were meant to authorize what they purported to authorize. Maj. op. at 1054 n. 11. I think it more than conceivable. But even if this repeated usage was "casual and inadvertent, not motivated or informed by the precise consideration at issue in the instant cases," *id.*, we are still left with *Chevron*, which held that when Congress "has not directly addressed the precise question at issue," a court must defer to a reasonable administrative interpretation. 104 S.Ct. at 2782. I find it difficult to understand how an interpretation offered half a dozen times by Congress in the legislative history can possibly be unreasonable when adopted by officials in the executive branch. The majority may find another interpretation more plausible, but that is not the standard we are charged to apply.

The majority has not in fact determined that the interpretation was unreasonable, but believes that evidence of possible congressional acquiescence is necessary before a proper conclusion can be reached one way or the other.² As I have just noted, con-

tion of the applicability" of subsection (27). One of the four type cases consists of

[a]liens who are notorious for allegedly engaging in excesses, including physical brutality while in political power in their native

gressional acquiescence is unnecessary if the department's interpretation is reasonable. But the majority's position seems to me incorrect for a second reason. Addressing the issue of congressional acquiescence in *Haig v. Agee*, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981), the Supreme Court noted that

it would be anomalous to fault the Government because there were so few occasions to exercise the announced policy and practice. Although a pattern of actual enforcement is one indicator of Executive policy, it suffices that the Executive has "openly asserted" the power at issue.

land, or who were prominently identified with any former regime which did so. *Foreign Affairs Manual*, pt. II, § 41.91(a)(27), reprinted in 6 C. Gordon & H. Rosenfeld, *Immigration Law and Procedure* 32-214.18 (1985). The concern reflected here has nothing to do with the specific activities in which these aliens are expected to engage while in the United States, but is rather an expression of disapproval of brutal governments; hence the exclusion of those "identified" with such regimes.

The majority also discusses three specific past exclusions under subsection (27) cited by the government and concludes that only one of the three was in fact an exclusion on the basis of prejudicial entry. Maj. op. at 1056 & n. 13. I think it only fair to note, however, that the government did not cite these examples for the purpose of supporting its argument that prejudicial entry alone is sufficient to merit exclusion. They were invoked instead to support the wholly separate point, accepted by the majority, that damage to foreign policy interests has been considered "prejudicial to the public interest." See Brief for Appellees at 54.

Finally, the majority makes reference to the conflicting affidavits submitted by the parties. Maj. op. at 1055. The affidavits of Lawrence S. Eagleburger, at the time the Under Secretary of State for Political Affairs, and Lewis Goetz, Deputy Assistant Secretary of State for Visa Services, support the government's position. J.A. at 138, 159-60. Plaintiffs have submitted the affidavit of Leonard Meeker, former Legal Adviser to the Department of State, which contradicts the position taken in the government's affidavits. J.A. at 250-52. Mr. Meeker's affidavit, however, offers an interpretation of subsection (27) that the majority has in part explicitly rejected—specifically, that subsection (27) only authorizes denial of visas to "aliens whose anticipated activities in the United States would create dangers to this country of a gravity comparable to espionage and sabotage," such as "murder, mob violence or terrorism." J.A. at 251-52;

id. at 303, 101 S.Ct. at 2780 (citation omitted). That open assertion is present, in this instance, in the State Department Manual, see *supra* note 2.³ Further evidence of congressional acquiescence may be hard to come by. Congress has not recodified or reenacted the immigration statute since 1952. The district court is therefore expected to infer acquiescence simply from evidence of passive congressional awareness of an existing policy, without the affirmative indication of congressional approval implied by a reenactment of the same statute without relevant revisions. Moreover, government records relating to visa requests are required by law to be

contra maj. op. at 1053-54. Such an interpretation is belied by the three specific examples of past exclusions described in the majority opinion, and would render subsection (27) entirely duplicative of subsection (29), which requires the exclusion of all 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...." An interpretation of subsection (27) that would render it superfluous, and therefore meaningless, is suspect. See 2A N. Singer, *Sutherland Statutory Construction* § 46.06 (Sands 4th ed. 1984). The fact that the majority has rejected the construction of "prejudicial to the public interest" that the Meeker affidavit claims was adopted by the executive branch in previous years does not, of course, mean that the majority cannot give any weight at all to the account in the affidavit of prior interpretations of "activities," since it was only the latter issue that the majority felt unable to resolve without resort to prior administrative interpretations. Nevertheless, it does cast some doubt on the validity and usefulness of the Meeker affidavit, and the extent to which it can be said to undermine the government's position sufficiently to make a remand necessary.

3. The majority cites *Kent v. Dulles*, 357 U.S. 116, 128, 78 S.Ct. 1113, 1119, 2 L.Ed.2d 1204 (1958), in characterizing the evidence before us as evidence of "scattered rulings ... not consistently of one pattern." In *Kent v. Dulles*, however, the Court justified that higher burden of proof placed on the government by reference to the difficult and important constitutional issues implicated by the government's policy. The plaintiffs before us, however, have not presented a single plausible constitutional argument. See *supra* Part IV.

2. As the majority notes, there is already some evidence in the record of prior administrative interpretation supporting the government's position. The State Department Manual lists four "type cases [that] are illustrative, but ... by no means exclusive, of those involving a determina-

kept confidential. 8 U.S.C. § 1202(f) (1982). While records of three incidents of exclusion, cited by the majority, have become available—prompted by “Congressional inquiry or other public interest,” Second Affidavit of Louis P. Goelz at 2, J.A. at 305—the overall policy is one of avoiding disclosure. Since Congress cannot acquiesce, or refuse to acquiesce, in a practice about which it is not generally informed, it is unlikely that the remand will produce any evidence more dispositive than that which is currently before us.

Even if the plaintiffs were able to demonstrate that their more narrow interpretation had governed Executive policy in prior years, they would still have to prove that it was an interpretation in which Congress can be said to have acquiesced. This may be difficult. Subsection (27) allows the President broad discretion in deciding which admissions would be prejudicial. If the President in the past has not exercised the full measure of the authority he now claims to possess, the mere absence of an affirmative response by Congress proves very little. Acquiescence is more easily inferred when the Executive may have in the past *overreached*, because that is the situation to which an objecting Congress is more likely to react, and in which inaction is more revealing. See, e.g., *Haig v. Agee*; *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

Since I believe that a fair construction of the statute supports the reasonableness of the government's interpretation, and since I cannot see how the case could conceivably be resolved against the government if it failed to come forward with the “further examples” requested by the majority, *majority*, at 1056, I dissent from the decision to remand.

III.

I have concerns as well with the majority's effort to distinguish subsections (27) and (28), and with its discussion of the McGovern Amendment. I agree that any interpretation of subsection (27) that renders subsection (28) superfluous and there-

by nullifies the McGovern Amendment would be incorrect, and I agree as well that subsection (28) and therefore the McGovern Amendment are applicable when the mere fact of membership in an organization proscribed under subsection (28) is the only basis for exclusion. However, the majority has fashioned a rule that subsection (27) may be used only when the reason for exclusion is *independent* of the fact of membership. The McGovern Amendment does not require such a rule.

In order to appreciate the purpose behind the McGovern Amendment, it is necessary to understand the state of the law at the time of its enactment. Subsection (28) then rendered anyone who was, or had been, a member of any anarchist, totalitarian, or communist organization ineligible for a visa, with the exception of those whose membership had been involuntary, those who had joined at a very young age, those who had joined in order to obtain food rations or other essentials, and those who had terminated their membership and actively opposed the doctrines of the organization for at least five years prior to the date of their application. Applicants who fell within one of these exceptions were not *per se* eligible, but could be admitted only if the consular official and the Attorney General determined that their admission would be “in the public interest.” 8 U.S.C. § 1182(a)(28)(I) (1976). In addition to the blanket exclusion required by subsection (28), subsection (27) existed as it does today, and provided for additional exclusions.

An alien denied a non-immigrant visa under any but three of the thirty-three subsections of 8 U.S.C. § 1182(a) (1976) could, notwithstanding his initial ineligibility, be admitted into the country “in the discretion of the Attorney General” if he approved a recommendation to that effect by the Secretary of State or a consular officer. 8 U.S.C. § 1182(d)(3)(A) (1976). Subsection (28) was one of the thirty subsections to which this waiver provision was applicable, and it was this provision that the McGovern Amendment modified. The McGovern Amendment, as originally enacted,

stated that “within 30 days of receiving an application for a non-immigrant visa by any alien who is excludable . . . by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible,” the Secretary of State should recommend to the Attorney General that the application be granted, unless national security concerns are implicated.

The McGovern Amendment was an expression of congressional disapproval of the statutorily-required blanket exclusion of virtually all people who were or had been affiliated in some way with an organization of one of the named varieties. Prior to the enactment of the McGovern Amendment, the millions of people around the world who fell into one of the categories denominated by subsection (28) were automatically excluded, unless the Secretary of State and the Attorney General affirmatively decided otherwise. Individual decisions had to be made with respect to every applicant who would have been admitted into the country *but for* the fact that he belonged at some time to a named organization. The Senate Report accompanying the McGovern Amendment explained that it would have the effect of “open[ing] the way to visits by Eurocommunist leaders and to Communist labor leaders without the executive branch having to make the politically difficult individual decisions which might imply a change in overall U.S. policy toward Communism.” S.Rep. No. 194, 95th Cong., 1st Sess. 13 (1977), U.S. Code Cong. & Admin. News 1977, pp. 1625, 1635. *Accord* S.Rep. No. 842, 95th Cong., 2d Sess. 16–17 (1978) (describing visits by West European Communist leaders and Communist labor leaders as the “principal result” of the McGovern Amendment).

The McGovern Amendment applies only to applicants who are “otherwise admissible to the United States,” and was amended in 1978 to include the following statement:

Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludable for reasons other than mem-

bership in or affiliation with a proscribed organization.

22 U.S.C. § 2691(a) (1982). As the 1977 Conference Report explained, the McGovern Amendment applies only to those excludable “*solely* because of membership in or affiliation with a proscribed organization.” H.R. Rep. No. 537, 95th Cong., 1st Sess. 31 (1977), U.S. Code Cong. & Admin. News 1977, pp. 1625, 1661 (emphasis added). In order to elaborate upon the meaning of phrases like “solely because of membership” and “otherwise admissible,” and to prevent “evasion” of the McGovern Amendment, the majority has formulated a rule that requires the government to process visa applicants under subsection (28), rather than (27), unless the reason for exclusion is not merely *in addition to*, but *independent of*, the fact of membership. As elaborated upon in the majority opinion, this requirement apparently was met when the Borge application was denied, but calls into question the denials in the other cases. Because I believe that the McGovern Amendment clearly does not apply to any of the visa requests before us today, I feel compelled to explain my understanding of what the McGovern Amendment does and does not do, and why a requirement that the reason be independent of membership will deny the Executive authority that Congress intended it to have.

Subsection (28) was enacted by a Congress that wished to exclude, as a general rule, all members of whatever level of participation in any communist, anarchist, or totalitarian organization. The presumption that all members of such groups, for that reason alone, ought to be excluded was rejected by the Congress that enacted the McGovern Amendment. But Thomas Borge, to take one of the cases before us, was not excluded because of membership in a communist party in Nicaragua. Borge is that country's Interior Minister and is one of the highest-ranking members of the Nicaraguan Cabinet. It was his *governmental* affiliation that triggered exclusion. Affidavit of Lawrence S. Eagleburger, J.A. at 141. Former Senator Pasti is an active participant in the World Peace Council,

which the State Department believes to be an instrumentality of the Soviet government. *Id.* at 141-42. Olga Finlay and Leonor Rodriguez Lezcano are members of the Federation of Cuban Women which, according to the State Department, is controlled by the Cuban Communist Party. Their visa applications were submitted by the Cuban government, *id.* at 142, and Finlay has represented the Cuban government on a United Nations Commission. Declaration of Olga Finlay, J.A. at 215.⁴ According to the Eagleburger affidavit, "[t]he official, governmental nature of their proposed trip was clearly manifested both by the issuance to the two women of Cuban Diplomatic Passports and by the submission of their applications through diplomat-

4. In cases of this sort, plaintiffs may dispute the United States' view that visa applicants are participants in or affiliated with certain foreign governments. In this case, for example, Finlay and Lezcano, in affidavits filed below, deny that the Federation of Cuban Women is controlled by either the Cuban government or the Cuban Communist Party, J.A. at 216, 245, and the plaintiffs "deny that Mr. Nino Pasti participates in the World Peace Council as an 'instrumentality' of the Soviet government," and state that they "have no information bearing on the accuracy of this characterization for the Council itself." Plaintiffs' Statement of Genuine Issues at 4, J.A. at 175. If the majority means to suggest that these disputes are open to judicial resolution, *see* maj. op. at 1049 n. 2, then it is making an assumption I find extremely dubious. First, such questions, while containing elements of fact, are largely interpretive. Determining the point at which one institution's influence over another becomes "control" requires a series of policy decisions courts are unequipped, and unauthorized, to make. Second, even if such determinations were within our power and competence, they would require information that might well be too sensitive for the Executive to submit, even *in camera*. We do not possess, and cannot demand, all of the same detailed and confidential information at the disposal of the Executive. Indeed, even if we had that information, we would not have the surrounding knowledge of such things as the methods of communist operations and linkages to place the information in context. Courts cannot replicate the expertise of the Department of State and proceed to take over the Department's functions. Third, the actual issuance of judicial pronouncements on the question of who is or is not an instrument of a foreign government, and the process of examination that would proceed them, carry the potential of sig-

ic channels." Affidavit of Lawrence S. Eagleburger at 8, J.A. at 142. Unless governments can themselves qualify as "organizations" under subsection (28), affiliations with specific governments, even when through a subsection (28) organization, constitute grounds for exclusion separate from those found within subsection (28) itself. Relationships between our government and the governments of Nicaragua, the Soviet Union, and Cuba have been marked with tension. The difficulties that characterize these relationships are not simply a function of the sort of generalized suspicion of communism that animated the near-absolute ban of subsection (28). I do not know whether the complexities of these government-to-government relationships ought

nificant disruption of our country's foreign policy.

In order to decide whether the Federation of Cuban Women, for example, is in fact "controlled" by the Cuban government, a court would presumably have to define the degree of influence necessary to constitute "control" and proceed to examine, through witnesses, documentary evidence, and public affidavits, if possible, the conflicting factual assertions and interpretive characterizations made by the private parties and the United States government. The court would wish to examine formal titles and organization charts, but would need in addition to analyze the more informal ways in which the Federation made its decisions and conducted its activities, to see if there existed a veil that needed piercing. Indeed, the foreign governments themselves might wish to participate, and submit their own affidavits disavowing any connection with the visa applicants. Under the Act of State doctrine, we might well be precluded from reaching a decision contrary to the assertions contained in such affidavits, for we would be "inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 84 S.Ct. 923, 926, 11 L.Ed.2d 804 (1964). A United States court ought not lightly undertake a role in which it must issue a public pronouncement that either the United States or a foreign government is untruthful about an issue of intergovernmental relations. Few exercises could be further outside the bounds of judicial competence, or more intrusive with respect to the conduct of foreign affairs. The United States' characterizations of the relationships between the visa applicants and foreign governments in this case cannot, therefore, be open to legal challenge.

properly to be characterized as "independent of," or merely "additional to," the adherence of these governments to a communist ideology. I do know that nothing in the sparse legislative history surrounding passage of the McGovern Amendment warrants an extreme interpretation barring such factors from consideration. Such a reading is certainly not required in order to ensure that subsections (27) and (28) each retain an independent meaning. The best construction appears to be that subsection (28) applies when the sole ground for exclusion is membership in an organization of the sort described. When that membership raises additional concerns, as it does when it involves a connection to a government that implicates American foreign policy, subsection (27) comes into play.

The distinction is real and important between a generalized congressional distrust of communist ideology and organizations and a specific Executive concern over admitting a particular person associated with a foreign government that the Executive considers in some respects adversarial to ours. The McGovern Amendment applies only to the former. That is suggested by the only two concrete examples of its application given in the legislative history—Eurocommunist leaders and Communist labor leaders. In fact, the State Department authorization bill passed in 1979 amended the McGovern Amendment to make clear that it did not apply to "representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state." 22 U.S.C. § 2691(b) (1982). As Congressman Solarz

5. I do not understand the reliance placed by the majority on the fact that previous visa requests by the same applicants have been granted, *maj. op.* at 1059, for that in no way calls into question the legitimacy of the government's position. The defendants have not specified before us the reasons for granting the earlier requests because they were not at issue in these cases. In any event, we certainly ought not to require the government to come into court and justify each past visa decision in order to prove a pattern of integrity. That would involve courts in judging the reasonableness of this aspect of United States foreign policy, a task for which they are wholly unsuited. It is for the Executive, and

explained to his colleagues on the House floor:

While [the McGovern Amendment] was very well intentioned, designed as it were to facilitate entry into the United States by a broad range of individuals, in practice it has resulted in a situation where a number of people have been admitted here who most of us, I think, do not believe should have been admitted to our country.

I have in mind, for example, ... the so-called leaders of purported labor unions in the Soviet Union and in other Communist countries of Eastern Europe who, whatever else they may be, cannot be considered genuine representatives of workers but are, rather, representatives of the State.

125 Cong.Rec. 8345 (1979). While the specific provision added dealt only with labor leaders, the understanding it reflected—that the status of applications by representatives of foreign governments were not to be affected by the McGovern Amendment, whatever the applicants' additional organizational affiliations might be—has broader application.

The majority in fact concedes that governmental affiliations qualify as legitimate grounds for the denial of a visa under subsection (27), and it is these affiliations that the defendants have consistently cited as the basis for denial in these cases. *See* Statement of Material Facts as to Which There is No Genuine Dispute at 5, 7, 9, J.A. at 128, 130, 132; Affidavit of Lawrence S. Eagleburger at 3, 7, 8, 9, J.A. at 137, 141, 142, 143.⁵ The majority's quarrel with the

not for courts, to determine when the relevant factors have changed, or when it is appropriate to change tactics even though circumstances remain the same. Additionally, requiring the Executive to justify a pattern of visa grants and denials would force the Department of State either to discuss highly sensitive matters in a public forum or to forego its authority to deny many visas. The denial of a visa is not a declaration of war; it may be a reflection of any of a number of specific and unreported developments affecting relations between nations. Even in relationships long characterized by hostility, there are thaws and chills, conciliatory gestures and confrontational ones. The govern-

defendants' position, therefore, is that the State Department has not advanced this rationale of government ties *independently* of organizational ties, but instead, in some of these cases, has found the nexus between the applicant and the government wholly within the applicant's membership in subsection (28) organizations. Thus, even if officials of a foreign government acting in that capacity create an organization of the sort described in subsection (28), fund it with government revenues, choose its staff, and decide upon its activities and policies, members of that organization are nevertheless not sufficiently affiliated with the parent government to justify their exclusion under subsection (27). It would seem entirely rational for the State Department to conclude that a member of the Communist Party of the Soviet Union was affiliated with the government of that nation but that a member of the Communist Party of the United Kingdom was not affiliated with the government of his country. In the former case, party membership carries an *additional*, though not an *independent*, status. The requirement of an additional status—governmental affiliation—is quite enough to give meaning to the McGovern Amendment and to distinguish subsection (27) from subsection (28).

The majority's elevation of form over substance has no basis in the language or the legislative history of the McGovern Amendment, which are silent on the question of where subsection (28) leaves off and subsection (27) begins. The majority infers its rule of independence from a structural analysis; it seeks to ensure that (28) is not completely subsumed within (27). But unless the majority believes that every subsection (28) organization is an instrumentality of a foreign government whose representatives the United States will wish to exclude, subsection (28) remains intact and independent without the majority's rule. Without the McGovern Amendment, there would be a statutory policy to exclude all members of subsection (28) organizations;

ment is certainly not required to choose between denying all visa requests coming from one country or individual or none at all, and is

that policy has *not* been revived as the rationale of the decision we review. The McGovern Amendment is, therefore, in no danger of becoming a nullity.

The majority holds that regardless of any connection that might exist between a particular proscribed organization and a particular foreign government, the McGovern Amendment prohibits using the associational ties as a basis for exclusion. The McGovern Amendment therefore becomes peculiarly selective in its prohibition of guilt by association. If the World Peace Council were *not* a subsection (28) organization, and came to be viewed as an instrumentality of, for example, the Libyan government instead of the Soviet government, the McGovern Amendment would not apply and members of the Council could be excluded. While Congress' attitude toward the exclusion of Communists may have changed somewhat between 1952 and 1977, it is doubtful that the McGovern Amendment was meant to confer upon communists a favored entry status. But that is precisely what the majority opinion does. I believe the more logical reading of the McGovern Amendment is the more narrow one—that the McGovern Amendment sought to end the statutory policy of excluding *all* members of subsection (28) organizations automatically, when there was nothing more than the fact of membership as a basis. I do not believe the provision was meant to insulate members of those organizations—and only members of those organizations—from whatever additional grounds for exclusion their membership raised.

The majority's rule of independence is thus neither supported by the language or the legislative history of the McGovern Amendment nor reasonably inferable from the structure of the statutory scheme, and its application will lead to illogical and inconsistent results. This rule was apparently fashioned in part as a means of preventing the Executive from "evading" the limit-

certainly free to determine that reducing access without eliminating it entirely constitutes an appropriate and measured policy.

tations of the McGovern Amendment. I wish to note why, even were the majority's construction to be otherwise correct, the safeguard created may be toothless. First, it is at least an open question whether the terms of the McGovern Amendment are in fact mandatory. The State Department has apparently interpreted them to be, *see* Drischler letter (cited in maj. op. at 23), and there is legislative history to support this interpretation. *See* S.Rep. No. 842, 95th Cong., 2d Sess. 16 (1978) (one year after passage, describing McGovern Amendment as "mandating" favorable recommendation from Secretary of State). The provision itself, however, only declares that the Secretary "should" make a favorable recommendation, 22 U.S.C. § 2691(a) (1982). In 1978, the Senate voted in favor of amending the provision to substitute the word "shall" for "should," but that revision was dropped at conference and the original language was retained. H.R.Rep. No. 1535, 95th Cong., 2d Sess. 44 (1978), U.S.Code Cong. & Admin.News 1978, pp. 2424, 2485. In 1979, during a discussion on the House floor over proposed modifications of the McGovern Amendment, Congressman Solarz stated:

Right now, under the McGovern amendment, the Secretary of State is obligated to recommend the waiver that they be admitted, unless he believes that admitting them would constitute a threat to the national security of the United States; and if he feels that they will not constitute a threat to the national security of the United States, he is obligated to recommend the waiver.

125 Cong.Rec. 8347 (1979). Congressman Fascal, Chairman of the Subcommittee on International Operations, responded:

I just want to say that I agree with the explanation made by the gentleman from New York (Mr. Solarz), with one correction: The present language of the law, that is, the McGovern amendment, is not mandatory.

Other than that, Mr. Chairman, I would agree with everything which the gentleman from New York has said.

Id. A bit later, Congressman Solarz indicated his agreement:

If the gentleman will yield, I want to underline what the subcommittee chairman said, that the McGovern language is not mandatory. The Conferees went to a good deal of trouble to use the word "would," [sic] not "shall,"....

Id.

Second, even if the McGovern Amendment is mandatory, it requires only that the Secretary of State issue a favorable recommendation. Before the prohibition embodied in subsection (28) may be waived, that recommendation must be approved by the Attorney General, who has complete discretion not to do so. 8 U.S.C. § 1182(d)(3) (1982). The Conference Report accompanying the McGovern Amendment expressly noted that "[t]his provision does not affect the authority of the Attorney General to deny waiver requests." H.R.Rep. No. 537, *supra*, at 32, U.S.Code Cong. & Admin.News 1977, p. 1662; *accord* S.Rep. No. 842, *supra*, at 17. The Attorney General is therefore not required to grant visas under subsection (28) to those applications which the Secretary of State is arguably required to support.

This fact has unfortunate consequences for the majority's reasoning. There are only two possibilities: that the Secretary of State and the Attorney General will behave disingenuously in order to evade the McGovern Amendment or that they will not.

As the majority indicates, maj. op. at 1059 n. 22, while the Attorney General retains the authority to decline to grant waivers for foreign policy reasons, it is unlikely that he would in fact make such determinations without guidance from the Secretary of State. Practically speaking, however, there is no way to prevent the Secretary of State from issuing a formal recommendation favoring admission, pursuant to his statutory duties as defined by this court, while also letting the Attorney General know that the granting of a waiver would prejudice the conduct of foreign affairs. Such behavior would render today's holding meaningless, but I can think of no way

in which it could be policed. The majority suggests that its rule of independence is needed to ensure a mechanism for judicial review of a potentially disingenuous State Department. Maj. op. at 1058 n. 20. But since the Attorney General remains free to decline to grant the visa notwithstanding a favorable recommendation, and the Secretary of State is effectively able to urge him to do so, then, on the hypothesis of disingenuity, the majority's rule accomplishes nothing and is, therefore, unnecessary. The denial of a waiver remains "walled off from any effective challenge." *Id.*

I agree with the majority, however, that compliance with the McGovern Amendment, as now interpreted, is to be expected. We may anticipate that the State Department will adhere to the standard articulated today in all respects, and will not take back in private the formal recommendations sent to the Attorney General, despite the fact that it possesses the power to do so. This is apparently the majority's expectation—in which case I am not at all certain why the mere fact that the State Department "possess[es] [the] power" to subvert the McGovern Amendment in other ways leads the majority to feel a prophylactic rule of sorts is necessary. Maj. op. at 1058 n. 20. It is puzzling that the majority posits both integrity and lack of integrity in the same Department in order to support different stages of its argument.

More importantly, if compliance with the spirit of its opinion is indeed the result the majority expects, it cannot claim that it has "preserve[d] the President's potency in this area." Maj. op. at 1049 n. 2. The majority supports that assertion by reference to the President's power, undisturbed by its opinion, to exclude aliens through the issuance of a Presidential Proclamation. However, if today's holding ultimately means that certain aliens may not be excluded save through such a proclamation, then the ability of the Executive to use the denial of visas for foreign policy purposes will be significantly diminished. In many instances, the use of a Presidential Procla-

mation would be diplomatic overkill and would lend an international importance to the person excluded that use of subsection (27) avoids. If such results are deemed unacceptable, many persons the Executive would like to exclude for good reasons will be allowed to enter, and he will be deprived of much of the flexibility and nuance that are essential in the conduct of foreign relations.

IV.

I am therefore left with plaintiffs' constitutional challenges. The statutory issues are somewhat complex; the constitutional issues are not. The Supreme Court precedent is clear and consistent.

Plaintiffs do not assert that the four unsuccessful visa applicants have any constitutional right to enter the United States. Instead, they assert their own rights, as listeners, to receive information. Such interests have been held to "implicate[]" first amendment rights and thus to confer standing in cases such as these. *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972). It is clear, however, that a potential listener who seeks a judicial declaration that the government's decision to exclude an alien is unconstitutional bears a difficult burden. That must be so if the right to listen, which *Kleindienst* recognizes, is not to destroy the United States' sovereign power to control entry into its territory. The first amendment, it must be remembered, does not protect only speech uttered in a lecture hall or an auditorium, and the interest in receiving information can be asserted by any individual in this country who wishes to speak with an alien. See *id.* at 768, 92 S.Ct. at 2584. Because the exclusion of aliens remains "a fundamental act of sovereignty," *Knauff v. Shaughnessy*, 338 U.S. at 542, 70 S.Ct. at 312, the Supreme Court has held

that when the Executive exercises this power . . . on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of

that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Kleindienst v. Mandel, 408 U.S. at 770, 92 S.Ct. at 2585.

In support of their first amendment argument, plaintiffs cite approximately twenty Supreme Court decisions, only one of which, however, deals with constitutional review of immigration law. There is in fact an unbroken line of decisions limiting the scope of judicial review in this area, of which *Kleindienst* is only one of the more recent. The Supreme Court has repeatedly held that the power to exclude aliens is "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. Mezei*, 345 U.S. 206, 210, 73 S.Ct. 625, 628, 97 L.Ed. 956 (1953). *Accord Regan v. Wald*, 468 U.S. 222, 104 S.Ct. 3026, 3039, 82 L.Ed.2d 171 (1984); *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 1477, 52 L.Ed.2d 50 (1977); *Harris v. Shaughnessy*, 342 U.S. 580, 589, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952); see also *Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) ("that the formulation of [immigration] policies is entrusted to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government").

Plaintiffs' primary legal claim is that the first amendment forbids the Executive from making decisions to exclude based on the content of an applicant's political beliefs. Such an assertion is wrong as a matter of law, and irrelevant to the case at bar. It is wrong as a matter of law because it describes the lower court holding reversed by the Supreme Court in *Kleindienst v. Mandel*. *Mandel v. Mitchell*, 325 F.Supp. 620 (E.D.N.Y.1971) (three-judge court). In upholding the refusal of the Attorney General to grant a waiver to Mandel from the mandatory exclusion of subsection (28), the *Kleindienst* Court necessarily upheld the constitutionality of the exclusion of communists required by sub-

section (28)—indisputably an exclusion based upon Mandel's political beliefs.

In any event, plaintiffs' characterization of the government's conduct in these cases is simply inaccurate. The government does not here enforce a policy of making decisions to exclude based on the content of applicants' political beliefs, but has instead chosen to exclude applicants who are members of or connected with particular foreign governments. By wrongly equating the two policies, plaintiffs mischaracterize the United States' action as "content-based censorship." Brief for Appellants at 56. Even if that were correct, as I have already shown, plaintiffs would not automatically prevail in the legal context of visa denials. It is idle to pretend that the United States is attempting to prevent certain ideas from reaching the American people. Those ideas are part of our domestic and international political discourse and their expression in this country is fully protected by the first amendment. *Kleindienst* demonstrates that the additional right to have particular aliens come here to express those ideas is limited by our government's plenary power over the admission of aliens. But, in any case, plaintiffs' description of what is taking place here is wrong. The existence of ideological differences between the United States and a foreign government does not mean that a denial of visas to persons affiliated with that government is an exclusion resting solely on the content of the applicants' political beliefs. Classifications of the sort involved here have been upheld in the past against first amendment challenges. *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965), upheld restrictions on travel by American citizens to Cuba. Preventing Americans from traveling to a foreign country is certainly not less serious constitutionally than preventing that country's citizens from coming here. The government's actions at issue in these cases obviously withstand the limited judicial scrutiny defined by the *Kleindienst* standard.

Plaintiffs briefly offer one other constitutional argument—that the broad discre-

tion delegated to the Executive in subsection (27) violates principles of separation of powers. Plaintiffs have chosen an especially inhospitable legal environment in which to attempt the resuscitation of the non-delegation doctrine, for it is in the context of foreign affairs that the Supreme Court has repeatedly upheld the legitimacy of broad and discretionary Executive power. "[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature," statutes conferring authority upon the President to conduct foreign affairs have necessarily been less detailed and specific than statutes concerned with domestic affairs. *Zemel v. Rusk*, 381 U.S. at 17, 85 S.Ct. at 1281. See *supra* Part II, and cases cited there. This constitutional argument is therefore no more substantial than plaintiffs' first amendment claim.

V.

In an affidavit filed below, Under Secretary Eagleburger stated:

The overwhelming majority of NIV applications involve only ordinary circumstances of aliens seeking to visit the United States for reasons of business or pleasure. However, in some instances, the issuance, denial or revocation of a NIV to a particular alien can have significant diplomatic or foreign policy ramifications to the extent that the issuance or denial is construed as an act of the United States Government. Thus, for example, the issuance or denial of a visa to a foreign government official may be taken by the alien's government as a reflection of United States foreign policy vis-à-vis that government and may result in reciprocal action or retaliation by that government. Similarly, the denial of visas to foreign government officials is one of the tools available to a government to communicate its attitude about the policies of other states.

J.A. at 137. This description of State Department policy is compatible with the statutes governing the issuance of non-immigrant visas, statutes which are constitutional under all applicable Supreme Court precedent. In the area of immigration law, "interwoven" as it is with "the conduct of foreign relations," *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 72 S.Ct. 512, 518-19, 96 L.Ed. 586 (1952), Congress has traditionally delegated—and the courts have respected—broad and discretionary Executive authority.

The majority's opinion is a cautious one: major issues presented in this litigation are left for subsequent resolution. Yet that virtue seems to me inadequate. The majority's constricted method of statutory construction, which is inconsistent with *Chevron*, its insufficient appreciation of the weight to be accorded the context of foreign policy in which this case arises, and its lack of deference to the determinations of the Department of State combine to produce an unnecessary remand. They seem likely ultimately to produce an incorrect and unfortunate result in this litigation. By itself that may not be very serious, although we have no way of knowing, but today's approach is capable of creating a series of similarly unfortunate results in other cases implicating foreign policy. If the approach employed here is repeated, then the majority opinion begins, albeit cautiously, a process of judicial incursion into the United States' conduct of its foreign affairs. For that reason, and because I believe that the law and the public record before us require affirmance of the district court's grant of summary judgment, I respectfully dissent.



In re William L. MAGWOOD, III.

Florence HICKS, Appellant,

v.

Paul D. PEARLSTEIN.

No. 84-5680.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 22, 1985 and Jan. 15, 1986.

Decided March 14, 1986.

As Amended March 14, 1986.

Appeal was taken from an order of the United States District Court for the District of Columbia, Thomas A. Flannery, J., refusing to set aside bankruptcy court order finding mortgagee in contempt for signing listing agreement without bankruptcy trustee's written approval. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that: (1) sale of property by bankruptcy trustee was to good faith purchaser, and therefore, Court of Appeals had no authority to overturn the sale, and (2) sanctions imposed on mortgagee by bankruptcy court were punitive in nature, and bankruptcy court exceeded its authority in attempting to impose those sanctions on mortgagee.

Remanded.

1. Contempt $\S$ 70

Civil contempt citations must either coerce compliance with court order or compensate injured party for losses caused by violation of court order.

2. Bankruptcy $\S$ 269

Sale of property by bankruptcy trustee was to good faith purchaser, whose purchase for a price higher than any appraised value of property was for "value"; therefore, the Court of Appeals had no authority to overturn trustee's sale of property despite a finding that bankruptcy court exceeded its authority in allowing trustee to sell property.

3. Bankruptcy $\S$ 229

Sanctions imposed on mortgagee allowing mortgagee, who allegedly violated settlement agreement with trustee, to purge herself of contemptuous conduct by authorizing trustee to sell property, free and clear of all liens, with all valid liens attaching to sale proceeds, taking no steps to sell property except through trustee, keeping property in repair, and reimbursing trustee for his time expended in court hearings and in preparation of those hearings exceeded bankruptcy court's statutory authority. 28 U.S.C.A. $\S$ 1481.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 84-01862).

Claude W. Roxborough, for appellant.

Paul D. Pearlstein, Washington, D.C., for appellee.

Harold J. Krent, Dept. of Justice, with whom Richard K. Willard, Asst. Atty. Gen., Joseph E. diGenova, U.S. Atty. and William Kanter, Dept. of Justice, Washington, D.C., were on brief for intervenor.

Professor Thomas G. Krattenmaker, for the Court as amicus curiae.

Murray Drabkin, Mark C. Ellenberg and Imogene Lehman, Washington, D.C., were on brief for amicus curiae urging affirmance.

Before EDWARDS, GINSBURG and SCALIA, Circuit Judges.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

On April 15, 1983, appellant Florence Hicks foreclosed a mortgage on property held by a debtor who two weeks earlier had filed for bankruptcy. At a hearing before the bankruptcy court to determine whether this foreclosure violated the automatic stay of execution rule, the appellant and the Trustee of the bankrupt estate reached an oral settlement establishing procedures for

R. David FINZER, Father, et al., Appellants,

v.

Marion S. BARRY, Jr., Mayor, District of Columbia, et al.

No. 84-5327.

United States Court of Appeals,
District of Columbia Circuit.

Argued March 20, 1985.

Decided Aug. 19, 1986.

As Amended Sept. 9, 1986.

Persons who wish to demonstrate in front of Nicaraguan embassy brought action challenging District of Columbia statute prohibiting display of signs bringing foreign government into disrepute within 500 feet of the embassy and prohibiting persons from congregating within 500 feet of embassy and not dispersing when ordered to do so. The United States District Court for the District of Columbia, Oliver Gasch, J., denied relief and plaintiffs appealed. The Court of Appeals, Bork, Circuit Judge, held that: (1) statute achieved permissible accommodation between competing claims of United States national interest and international obligations and the First Amendment; (2) there was no less restrictive alternative; (3) statute was not unconstitutionally vague; and (4) statute was not unconstitutionally overbroad.

Affirmed in part and remanded.

Wald, Circuit Judge, dissented and filed an opinion.

1. Constitutional Law ¶90.1(1)

Disorderly Conduct ¶1

Statute prohibiting the display of signs tending to bring foreign government into disrepute within 500 feet of the foreign embassy and prohibiting people from congregating within 500 feet of an embassy and refusing to disperse when ordered to do so achieves permissible accommodation between competing claims of First

Amendment and the United States national interest and international obligations. D.C. Code 1981, § 22-1115; U.S.C.A. Const. Amend. 1.

2. Disorderly Conduct ¶1

District of Columbia statute governing demonstrations in front of foreign embassies was enacted pursuant to Congress' power under Article I, § 8, to define and punish offenses against the law of nations. D.C. Code 1981, § 22-1115; U.S.C.A. Const. Art. 1, § 8, cl. 10.

3. Ambassadors and Consuls ¶3

Host states have special responsibility to ensure that foreign embassies and the personnel inside them are free from threats of violence and intimidation.

4. Constitutional Law ¶70.1(4)

Determination of Congress that District of Columbia statute governing demonstrations and displays of signs within 500 feet of embassies was necessary to enforce the United States obligations under international law was entitled to deference. D.C. Code 1981, § 22-1115.

5. Constitutional Law ¶70.1(4)

Deference which court gives to legislature in determining need for statute which is challenged on constitutional grounds is not a deference to the government's legal judgment that the statute is constitutional but, rather, to the factual predicate for it.

6. Federal Civil Procedure ¶2544

Mere mention to district court that party vigorously disputes statements made in declarations offered in support of motion for summary judgment is not sufficient to call into question the contentions made by the opposing party.

7. Constitutional Law ¶90.1(1)

First Amendment does not guarantee an optimal setting for speech; there is no right to the backdrop most interesting to press photographers or television cameramen. U.S.C.A. Const. Amend. 1.

8. Constitutional Law ¶90.1(2)

Statute barring all demonstrations within 500 feet of embassy would not be

less restrictive alternative than District of Columbia statute regulating demonstrations by prohibiting banners which bring the government into disrepute and prohibiting people from congregating within 500 feet to meet interest of avoiding affronts to dignity of foreign governments and diplomatic personnel and eliminating threats to the security of foreign embassies. D.C. Code 1981, § 22-1115.

9. Constitutional Law ¶90.1(1)

Not all content-based restrictions or viewpoint-based restrictions on speech are automatically unconstitutional. U.S.C.A. Const. Amend. 1.

10. Disorderly Conduct ¶1

District of Columbia statute prohibiting display of signs that bring foreign government into disrepute within 500 feet of that government's embassy and prohibiting people from congregating within 500 feet of embassy was not unconstitutionally vague as applied to persons who wish to congregate within 500 feet of Nicaraguan embassy carrying signs critical of the Nicaraguan government. D.C. Code 1981, § 22-1115.

11. Disorderly Conduct ¶1

Provision of District of Columbia statute governing demonstrations in front of foreign embassies which forbids congregating within 500 feet of the official buildings after police authorities have ordered dispersal is not unconstitutionally vague on the theory that it does not give standards to define the situations in which orders may be given by the police. D.C. Code 1981, § 22-1115.

12. District of Columbia ¶22

District of Columbia statute governing demonstrations in front of foreign embassies does not grant police the power to disperse persons in front of embassies for reasons having nothing to do with the nearby embassy and the purposes behind the statute supplies the necessary criteria for determining when the police may give such orders. D.C. Code 1981, § 22-1115.

13. Constitutional Law ¶42.2(1)

Doctrine of overbreadth constitutes exception to judicial rules of standing, applicable only in First Amendment cases, by allowing litigants to whom a statute is constitutionally applied to challenge a statute on First Amendment grounds. U.S.C.A. Const. Amend. 1.

14. Constitutional Law ¶82(4)

When overbreadth of a statute is substantial with reference to its plainly legitimate sweep and a narrowing construction is unavailable, facial invalidation will be in order. U.S.C.A. Const. Amend. 1.

15. Statutes ¶64(1)

Where party challenging statute on First Amendment grounds is himself engaged in protective speech which overbroad statute seems to punish, court will invalidate the statute to the extent that it reached protected conduct while leaving the remainder intact. U.S.C.A. Const. Amend. 1.

16. Constitutional Law ¶82(4)

Statute may be substantially overbroad when its potential for application to protected activity overwhelms its potential for application to unprotected activity. U.S.C.A. Const. Amend. 1.

17. Disorderly Conduct ¶1

District of Columbia statute prohibiting displays of signs intending to bring foreign governments into disrepute within 500 feet of embassy and prohibiting people from congregating within 500 feet of embassy and not dispersing when ordered to do so is not unconstitutionally overbroad. D.C. Code 1981, § 22-1115; U.S.C.A. Const. Amend. 1.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 84-0899).

Raymond D. Battocchi, with whom Alfred F. Belcoure, James A. Bensfield and Steven F. Korostoff, Washington, D.C., were on brief, for appellants.

William J. Earl, Asst. Corp. Counsel for Dist. of Col., with whom John H. Suda, Principal Deputy Corp. Counsel for Dist. of Col. and Charles L. Reischel, Deputy Corp. Counsel for Dist. of Col., Washington, D.C., were on brief, for appellees.

R. Craig Lawrence, Asst. U.S. Atty., with whom Joseph E. diGenova, U.S. Atty., and Royce C. Lamberth, Asst. U.S. Atty., were on brief, for U.S., Washington, D.C., *amicus curiae* urging affirmance.

Before WALD, Chief Judge, BORK, Circuit Judge, and DAVIS,* Circuit Judge, United States Court of Appeals for the Federal Circuit.

Opinion for the Court filed by Circuit Judge BORK.

Dissenting opinion filed by Chief Judge WALD.

BORK, Circuit Judge:

Appellants are individuals who wish to carry placards opposing the policies of the Soviet and Nicaraguan governments in front of those governments' embassies, located within the District of Columbia. In the absence of a permit, such protests are barred by D.C.Code § 22-1115 (1981). That same statute authorizes police to disperse congregations in front of embassies. Appellants asserted unsuccessfully before the district court that, on its face, this law violates the first and fourteenth amendments to the Constitution. They appeal the district court's holding that the statute is

constitutional and its grant of summary judgment for defendants.

The challenged statute regulates demonstrations taking place in front of foreign embassies (or buildings occupied by representatives of foreign governments) located within the District of Columbia. It contains several subsidiary provisions but for purposes of exposition it is sufficient to note its two primary features. The first makes it unlawful to "display any ... placard ... designed ... to ... bring into public odium any foreign government ... or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government" within 500 feet of that country's embassy, unless the demonstrators receive a permit to do so from the Chief of Police. The second feature makes it unlawful to "congregate within five hundred feet of any [embassy], and refuse to disperse after having been ordered so to do by the police authorities" of the District of Columbia.¹

Speaking very generally, the first part of the statute—requiring a permit for the display of a sign tending to bring a foreign government into disrepute—is primarily intended to avoid affronts to the dignity of foreign governments and their diplomatic personnel. The second feature—prohibiting "congregating"—is concerned more with threats to the security of the foreign government's representatives and property. Each of these main divisions of the statute is, of course, capable of serving both purposes mentioned. In both cases, the protection is limited to an area extend-

foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government, within five hundred feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes, except by, and in accordance with, a permit issued by the Chief of Police of the said District; or to congregate within five hundred feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District.

ing 500 feet from the building. In *Frend v. United States*, 100 F.2d 691 (D.C.Cir. 1938), *cert. denied*, 306 U.S. 640, 59 S.Ct. 488, 83 L.Ed. 1040 (1939), this court rejected a first amendment challenge to section 22-1115 and upheld the provision's constitutionality. In issuing the judgment we review today, the district court, relying in part on *Frend*, reached the same conclusion. *Finzer v. Barry*, Civ. Action No. 84-0899 (D.D.C. May 17, 1984), Record Excerpts ("R.E.") at 62.

Our opinion is, unfortunately, quite lengthy, because in addition to presenting our analysis, it is necessary that we address the numerous and varied challenges to this statute advanced by appellants and the dissent. We hold that section 22-1115 passes constitutional muster, and we affirm the district court's holding to that effect. We remand, however, for the limited purpose of addressing appellants' claim that section 22-1115 has been enforced by local authorities against persons who were not in fact engaged in activities forbidden by the statute.

I.

Father R. David Finzer is the National Chairman of the Young Conservative Alliance of America, Inc., which he describes as "an organization of younger citizens who hold conservative views, and are dedicated to advocating and furthering those viewpoints." Declaration of Father R. David Finzer, R.E. at 15. He and three co-plaintiffs—Bridget Brooker, J. Michael Waller, and Michael Boos—initiated this action in March of 1984 against the District of Columbia, the Mayor, and the Chief of Police. The United States was granted leave to participate as *amicus curiae* and supported the constitutionality of the statute.

Plaintiffs' complaint and accompanying declarations state that they wish to conduct demonstrations of the sort described in D.C.Code § 22-1115—they wish to carry signs critical of the Soviet and Nicaraguan governments within 500 feet of their embassies. Mr. Waller, for example, wishes

to carry a sign bearing the words "Stop the Killing" in front of the Nicaraguan Embassy. Two of the plaintiffs claim to have been prevented in the past from demonstrating by uniformed police officers acting under the authority of section 22-1115. Additionally, they allege that the statute has been enforced against activity that was not in fact within its reach. Arguing that section 22-1115 abridges rights guaranteed by the first and fourteenth amendments to the United States Constitution, plaintiffs moved for summary judgment, seeking a permanent injunction against the provision's enforcement and a declaration of its unconstitutionality.

Defendants opposed this motion and filed a cross motion for summary judgment. They filed accompanying declarations from David Fields, Deputy Assistant Secretary of State for Security; Thomas D. Quinn, Special Agent in Charge of the Office of Protective Operations of the United States Secret Service; James E. Nolan, Jr., Director of the Office of Foreign Missions, Department of State; and John C. Connor, Deputy Chief of Police and Commanding Officer of the Special Operations Division of the Metropolitan Police Department in the District of Columbia. The declarations of the two State Department officials noted that the responsibility of a host state to provide appropriate protection to foreign embassies within its borders is one codified and imposed by international law, and that the degree of protection afforded by foreign governments to American diplomatic personnel abroad depends in significant part upon the protection provided by our government to foreign diplomats living in Washington, D.C. It was the considered judgment of both men that diminishing the protection provided by section 22-1115 would have a serious and adverse effect upon the relationships between the United States and many other governments and would endanger American diplomatic personnel who live and work in other countries. The other two declarants stated, on the basis of their professional experience, that section 22-1115 was necessary to the

*Sitting by designation pursuant to 28 U.S.C. § 291(a).

1. The full text of D.C.Code § 22-1115 (1981) reads as follows:

It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party, or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any

continued security of foreign embassies located in Washington, D.C. They explained that the task of protecting foreign embassies presented unique security problems, because—unlike, for example, when protecting the White House, the Capitol, or the Supreme Court—American police are prohibited from entering the premises. They may do so only upon the express prior approval of the foreign government, which, for obvious reasons, will rarely be given. The 500 foot buffer zone created by section 22-1115 compensates to some degree for the absence of any American police presence inside these buildings. R.E. at 36-58.

The plaintiffs did not submit any declarations in response. Instead, they filed a Statement of Material Facts in Dispute in which they claimed that they were entitled to summary judgment even if all the defendants' declarations were accepted as true, and informed the district court that they did not wish to seek discovery at the time with respect to the factual contentions made in those declarations. R.E. at 59.

In a Memorandum Order issued on May 17, 1984, Judge Gasch granted defendants' motion for summary judgment. He held section 22-1115 to be "necessary for the protection of the personnel and property of foreign governments located in Washington, D.C." *Finzer v. Barry*, Civ. Action No. 84-0899, mem. op. at 3, R.E. at 64. He found that the statute served to fulfill American obligations under international law and to protect our representatives abroad, noting that "[f]ew government interests are more compelling." *Id.* Judge Gasch held therefore that the statute withstood the scrutiny required by the equal protection clause and relied upon the authority of *Frend* in rejecting the first amendment challenges.

II.

The appellants in *Frend v. United States* had been convicted of violating section 22-1115 by demonstrating in front of the Aus-

trian and German embassies. Finding that there was no question that their activities ran afoul of the statute, the *Frend* court proceeded to examine the statute's constitutionality.

The court noted that section 22-1115 was enacted as an exercise of Congress' constitutionally vested authority to "define and punish . . . Offenses against the Law of Nations," U.S. Const. art 1, § 8, cl. 10, its purpose being 'to fulfill the United States' duty under international law "of protecting the residence of an ambassador or minister against invasion as well as against any other act tending to disturb the peace or dignity of the mission or of the member of a mission." 100 F.2d at 692, 693. Limited as the statute was to "public demonstrations calculated to arouse passions and resentments in those governments with which we have official relations," this court held that section 22-1115 was a legitimate and constitutional exercise of congressional authority. *Id.* at 693.

Although *Frend* is persuasive precedent, we cannot decide this case simply by citing it as the binding law of the circuit. The case was decided almost a half century ago and in the interval the Supreme Court has developed constitutional law in ways that must be taken into account. Appellants challenge section 22-1115 in part on the basis of a hybrid of equal protection and first amendment law that became part of the doctrinal landscape several decades after *Frend*. Indeed, much of modern first amendment law took shape after *Frend* was decided. We are compelled, therefore, to reexamine *Frend* in light of intervening precedent. Upon review, we find much of its analysis still convincing, and the basic holding fully consistent with the constitutional standards that have evolved.²

III.

[1] Though it will be necessary in the course of this opinion to meet the multiple charges levelled by appellants and by the

against precisely the same challenges presented here. *United States v. Brown*, No. M-10901-83 (D.C. Super. Ct. Jan. 20, 1984).

dissent upon this minor regulation of demonstrations, the core of this case lies in the relationship between the United States' national interests and international obligations and the first amendment's guarantee of free speech. The question to be determined is whether section 22-1115 achieves a permissible accommodation between the competing claims of these profound constitutional values.

A.

[2] Section 22-1115 was enacted pursuant to Congress' power, under article I, section 8 of the Constitution, "To define and punish . . . Offenses against the Law of Nations." The need for such authority was, of course, one of the reasons a new constitution was desired, and the power was placed among the great powers granted the new government. Implementation of the law of nations by the American government was seen as crucial to the conduct of our foreign relations, a subject of pervasive concern in the Constitution. For that reason, the statute before us, though rooted in Congress' power to define and punish offenses against the law of nations, also draws sustenance from all those provisions of articles I and II that empower the national government, as a whole, to manage American intercourse with other nations.

In vesting Congress with the power to define, as well as to punish, offenses against the Law of Nations, article I, section 8 of the Constitution authorized Congress to derive from the often broadly phrased principles of international law a more precise code, as it determined that to be necessary to bring the United States into compliance with rules governing the international community. In enacting section 22-1115, Congress sought to guarantee to foreign diplomats, long understood as "objects of especial respect and protection,"³ the security to which they have always been entitled under legal doctrines

accepted and enforced throughout the world. Since the days of Blackstone, "infringement of the rights of ambassadors" have been regarded as one of "the principal offenses against the law of nations." 4 W. Blackstone, *Commentaries* 68, and for as long as the United States has been a nation, those rights have been recognized to include those that are implicated here—protection from intimidation and the potential of violence, and from assaults on the dignity and peace of the embassy as well.

[3] The principle that host states have a special responsibility to ensure that foreign embassies and the personnel inside them are free from threats of violence and intimidation is "solidly entrenched in the Law of Nations." 2 C. Hyde, *International Law* 1249 (1945). Vattel, one of the first to attempt to codify the Law of Nations, wrote in the eighteenth century that embassies

being of such great importance in the universal society of nations, and so necessary to their common well-being, the persons of ministers charged with those embassies are to be held *sacred* and *inviolable* among all nations. . . . This safety is particularly due to the minister, from the sovereign to whom he is sent. To admit a minister, to acknowledge him in such character, is engaging to grant him the most particular protection, and that he shall enjoy all possible safety. It is true, indeed, that the sovereign is bound to protect every person within his dominions, whether native or foreign, and to shelter him from violence: but this attention is in a higher degree due to a foreign minister.

Vattel, *The Law of Nations* 464-65 (1863) (emphasis in original). Vattel went on to note that while an act of violence done to a "private person" was an "ordinary transgression," which the sovereign of the country in which it occurred was free to pardon, a similar act against a foreign ambassador was "a crime of state, an offence against

2. We note that the same conclusion has recently been reached by the Superior Court of the District of Columbia, which upheld § 22-1115

3. President Fillmore, Message to Congress, Dec. 2, 1851, 6 J. Moore, *International Law Digest*

813 (1906).

the law of nations," of which the power to pardon was vested in the sovereign "who has been offended in the person of his representative." *Id.* at 465. The need for special measures to ensure protection is thus a function of both the unique sensitivity of the position and the strength of feeling that may often be aroused against nations which, while perhaps in some respects adversarial to ours, are ones with which we need to maintain diplomatic channels of communication.

The duty to safeguard the peace and dignity of the embassy has equally strong roots. Vattel explained:

The respect which is due to sovereigns should redound to their representatives, and especially their ambassadors, as representing their master's person in the first degree. Whoever offends and insults a public minister commits a crime the more deserving of severe punishment, as he might thereby involve his country and his sovereign in very severe difficulties and trouble.

Vattel, *supra*, at 463. Thus, the tearing down in Philadelphia in 1802 of the flag of the Spanish minister, "with the most aggravating insults," was considered actionable in the Pennsylvania courts as a violation of the law of nations. 4 J. Moore, *Digest of International Law* 627 (1906) (quoting letter from Secretary of State Madison to Governor McKean (May 11, 1802)). A complaint by the British government in 1794 concerning a "riot committed by a number of persons tumultuously assembled before the house of a foreign consul, requiring him to deliver up certain persons supposed to be resident with him, and insulting him with improper language," was determined not to be subject to prosecution in the United States only because a consul was not considered a public minister. 1 Op. Att'y Gen. 41-42 (1794). Indeed, Attorney General William Brad-

4. The Act of State doctrine is a reflection of judicial adherence to a similar principle: courts will allow what may be an expropriation to take place rather than inquire into the representations made by a foreign government with respect to acts within its borders, in part out of a

ford, in 1794, published an opinion in which he noted that the law of libel, when applied "in the case of a foreign public minister, ... is strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence, but also from insult." 1 Op. Att'y Gen. 52 (1794). *Accord* 1 Op. Att'y Gen. 73 (1794) ("it is usual [for foreign nations] to complain of insults to their ambassadors, and to require the parties to be brought to punishment"). The longstanding principle of diplomatic immunity reflects the same concern. One of the statutes enacted by the First Congress protected ambassadors from arrest and from suit. Any person who sought to prosecute or serve a writ upon an ambassador was subject to up to three years' imprisonment, as were his attorney and any official who sought to execute the writ. Act of Apr. 30, 1790, ch. 9, §§ 25-26, 1 Stat. 112, 117-18.⁴

It was assumed by the framers and ratifiers of the Constitution that our obligations under international law would be honored. In the course of their rebellion, the American colonies were quick to assure the world that the "law of nations [would be] strictly observed." 14 J. Cont.Cong. 635 (1779). The Continental Congress, lacking meaningful authority, had to content itself with passing a resolution urging the states to provide judicial remedies for infringements of the rights of ambassadors. 21 J.Cont.Cong. 1136-37 (1781). This resolution was apparently ineffective, for Edmund Randolph was later, at the constitutional convention, to identify as one of the defects of the Articles of Confederation that "they could not cause infractions of treaties or of the law of nations, to be punished," and to note as an example that "[i]f the rights of an ambassador are invaded by any citizen it is only in a few states that any laws exist to punish the offender." 1 M. Farrand, *The Records of the Federal*

reluctance to "give offense." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432, 84 S.Ct. 923, 942, 11 L.Ed.2d 804 (1964), and in order to "avoid disrespect for foreign states." § 469 comment a *Restatement of Foreign Relations Law (Revised)* (Tent.Draft No. 7, 1986).

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Convention of 1787, at 19, 25 (1911). In arguing for ratification, John Jay subsequently characterized it as "of high importance to the peace of America that she observe the law of nations." The Federalist No. 3, at 13 (P. Ford ed. 1898). *Accord* Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U.Pa.L.Rev. 26, 55-56 (1952) ("the Constitution was framed in firm reliance upon the premise, frequently articulated, that ... the Law of Nations in all its aspects familiar to men of learning in the eighteenth century was accepted by the framers, expressly or implicitly, as a constituent part of the national law of the United States").

As we have demonstrated, the framers understood that the protection of foreign embassies from insult was one of the central obligations of the law of nations. *See supra*, pp. 1455-56. Indeed, the Act of April 30, 1790, which provided for the imprisonment of anyone who sought to bring legal action against an ambassador, *see supra* p. 1456, was enacted by a Congress that consisted of many of the framers of the Constitution, along with their contemporaries. That Act flatly denied access to the courts, which is a form of petitioning the government, and yet was assumed to be constitutional. As the Supreme Court has shown, it is often instructive to examine the practices at the time of the Constitution's framing as a guide to understanding the meaning of its provisions. *See Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983).

These were among the considerations that motivated the Congress that enacted section 22-1115. These principles were repeatedly invoked during the debate on the Senate floor. Senator Pittman, the sponsor of this provision, commented:

I believe that since the beginning of government the inviolability of ambassadors and ministers has been universally recognized in all civilized countries. Even in times of vicious wars special ambassadors from one of the hostile countries to the other have gone without

guards, realizing that the honor of the country to which they were going was sufficient to protect their lives and to protect them in the performance of their duties. If this were not so, intercourse between governments would be practically impossible.

81 Cong.Rec. 8587 (1937). The issue of the law's constitutionality was the subject of some discussion, and Senator Pittman argued strenuously that there was no constitutional right to do that which was regulated by the statute:

—to make an offensive demonstration in front of an embassy or in front of a legation, the residence of a diplomat, who is our guest here, who depends on us wholly for his protection not only against murder, not only against insult, but against any character of annoyance or interference that will bring the hatred of the people of his country against our people.

Id. at 8589.

The requirements imposed by international law have changed somewhat since the days of Vattel, since the founding of the Republic, and even since the era in which section 22-1115 was enacted. The legal principles embodied in section 22-1115, however, have gained rather than lost force in the intervening years. Article 22 of the 1961 Vienna Convention on Diplomatic Relations, to which the United States is a signatory, sets out duties expected of a host state in regard to the mission premises of foreign nations. It states:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Basic Documents in International Law 219 (Ian Brownlie ed. 1983) (emphasis added). The principles embodied in the Vienna Convention were for the most part already established under customary international law. According to Leonard Meeker, who as Legal Adviser to the State Department testified in favor of Senate ratification, "[t]he 1961 Vienna Conference examined the articles in the light of modern conditions, surveying the body of law and practice which had developed over the years regarding the rights, duties, and privileges of diplomatic missions" and "recognized the great need for an agreed international standard of treatment." *Hearing on the Vienna Convention on Diplomatic Relations Before the Subcomm. of the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 2 (1965).

Article 22 of the Vienna Convention was derived from draft article 20, which was adopted in 1958 by the International Law Commission. In its commentary on this provision, the Commission stated that the receiving state bore a "special duty," and that it "must, in order to fulfill this obligation, take special measures—over and above those it takes to discharge its general duty of ensuring order." *II Yearbook of the International Law Commission 1958* at 78, 95. The Department of State has

5. As we have indicated, Article 22 of the Vienna Convention created no new law, but rather codified doctrine that already existed. In similar fashion, the Harvard Draft Convention on Diplomatic Privileges and Immunities, published in 1932, provided that:

A receiving state shall protect the premises occupied or used by a mission, or occupied by a member of a mission, against any invasion or other act tending to disturb the peace or dignity of the mission or of the members of a mission.

26 Am.J.Int'l L. 20-21 (Supp.1932). According to the commentary accompanying the Convention:

Protection against invasion of the premises of a mission ... means protection against any

cited section 22-1115 as the concrete implementation by the United States of its legal obligations under paragraph two of article 22 of the Vienna Convention. *Hearing on the Vienna Convention on Diplomatic Relations Before the Subcomm. of the Senate Comm. on Foreign Relations*, *supra*, at 49.⁵

We think it clear beyond quibble that since the founding of our nation adherence to the law of nations, and most particularly that branch of the law that demands security for the persons and respect for the dignity and peace of foreign emissaries, has been regarded as a fundamental and compelling national interest. It is also clear that the founders, who explicitly gave Congress the power to enforce adherence to the standards of the law of nations, which they understood well, saw no incompatibility between this national interest and any guaranteed individual freedom.

B.

It must not be forgotten that a determination by the political branches concerning the obligations of the United States is also a determination about the conduct of American foreign policy. Defining and enforcing the United States' obligations under international law require the making of extremely sensitive policy decisions, decisions which will inevitably color our relationships with other nations. Such decisions "are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly

attempt to enter the premises against the will of the chief or other members of the mission. The duty, however, goes further than that. The receiving state is under a duty to protect the premises against any acts tending to interfere with the enjoyment or possession of such premises. The special duty of protection of premises would include protection against crowds or mobs collected in the vicinity of the premises for the purpose of expressing abuse, contempt or even disapprobation of the sending state or of its mission, or of the members of a mission. A similar duty would seem to exist to protect such premises against so-called "picketing," this being an act tending to disturb the peace and dignity of the mission. *Id.* at 56-57.

responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility" *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 436, 92 L.Ed. 568 (1948).

A number of judicial doctrines embody the "classical deference [owed by courts] to the political branches in matters of foreign policy." *Regan v. Wald*, 468 U.S. 222, 242, 104 S.Ct. 3026, 3039, 82 L.Ed.2d 171 (1984). For example, the Act of State doctrine, *see supra* note 4, "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations," and derives from the "strong sense" that an absence of judicial restraint in that area "may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 937, 11 L.Ed.2d 804 (1964). The political question doctrine requires that courts abstain from cases where there "is found a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962), foreign affairs exemplifying perhaps the most prominent such commitment. *See Goldwater v. Carter*, 444 U.S. 996, 1002-06, 100 S.Ct. 533, 536-39, 62 L.Ed.2d 428 (1979) (Rehnquist, J., joined by Burger, C.J., and Stewart and Stevens, JJ., concurring in the judgment). Similarly, the Court has repeatedly characterized immigration policy, "interwoven with ... the conduct of foreign relations," *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 72 S.Ct. 512, 518-19, 96 L.Ed. 586 (1952), as "largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 1477, 52 L.Ed.2d 50 (1977) (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210, 73 S.Ct. 625, 628, 97 L.Ed. 956 (1953)). These lines of

doctrine are unified by the recognition that there are certain classes of decisions which courts are institutionally less suited to make.⁶

[4] Deference to the judgment of Congress and the President in these matters is, of course, by no means absolute. But this is not a case in which we are asked to believe any implausible thing. It is obvious that ill treatment of ambassadors to the United States will adversely affect the interests of the United States. It is also obvious that the protection accorded those ambassadors by section 22-1115 is a limited one and regulates speech to a very minimal extent. Strictly speaking, it may be doubted whether there is any need for any particular deference to the judgment of the political branches in order to uphold this statute. But if there is such a need, it is amply met.

We have here an unusually strong case for judicial deference, over and above the traditional and general requirement of restraint in the area of foreign relations, for we are asked to review a statute which both Congress and successive Presidents have declared to be necessary to fulfill our obligations under both customary international law and a treaty which we have signed. It has long been understood that the interpretation given by the executive branch of the country's responsibilities under the treaties to which it is a signatory are entitled to "great weight." *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85, 102 S.Ct. 2374, 2379-80, 72 L.Ed.2d 765 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S.Ct. 922, 926, 6 L.Ed.2d 218 (1961). This necessarily shapes the nature of the scrutiny to which we subject the justifications offered for section 22-1115, for in this context a court cannot lightly dispute a determination by the political branches that the statute meets important international obligations, that the interests at stake are compelling,

6. Contrary to the suggestion made by the dissent, dissent at 1484 n. 8, first amendment cases are no exception to this principle. *See Klein-*

dienst v. Mandel, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972).

or that those interests cannot be met by a statute with a more narrow reach. When a provision is enacted in order to bring the United States into compliance with international law, and when those obligations are reaffirmed by treaty, a court must give careful consideration before it sets aside that which the legislative and executive branches have deemed necessary to fulfill the nation's international responsibilities. It would be quite improper for the judiciary to disregard international obligations that are inseparable from our nationhood.

C.

[5] We accept, as highly pertinent to the compelling interests served by section 22-1115, the uncontradicted assertions made in the government affidavits, which describe the sensitive foreign policy concerns the statute implicates. Contrary to the suggestion made by the dissent, we do not uphold the statute "simply because the government has sent its lawyers into court to defend it." Dissent at 1489. The presence of a first amendment claim requires that the court examine the balance struck by the political branches. The deference we owe is not to the government's legal judgment that the statute is constitutional, but to their factual discussion of the nature and depth of the foreign relations interests that are involved. (As we have said, with or without such deference, it is obvious that these interests are genuinely present.) Once we accept that these interests exist, it becomes the responsibility of the court to determine whether they justify the statute before us.

[6] The four uncontradicted declarations submitted by defendants below indicate some of the special concerns justifying

7. Appellants claim that the district court's reliance on the assertions contained in these declarations was improper and in the event their argument that the statute is facially unconstitutional is rejected, they urge that we remand the case so that the assertions can be contested at trial. Appellants misconceive the responsibility of a party opposing a motion for summary judgment. The mere mention to the district court that plaintiffs "vigorously dispute" statements made in declarations, R.E. at 60, without

the unique measures imposed by section 22-1115.⁷ The two State Department officials cite the Vienna Convention as the source of the international obligation honored by the statute. Declaration of James E. Nolan, Jr., R.E. at 46; Declaration of David Fields, R.E. at 36-37. The Vienna Convention, as we have explained, codified both the responsibility to provide security to foreign embassies and the responsibility to protect them from affront. The affidavits do not explain, nor need they, that it constitutes an affront to display a sign that characterizes members of a government as, for example, "killers." Expert judgment is hardly necessary on such a point. What the affidavits provide is a detailed description of the special difficulties associated with ensuring the security of foreign embassies, and the consequences of failing to do so.

Both David Fields—the State Department official responsible for coordinating security arrangements for diplomatic personnel in the District—and James Nolan—Director of the Office of Foreign Missions—attested to the existence of a direct relationship between the perception held by other governments of the strength of security provided their diplomats here and the extent of protection they choose to provide ours. In Nolan's words, "[t]o compromise on the security provided to foreign missions here is to compromise on the security of our personnel in our missions overseas. What happens in terms of security provided to foreign diplomatic personnel and premises here has a direct impact on the protection afforded U.S. missions and personnel abroad." Declaration of James E. Nolan, Jr. at 2, R.E. at 47. *Accord* Declaration of David Fields at 2, R.E. at 37.

any supporting citations to the record, *see* Local Rule 1-9(i), will not serve to call into question the contentions made by the opposing parties. *See* Fed.R.Civ.P. 56(e) ("When a motion for summary judgment is made and supported ... an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.")

These concerns were very much in the mind of Congress when it enacted section 22-1115. Senator Pittman explained that "the motive that actuates us today is to have the foreigners upon whom we must depend for the protection of our citizens friendly to us." 81 Cong.Rec. 8485 (1937). This was echoed by Cordell Hull, then Secretary of State, who urged passage of the statute in a letter to Senator Pittman: "Unless we extend such reasonable protection to representatives of other governments, we cannot hope to receive protection for our representatives abroad." *Id.* at 8486. Foreign governments may not all be expected to preserve the same equanimity in the face of hostile demonstrations that we require of domestic government. Moreover, foreign governments, not being subject to United States law, particularly constitutional law, as American officials are, have ways of retaliating against American interests and Americans, whether official representatives or private citizens, abroad.

As the declarations of the Secret Service agent who heads the Office of Protective Operations, Thomas Quinn, and the Commanding Officer of the Special Operations Division of the Metropolitan Police Department, Deputy Chief of Police John Connor, reveal, there are unique obstacles to providing adequate security to foreign embassies—the most significant of which is the inability of police personnel to establish a presence inside the buildings. The Quinn declaration is worth quoting at length:

2. In many respects the obstacles confronting the Secret Service in providing security for foreign embassies, legations and consulates are much greater than those encountered in protecting personnel and property of the United States. At the White House and at the residence of the Vice President, for example, the Secret Service maintains a presence inside the structures which enables it to deploy a defensive network consisting of a number of manned perimeter posts radiating out from a centralized command center. The Secret Service's permanent

on-site presence has also facilitated the installation of sophisticated surveillance equipment which enables Secret Service personnel to continuously monitor the area between the building and the fence which surrounds the site. Although the task of insuring the safety of the White House complex and the residence of the Vice President is extremely difficult, it would be impossible were the Secret Service subject to the same legal constraints that control Secret Service operations at foreign embassies, consulates, and legations.

3. The structures which house the diplomatic operations of foreign nations provide a tangible focal point to those wishing to demonstrate against the policies of the foreign government. Recent events underscore the fact that demonstrations near embassies or other official foreign government buildings, even if initially peaceful, exacerbate tensions and often lead to violent confrontations between the police and demonstrators. However, in contrast to the White House and other official buildings of the United States, Secret Service personnel are prohibited by international law and comity from entering onto the premises of a foreign embassy, legation, or consulate except with the expressed prior approval of the foreign government. Consequently, at such locations, the Secret Service has no centrally located defensive command center, has a minimal amount of intrusion detection equipment at its disposal, and, perhaps most important, has no secondary or fall-back defensive position which would otherwise be available if the Secret Service were permitted to position personnel inside the protected premises.

Declaration of Thomas D. Quinn at 2-3, R.E. at 42-43. The 500-foot buffer therefore provides "a necessary zone for police response in those instances when the perimeter is breached." Declaration of John C. Connor at 2, R.E. at 49.⁸

8. The Fields Declaration cites an incident that

illustrates the importance of this buffer:

D.

It has long been understood that the right to demonstrate may be made to depend in part on the site of the protest. The Supreme Court has upheld the constitutionality of laws regulating protests in front of a courthouse on the basis of the State's "legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create." *Cox v. Louisiana*, 379 U.S. 559, 562, 85 S.Ct. 476, 479, 13 L.Ed.2d 487 (1965). It has upheld the application of a general trespass statute to demonstrations at jails, jails having been "built for security purposes." *Adderley v. Florida*, 385 U.S. 39, 41, 87 S.Ct. 242, 244, 17 L.Ed.2d 149 (1966). It has upheld the exclusion of political candidates from military bases, the function of military bases being "to train soldiers" rather than host political events. *Greer v. Spock*, 424 U.S. 828, 838, 96 S.Ct. 1211, 1217, 47 L.Ed.2d 505 (1976). And it has upheld the regulation of expressive activity near a school when such activity might disturb the educational activities inside. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Each of these cases makes clear that the nature and extent of first amendment rights may vary with the location at which their exercise is sought.

Appellants offer extensive analogies to prior cases involving protests in front of the White House, the Capitol, and the Supreme Court, but the regulations in those cases simply did not implicate the same set of interests addressed by section 22-1115. First, shielding government officials from public protest is incompatible with our democratic structure, which relies on public criticism as a means of promoting responsive government. Foreign ambassadors, in

contrast, have no similar obligation to be accessible to public attack, and our polity does not have the same interest in ensuring that they are. Second, we cannot ignore the fact that American diplomats living overseas are always to some degree at risk. The perception abroad that our government is diminishing the protection accorded the embassies to whom we are host would, we are told, seriously compound that risk. Finally, and most fundamentally, we face here a question of living up to our obligations under international law and a treaty. These considerations distinguish the issues presented here from those involving protests in front of the White House, the Capitol, and the Supreme Court.

Section 22-1115, then, is a statute supported by a compelling governmental interest and one which imposes only a very minor geographic limitation on speech. It is impossible for us to see how the compelling interest at stake could be served with a regulation that had any significantly smaller impact on speech.

[7] The statute that Congress has crafted proscribes an opposition demonstration only within a narrowly defined locus. Plaintiffs are free under section 22-1115 to hold an anti-Soviet demonstration anywhere in the city but within 500 feet of the Soviet Embassy. Appellants presumably feel that the embassy location would generate heightened visibility and best help them succeed in getting their message across. But the first amendment does not guarantee an optimal setting for speech; there is no right to the backdrop most interesting to press photographers or television cameramen. See *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69

Had the distance separating the demonstrators from the Embassy been less, the results probably would have been quite different, and property damage and personal injury to the embassy and its occupants might well have resulted, with potentially serious consequences for U.S. foreign relations and the security of U.S. personnel overseas.

Declaration of David Fields at 3-4, R.E. at 38-39.

FINZER v. BARRY

Cite as 798 F.2d 1450 (D.C. Cir. 1986)

L.Ed.2d 298 (1981); *Adderley v. Florida*, 385 U.S. at 47-48, 87 S.Ct. at 247-48; *White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518 at 1520, 1538 (D.C.Cir.1984). Inevitably, many of the most desirable places to demonstrate will be buildings and areas that for other reasons require special protective measures. We think Congress has met an unusually difficult problem with a balanced attempt to restrict no more speech than necessary.⁹

The obligations of the United States under international law, reaffirmed by treaty, do not, of course, supersede the first amendment. Neither, however, has it ever been suggested that the first amendment is incompatible with the United States' most basic obligations under the law of nations. The two must be accommodated and section 22-1115 accomplishes an accommodation well within the range of the permissible. That may be seen by imagining a shift of the balance in either direction. Were we to hold that the first amendment requires Congress to allow protests and demonstrations up to the gate of an embassy, there would be very little left of the United States' international obligation to preserve the peace, dignity, and security of foreign representatives in our nation's capital. Peace and dignity would be destroyed outright, while, as a practical matter, the task of repulsing invasions of the embassy and its grounds would be left largely to the foreign nation's security forces. Violence

9. Appellants suggest that the existence of 18 U.S.C. § 112(b) (1982) demonstrates that Congress could have achieved the same ends with a narrower statute. 18 U.S.C. § 112(b) regulates demonstrations near embassies and other buildings owned by foreign governments outside the District of Columbia, and is somewhat less restrictive than § 22-1115 of the D.C.Code. The unstated premise of this argument, however, is that the governmental interests at stake in these two statutes are indistinguishable. In fact, the same Congress that enacted § 112(b) in its present form—amending a more restrictive version than had been enacted some years before—left § 22-1115 alone. There are several plausible reasons why Congress might choose to differentiate between the two. The greater concentration of embassies in the District of Columbia, and the special visibility of the capital, may well make enhanced protection necessary. In addition, Congress relies to some extent on the

between American citizens and foreign security forces in Washington, D.C., is hardly calculated to improve relations between governments or to be thought by the international community to be an adequate discharge of America's international obligations. If, on the other hand, Congress tried to protect foreign representatives from all affronts, it would have to rule off limits all utterances anywhere tending to bring foreign governments into disrepute. That, of course, is unthinkable. The first amendment would have been destroyed over wide areas in the name of international law. What has been done through section 22-1115 is to give first amendment freedoms the widest scope possible consistent with the law of nations. Appellants, and all other Americans, may freely express their sentiments about the actions of the Soviet Union and Nicaragua on radio and television, in print, by speech or placard, and they may do so anywhere in the United States, but they may not carry the described placard or congregate within 500 feet of the embassy of the nation concerned. To regard that trifling limitation, enacted under a power explicitly given by the Constitution, as a threat to freedom of speech seems to us a considerable exaggeration.

E.

The dissenting opinion offers a number of objections to our analysis. At this point

state and local governments to provide whatever additional measures are necessary to protect foreign nationals, aware perhaps that security needs may differ from state to state. See *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 475 (2d Cir.1980) (18 U.S.C. § 112(b) did not set "maximum standards of protection," and left open possibility of local authorities using "stricter controls"). Therefore, the fact that Congress generally exercises much more direct and specific authority over municipal activities in the District of Columbia than those in other cities may well explain the differences between the measures adopted in the two statutes. We note in this regard that the authority of the United States Secret Service over matters involving the protection of foreign embassies is substantially greater for those embassies located within the District than for those located outside. 3 U.S.C. § 202 (1982).

Another example of this problem occurred recently in connection with a demonstration near the Soviet Embassy here by a group of Afghans protesting the Soviet invasion of Afghanistan. The demonstrators broke through police lines, but due to the 500-foot distance separating them from the Embassy premises, police were able to re-establish control, making a number of arrests in the process, before the demonstrators could reach the building.

we undertake to respond to the related arguments that the statute serves no compelling governmental interest, that it is both overinclusive and underinclusive, and that it is unconstitutional because there is a less restrictive alternative available. We think that these arguments are not only defective but that, in an important respect, the first and the third contradict one another.

The dissent regards the interest in maintaining our nation's adherence to longstanding principles of international law as not compelling. In the dissent's view, that interest is so far from compelling that, aside from providing an initial source of authority for the congressional enactment, the law of nations does not bear at all on the question of that enactment's constitutionality. This line of attack requires the dissent to trivialize the compelling national interests that are reflected in international law. When these interests are given their appropriate weight, however, the dissent's constitutional argument—which is premised on its utter rejection of those interests—is revealed as beside the point.

The dissent's analysis appears to rest on the assumption that this court must either hold that international law "supersede[s]" constitutional requirements (as we are charged with doing, dissent at 1482), or conclude that international law is irrelevant and conduct the analysis as if no principle of international law were present (as the dissent does). Both propositions would be incorrect.

If international law were, as the dissent views it, just another code of rules, like the common law of negligence or statutory law governing commercial transactions, it would of course offer little that need be weighed against a constitutional provision. As a matter of formal description, leaving aside the real interests in play, it is true that in the American legal hierarchy, the Constitution trumps all other law. But it is also true, as the dissent systematically overlooks, that other law sometimes expresses values and concerns that are of legitimate constitutional dimension. In

such cases, the assertion that the Constitution cannot be overridden by ordinary law is true but analytically empty. As we have tried to make clear, international law in the aspect dealt with here is important not in the merely formal sense just described but because it embodies American interests that are themselves given weight in the Constitution and that must, for that reason, find accommodation with the first amendment. Those interests have to do with the place of the United States among nations, with the respect it is accorded, with the raising or lowering of tensions between our country and others, with the conduct of our foreign policy, primarily by the President but also in some measure by Congress in ways specified by the Constitution, and, in extreme cases, with war and peace. When, in the considered judgment of the branches charged by the Constitution with the responsibility for these matters, a minor regulation of picketing is necessary to preserve the peace and dignity of foreign emissaries, it is preposterous to say that no interest is present that courts need to respect and weigh.

While the dissent appears to concede that "the nature of an embassy and our responsibilities as international hosts do weigh in the balance as to what is permissible regulation of free speech in that particular place," dissent at 1483, it chooses to ignore completely the definitions given those responsibilities by Congress, the President, and codified and customary international law in favor of its own. One reads the dissent's analysis of the dignity interest in vain for a hint that any such responsibilities are involved here. Dissent at 1485-87. The dissent rejects this interest on the basis of a generalization—people ought not be shielded from speech they find distasteful—that has never been applied in this context, as if the context were irrelevant. Any "weighing" the dissent has done is invisible. We think the founders would have been quite surprised to learn that the document in which they constituted the government precludes the enactment of a statute to honor one of the core

principles of the law of nations because that interest is not "compelling."

The dissent also employs an all-or-nothing theory of compelling governmental interests to argue, so far as one can tell, that the United States must either abandon any attempt to protect the peace and dignity of foreign embassies or impose nationwide censorship over all modes of expression that might conceivably insult any foreign government. Dissent at 1481-82. The dissent notes that the government has never sought to ban all conceivable affronts to foreign governments, and concludes from this that America's international obligation is "flexible," *id.* at 1485, thus not compelling, and hence, in effect, constitutionally non-existent. Going to the other extreme, the dissent wonders how, if section 22-1115 is supported by a compelling governmental interest, the ban can be so limited. The dissent implies that our analysis would support a nationwide suppression of any criticism of foreign governments, which the dissent finds "worrisome." *Id.* at 1487. The Vienna Convention specifically requires protection of *embassy premises*, not of foreign sensibilities about what is printed in American newspapers. But that fact aside, the dissent's is a startling mode of constitutional analysis: faced with a spectrum between competing constitutional values, a court must override one value completely and take the other to its extreme. A court faced with the competing constitutional demands of fair trials and press freedom could resolve the issue, apparently, only by prohibiting any press reports of any criminal proceedings or by throwing the entire process open, even to the extent of allowing television cameras into the deliberations of the grand and petit juries. Either result would be absurd. We can uphold, for example, a decibel limit applied

to soundtrucks without fear that the same rationale—preserving the public peace—would equally well support the silencing of all speech everywhere. The everyday business of judging is the exercise of judgment, of balance, of accommodation, not the announcement that no value may be admitted into the calculus which, if carried to its extreme and applied without regard to competing values, would produce an unacceptable result.

The dissent challenges also our holding that the statute is sufficiently tailored, and concludes that the regulation is both overinclusive and underinclusive. However, its discussion measures the statute only against the interest in security, having eliminated the interest in peace and dignity from the analysis. Since we have shown that this second interest is valid as well, we need express no judgment on whether the security interest, standing alone, would be sufficient to justify the constitutionality of section 22-1115.

[8] The dissent argues in addition, however, that even if the statute were adequately tailored it would be unconstitutional because there exists a less restrictive alternative: a statute barring *all* demonstrations within five hundred feet of an embassy. It seems somewhat odd to describe an alternative that restricts more speech as "less restrictive." While there certainly is more involved in the examination of alternatives than simply "comparing the number of syllables that are uttered" under each, dissent at 1493, an alternative statute that restricts *every* exercise of expression regulated by the statute before us *and* other, presently unregulated, speech activities as well, is not (whatever other virtues it may possess) a less restrictive alternative.¹⁰

10. The dissent is correct when it points out that "the 'greater' power does not necessarily include the lesser." Dissent at 1492. Therefore, the fact that a broad, content-neutral prohibition would be constitutional does not, by itself, imply that all less broad, content-based statutes are necessarily constitutional too. In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), *Grayned v.*

Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), and *Carey v. Brown*, 447 U.S. 455, 461-62, 100 S.Ct. 2286, 2290-91, 65 L.Ed.2d 263 (1980), the mere fact that total antipicketing laws might be constitutional did not justify laws that permitted some picketing but not others on the basis of content. In those cases, however, the statutes were infirm not because there was a constitutionally acceptable content-neutral alter-

The dissent takes an unwarranted step when it concludes that section 22-1115 is unconstitutional because a broader time, place, or manner regulation would be constitutionally acceptable and would accomplish the same ends. While Congress is free to enact such a statute, it need not do so.¹¹ Under the dissent's theory, the law upheld in *Cox v. Louisiana*, which prohibited picketing near a courthouse "with the intent of influencing any judge, juror, witness, or court officer," ought to have been struck down because the local government was free to ban all picketing near a courthouse. The law in *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, which forbade adult theatres from locating within 1,000 feet of other adult theatres, ought to have been invalidated because such a restriction could lawfully have been applied, and therefore could only lawfully have been applied, to all theatres. The dissent's position requires as well that we regard the unpublished order issued by a panel of this court (Judges Wright, Leventhal and Robb) in *Jackalone v. Andrus*, No. 79-2359 (D.C. Cir. Nov. 19, 1979), as wrong. In *Jackalone*, we "accept[ed] the representation of the State Department that a demonstration at Lafayette Park has an unacceptable potential for danger to the hostages now being held in the American Embassy in Tehran," and upheld its prohibition. *Id.* While that order, being unpublished, is not

precedent, we think it instructive to note that the dissent's analysis would have required that the prohibition on demonstrations relating to the Iranian situation that was upheld in the order be voided, with the government allowed to choose only between permitting the demonstration or banning all demonstrations in that area.¹²

The dissent's analysis thus reads a grave threat to liberty in every statutory distinction related to the purpose of the statute, and inexorably leads to a requirement of a total ban within the proscribed area. This would present a new element in first amendment jurisprudence—a "most restrictive alternative" doctrine. The cure suggested is far broader than the problem. One supposes that Father Finzer, if he won his case on such a ground, might reasonably consider his victory Pyrrhic. Nothing is solved by such a "solution."

The dissent's assertion that it would be constitutional to prohibit all demonstrations near embassies—an assertion necessary to its claim that the present statute is unconstitutional because there exists a "less restrictive" alternative—undercuts another key premise of its argument because it cannot be squared with the dissent's rejection of any valid interest in protecting the peace and dignity of embassies. As the dissent agrees, a law prohibiting a lone protester carrying a sign of any sort bears no relation to safeguarding the phys-

ical security of the building and its occupants. Dissent at 1488. The only conceivable interest that would support such a restriction of speech is that of dignity and peace. The dissent admits as much when it states that its proposed total ban "would provide greater protection from the dangers to both dignity and security than the current regulation does." Dissent at 1495. The dissent's endorsement of the constitutionality of such a statute is a recognition, therefore, that political speech near an embassy poses a special problem that is of constitutional magnitude, and that problem is the one the dissent elsewhere denigrates, the need to maintain the peace and dignity of foreign emissaries. The dissent thus necessarily concedes implicitly what it denies explicitly.

The dissent compounds its analytic difficulties by suggesting (without explanation) that this interest, while not "compelling," might be "significant" and that it therefore would justify a statute that is content-neutral but not one that is content-based. Dissent at 1496 n. 23. The dissent never reveals the process by which it calibrates these standards, so there is no way of knowing why the interest in honoring international obligations, and the foreign policy concerns implicated by those obligations, rise so far and no further. Certainly there is nothing in the dissent's analysis of the dignity interest that provides the answer. That discussion, as we have noted, approaches this interest by completely abstracting it from the international context in which it arises, and rejects our holding that it is compelling simply by noting that individuals may not be "shield[ed]" ... from hearing things they find offensive," when that offensiveness is based "on the fact that the audience disagrees." *Id.* at 1485-86.

There are at least two answers to this truism. The first is that the proposition was designed for members of the American political community. They may not be shielded from speech with which they disagree because the competition of ideas is central to our democratic process. That rationale has nothing to do with giving

offense to a foreign ambassador. The dissent never addresses this point. It merely notes that public criticism of foreign governments may affect the domestic political debate. While the assertion is true, it does nothing to salvage the dissent's challenge to the interest in preserving the peace and dignity of the embassy, since that challenge is grounded in the principle that there is no legitimate interest in shielding listeners from speech they find offensive. The identity of the listener is relevant to the question of when this principle applies.

The second answer is that, were it applicable here, the proposition advanced would make it impossible to sustain the dissent's position. The interest in shielding people from political speech with which they disagree is neither compelling nor important nor legitimate, and cannot justify a statute enacted for that end even if, in order to make it more constitutionally palatable, the legislature bans favorable speech at the same time. If the serious and substantial foreign policy concerns we have described are not present, then a content-neutral statute passed in order to forestall critical speech (by banning all speech) would be unconstitutional. If, as we believe, and as the governmental branches entrusted with judgment on these matters have asserted, these concerns are in fact deeply implicated, they are quite clearly compelling.

IV.

We turn now to the challenge presented by appellants, which is in some respects quite different from that made by the dissent. For obvious reasons, the appellants do not suggest that prohibiting their demonstration would be permissible as long as others are prohibited as well. While they urge upon us several distinct grounds for reversing the decision below, they too emphasize the issues of content and viewpoint discrimination. As we have explained, the first provision of the statute they seek to invalidate applies only to demonstrations in which signs are displayed that are designed

native, but because the distinctions embodied in the statutes were not narrowly tailored to serve compelling government interests.

11. The dissent's heavy reliance on *Schacht v. United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970), is misplaced. The viewpoint-discrimination in *Schacht* did not serve any legitimate governmental interest. It appears from the decision that the government did not claim otherwise, and chose to defend its position on other grounds.

12. The dissent need not be troubled by our citation of this unpublished order. The Circuit Rule only forbids citing such orders "as precedent," *Western Union Telegraph Co. v. FCC*, 773 F.2d 375, 377 n. 1 (D.C.Cir.1985), which we do not do. We mention *Jackalone* only because it serves to illustrate a realistic scenario in which the dissent's theory would require an incorrect result. While the regulation under which the

to bring a foreign government into "public odium" or "public disrepute." Their legal challenge relies heavily on this element of the statute as the root of its constitutional infirmity, raising claims grounded in the first amendment guarantees of free speech and assembly and the fourteenth amendment guarantee of equal protection.

Content-based restrictions have been held to raise both first and fourteenth amendment claims because in the course of regulating speech, they differentiate between types of speech. Compare *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (exclusion of religious speech from public forum violates first amendment right of free speech) with *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (exemption of labor picketing from ban on picketing near schools violates fourteenth amendment right of equal protection). Under either theory, such a statute is valid only if "necessary to serve a compelling state interest and ... narrowly drawn to achieve that end." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983); accord *Carey v. Brown*, 447 U.S. 455, 461-62, 100 S.Ct. 2286, 2290-91, 65 L.Ed.2d 263 (1980).

[9] Appellants do not concede that this is the relevant test. Instead, they point to language in *Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), and *Regan v. Time*, 468 U.S. 641, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984), which might seem to suggest a total ban on content-based restrictions of any sort. Were appellants correct, first amendment law would have been revolutionized. The Court, it would have to be supposed, has overruled *sub silentio* *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (heightened protection accorded writings about "public figures"), *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (upholding obscenity regulation), and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.

1031 (1942) (upholding prohibition of use of "fighting words"), as well as a host of other decisions too numerous to mention here. No such upheaval has taken place. In *Mosley*, the Court invalidated a city ordinance that prohibited all picketing within one hundred and fifty feet of a school, except peaceful labor picketing of any school involved in a labor dispute. Although the opinion in *Mosley* contains dicta suggesting that content-based restrictions are "never permitted," 408 U.S. at 99, 92 S.Ct. at 2292, the Court in that case in fact conducted the traditional analysis and determined that the statute in question was not sufficiently tailored to its objectives. *Id.* at 100-101, 92 S.Ct. at 2292-93. Were content-based restrictions automatically unconstitutional, that discussion would have been unnecessary. In *Regan v. Time*, the Court found unconstitutional a statutory scheme which made it a crime to photograph securities or obligations of the United States unless "for philatelic, numismatic, educational, historical, or newsworthy purposes," 18 U.S.C. § 504 (1982), finding that a determination of newsworthiness or educational value was necessarily content-based. The government defendants, however, had declined to defend the constitutionality of the content-based regulation as written, arguing that the provision in question was not in fact mandatory. 468 U.S. at 649 n. 5, 104 S.Ct. at 3267. Although the majority opinion includes the assertion that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," *id.* at 648-49, 104 S.Ct. at 3267 the absence of the traditional balancing analysis can likely be attributed to the refusal of the government to put forward any governmental interest served by the provision as written for the Court to balance. We note that in a case decided after *Regan*, this court declined to adopt the extreme view urged by appellants here and reaffirmed the continuing validity of the "narrowly tailored to compelling state interest" test. *White House Vigil for the ERA Commit-*

tee v. Clark, 746 F.2d 1518, 1526 n. 66 (D.C.Cir.1984).

Appellants argue alternatively that even if content-based restrictions are generally subject to a balancing test, section 22-1115 is not. They point out that this statute represents not only content discrimination, but viewpoint discrimination as well. While a prohibition of, for example, all political speech near an embassy would be a content-based restriction arguably subject to the standard described above, a prohibition of speech that brings a foreign government into disrepute is a viewpoint-based restriction that appellants contend is *per se* unconstitutional. They maintain that the fact that the statute is viewpoint-discriminatory, "standing alone," renders it invalid. Reply Brief for Plaintiffs-Appellants at 1-2. This is presumably why they characterized the declarations submitted below by defendants as "not relevant nor material to any issue involved in this case." Brief for Plaintiffs-Appellants at 58.

We do not think the law is more severe with respect to viewpoint-based restrictions

than it is to content-based restrictions. Although some academic commentators have urged that there be different tests for those content-based restrictions that are viewpoint-neutral and those that are not,¹³ the Supreme Court has maintained a uniform standard. See *Carey v. Brown*, 447 U.S. at 462 n. 6, 100 S.Ct. at 2291 n. 6. Indeed, the suggestion that a statute which is not viewpoint-neutral is automatically invalid was put to rest in *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), which upheld the constitutionality of laws prohibiting members of the armed forces from making speeches which "bring discredit upon the armed forces," 10 U.S.C. § 934 (1982).¹⁴

Statutes that regulate speech in ways that affect different viewpoints differently may well be less likely to be upheld than statutes which affect all viewpoints equally, but that is simply because there are fewer situations that justify differentiation according to the speaker's viewpoint. The standard for justification remains the same.¹⁵

13. See, e.g., Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 Geo. L.J. 727 (1980); Stephan, *The First Amendment and Content Discrimination*, 68 Va.L.Rev. 203 (1982); Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U.Chi.L.Rev. 81 (1978).

14. Contrary to the suggestion made by the dissent, dissent at 1493 n. 18, we do not attribute "relevance to the Court's silence" in *Parker*, for the Court was not silent. In the course of rejecting the overbreadth challenge, the Court held that Levy's conduct—illegal because of the content of his public statements, 417 U.S. at 736-37, 739, 94 S.Ct. at 2552-53—was "unprotected under the most expansive notions of the First Amendment" and that the regulations at issue "may constitutionally prohibit" it. *Id.* at 761, 94 S.Ct. at 2564. The dissent correctly notes that the reasoning in *Parker* relies heavily on the military context of these regulations. We therefore do not regard *Parker* as dispositive in this case, except insofar as it demonstrates that the suggestion by appellants that all viewpoint distinctions are *per se* unconstitutional is unfounded—a suggestion about which the dissent is ambivalent. Dissent at 1494.

15. Under the most recent Supreme Court precedent, § 22-1115 may not in fact qualify as a content-based statute. In *City of Renton v. Play-*

time Theatres, Inc., — U.S. —, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Court found constitutional a zoning ordinance that prohibits "adult" motion picture theatres from locating within one thousand feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Writing for six members of the Court, Justice Rehnquist explained that while the ordinance "treats theatres that specialize in adult films differently from other kinds of theatres," it nevertheless was aimed not at the content of the films "but rather at the secondary effects of such theatres on the surrounding community." *Id.* at — U.S. at —, 106 S.Ct. at 929 (emphasis in original). It was thus "completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.'" *Id.* (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976) (emphasis added in *City of Renton*)). Similarly, § 22-1115, while differentiating on the basis of the content of the speech, is justified by reference to content-neutral values—the need to adhere to principles of international law and to provide sufficient protection to foreign embassies. Because we are not entirely sure, from *City of Renton* alone, whether § 22-1115 is the sort of statute that can be analyzed under the standard applicable to

V

We stated in Part III our holding that the interests which section 22-1115 was enacted to serve are indisputably compelling. Appellants have not seriously contested that point, although neither have they conceded it. Their argument is rather that regardless of the importance of the statute's ends, the means it establishes are unconstitutionally vague, standardless, facially overbroad, and discriminatory. We now take up each set of claims in turn.

A.

[10] The issue of vagueness requires no lengthy discussion. Whatever ambiguity may exist at the fringes, section 22-1115 applies clearly and directly to the activities in which the parties who brought this action wish to engage. The complaint they filed made precisely that admission: "[P]laintiffs wish peacefully to carry banners, placards, signs and devices which depict messages critical of foreign governments, and their acts and policies. They wish to do so on the public streets and sidewalks in the District of Columbia, within 500 feet of the official buildings of the foreign governments whose acts and policies they intend to criticize." Complaint at 3-4, R.E. at 6-7. There is no ambiguity, therefore, in the statute's application to the conduct primarily at issue. See *Young v. American Mini Theatres*, 427 U.S. 50, 58-59, 96 S.Ct. 2440, 2446-47, 49 L.Ed.2d 310 (1976) (holding it "unnecessary" to consider vagueness challenge to an ordinance "unquestionably applicable" to the parties before the Court).

Nor in any event is section 22-1115 unconstitutionally vague. With this statute, as with virtually all statutes, it is undoubtedly the case that a skilled legal "imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question." *American Communications Association v. Douds*, 339 U.S. 382,

content-neutral time, place and manner restrictions, and because we believe it meets the more stringent standard to which content-based re-

412, 70 S.Ct. 674, 690, 94 L.Ed. 925 (1950). Nevertheless, its language is straightforward. As this court has previously observed, "[s]ection 22-1115 meticulously specifies the consequences against which it erects protection for foreign governments." *Zaimi v. United States*, 476 F.2d 511, 526 (D.C.Cir.1973). Both demonstrators and law enforcement officers are given a clear description of the activity the statute proscribes, and there is no reason to believe that a substantial amount of conduct outside its scope is being deterred. Section 22-1115 defines the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983), and that is all that is required.

B.

[11] Appellants challenge that portion of section 22-1115 which forbids congregating within five hundred feet of the official buildings after police authorities have ordered dispersal on the ground that the provision does not contain standards defining when such orders can be given. They cite only one case in support of this argument—*Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). They assert that *Shuttlesworth* is "dispositive," because section 22-1115—like the statute struck down in *Shuttlesworth*—confers "absolute discretion" on city officials to prevent a public demonstration. Brief for Plaintiffs-Appellants at 53. The dissent agrees with this argument, and finds controlling our decision in *United States v. Abney*, 534 F.2d 984 (1976) (per curiam). We disagree; the statutes are more different than they are similar, and their differences are constitutionally relevant. The statute in *Shuttlesworth* governed all demonstrations taking place in the

restrictions have traditionally been held, we focus on that latter standard.

public streets of Birmingham. Demonstrators were required to obtain a permit from the city, which could be denied if the relevant commission determined "in its judgment [that] the public welfare, peace, safety, health, decency, good order, morals or convenience" so required. 394 U.S. at 149, 89 S.Ct. at 937. The regulation in *Abney* required anyone wishing to sleep, camp or loiter in Lafayette Park for more than four hours to obtain a permit from the Superintendent. The final clause of section 22-1115, in contrast, governs only the sensitive areas surrounding foreign embassies and other such official buildings. It establishes no permit procedure applicable to all demonstrations, but authorizes policemen who are on the scene to order dispersal.

We find unconvincing the dissent's argument that procedures requiring permits, such as those invalidated in *Shuttlesworth* and *Abney*, are constitutionally indistinguishable from the police discretion involved here. Police have always possessed authority to require people to move when a statute supplies the criteria that guide and confine police discretion. This court upheld two such statutes granting police discretion no broader than that given by section 22-1115 in *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107 (D.C.Cir. 1977). Section 22-1121(2) of the District of Columbia Code, provides:

Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby—...

16. The pertinent text of the Police Line Regulation is as follows:

Sec. 5a. When fires, accidents, wrecks, explosions, parades, or other occasions cause or may cause persons to collect on the public streets, alleys, highways, or parkings, the Chief of Police, inspector, captain of police, or officer acting for him, may establish such area or zone as he considers necessary for the purpose of affording a clearing for: (1) the operation of firemen or policemen; (2) the passage of a parade; (3) the movement of traffic; (4) the exclusion of the public from the vicinity of a riot, disorderly gathering, accident, wreck, explosion, or other emergency; and (5) the protec-

(2) congregates with others on a public street and refuses to move on when ordered by the police; shall be fined not more than \$250 or imprisoned not more than ninety days, or both.

This statute requires the police to judge what constitutes a breach of the peace and what circumstances may lead to a breach of the peace, judgments of the same nature as those required by section 22-1115. Additionally, Article VI, § 5a of the District's police regulations, known as the Police Line Regulation, authorizes a police officer to clear an area of the size he considers "necessary" for a variety of purposes when fires, accidents, etc., or "other occasions cause or may cause" persons to collect. Every person "shall comply with any necessary order or instruction of any police officer." 16 This court, in reversing the district court's invalidation of the regulation as allowing "unfettered discretion," pointed out that it could not be known in advance what would be necessary on particular occasions so that "the regulation's definition of the scope of police discretion in functional terms is reasonable, and ... meticulous specificity is not required." 566 F.2d at 119.

[12] The case before us is equally clear. The authority to disperse is given by a statute that has specific purposes. The authority may be exercised, therefore, only when the police reasonably believe that a threat to the security or peace of the embassy is present. The dissent would not suggest, we are confident, that a court would sustain a conviction *under this stat-*

tion of persons and property. Every person present at the scene of such an occasion, shall comply with any necessary order or instruction of any police officer. No person shall enter such area or zone, unless duly authorized by the person in command on such an occasion: Provided, That bona fide representatives of the press and bona fide insurance adjusters or underwriters and such other persons as the Chief of Police may authorize to be within such space, and who shall have plainly exposed to view the press pass or fire pass described in this section, shall be permitted within the lines established by the Police Department under the conditions named in the following paragraph....

ute for refusal to disperse upon a policeman's order if the policeman had acted out of personal malice, to prevent the sidewalk sale of neckties, or in order to interrupt what he suspected to be a conversation contemplating the sale of drugs. It is not a question of requiring proof of an "abuse of power" before voiding this provision. Dissent at 1499. We do not believe the provision grants police the power to disperse for reasons having nothing to do with the nearby embassy. In a word, the purposes of the statute supply the necessary criteria just as much as a "breach of the peace" ordinance does. The dissent refers to this as a "narrowing" construction, dissent at 1497, but we think it is simply the most plausible construction, one following the unexceptional principle that statutes are construed in light of the purposes behind their enactment. The dissent insists upon giving the statute the most expansive construction conceivable, one unrelated to the legislative purpose. We can see no reason for doing so, aside from the fact that it is easier to attack the inflated version. The discretion given by section 22-1115, being cabined by the statute's purposes, is no broader than essential and is, therefore, constitutionally permissible.¹⁷

C.

Appellants next contend that the statute is overbroad, and sufficiently so to require facial invalidation. The overbreadth doctrine in first amendment law has taken a number of different forms, none of which provides grounds for sustaining appellants' facial attack.

[13] First, overbreadth constitutes an exception to traditional rules of standing, an exception applicable only in first amendment cases. Litigants to whom a statute is constitutionally applied cannot generally

17. The dissent states that we have ignored circuit precedent by reading the second clause of § 22-1115 as we do. The precedent to which the dissent refers is *Zaimi*, 476 F.2d at 515, in which we held that the second clause was functionally separate from the first. The dissent misunderstands our analysis. We do not believe that the second clause is limited by the

seek its invalidation because it infringes the rights of hypothetical individuals not before the court. In order to avoid the chilling effect of an overbroad regulation of speech, however, such a challenge will be permitted under the first amendment. See, e.g., *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980).

[14] Second, when the overbreadth of a statute is substantial with reference to its "plainly legitimate sweep," *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973), and a narrowing construction is unavailable, facial invalidation will be in order. Overbreadth thus serves as both a jurisdictional doctrine and as a substantive doctrine of first amendment law. In such cases, the fact that some of the activity regulated may constitutionally be subject to restrictions is insufficient to save the statute. See, e.g., *Coates v. Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971).

[15] Third, where the party challenging the statute is himself engaged in protected speech which the overbroad statute seeks to punish, a court will follow the more traditional practice—invalidate the statute to the extent that it reaches protected conduct, while leaving the remainder intact. In such instances, the Court leaves in force that portion of the statute that regulates activity in a constitutionally permissible manner. See, e.g., *Brockett v. Spokane Arcades, Inc.*, — U.S. —, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985).

[16] While appellants regard their own planned activities as protected, they do not offer any limiting construction to this court. They seek instead a facial invalidation on grounds of overbreadth. The Supreme Court has characterized the facial

first, i.e., that police may order dispersal only where the congregation is displaying signs of the sort described. Rather, we believe the provision is limited by the general purposes which motivated the enactment of the statute as a whole, i.e., protection of the peace and security of the embassy. Dispersals may only be ordered in accord with those purposes.

invalidation of a statute because of overbreadth as "manifestly, strong medicine," to be employed "sparingly." *Broadrick v. Oklahoma*, 413 U.S. at 613, 93 S.Ct. at 2916. The Court has therefore held that "particularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S.Ct. at 2917. When the central requirement of substantiality is met, it is often because the statute contains a fundamentally illegitimate predicate for government action, or was premised on an unsupported assumption that purported to tie its means to its ends. For example, in *Coates v. Cincinnati*, the Supreme Court struck down a city ordinance forbidding three or more persons from assembling on a sidewalk and conducting themselves "in a manner annoying to persons passing by." 402 U.S. at 611, 91 S.Ct. at 1686. The statute was overbroad because, while many annoying activities—such as disturbance of the peace—could constitutionally be regulated, "mere public intolerance or animosity cannot be the basis" for such a law. *Id.* at 615, 91 S.Ct. at 1689. In *Schaumburg v. Citizens for a Better Environment*, an ordinance prohibiting street solicitations by charitable organizations that did not use at least 75% of their receipts for "charitable purposes" was invalid because—despite the fact that some of these organizations were undoubtedly subject to regulation—the percentage figure was not a relevant measure of the integrity of the organization, or the threat it posed to public safety or residential activity, which were the interests asserted to be at stake. 444 U.S. at 636, 100 S.Ct. at 835. In such cases, what renders a statute's overbreadth substantial is that the error taints the entire provision—the statute "in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 n. 13, 104 S.Ct. 2839, 2851-52, 81 L.Ed.2d 786 (1984) (emphasis added).

Even when all its applications are not so tainted, a statute may be substantially overbroad when its potential for application to protected activity overwhelms its potential for application to unprotected activity.

Our analysis is guided by *Broadrick v. Oklahoma*, in which the Court explained:

[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

413 U.S. at 615, 93 S.Ct. at 2917 (emphasis added).

[17] Appellants have not made anything like the showing of substantial overbreadth needed to justify a facial invalidation. They argue that the statute is overbroad because

[i]t prohibits any form of peaceful expression by any member of the public who displays a sign designed to disagree with a foreign government's views. It goes so far as to prohibit anyone with an anti-Soviet lapel button from walking within 499 feet of the Soviet Embassy.

Brief for Plaintiffs-Appellants at 50-51.

Any statute that sets clear limits—and so avoids the charge of vagueness—will be subject to this sort of overbreadth attack. It might be noted that the statute does not apply when someone with an eight-foot,

anti-Soviet sign stands 501 feet from the Soviet Embassy. The only cure for the kind of overbreadth appellants complain of would be a statute that carefully correlated the size of signs and lettering with the permissible degree of distance from the Embassy. The person wearing the lapel button might be allowed to go up to ten feet from the property while the person with the eight-foot sign might not be allowed within a thousand feet. The first amendment does not require such a complex and difficult-to-police sliding scale. Congress has made a reasonable attempt to balance the interests protected by the first amendment and the combined interests of United States foreign policy and obligations under international law. The balance struck is, as it should be, favorable to first amendment interests.

In addition to the need to ensure security, the other requirement imposed by the Vienna Convention—the maintenance of the peace and dignity of the embassy premises—is clearly contained within section 22-1115's "plainly legitimate sweep," and demonstrations, even those by lone protestors, may threaten fulfillment of that obligation without necessarily posing a threat of violence. Appellants thus offer us no real basis on which to conclude that section 22-1115 is overbroad or substantially so.¹⁸

D.

Appellants have offered one further argument meriting discussion—that the con-

8. Appellants also contend that the statute is substantially overbroad because it regulates criticism of any foreign government in front of any foreign embassy. In other words, the statute, in appellants' view, prohibits an anti-Israel demonstration in front of the Syrian Embassy. We think this construction implausible in light of the purposes behind the provision's enactment. We think it in any event precisely the sort of challenge that ought to be made by an individual prevented from so demonstrating, and one which, if successful, would call for a limiting construction rather than facial invalidation. In the absence of any evidence that the statute has ever been applied in such a fashion, we will not entertain such a challenge now. See *Regan v. Time*, 468 U.S. at 649-52, 104 S.Ct. at 3267-69 (overbreadth challenge "unavailing" when there is "no evidence" that the statute will be interpreted as feared).

tent-based restriction itself is not narrowly tailored to serving the interests at stake and is therefore unconstitutional.¹⁹ Were we to accept this argument, we would have to strike the statute in its entirety. We can imagine other statutes, however, in which the element of content discrimination would be more neatly severable—statutes, for example, which exempt narrow categories of speech from regulations otherwise universally applicable.²⁰ In such instances, if the court were to strike only the element of discrimination and leave a flat and neutral prohibition in place, it would be narrowly tailoring the statute by broadening its application—a peculiar outcome, but one that would end the equal protection problem. We note this anomaly to illustrate the potential clash between the first amendment doctrines of overbreadth and equality. As a legislature narrows a statute to ensure that no more speech is regulated than is absolutely necessary, it begins differentiating among types of speech activities. A total prohibition, in contrast, is the most neutral statute of all.

The differentiation at issue in this case is easy to justify. This statute was enacted in order to protect foreign embassies from the potential of violence, and threats to its peace and dignity, and to enhance the security of our own diplomats and citizens overseas. Demonstrations called to express support for foreign governments in

19. Appellants also maintain that the exception to § 22-1115 for labor picketing, codified in § 22-1116, is an unconstitutional content-based restriction. We reject this argument for the reason given by the three-judge court in *Jewish Defense League v. Washington*, 347 F.Supp. 1300 (D.D.C.1972).

20. The law invalidated by the Supreme Court in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), was one such statute. It prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. The Court held that the statute violated the equal protection clause, but never explained its decision to strike the statute rather than the exemption.

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Cite as 798 F.2d 1450 (D.C. Cir. 1986)

front of their embassies simply do not threaten these interests. Congress was not obliged to regulate such demonstrations for the sake of symmetry, and its decision not to do so does not disable it from regulating demonstrations that do threaten these interests. It is precisely because this statute is narrowly tailored that it contains a content-based restriction. The content-based portion of section 22-1115 is thus tailored to serve two compelling interests simultaneously—it regulates expressive conduct that may threaten to undermine American compliance with international law and the safety of foreign and American diplomats, while leaving unregulated expressive conduct that does not. It would turn overbreadth analysis on its head to maintain that Congress is required to regulate more speech than necessary.

There is some force to the argument that a broad regulation which affects all speech equally raises fewer constitutional problems than one which regulates less aggregate speech but discriminates while doing so. At the very least, they raise different problems. However, the fundamental con-

cern underlying the disfavored status accorded content-based restrictions is not implicated by section 22-1115. There is no "preferred view" the government is seeking to promote, nor a minority view it seeks to suppress. In fact, there is no single point of view targeted at all; under the most reasonable interpretation of the statute, see *supra* note 18, what is prohibited in front of the East German Embassy is permitted in front of the West German one, and vice versa.²¹ We therefore do not find the distinction embodied in section 22-1115 troublesome, although it is indisputably content-based. A principle of international law—that shields embassies from various forms of hostile activity is itself necessarily content-based. In order to protect the safety, peace and dignity of foreign embassies, Congress need not prohibit speech activities that it deems do not implicate such concerns, any more than a locality that wished to prohibit the shouting of "Fire!" in a crowded theatre would be constitutionally required to outlaw the shouting of "Encore" as well.²²

21. In a declaration filed below, Father Finzer stated: "I ... believe that my conservative colleagues and I are being discriminated against because of the nature of our political beliefs." Declaration of Father R. David Finzer at 5, R.E. at 19. Appellants have supplemented the record before us with a press release issued by the city government, entitled "District Drops Charges in South Africa Case." In this press release, District of Columbia Corporation Counsel Inez Smith Reid announced that the District would be dropping charges against five persons who crossed a police barricade during a demonstration at the South African Embassy. Ms. Reid said:

It would be untenable for the Office of the Corporation Counsel to prosecute these five individuals who demonstrated peaceably to call attention to the gross injustices which result from the South African policy of apartheid. We are aware that the United States Attorney for the District of Columbia has dropped charges against several of those arrested at the South African Embassy. For us not to do so would set an inconsistent policy with respect to the prosecution of those arrested at the South African Embassy. Finally, no significant District of Columbia interest would be served by these prosecutions.

These five individuals were arrested pursuant to local laws, while those the U.S. Attorney decided

not to prosecute had been arrested pursuant to § 22-1115.

We do not have before us any similar documents from the U.S. Attorney's office and we decline to speculate, absent substantial evidence, about its motives and rationales. We note, however, that a statute constitutional on its face may not be applied in an unconstitutional manner. *Yick Wo v. Hopkins*, 118 U.S. 356, 65 S.Ct. 1064, 30 L.Ed.220 (1886). The boundaries of prosecutorial discretion are quite wide, but they are not limitless. *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962). Because the plaintiffs before us have not pressed a claim of selective prosecution, we offer no opinion on the constitutional issues such a claim might raise.

22. The dissent misses the point of this analogy, dissent at 1495 n. 22, which is that when only one particular category of speech threatens the legitimate interest the legislature seeks to promote, other, nonthreatening categories need not necessarily be regulated as well. The dissent compares § 22-1115 to a law allowing theatre-goers to shout "Encore" but not "Boo." If shouting "Boo," but not "Encore," had the same effect as shouting "Fire," then the law could permissibly regulate the shouting of "Boo" and "Fire" while leaving "Encore" alone.

VI.

The dissent's apocalyptic version of what is at stake here requires that we once more attempt to place this case in realistic perspective. The dissent argues as though the statute before us attempted the general suppression of entire categories of speech rather than merely preventing the offering of political insult within the immediate vicinity of a foreign embassy. The placard provision of the statute involves only the latter and, for that reason, the dissent's extensive quotations about the central role of the first amendment in our national life are, to say the least, disproportionate. This is simply not a statute that threatens "our free speech birthright," the "silencing of Americans in their views," the "distortion of the marketplace of ideas," or the "mutilation of the thinking process of the community." Dissent at 1477, 1487, 1490. The excitement generated by such rhetoric is quite spurious in the context of the 500-foot radius in which this regulation operates.

The dissent objects to section 22-1115 on the ground that it bars only the carrying of hostile placards and not of supportive placards within 500 feet of an embassy. The ground for this objection is that the narrower prohibition distorts the marketplace of ideas by allowing the presentation of one side only.

This objection is entirely theoretical; indeed, if the word may be used in a pejorative sense, it is merely academic. There simply is not and never has been a problem with carriers of supportive placards. More to the point, there is not and never has been political debate about the merits of foreign governments and their policies within 500 feet of their embassies. The dissent's argument conjures up a picture of rival speakers at podiums before the Nicaraguan embassy while the nation watches. There is simply no reality in that picture. The debate about Nicaragua is carried on in innumerable fora in Washington and across the nation but no such debate has entered the marketplace of ideas and our nation's political process from the area

bounded by a radius extending 500 feet from 1627 New Hampshire Avenue, N.W. If preventing Finzer from displaying a sign critical of the Sandinistas at that address has mutilated the thinking process of the community, the effect has not been noticeable.

In response, the dissent makes reference to the anti-apartheid demonstrators who have picketed the South African Embassy this last year, and to the significance of their protest in shaping the public debate. Dissent at 1499-1500. It is difficult to know what point the dissent seeks to make with this example. The "less restrictive" alternative favored by the dissent would have prohibited those demonstrations as thoroughly as section 22-1115. The question is whether the public debate has in any way been warped out of shape because these demonstrations are prohibited and some wholly imaginary supportive demonstrations are not. To state the question is to answer it.

VII.

While we hold therefore that section 22-1115 is constitutional, we remand to the district court with instructions to make factual and legal findings with respect to one further issue. The Complaint and Declarations below contained allegations of incidents in which police officers, claiming to be enforcing section 22-1115, prevented some of the appellants from engaging in activity which section 22-1115 plainly does not proscribe. For example, Finzer claims to have been prevented from kneeling on the sidewalk directly in front of the Soviet Embassy to pray silently, Declaration of Father R. David Finzer at 2, R.E. at 16, and Brooker describes an occasion in which she was told she could not stand in front of the Soviet Embassy "to say the Lord's Prayer." Declaration of Bridget Brooker at 2, R.E. at 22. The record does not reveal the context in which these incidents took place, but we note that the first part of section 22-1115 applies only when a protestor is carrying a sign of some sort, and the second part applies only when a congregation

of people has been ordered to disperse. See *Zaimi v. United States*, 476 F.2d 511 (D.C.Cir.1973). If neither of these conditions applied, then the appellants were wrongfully prevented from conducting their protest. While the District of Columbia Corporation Counsel has indicated that appellants will not be prosecuted for such activity, Defendants' Statement of Material Facts in Dispute, R.E. at 34, we have no similar statement before us from the Office of the United States Attorney in Washington, D.C., which also has prosecutorial jurisdiction over these matters. If section 22-1115 has been interpreted to prohibit conduct that is in fact clearly beyond its scope, a declaratory judgment prohibiting official interference with activities outside its proper reach would be appropriate.

VIII.

We wish to reiterate, in conclusion, the special circumstances that surround the provision whose constitutionality we have upheld. It represents an exercise by Congress not simply of the police power, but of its authority and responsibility under the Constitution to impose upon citizens what it understands to be the obligations required by international law. It does not eliminate any point of view from our political discourse, but sets aside the space immediately surrounding foreign embassies as an area free from hostile protest. The unique restrictions imposed are justified by the unique interests that are at stake, interests which include the safety of American personnel living abroad in a time in which international incidents provide regular reminders of the precariousness of their position. We think Congress acted within its authority when it required that these demonstrations take place elsewhere in the District. We therefore affirm the constitutionality of section 22-1115, and remand this case to the district court for a determination of whether the local authorities have exceeded the scope of their statutory authority.

It is so ordered.

WALD, Chief Judge, dissenting:

Perhaps no two national interests engender so much deserved passion as the security of our citizens at home and abroad and the freedom of these same citizens to speak out on issues of public importance. Recent times have, unfortunately, taught us that we cannot always have a full measure of both. But even within the shadow of treachery and terrorism, we must not too hastily surrender our free speech birthright to phantom national security interests and international obligations. We must at the least demand reasonable proof that genuine issues of security or treaty obligations are implicated. The survival of our most cherished freedoms in time of trial requires that courts carefully scrutinize the strength of competing foreign relations and free speech interests and ensure that the "delicate balance" is rightly struck.

Everyone involved in this case is all too cognizant of the dangers right now facing our embassies abroad and the embassies of foreign sovereigns in our own country. I would be reluctant to challenge the validity of a 100 or even a 500 foot ban on picketing or demonstrating in front of an embassy based on genuine security concerns. That is not, however, what is involved in this case. This case involves the discriminatory application of a ban to some demonstrators but not others, based not on the need to protect the embassy's security but on the more amorphous need to prevent affronts to the "dignity" of the embassy.

I realize, too, that we must inevitably defer to the superior knowledge and responsibilities of the political branches of our government on the risks involved in certain courses of conduct in foreign affairs. But I am equally convinced that we must adamantly protect free speech and the right to express political dissent, not just about our own country's but about other countries' policies. Debate over such essential matters must not be unnecessarily restricted, particularly if there is no offsetting gain to security at home and abroad. To permit fears of irrational behavior by others to so dominate our thinking that we do not insist on proof that

substantial restrictions on free speech are in fact required by "national interests and international obligations," maj. op. at 1455, presents risks to our basic freedoms that are more deadly than any terrorists' blows.

A painstaking assessment of the plaintiffs' facial attack on the constitutionality of this statute leads me to conclude that parts of it violate the first amendment. The majority makes an eloquent case for upholding the statute in its entirety because Congress' and the executive, the branches charged with protecting foreign countries' presence here and our own citizens abroad, have approved it. It is inappropriate, the majority argues, for the judiciary to scrutinize too severely the decision of those branches that this particular law is "necessary to fulfill our obligations." Maj. op. at 1459-60. Summing up its case for superdeference, the opinion concludes that

a court cannot lightly dispute a determination by the political branches that the statute meets important international obligations, that the interests at stake are compelling, or that those interests cannot be met by a statute with a more narrow reach.

Id.

The majority's warning is intimidating but, like much of the free speech/national

1. The majority speaks often and fondly of the need to defer to Congress' balancing of free speech interests and the dictates of the Law of Nations, but acknowledges that the balance reached in 1937, before any of the relevant Supreme Court decisions on content-discrimination issued, must be reassessed in light of those dramatic changes in first amendment jurisprudence. See maj.op. at 1454.

Recent congressional action in the area casts doubts on whether today's Congress agrees that D.C.Code § 22-1115 reflects the right constitutional balance. From 1972 to 1976, the statute that governs embassies in the fifty states penalized anyone who

(1) parades, pickets, displays any flag, banner, sign, placard, or device, or utters any word, phrase, sound or noise, for the purpose of intimidating, coercing, threatening, or harassing any foreign official or obstructing him in the performance of his duties, or

(2) congregates with two or more persons with the intent to perform any of the aforesaid acts.

18 U.S.C. § 112. In 1976, however, Congress amended § 112 to eliminate the prohibition on

security debate, assumes that a choice rather than an accommodation must be made between the two goals. Although the majority rightly identifies the core issue in this case as the need to strike a permissible accommodation "between the United States' national interests and international obligations and the first amendment's guarantee of free speech," maj. op. at 1455, the only accommodation it recognizes as legitimate is that struck by Congress or the executive. It is too willing, in my view, to sacrifice first amendment freedoms to the generality of political decisionmaking in the area of foreign affairs without carefully inquiring whether international obligations and national security concerns are really implicated at all, and if they are, whether the statute fulfills those interests with the least amount of intrusion into cherished constitutional rights.

Thus, the fatal flaws I see in the statute and in the District Court's decision summarily upholding it *have nothing to do* with the degree of deference we must give to the assessments of the other branches on matters of foreign affairs. Rather, they involve quintessentially legal judgments about accommodating one aspect of

banners, signs, placards, or devices. The amendment was explained on the ground that the old statute "raises serious Constitutional questions because it appears to include within its purview conduct and speech protected by the First Amendment." H.R.Rep. No. 1614, 94th Cong., 2d Sess. 6 n. 9, reprinted in 1976 U.S. Code Cong. & Ad.News 4480, 4484 n. 9; S.Rep. No. 1273, 94th Cong., 2d Sess. 8 n. 9 (1976). Thus, even though the pre-amendment § 112 was far less restrictive of speech than D.C.Code § 22-1115 is, Congress thought it necessary to amend it to conform with the dictates of the first amendment.

This post-enactment history is not, of course, evidence of how Congress feels about the D.C. Code provision's constitutionality. It is evidence, however, that Congress has re-evaluated the proper balance between embassy security and first amendment interests and that the 1937 statute, now part of the local District of Columbia Code, may no longer reflect Congress' current views as to where that balance lies. See *infra* at 1465 n. 10.

the Law of Nations, relating to "appropriate" safeguarding of an embassy's "dignity," with the dictates of first amendment law, already established in Supreme Court decisions. I am, to paraphrase a recent Supreme Court pronouncement on deference in the context of foreign affairs,

cognizant of the interplay between [this case] and the conduct of this Nation's foreign relations, and [I] recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the judiciary's characteristic roles is to interpret [that document], and [I] cannot shirk this responsibility merely because our decision may have significant political overtones.

Japan Whaling Association v. American Cetacean Society, — U.S. —, —, 106 S.Ct. 2860, 2865, 92 L.Ed.2d 166 (1986). There is still room for the courts to levy "severe scrutiny" before upholding a law which on first glance looks like a classic, textbook example of prohibited viewpoint discrimination and unbridled police discretion.

D.C.Code § 22-1115 suffers from numerous constitutional infirmities. Section I sets out the standards that are used in analyzing content-based speech restrictions and establishes that the majority's reliance on the Law of Nations does not alter those standards in any significant way. Section II reviews the interests that the government relies on to justify the statute, and concludes that the only "compelling" interests involved in this case are those related to security; protecting the "dignity" of embassies, unless it can be directly tied into a security interest, cannot justify a content-based distinction. Section III tests the statute against the D.C. government's asserted security interest, and demonstrates that the statute is both fatally overinclusive and underinclusive. Moreover, even if

its fit with those security interests were tighter, its viewpoint discrimination would still be constitutionally unjustifiable since a viewpoint-neutral regulation is readily available that would advance legitimate security interests in a manner far less restrictive of free speech values. Finally, Section IV turns to the second clause of the statute and concludes that its vesting in police officers of standardless discretion to disperse a congregating group is facially unconstitutional.

I. THE APPROPRIATE STANDARD OF SCRUTINY

A. Content-Based Distinctions

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2289, 33 L.Ed.2d 212 (1972). Unlike content-neutral time, place, or manner restrictions where the government has a relatively light burden to carry in justifying regulation, the government has an exceptionally heavy burden to bear when it seeks to justify a content-based restriction on speech. See *Regan v. Time, Inc.*, 468 U.S. 641, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984); *Widmar v. Vincent*, 454 U.S. 263, 270, 102 S.Ct. 269, 274, 70 L.Ed.2d 440 (1981); *Police Department v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The government must demonstrate that the statute "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). As part of the "necessary" and "narrowly drawn" inquiries, the government must show that "no adequate alternative" exists that would be less restrictive of speech.² *Carey v. Brown*, 447 U.S. 455,

Wygant v. Jackson Board of Education, — U.S. —, 106 S.Ct. 1842, 1850 n. 6, 90 L.Ed.2d 260 (1986) (Powell, J., plurality opinion).

By contrast, the Supreme Court has instructed that "less-restrictive-alternative analysis ... has never been a part of the inquiry into the validity

2. "The term 'narrowly tailored,' so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration whether lawful alternative and less restrictive means could have been used."

465, 100 S.Ct. 2286, 2292, 65 L.Ed.2d 263 (1980). See also *Gay Student Services v. Texas A & M University*, 737 F.2d 1317, 1331 (5th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 1860, 85 L.Ed.2d 155 (1985); *Frumer v. Cheltenham Township*, 709 F.2d 874, 877 (3d Cir.1983). In short, whenever the government has regulated speech on the basis of content, the Court has applied the "most exacting scrutiny," *Widmar*, 454 U.S. at 276, 102 S.Ct. at 277 "to determine whether there is any method of achieving the state's ... purposes ... which has a lesser effect on protected expression." *Tacynec v. City of Philadel-*

of a [content-neutral] time, place, and manner regulation. It is enough that the ... restriction substantially serves the Government's legitimate ends." *Regan v. Time, Inc.*, 468 U.S. 641, 657, 104 S.Ct. 3262, 3272, 82 L.Ed.2d 487 (1984) (emphasis added); see also *White House Vigil for ERA Committee v. Clark*, 746 F.2d 1518, 1528-29 (D.C.Cir.1984) (refusing to apply least-restrictive-alternative analysis to content-neutral time, place, and manner restriction).

3. Indeed, even more threatening to our constitutional values, it is a viewpoint-based statute. See *infra* at 1492-96.

4. The first clause of the statute encompasses "any flag, banner, placard, or device." For convenience sake, I shall refer to this entire class as signs.

5. The majority suggests, however, that under *City of Renton v. Playtime Theatres, Inc.*, — U.S. —, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), "§ 22-1115 may not in fact qualify as a content-based statute." Maj.op. at 1469, n. 15. In that case, the Supreme Court held that zoning of adult theatres designed to "protect the city's retail trade, maintain property values, and generally 'protect[] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views," did not trigger the scrutiny reserved for typical content-based regulations. 106 S.Ct. at 929. The Court found the "resolution of [the] case largely dictated by [the] decision in *Young v. American Mini Theatres, Inc.*, [427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)]." *Renton* and *Young*, however, are obviously and dramatically different from the case at bar.

In upholding the Renton ordinance, the Court stressed that the "ordinance does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds ac-

phia, 687 F.2d 793, 798 (3d Cir.1982), *cert. denied*, 459 U.S. 1172, 103 S.Ct. 819, 74 L.Ed.2d 1016 (1983).

There is no doubt that D.C.Code § 22-1115 is a content-based statute.³ It prohibits only demonstrations involving 'signs' that hold the foreign government up to public odium or disrepute, while allowing signs that do not. In their briefs and arguments before this court, "[n]either appellees nor amicus dispute[d] the fact that § 22-1115 is a content based act." Brief for Amicus Curiae United States of America at 16. The majority recognizes this.⁴ See maj. op. at 1475.

ceptable, but deny use to those wishing to express less favored or more controversial views." *Id.* 106 S.Ct. at 929 (quoting *Masley*, 408 U.S. at 95-96, 92 S.Ct. at 2289-90; see also *Young*, 427 U.S. at 67-68, 96 S.Ct. at 2450-51 (opinion of Stevens, J.)). In this case, the government has done just that. Unlike the Renton ordinance, D.C.Code § 22-1115 turns on the viewpoint of the speaker, and there can be no denying that one of the predominant reasons for the restriction is to prohibit the airing of views that are disfavored by those occupying foreign embassies. See *infra* at 1493.

The fact that the statute was indeed enacted in order to shield foreign emissaries from the content of speech eliminates any analogy to *Renton* where the Court held that the ordinance was only aimed at "secondary effects." 106 S.Ct. at 929. Here, a major part of the perceived evil is the content of the speech itself, and the emotive impact of it. If listeners' reaction to the content of speech is deemed to be a "secondary" effect, then there is nothing left at all of the content-based distinction doctrine. Yet, on the day it decided *Renton*, the Court also issued its decision in *Pacific Gas & Electric Co. v. Public Utilities Commission*, — U.S. —, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986), in which it reaffirmed the content doctrine. *Id.* 106 S.Ct. at 914 ("For a time, place, or manner regulation to be valid, it must be neutral as to the content of the speech to be regulated.").

Finally, it is important to keep in mind that *Renton* was dealing with the issue of adult theatres. For good or for bad, the Supreme Court has adopted the view that not all speech is privy to the same protection. As Justice Stevens explained in *Young*, "[w]hether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our

B. The Law of Nations

Before proceeding to analyze the "compelling" interests advanced by the D.C. government in support of the statute, I will address the linchpin in the majority's rationale for upholding the statute: that the United States has a special duty under the customary Law of Nations and Article 22 of the Vienna Convention on Diplomatic Relations "to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." 23 U.S.T. 3227, 3237, T.I.A.S. No. 7502; see maj. op. at 1457. The opinion cites Senator Pittman, the sponsor of § 22-1115, as relying on the Law of Nations for the obligation of a host country to protect a foreign embassy against not only physical invasion but "an offensive demonstration ... not only against insult, but against any character of annoyance or interference that will bring the hatred of the people of his country against our people." See maj. op. at 1457.

Senator Pittman's rhetorical protectorate is a tall order indeed and, if taken literally, would include a ban against offensive editorials in the local newspapers as well as critical citizens parading in front of the embassy. The Vienna Convention is, after all, not limited to the "premises" of the embassy but prohibits any "impairment of its dignity," see *supra* at 1481, presumably referring to the dignity of a nation or its officials, not a building. Yet it is quite clear that the Law of Nations embodies no such requirement. The United States government has often cited the constitutional limitations on its ability to curtail freedom of expression in response to complaints by foreign embassies of insult or annoyance by American citizens. In the 1930s, the Constitution was invoked to fend off requests by the German government to stop the showing of an anti-Hitler film in Chicago and to prevent a mock trial of

choice." 427 U.S. at 70, 96 S.Ct. at 2452. Along the continuum, there can be no doubt that political speech, such as that abridged in this case, is entitled to the utmost protection. See *Brown v. Harilage*, 456 U.S. 45, 52, 102 S.Ct. 1523, 1528,

Hitler from taking place in Madison Square Garden. In 1941, the Egyptian prime minister complained to the United States about an article in *Foreign Affairs* calling the King of Egypt a "quising," but was mollified by our government's explanation that it could do nothing but apologize since its Constitution contains guarantees of freedom of the press. M. Whiteman, 5 *Digest of International Law* 160-62, 168 (1965).

Our government has similarly invoked the first amendment in response to complaints of insult stemming from protected activities in the vicinity of foreign missions and consulates. When, in 1958, the Soviet delegation to the United Nations complained about a demonstration in front of its building, the United States declined to take action, explaining that it could not "associate itself with any attempts to abrogate the constitutional rights of residents of the United States to gather in peaceful assembly and to express their beliefs and convictions." M. Whiteman, *supra*, Vol. 7 at 385 (1970). Several years later, the United States again rebuffed a Soviet complaint, contending that no principles of international law were violated when a synagogue across the street from the Soviet mission erected a plaque pointedly referring to "the cry of the oppressed ... Jewish Community in the Soviet Union." *Id.* at 384. More recently, in 1979, the United States refused to act when the Soviets complained about demonstrations near their San Francisco consulate, noting that the protest was peaceful and legal under 18 U.S.C. § 112. M. Nash, *Digest of United States Practice in International Law* 674 (1979).

Under the majority's broad brush analysis of the relationship between the Law of Nations and the first amendment, the United States probably could and indeed should have taken all of the requested actions. Its refusal to do so suggests that its offi-

71 L.Ed.2d 732 (1982); *In re Primus*, 436 U.S. 412, 437-38, 98 S.Ct. 1893, 1907-08, 56 L.Ed.2d 417. See generally Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind.L.J. 1, 20 (1971).

cials entertain, as I do, serious doubts about "the framers['] unders[anding] that the protection of foreign embassies from insult was one of the central obligations of the law of nations." Maj. op. at 1457.⁶ At a minimum, these tolerated insults and annoyances visited upon foreign diplomats by United States citizens clearly illustrate that our government's obligations under the Law of Nations are not as rigidly circumscribed as Senator Pittman and the majority would have us believe. The mere fact that the United States' obligation is flexible does not, of course, mean that it is not compelling, *cf.* maj. op. at 1465, but does indicate that first amendment interests can be accommodated under the Law of Nations without imposing the constitutionally dubious strictures of § 22-1115.

The reasonableness and flexibility of the Law of Nations is further illustrated by the quite temperate language of Article 22 of the Vienna Convention, the obligations of which are purportedly fulfilled in part by § 22-1115. Article 22 provides only that governments have a "special duty" to take "appropriate" steps to protect the peace and dignity of the mission. 23 U.S.T. 3227, 3237, T.I.A.S. No. 7502. The commentary on the draft of this Article states that "in order to fulfill this obligation [a government must] take special measures—over and above those it takes to discharge its general duty of ensuring order." M. Whiteman, *supra*, Vol. 7 at 373 (1970). There is nothing in this language to indicate that consideration of what is "appropriate" should not encompass consideration of what is constitutional. *See infra* at 1485 & n. 10.

Article I, § 8 of the Constitution enumerates the areas within which Congress is generally authorized to act. As part of an extensive list, clause 10 provides that Congress has the power "[t]o define and punish ... Offences against the Law of Nations." Congress certainly may draw on Article I's Law of Nations clause for its

general authority to enact D.C. Code § 22-1115. But that being said, the Law of Nations does not answer the question of whether Congress, in enacting some of the provisions of § 22-1115, has violated the first amendment's provision that "Congress shall make no law ... abridging the freedom of speech." The Law of Nations clause, like the commerce clause or any other source of congressional authority, can be exercised only subject to express limitations found elsewhere in the Constitution.

Indeed, the majority opinion, after a nine-page discourse on the Law of Nations, finally recognizes this ultimate legal truth and concedes that "[t]he presence of a first amendment claim requires that the court examine the balance struck by the political branches," maj. op. at 1460, although only after admonishing that the examination must be conducted with superdeference to the conclusions of the political branches. The majority's attempt to lean so heavily and for so long on the Law of Nations to justify a statute that it implies might otherwise violate the first amendment is constitutionally troublesome, to say the least. *See* maj. op. at 1462 (the issue in this case is fundamentally "a question of living up to our obligations under international law and a treaty").

The Supreme Court has made clear that principles of international law and treaties cannot supersede our Constitution. In *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957), the Court explained that "[i]f our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes." *Id.* at 14, 77 S.Ct. at 1229. The Court found it "obvious" that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."

recognized as involving our government's obligations to protect the embassy's security rather than its dignity. *See* maj. op. at 1455-57.

Id. at 16, 77 S.Ct. at 1230. *See also* *Geofroy v. Riggs*, 133 U.S. 258, 267, 10 S.Ct. 295, 297, 33 L.Ed. 642 (1890), ("It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids."). Similarly, the most recent Restatement of Foreign Relations Law explains that "rules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them." Restatement of Foreign Relations Law § 131 comment a (Tent. Final Draft, July 15, 1985); *see also* L. Henkin, *Foreign Affairs and the Constitution* 251-54 (1972).

While invocation of congressional authority to punish offenses against the Law of Nations cannot override the first amendment, the concerns embodied in the Law of Nations can be evaluated to determine whether they rise to the level of "compelling interests" which warrant narrowly tailored restrictions on free speech. Just as "the nature and extent of first amendment rights may vary with the location at which their exercise is sought," maj. op. at 1462, the nature of an embassy and our responsibilities as international hosts weigh in the balance as to what is permissible regulation of free speech in that particular place. *See* L. Henkin, *supra*, at 254 ("One may expect that the national interest in war and peace and even lesser concerns of foreign relations would have important weight in any balance."). Contrary to the majority's suggestion, I do not "overlook[]" that other law sometimes expresses values and concerns that are of legitimate constitutional dimension." Maj. op. at 1464. I examine both the dignity and security interests protected by the Law of Nations. *See infra* at 1484-87.

The Law of Nations, standing alone, does not, however, constitute an automatic "compelling interest" which justifies any limitation on free speech in the vicinity of embassies. Because I do not believe there is a compelling interest to weigh here, I fail to see how my analysis can be character-

ized as an "all-or-nothing" approach to first amendment balancing of "competing constitutional values." *Cf.* maj. op. at 1465. Simply because an interest is recognized in the compendious Law of Nations does not confer upon it the status of a compelling interest that must override any other constitutional guarantee. To say that it does would be to recognize *de facto* the Law of Nations as superior to the Constitution—a result which has been soundly rejected by the Supreme Court. We would agree, I presume, that no law could forbid black persons from demonstrating in front of embassies of countries that officially practice segregation on the grounds that it would "insult" them or be offensive to their dignity.

A treaty, like any other statute, represents Congress' assessment of the national interest. In reviewing both treaties and statutes against first amendment challenges, the court may not simply defer to that congressional judgment. To the contrary, the Supreme Court has instructed that the defender of any such law or regulation restricting free speech, be it of congressional or state origin, has the affirmative burden of proving its constitutionality. *See Philadelphia Newspapers, Inc. v. Hepps*, — U.S. —, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986). Legislative enactments of content-based speech restrictions have always been subjected to more severe scrutiny than other laws. In these super-sensitive first amendment areas, the mere fact that Congress passed the act in the first place simply does not weigh in so heavily as it does in other kinds of constitutional inquiries. Resort to the Law of Nations cannot short-cut the arduous process of constitutional adjudication that requires a careful assessment of the particularized justification for any law that impinges free speech as severely as this one does. We must ask whether the abridgement is truly "necessary" to attain a compelling interest, and even if it is, whether it has been crafted in a way to restrict as few fundamental rights as possible. On this record, both

6. Many of the majority's examples—protections against acts of violence such as the tearing down of flags or tumultuous riots—are readily

questions must be answered with a resounding "No."

II. THE ASSERTED INTERESTS

The D.C. government asserts that D.C. Code § 22-1115 serves two separate compelling interests: first, it directly protects the security of foreign embassies and thereby it indirectly protects the security of our own embassies in foreign countries. Second, it helps preserve foreign embassies' dignity by shielding them from the insult of demonstrations that hold their governments up to public odium or disrepute. Our task is to decide whether these asserted interests are sufficiently compelling to justify overriding the free speech interests of citizen demonstrators.

A. Security Interest

Our government has a unique and compelling interest in maintaining security for foreign embassies in Washington and in making efforts to increase the security of United States embassies abroad. Accordingly, statutory prohibitions must be upheld if they can be shown to be directly tied to these security interests⁷ and properly crafted to advance these interests with minimal restrictions on free speech. Such security interests have been held to be important enough to justify content-neutral restrictions on speech in the vicinity of embassies and missions. *CISPES v. FBI*, 770 F.2d 468, 472-75 (5th Cir.1985); *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 474-76 (2d Cir.1980), cert. denied, 450

U.S. 913, 101 S.Ct. 1352, 67 L.Ed.2d 337 (1981). But the majority and I agree that the security interest cannot justify much of the content-based statute before us. See *infra* at 1487-90. Hence, we must look to some other interest which may serve to explain the statute's prohibitions. The government asserts that its interest in preserving the "dignity" of the embassies so qualifies.

B. "Dignity" Interest

It is not at all apparent that the D.C. government's asserted interest in preserving foreign embassies' "dignity" is a compelling interest capable of overriding the constitutional guarantee of free speech. The courts in *CISPES* and *Concerned Jewish Youth* relied solely on security interests to affirm content-neutral speech prohibitions in the vicinity of consulates and missions, making no reference to the dignity interest asserted here. The majority nonetheless accepts, without question or analysis, the government's assertion that the statute is valid because it protects foreign embassies from the "insult" of being exposed to signs that oppose their governments' policies. The majority's calculus is that (a) since preservation of the dignity of embassies is required by the Law of Nations and (b) since the sign restriction is somehow related to the preservation of the dignity of the embassies, then (c) the sign restriction passes constitutional muster.⁸

ling because "a court cannot lightly dispute a determination by the political branches . . . that the interests at stake are compelling." Maj.op. at 1459. The majority never explains, however, which political branch made this determination, and when they made it. Was Congress so omniscient that in 1937 it could anticipate future developments in first amendment law and carry out analyses that had not yet been developed? The fact is that recent congressional action casts doubt about whether Congress still thinks that the statute reaches a correct constitutional balance. See *supra* note 1. Thus, even if this notion of super-deference had a role to play in compelling interest scrutiny, there is no support for it in this case.

More generally, where the Supreme Court has desired lower courts to modify their usual methods of review in first amendment cases, it has

The majority's reasoning grossly misstates the relevance of the Law of Nations to this case. While the Law of Nations does impose some obligation to protect the dignity of foreign embassies, that obligation is flexible and does not require protection from all insult, especially at the expense of constitutional guarantees. See *supra* at 1481-82. In enacting protection for foreign emissaries outside the District of Columbia, for example, Congress has managed to fulfill its obligations to protect the dignity and security of foreign officials through the use of criminal penalties punishing harassment and through other content-neutral restrictions.⁹ See 18 U.S.C. § 112 (1982). Certainly the Law of Nations does not have a special District of Columbia provision imposing extra duties on host governments here.¹⁰

I cannot accept the majority's conclusion that the preservation of an embassy's dig-

clearly told us so. See *Goldman v. Weinberger*, — U.S. —, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."). Deference to the political branches is not otherwise as broad in the first amendment context as in some other areas, even when issues of foreign affairs are involved. See *supra* at 1483; *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (per curiam).

9. The statute punishes whoever congregates with two or more other persons within one hundred feet of a listed diplomatic building with intent to "intimidate[, coerce[, threaten[, or harass[] a foreign official or an official guest or obstruct[] a foreign official in the performance of his duties." Relying on the complete content-neutrality of the statute, and only on the government's asserted security interest, the Fifth Circuit held in *CISPES* that the statute was constitutionally permissible. 770 F.2d at 472-75.

10. Despite the majority's attempts to vest the "dignity" interest with a congressional imprimatur, Congress' post-Vienna Convention enactments dealing with consulates and missions outside the District of Columbia have been far less concerned with protecting foreign emissaries against insult and far more sensitive to first amendment values than § 22-1115. Despite the long-standing nature of the Law of Nations' alleged concern with protecting embassies from

nity is such a compelling interest that it can justify the content-based restriction on speech embodied in this statute. Settled first amendment principles establish that shielding listeners from hearing things they find offensive or politically distasteful is not an interest capable of supporting suppression of protected speech. Even crude, vile, or sexually explicit speech may not generally be forbidden because of its communicative impact. See *Bethel School District No. 403 v. Fraser*, — U.S. —, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986) ("use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point"); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71-72, 103 S.Ct. 2875, 2882-83, 77 L.Ed.2d 469 (1983) (rejecting "offensiveness" interest even where less protected, commercial speech is involved);

annoyance and insult, until 1972 the only statutory protection afforded foreign diplomats outside D.C. was against violent acts. See 18 U.S.C. § 112 (1969). In 1972 the statute was amended to restrict harassing demonstrations near embassies in order "to protect the peace, dignity and security of foreign officials." S.Rep. No. 1105, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4316, 4328; see *supra* at 1478 n. 1. The Senate was concerned about the first amendment implications of this prohibition, however, and added a provision to the final bill, still codified at 18 U.S.C. § 112(d) (1982), explaining that "[n]othing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States." *Id.*, reprinted in 1972 U.S. Code Cong. & Ad. News at 4330. Congress remained concerned about the free speech implications of its actions, however, and when it revisited § 112 four years later it repealed the picketing provisions, citing constitutional concerns. See *supra* at 1478 n. 1. Congress is presumably satisfied that 18 U.S.C. § 112 fulfills its duties under the Vienna Convention, even though it no longer contains anything remotely like the restrictions embodied in § 22-1115 and expressly directs that it be interpreted so as not to abridge first amendment rights. This congressional pronouncement is far more persuasive on the requirements of the Law of Nations and the Vienna Convention and their relation to the first amendment than the decades-old provisions of § 22-1115, enacted before the Vienna Convention and many of the important developments in first amendment law.

7. Because I find no demonstrated connection between the hostile sign prohibition and the fear of foreign retaliation in this case, I need not decide whether fear of a foreign government's actions in response to peaceful criticism may ever justify infringement of an American citizen's constitutional rights. I admit to grave concerns about the degree or circumstances under which a foreign government's threats, through a grand-scale heckler's veto, can justify abridgement of constitutional rights. An admittedly extreme example makes the point: if some foreign country threatened to attack Americans abroad unless we rescind voting rights for blacks in the United States, that could hardly justify such discrimination.

8. At another point the majority argues that the "dignity" interest must be accepted as compel-

Cohen v. California, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."); *Coates v. City of Cincinnati*, 402 U.S. 611, 615, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971) ("Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms.").

How much stronger the impediment when the offensiveness of the speech is based on the fact that the audience disagrees with the political message of the speaker. See *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 1365, 22 L.Ed.2d 572 (1969). As the Supreme Court has recognized,

a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute ..., is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

11. This is not a case, like those cited by the majority, *maj. op.* at 1462, where the nature of the demonstration site is functionally incompatible with free speech. We are dealing here with public sidewalks. First, no aesthetic or traffic rationale has been set forth for the sign ban. If one had, then presumably signs in support of the embassy's government would be equally forbidden. See *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966) (upholding content-neutral regulation of speech on jail premises). Nor is this a case like *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d

Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949). So precious is our freedom of speech that courts have felt compelled to protect politically oriented exercises of free speech as offensive, and potentially inflammatory, as Nazi marches and Ku Klux Klan rallies. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir.) (Nazi rally in Skokie, Illinois), *cert. denied*, 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978); *Knights of Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir.1978) (Ku Klux Klan rally). The Supreme Court has held that the first amendment even requires states to tolerate advocacy of the use of force or of law violations except "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969) (emphasis added); see also *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 328, 38 L.Ed.2d 303 (1973) (per curiam).

The government nonetheless asks us to break new doctrinal ground here and to recognize a compelling interest in shielding foreign emissaries from speech which they find offensive because of its political content.¹¹ The majority asserts that because foreign officials have no obligation to be accessible to public protest or to participate in the clash of ideas central to our democratic process, the general ban against censoring unpopular speech is inapposite here. *Maj. op.* at 1462, 1467. I disagree. This key first amendment principle is based on the need to protect the rights of the speaker and so its application does not generally turn on the type of listener involved.¹²

487 (1965), where the explicit constitutional value of preserving fair trials justified a viewpoint-neutral restriction that prohibited expression designed to influence judicial proceedings in the vicinity of a courthouse.

12. The Court has created an exception when the audience is schoolchildren. *Bethel School District*, — U.S. at —, 106 S.Ct. at 3164. Foreign emissaries are not, like America's youth, in need of civic training or special protection from sexually explicit speech. Neither does the Law of Nations constitute them as a class apart, entitled

Furthermore, there can be no clear-cut division between foreign and domestic political debate—limiting speech addressed to foreign embassies will inevitably affect the competition of ideas in the United States. Current anti-apartheid protests in front of the South African embassy are very much a part of the domestic political debate about appropriate United States responses to the South African regime.

The notion that the Law of Nations permits or requires silencing of Americans in their views on foreign governments' policies to avoid assault on the dignity of the embassy is too radical a departure from recognized first amendment principles to be accepted on the D.C. government's or the majority's say-so. If the protection of a foreign emissary's dignity is as compelling an interest as the majority believes, how can the ban on criticism be limited to an area within 500 feet of an embassy? Surely if the dignity interest is so compelling, and its compelling nature is evaluated under the majority's superdeferential standards, there is nothing to prevent suppression of insulting speech in many other forms and locations. These worrisome implications of the majority's dignity rationale make this truly a case about "the general suppression of entire categories of speech rather than merely preventing the offering of political insult within the immediate vicinity of a foreign embassy." *Maj. op.* at 1476.

Only if the District can show some interest that transcends the foreign government's sensitivity to insult in response to peaceful picketing would the first amendment allow suppression of political expression by American citizens. That interest could logically only be threats to the security of the embassy and its personnel or a threat of retaliation to our citizens and embassies abroad.

III. CUSTOM TAILORING

In addition to showing that any content-based restriction on speech is supported by a compelling governmental interest, the government must also demonstrate that

to exercise a heckler's veto in violation of con-

stitutional principles. *Cf. supra* at 1484 n. 7.

the restriction is not only narrowly tailored to achieve that interest, but is the least restrictive alternative available. See *supra* at 1479-80. The statute "in issue here is fatally overinclusive in some respects and fatally underinclusive in others." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 218, 95 S.Ct. 2268, 2277, 45 L.Ed.2d 125 (1975) (Douglas, J., concurring). The statute is overinclusive because no compelling interest in maintaining security has been shown to justify a prohibition on signs; it is underinclusive because a prohibition directed solely to anti-embassy speech cannot be justified when pro-embassy speech is likely to pose many of the same security risks. Moreover, even if the statute's viewpoint-discriminatory restriction were demonstrably related to the proffered security interests, the only constitutionally acceptable solution would be to create a viewpoint-neutral time, place, or manner restriction, i.e., relegating both pro- and anti-foreign government viewpoints to a forum outside of the 500 foot zone.

A. Overinclusiveness

As discussed in Section II, the only compelling interest that could justify the free speech restriction of this statute is security. However, while the second clause of the statute—the congregating prohibition—is readily recognizable as a security measure, there is no evidence whatsoever in the record to support on security grounds the restriction of the first clause, which allows demonstrators within 500 feet of the embassy provided that they do not hold signs that hold the embassy's government or officers up to "public odium" or "public disrepute."

The State Department affidavits assure us that "not all demonstrations are prohibited under section 22-1115. Vigils or protests which do not involve the use of placards or banners, and leafletting when the handout is not facially 'odious' are allowed so long as the demonstrators do not congregate within the '500 foot' pe-

rimeter." See Affidavit of Deputy Chief John C. Connor, J.A. at 51 (discussing candlelight vigil that was deemed permissible); Defendants' Statement of Material Facts as to Which There is No Genuine Issue, point 7. Nothing in the record explains how or why this restriction on certain kinds of signs is related to the government's interest in maintaining embassy security. There is, for example, no claim, as there certainly was in *White House Vigil for ERA Committee v. Clark*, 746 F.2d 1518 (D.C.Cir.1984), that the sign restrictions are necessary to preserve visibility for security reasons or to prevent their use as weapons. *Id.* at 1532-34. The majority admits that "a law prohibiting a lone protester carrying a sign of any sort bears no relation to safeguarding the physical security of the building and its occupants. The only conceivable interest that would support such a restriction of speech is that of dignity and peace." Maj. op. at 1467.¹³

Since I do not believe that this statute can be upheld merely because it protects embassies from insult, the only constitutionally acceptable justification for upholding the controversial sign provisions of the statute is that countries offended by hostile demonstrators might turn face and refuse to protect our embassies or citizens abroad.¹⁴ Indeed, the majority repeatedly hammers home this appalling spectre. Yet it is worth noting that none of the affida-

vits provided by the State Department and Secret Service representatives ever assert a direct link between our protecting foreign embassies from insult and the security of our foreign citizens abroad.¹⁵ See, e.g., Affidavit of James E. Nolan, Jr., Director of the Office of Foreign Missions, Department of State, J.A. at 47 ("what happens in terms of security provided to foreign diplomatic personnel and premises here has a direct impact on the protection afforded U.S. missions and personnel abroad") (emphasis added).

Thus, while the record before us supports to some degree the proposition that lessening the security of foreign embassies in this country might have adverse repercussions on our embassies abroad, there is not one word of evidence regarding what might happen if we allow marchers in front of the embassy to carry signs that hold the foreign government up to "public odium." Speculation could as easily run either way: that any reduction in the level of tranquility or good will around the embassy might lead to repercussions on our embassies abroad; or that given the government's contention that foreign governments closely scrutinize our policies regarding their embassies, and respond in an "eye for an eye" fashion, the only consequence that might ensue is that our own embassies would be subjected to "insult" signs by other countries' citizens.¹⁶ The point is, of

sies from insult and avoiding retaliation abroad any more than it provides evidence of a link between security interests and retaliation. "Expert judgment" is equally necessary in both cases.

16. The major sponsor of the Senate Joint Resolution culminating in D.C.Code § 22-1115, did proffer at one point the explanation that the sign provision was designed to prevent the communication of ideas that threaten to

bring the hatred of people upon us whose embassy is thus besmirched.... [A]ll the armies that can be furnished will not protect our men and women in China and Japan if we arouse and incur the hatred not of those governments but of their people by speaking unkindly or in a manner to bring into odium their Governments and their people.

81 Cong.Rec. 8589 (comments of Sen. Pittman, Aug. 10, 1937). Thus, it is evident that part of

course, that mere speculation is not sufficient at least where there is no obvious relationship between the insult suffered from unsympathetic signs held in front of an embassy here and foreign governments' significant retaliation against our citizens abroad. If any disagreeable gesture to a foreign government is sure to turn into such retaliation, we are already endangering our nonresident citizens' lives by permitting embassy demonstrators at all, regardless of the presence or absence of signs. The silence of the record on this point belies any contention that there is a nexus between exposure to signs that disagree with a foreign government's policy and enhanced risk to Americans in that foreign country. Some affirmative evidence must surely be required to justify an explicitly content-based restriction on free speech.

The majority scrupulously fails to scrutinize the evidence actually submitted to the trial court to see whether it supports the D.C. government's claim that the sign provision is narrowly enough tailored to serve the compelling interests of national security. According to the majority, "[t]he four uncontradicted declarations submitted by defendants below indicate some of the special concerns justifying" D.C.Code § 22-1115. Maj. op. at 1460. Far from "indicat-

the statute's purpose, at least in its major sponsor's mind, was to protect the security of American citizens living abroad by diminishing the risk of incurring a foreign people's anger. See also *id.* at 8485 (comments of Senator Pittman, Aug. 7, 1937).

The opinion of a senator in 1937 that protecting foreign embassies from exposure to adverse signs was necessary to protect American nationals in foreign countries cannot, of course, be viewed as dispositive then, much less 50 years later. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S.Ct. 1535, 1543, 56 L.Ed.2d 1 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). Unlike most duly-enacted laws which are presumed constitutional, the government bears the burden of proving the constitutionality of laws infringing on first amendment rights. See generally *Philadelphia Newspapers, Inc. v. Hepps*, — U.S. —, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986).

The fact is, however, that even Senator Pittman rejected the hypothesis that an affront to the dignity of the embassy might have official

ing" "some" of the concerns, the affidavits constituted the entire evidentiary record which the District Court had before it in deciding whether summary judgment was appropriate, and not one word in any of them documents or even predicts adverse effects if we were to allow insulting signs in front of embassies. Elementary rules of civil procedure dictate that summary judgment should not have been granted in the absence of any evidence indicating that the ban on signs was necessary to protect embassy security at home or abroad.

We cannot uphold the statute simply because the government has sent its lawyers into court to defend it. It is our job to demand facts and evidence to show that the asserted justification really exists. As the Supreme Court has explained, a reviewing court's duty in first amendment cases is "to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S.Ct. 1535, 1543, 56 L.Ed.2d 1 (1978). Virtually all first amendment cases involve "delicate" issues, and many implicate foreign relations. See, e.g.,

repercussions. In response to a question as to whether the efforts of foreign governments to protect American nationals are dependent on the passage of the resolution, he responded that the foreign governments "no matter whether or not we protect them against insults and annoyance and possibly riot and physical injury, will do what they can to protect our citizens in their countries; but there is danger of physical injury when great and angry crowds meet in the way that has been referred to." 81 Cong.Rec. 8485 (remarks of Sen. Pittman, Aug. 7, 1937). It is thus apparent that the years have brought a shift in the governmental interest that is asserted to support the statute.

This shift in the interests that the statute serves is not, in and of itself, problematic. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71, 103 S.Ct. 2875, 2882, 77 L.Ed.2d 469 (1983) ("Insufficiency of the original motivation does not diminish other interests that the restriction may now serve"). Such a change of interests served does, however, highlight the need for clear articulation and support for the current interests.

13. The majority explains that the first part of the statute—requiring a permit for the display of a sign tending to bring a foreign government into disrepute—is primarily intended to avoid affronts to the dignity of foreign governments and their diplomatic personnel. The second feature—prohibiting "congregating"—is concerned more with threats to the security of the foreign government's representatives and property. Maj. op. at 1452 (emphasis added).

14. Even this justification raises serious constitutional questions. See *supra* at 1484 n. 7.

15. The majority attempts to overcome this evidentiary gap by pointing out that the affidavits mention the Vienna Convention, which codifies this country's obligation to protect both the security and dignity of embassies. Maj. op. at 1460. That treaty does not, however, provide evidence of a nexus between protecting embas-

New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (per curiam) (rejecting government's attempt to restrain publication of Pentagon Papers on national security grounds). Yet, none of these landmark first amendment cases suggests the hands-off approach that the majority now uses to justify virtual abdication of judicial responsibility to closely scrutinize first amendment abridgements of pure political speech. See *supra* at 1484 n. 8.

B. Underinclusiveness

When the government makes a distinction based on the content of speech, it must demonstrate that this distinction is a close fit to its asserted interests. It is true that the Supreme Court

frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89, 75 S.Ct. 461, 464-65, 99 L.Ed. 563 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95, 92 S.Ct. at 2289. Thus, "under the Equal Protection Clause, not to mention the First Amendment itself," *id.*, at 96, even a traffic regulation cannot discriminate unless there are clear reasons for the distinctions.

Erznoznik v. City of Jacksonville, 422 U.S. 205, 215, 95 S.Ct. 2268, 2275, 45 L.Ed.2d 125 (1975).

The Court's treatment of content-based distinctions, which in many ways resembles its treatment of disfavored classifications such as race under the equal protection clause, is based on the proposition that such classifications are inherently suspicious and even dangerous, in and of themselves. Thus, content-based distinctions re-

quire a far stronger showing of narrow tailoring than more neutral classifications. Even a cursory analysis of the nature and effect of content distinctions reveals why.

First, "when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'" *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.Ed. 267 (1951) (Frankfurter, J., concurring)). Especially when the "purported concern [is] to avoid controversy excited by particular groups," distinctions "may conceal a bias against the viewpoint advanced by the excluded speakers." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, — U.S. —, 105 S.Ct. 3439, 3455, 87 L.Ed.2d 567 (1985).

Moreover, content-based restrictions and, to an even greater extent, viewpoint-based restrictions distort the marketplace of ideas by allowing only one side of the debate to speak at the chosen forum. "[B]ecause by effectively excising a specific message from public debate, they mutilate 'the thinking process of the community' and are thus incompatible with the central precepts of the First Amendment," such statutes are not tolerated save in the most exceptional circumstances. *Stone, Content Regulation and the First Amendment*, 25 Wm. & Mary L.Rev. 189, 198 (1983) (quoting A. Meiklejohn, *Political Freedom* 27 (1960)).

Given these special concerns, underinclusiveness is not so readily acceptable in laws embodying content-based distinctions. The fact that the law fails to address the entire problem "undercut[s] the asserted importance of the government interest said to support the restriction." *Id.* at 206; see *Carey v. Brown*, 447 U.S. 455, 465 & n. 9, 100 S.Ct. 2286, 2292 n. 9, 65 L.Ed.2d 263 (1980) ("overinclusiveness and underinclusiveness of the statute's restriction ... un-

dermine [state's] claim that the prohibition ... can be justified by reference to the State's interest in maintaining domestic tranquility"). See generally Karst, *Equality As a Central Principle in the First Amendment*, 43 U.Chi.L.Rev. 20 (1975).

Examination of D.C.Code § 22-1115 and its purported security justifications reveals that it is indeed severely underinclusive. The statute prohibits demonstrations with signs that disapprove of the embassy government's position, but allows demonstrations with signs that support it. Yet, the government's own affidavit lends support to the view that violence can as easily erupt from an "initially peaceful" demonstration as from an openly hostile one. Affidavit of Thomas D. Quinn, Special Agent in Charge in the Office of Protective Operations of the United States Secret Service, J.A. at 42. No affidavit suggests that demonstrations including signs of one viewpoint are more prone to outbreaks of violence with the police or other members of the public. Thus, there is no ground in this record for the majority's conclusion that demonstrations expressing support for an embassy's position "simply do not threaten" the interests of the foreign government in avoiding violence and maintaining its dignity. Maj. op. at 1474-75. Imagine demonstrators carrying signs in front of the South African Embassy announcing, "We Support Apartheid." Surely they would engender as much potential for violence and indignity as signs reading, "We Condemn Apartheid." Would a 1939 Nazi demonstration in front of the German Embassy with signs praising the Third Reich threaten the peace less than demonstrators decrying that regime? 17

Moreover, even if documented, the argument that pro-embassy views are less dangerous than anti-embassy ones has no constitutional acceptability. It was soundly rejected in *Mosley*, where the city argued that "although it permits peaceful labor picketing, it may prohibit all nonlabor pick-

eting because, as a class, nonlabor picketing is more prone to produce violence than labor picketing." 408 U.S. at 100, 92 S.Ct. at 2292. The Supreme Court disagreed, and instead laid down the rule that:

Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School District*, 393 U.S. 503 at 508, 89 S.Ct. 733 at 737, 21 L.Ed.3d 731.

Mosley, 408 U.S. at 100-01, 92 S.Ct. at 2292-93. Similarly here, the mere prediction that anti-government demonstrations are likely to create more of a security threat than pro-government demonstrations is simply too broad a proposition to justify a classification on the basis of viewpoint like the one enshrined in § 22-1115.

C. Neutrality As the Least Restrictive Alternative

Finally, and most fundamentally, the statute could not pass constitutional scrutiny even if the fit between the content-based classification and the government's asserted compelling interest in security were neat or even if one accepted the majority's tenuous "dignity" justification. The Supreme Court's first amendment decisions instruct that the government has a duty, when it adopts a content-based restriction on speech, to show that it is the least restrictive means possible to accomplish a compelling interest. See *supra* at 1479-80. That showing cannot be made

are critical of foreign governments is an additional constitutional problem in implementing the statute.

17. Although these examples are clear-cut, the kind of ideological line-drawing by government officials that may be necessary in some cases to decide which signs are supportive and which

here where a valid content-neutral time, place, or manner restriction is an available alternative to the viewpoint-based restriction.

The majority concludes that the content distinction is justified anyway because the alternative of prohibiting both viewpoints within 500 feet of the embassy will restrict even more speech. This conclusion wholly ignores the "equality principle" that the Supreme Court has recognized in first amendment jurisprudence. The Court has on several occasions subordinated the first amendment interest in total aggregate speech to the first amendment interest in maintaining equality among speakers and, more importantly, viewpoints.

1. The "Greater" Power Does Not Necessarily Include the Lesser

There is more to the constitutional guarantee of free speech than quantitative measuring, i.e., simply ensuring that the most people are allowed to say the most words possible. The Supreme Court has indicated that the Constitution tolerates, and may even require, some broader restrictions on speech in order to avoid the evil of narrower content-based classifications. For example, in *Schacht v. United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970), the Court struck down a provision of a federal statute that authorized an actor to wear a military uniform while portraying a serviceman in a theatre or motion picture so long as "the portrayal does not tend to discredit that armed force." *Id.* 398 U.S. at 59-60, 90 S.Ct. at 1557. Acknowledging that a broad prohibition on wearing "our military uniforms without authority is, standing alone, a valid statute," *id.* at 61, the Court nonetheless held that the narrower prohibition violated the first amendment, because it discriminated in favor of and against particular viewpoints.

Similarly, in *Police Department v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), and in *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), the Court struck down statutes incorporating content distinctions

even though broader, content-neutral restrictions on picketing would apparently have passed muster. Again, in *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980), the Court struck down an Illinois statute that barred all picketing of residences except for "the peaceful picketing of a place of employment involved in a labor dispute." *Id.* 447 U.S. at 457, 100 S.Ct. at 2288. The Court stressed that it should not be

understood to imply, however, that residential picketing is beyond the reach of uniform and nondiscriminatory regulation.... "The crucial question, however, is whether [the Illinois statute] advances that objective in a manner consistent with the command of the Equal Protection Clause." *Reed v. Reed*, 404 U.S. [71], 76, [92 S.Ct. 251, 254, 30 L.Ed.2d 225] [(1971)]." *Police Department of Chicago v. Mosley*, 408 U.S., at 99, 92 S.Ct. at 2292. And because the statute discriminates among pickets based on the subject matter of their expression, the answer must be "No."

Id. 447 U.S. at 470-71, 100 S.Ct. at 2295-96. See also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 n. 13, 95 S.Ct. 2268, 2276 n. 13, 45 L.Ed.2d 125 (1975) (indicating that "narrowly drawn nondiscriminatory traffic regulation" would be upheld even though more narrowly drawn discriminatory regulation was invalid).

This theme is consistent with the principle that the "constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression." *Pacific Gas & Electric Company v. Public Utilities Commission*, — U.S. —, 106 S.Ct. 903, 907, 89 L.Ed.2d 1 (1986). As Justice Brennan has explained, "[t]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587, 100 S.Ct. 2814, 2833, 65 L.Ed.2d 973 (1980) (Brennan, J., concur-

ring). It thus borders on the frivolous to suggest that the first amendment, or its "narrowly tailored" component, can be meaningfully applied by comparing the number of syllables that are uttered regardless of their content or the extent to which the government is providing an optimal forum to one side only of a political debate. In the words of a leading commentator, "the first amendment is concerned, not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with the extent to which the law distorts the public debate." Stone, *supra* p. 29, at 198. Once these core values are taken into account, it is not at all "odd to describe an alternative that restricts" more words, but preserves equality, as less restrictive of first amendment freedoms. See maj. op. at 1465.

2. Viewpoint Discrimination and the Available Alternatives

The dangers of content discriminatory speech limitations are at their zenith when the discrimination is based not on the type of subject matter in general but on the particular viewpoint of the speaker. See Stephan, *The First Amendment and Content Discrimination*, 68 Va.L.Rev. 203, 233 (1982). Contrary to the majority's suggestion,¹⁸ the Supreme Court has

never held that government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government may entirely exclude discussion of the subject from the forum. In this context, the greater power does not include the lesser because for First Amendment purposes exercise of the lesser power is more threat-

ening to core values. Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of "free speech."

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 61-62, 103 S.Ct. 948, 963-64, 74 L.Ed.2d 794 (1983) (Brennan, J., dissenting) (emphasis added). Indeed, in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the plurality, while suggesting the legitimacy of some content-based distinctions, was careful to point out that viewpoint discrimination was not involved in the case. *Id.* 427 U.S. at 67-68, 96 S.Ct. at 2450-51.

The driving concept of the first amendment to promote a marketplace of ideas is twisted out of shape when, through governmental action, only one side of the debate is permitted access to the premium selling booth. While the Constitution does not guarantee speakers the best possible media exposure, see *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298 (1981), it does guarantee competitors equal access to such exposure. Above all else, the first amendment "forbids government to interfere with the competition of ideas." *Georgies v. Carney*, 691 F.2d 297, 300 (7th Cir.1982). The viewpoint distinction in D.C.Code § 22-1115 violates this core principle with a vengeance.

D.C.Code § 22-1115 is obviously a viewpoint-based regulation. A picketer's access to the 500 foot zone turns exclusively on whether his signs applaud or condemn the government of the embassy. Yet the majority suggests that because the statute applies equally to those who wish to protest against the East German and the West German embassies, it does not illegitimate-

18. The majority suggests that, in one case, the Supreme Court has tolerated viewpoint-based regulation of speech. See maj. op. at 1469 (citing *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974)). Nothing in *Parker* supports this proposition. First, although the statute was arguably viewpoint-based, *Parker* did not challenge that aspect of it before the Court. Moreover, even if we attribute relevance to the Court's silence on that issue, we cannot ignore the Court's repeated admonitions that its ruling

in *Parker* was unique to the military context. The Court stressed that "[i]n the armed forces some restrictions exist for reasons that have no counterpart in the civilian community.... Speech that is protected in the civilian population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." *Id.* at 758-59, 94 S.Ct. at 2562-63 (quoting *United States v. Priest*, 45 C.F.R. 338, 344 (1972)).

ly discriminate among viewpoints. Maj. op. at 1475. The majority's argument is silly. Issues and controversies do not divide themselves neatly along national lines like paired legislative votes. The statute does engage in viewpoint discrimination when anyone who wishes to disagree with any country's policy is banned from picketing at that country's embassy, while those supporting it are welcomed. Indeed, the legislative history reveals no small amount of intolerance for groups who choose to demonstrate against other countries' policies.¹⁹

It is still not clear whether the heightened special fears associated with viewpoint-based regulation mean that our Constitution will *never* tolerate regulation based on the speaker's viewpoint.²⁰ In *Carey v. Brown*, 447 U.S. 455, 465, 100 S.Ct. 2286, 2292, 65 L.Ed.2d 263 (1980),

19. Discussing the protests that he received about the statute, Senator Pittman stated:

Whence come these protests against the joint resolution? Have we heard the American Legion appealing to us...? Have we heard the Veterans of Foreign Wars appealing to us...? Have we heard the Daughters of the American Revolution protesting that by the enactment of this resolution we are destroying constitutional rights?

No! Telegrams are coming to us, but who are they from? Some day before our committee we will find out who is sending them....

81 Cong.Rec. 8590 (remarks of Sen. Pittman, August 10, 1937).

20. *Schacht v. United States* is one of the only modern Supreme Court decisions dealing with a viewpoint-discriminatory statute. After wearing an army uniform in a street skit protesting American involvement in the Vietnam war, Schacht had been convicted of violating 18 U.S.C. § 702, which forbids unauthorized wearing of the uniform of the armed forces of the United States. Schacht defended himself on the basis of 10 U.S.C. § 772(f), which provided that "[w]hile portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force." (emphasis added). After explaining that a blanket prohibition on unauthorized wearing of a uniform would be valid, 398 U.S. at 61, 90 S.Ct. at 1558, the Court nonetheless struck down the conviction, holding that:

In the present case Schacht was free to participate in any skit at the demonstration that

however, the Court did explain that it "might agree that certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction—if narrowly drawn—would be a permissible way of furthering those objectives" (emphasis added). We need not resolve the ultimate issue in this case.²¹ It is enough that an obvious and constitutionally acceptable alternative is available here, i.e., a viewpoint-neutral restriction on all demonstrating in the vicinity of an embassy. The existence of this obvious alternative serves to further condemn the viewpoint discriminatory § 22-1115.

I can think of few scenarios more antithetical to first amendment values than one involving two groups—one pro-foreign government, one anti-government—simultaneously approaching an embassy with

praised the Army, but ... he could be convicted of a federal offense if his portrayal attacked the Army instead of praising it.... Clearly punishment for this reason would be an unconstitutional abridgment of freedom of speech. The final clause of § 772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment. To preserve the constitutionality of § 772(f) that final clause must be stricken from the section. *Id.* at 63, 90 S.Ct. at 1559. Significantly, the Court never looked to any potential justifications or compelling interests that might lie behind the distinction. On the other hand, language in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), might be read to support the theory that some viewpoint discriminatory statutes could pass muster, at least in the school setting. See *id.* 393 U.S. at 511, 89 S.Ct. at 739 ("the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible"). But see *Bethel School District No. 403 v. Fraser*, — U.S. —, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (different first amendment standards apply in the school setting).

21. Because of the existence of an alternative to viewpoint discrimination in this case, I need not decide this issue. What the majority terms as ambivalence, maj. op. at 1469 n. 14, I prefer to think of as adherence to the long-standing principle of deciding constitutional issues as narrowly as the case allows.

signs. The policemen's task under § 22-1115 is to discern the viewpoint of each speaker and allow one group to pass the 500 foot barrier while forcing the other group to stay behind it. Those barred from the forum are not only deprived of access, but are also forced to watch their competitors take over the forum for their exclusive use. How much less odious to first amendment freedoms and values if all embassy demonstrators were forced to respect the 500 foot limit?²²

22. The majority argues that my approach is inconsistent with the Supreme Court's decision in *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), and this court's unpublished order in *Jackalone v. Andrus*, No. 79-2359 (D.C. Cir. Nov. 19, 1979). Maj. op. at 1466. The majority misconstrues the import of those decisions, and exaggerates the scope of my approach. *Cox* was decided in 1965, well before the Supreme Court developed its special rules for dealing with content-based restrictions. In any event, the statute there, while arguably content-based, was clearly not viewpoint-based and thus did not implicate the same concerns as the one here.

As for *Jackalone*, I find it troublesome that the majority ignores the Circuit Rule which, as the majority concedes, provides that unpublished orders are not citable as precedents. Maj. op. at 1466. See also *Western Union Telegraph Co. v. FCC*, 773 F.2d 375, 377 n. 1 (D.C.Cir.1985) (admonishing counsel not to cite unpublished orders) (per Scalia, J., with Mikva, J., and Bork, J., concurring). While the majority seems to assume that a case is not cited "as precedent" unless it controls the decision, traditionally a case is used as precedent whenever it is "considered as furnishing an example or authority for an identical or similar case afterwards arising." *Black's Law Dictionary* 1059 (5th ed. 1979) (emphasis added). The majority clearly relies on *Jackalone* for its quality as precedent, and Rule 8(f) itself indicates that unpublished cases are only to be cited for purposes such as *res judicata* "which turn on the binding effect of the judgment, and not on its quality as precedent." Under the dictionary definition of precedent and the history of circuit practice under Rule 8(f) there is no support whatsoever for the majority's use of *Jackalone* in its decision.

In any case, the fact that the order in *Jackalone* was all of three sentences and set out no background facts renders it useless even as an instructive guide. If, as the briefs tend to indicate, *Jackalone* merely held that the government rightfully denied a permit since, in view of the hostage crisis, there was "a clear and present danger to the public safety, good order, or

Thus, I do not believe that D.C.Code § 22-1115 is the least restrictive method of dealing with the interests that the government has proffered, even if these interests are legitimate and compelling ones. A viewpoint-neutral regulation prohibiting all embassy-related sign holding in the 500 foot zone around the embassy would provide greater protection from the dangers to both dignity and security than the current regulation does,²³ would remove the problem of viewpoint discrimination, and would

health," see 36 C.F.R. § 50.19(d)(2), there is no inconsistency. Such a regulation would be clearly content-neutral. Although the majority asserts that the regulation in *Jackalone* was actually applied based on the content and viewpoint of the speech, maj. op. at 1466 n. 12, the government's brief in *Jackalone* denies this. Brief for Federal Appellants at 11. If the Park Service had promulgated a permanent regulation banning all anti-Iranian demonstrations in the park, I certainly would argue that a viewpoint-neutral regulation should have been substituted. We, of course, have no idea from the order if the court in *Jackalone* even considered the "content" issue, which makes it even more farfetched to suggest that *Jackalone* represents the judgment of a panel of this court on any issue before us.

The majority's failure to recognize the differing impacts of content-based and viewpoint-based regulation is again evidenced by its own hypothetical which asks whether "a locality that wished to prohibit the shouting of 'Fire' in a crowded theatre" should not "be constitutionally required to outlaw the shouting of 'Encore' as well." Maj. op. at 1475. The majority misses the point that the fire/encore distinction is a content-based one, while § 22-1115 is viewpoint-based. Building on the analogy, § 22-1115 is equivalent to telling the audience they may yell encore, but may not boo at the end of a performance that they dislike.

23. Such a ban might be upheld solely on the basis of the important governmental interest in protecting embassy security. Cf. *CISPES v. FBI*, 770 F.2d at 468, 472-75 (5th Cir.1985); *Concerned Jewish Youth v. McGuire*, 621 F.2d 471 (2d Cir.1980), cert. denied, 450 U.S. 913, 101 S.Ct. 1352, 67 L.Ed.2d 337 (1981). The fit between a total ban and the security interest would be tighter than that between § 22-1115 and the security interest, which is not narrowly served by a content- and viewpoint-based restriction. Such a statute would still provide more protection than the general embassy statute, 18 U.S.C. § 112, discussed *supra* at 1485. This extra protection might, depending on the

provide an equally accessible forum for all speakers outside of the 500 foot zone.²⁴

Everyone agrees that embassies deserve to be protected against genuine dangers to their security, even if that means total prohibitions against demonstrations within close range. What we do not agree on is whether dignity interests can rise to a level compelling enough to justify protecting embassies by using a ban on free speech that discriminates in an arbitrary and unnecessary way between those who may demonstrate in front of embassies and those who may not. Certainly a fair and rational law which embodies no such discrimination could not be perceived in any foreign quarter as a lesser protection for foreign representatives, warranting retaliatory action against Americans living in their country.

IV. STANDARDLESS DISCRETION

The second clause of § 22-1115 makes it unlawful "to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to

factual showings made, be reasonable in light of the peculiar security concerns in the District of Columbia, such as those the government discussed in its affidavits.

It is also possible that a content-neutral ban could be upheld, at least in part, based on the government's asserted "dignity" interest. Although I have concluded that dignity does not rise to the level of a compelling interest so as to justify the content-based restrictions of § 22-1115, it might qualify as a "significant" enough interest to justify a content-neutral ban. Contrary to the majority's suggestion, maj. op. at 1466-67, there is no inconsistency in this position unless one sees fit to ignore two decades of Supreme Court precedent establishing dramatically different levels of scrutiny for content-based and content-neutral regulation of speech. See *supra* at 1479.

24. This is not to say that this balance would be the same in each and every case involving content-based distinctions. For example, where the goal of neutrality would require broad, outright prohibitions on otherwise protected speech, that might not be considered an acceptable alternative. See Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan.L.Rev. 113, 136-37 (1981); Comment, *Equal But Inadequate Protection: A Look at Mosley and Grayned*, 8 Harv.C.R.-C.L.L.Rev. 469, 476 (1973). Similarly, even if one assumes that the Court treated the statute in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310

do by the police authorities of the said District." D.C.Code § 22-1115. In short, congregation (provided that there are no signs) anywhere within 500 feet of the embassy—up to the very gates—is permissible, unless the police decide it is not, and order the crowd to disperse.

Undoubtedly the District may grant authority to its police to disperse crowds and preserve the public peace under certain circumstances. See *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). But in describing that authority, the Supreme Court has been careful to point out that it must be "appropriate, limited discretion, under properly drawn statutes or ordinances." *Id.* at 558, 85 S.Ct. at 466. For example, in the area of licensing, the Court has declared that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v.*

(1976), as a traditional content-based distinction, but see *supra* note 5, any content-neutral statute there would have required forcing all theatres to move to the outskirts of the city. This is far different from establishing a 500 foot neutral zone. Moreover, since the objective in *Young* was to segregate the adult theatres, requiring all theatres to be in a single area would hardly have accomplished the goal. Finally, as the court in *Young* stressed, that statute did not involve viewpoint discrimination. See *Young*, 427 U.S. at 67-68, 96 S.Ct. at 2450-51.

* In this case, by contrast, a blanket bar against protests in the 500 foot zone would leave opportunities for expression elsewhere, as required of a content-neutral time, place, and manner regulation. See *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 654, 101 S.Ct. 2559, 2567, 69 L.Ed.2d 298 (1981) (discussing requirement of adequate alternative forum). As the majority repeatedly points out, closing off a 500-foot zone around embassies is a limited impingement on speech, if applied across-the-board. The majority's analysis is, of course, totally inapposite to the statute at hand, which involves a content-based restriction. The availability of a forum 500 feet away is only relevant when a content-neutral statute is involved, since the Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison Company*, 447 U.S. at 541 n. 10, 100 S.Ct. at 2335 n. 10.

Cite as 798 F.2d 1450 (D.C. Cir. 1986)

City of Birmingham, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938-39, 22 L.Ed.2d 162 (1969). Similarly, the Supreme Court has insisted that the "legislature establish minimal guidelines to govern law enforcement" officials in the exercise of their discretion. *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974)). Standards are, ironically, deemed essential in other cases to avoid the very possibility, ensconced in the statute here, of public officials' taking the speaker's content and viewpoint into account in determining whether to license, or in this case, disperse, a gathering. See generally *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 964 n. 12, 104 S.Ct. 2839, 2851 n. 12, 81 L.Ed.2d 786 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 628-32, 100 S.Ct. 826, 831-34, 63 L.Ed.2d 73 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976); *Staub v. City of Baxley*, 355 U.S. 313, 321-25, 78 S.Ct. 277, 281-84, 2 L.Ed.2d 302 (1958); *Lovell v. City of Griffin*, 303 U.S. 444, 451-53, 58 S.Ct. 666, 668-69, 82 L.Ed. 949 (1938).

But § 22-1115 provides no guidance at all as to when the police should and should not disperse a "congregating" group. In *Zaimi v. United States*, 476 F.2d 511, 515 (D.C.Cir.1973), this court explained that the second section of the statute, i.e., the congregating provision, is "functionally" separate from the first part, dealing with

signs. This court clearly held that the portion of the ordinance prohibiting congregating was not qualified by the first portion of the ordinance. *Id.* at 527. Thus the majority cannot, consistent with circuit precedent, save this portion of the ordinance from facial invalidity by interpreting the ordinance to allow the police to order dispersal only when they "reasonably believe that a threat to the security or peace of the embassy is present." Maj. op. at 1472.²⁵ While the majority by judicial fiat reads into the second part of the ordinance an overriding purpose of protecting the dignity of the embassy, maj. op. at 1472 & n. 17, that purpose is nowhere to be found in the language of that part of the ordinance. In addition, only a narrowing interpretation by a state court or legislature can be relied upon to qualify a potentially standardless restriction on speech so as to overcome a constitutional challenge. *Gooding v. Wilson*, 405 U.S. 518, 520, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972); *Hill v. City of Houston, Texas*, 764 F.2d 1156, 1164-65 (5th Cir.1985).

This statute is thus very different from the majority's example, D.C.Code § 22-1121(2), which this court upheld in *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107 (D.C.Cir.1977). See maj. op. at 1471. On its face, § 22-1121(2) penalizes one who "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby—(2) congregates with others on a public street and refuses to move on when ordered by the police." The

25. In *Frend v. United States*, 100 F.2d 691 (D.C. Cir.1938), cert. denied, 306 U.S. 640, 59 S.Ct. 488, 83 L.Ed. 1040 (1939), the court interpreted the permit provision of the statute's first clause in a manner that avoids this difficulty. The clause makes it unlawful to display the listed items within 500 feet of the listed buildings "except by, and in accordance with, a permit issued by the Chief of Police of the said District." Nonetheless, the court amazingly concluded that the statute

[b]y its terms . . . makes it a misdemeanor to do the prohibited things, and the provision authorizing the Superintendent of Police to issue a permit must be read as authorizing its issuance subject to the prohibitions of the

resolution. That is to say, that only in those cases in which its use will not harass or bring into public odium the representatives of foreign governments, does power to issue exist. *Id.* at 694. This reading of the statute, is, of course, nonsensical. Only those who wish to engage in what is enumerated in the statute need to seek permits, yet, according to *Frend* permits may not be issued to anyone who intends to do that which is enumerated. Nonetheless, that portion of *Frend* does represent the law of the circuit until overruled by the full circuit or by the Supreme Court. Undoubtedly taking this into account, plaintiffs have not challenged the licensing scheme of the statute's first clause.

ordinance had, however, been interpreted by this court earlier, acting as a local court (before the present D.C. local court system was created), to apply only to conduct which constitutes a nuisance or creates a substantial risk of provoking violence. *Id.* at 116. Relying on this narrowing construction of the phrase "breach of the peace," we found that the ordinance was constitutional. *Id.* at 116-17.²⁴ But, as I have explained, *Mobilization Committee's* limiting technique is not available with respect to § 22-1115. See *supra* at 1471-72.

Our disposition of this issue is controlled by this court's decision in *United States v. Abney*, 534 F.2d 984 (D.C.Cir.1976) (per curiam), where we struck down the conviction of a protestor who, while protesting in Lafayette Park, violated a regulation which provided that "[s]leeping, loitering or camping with intent to remain for a period of more than four hours in any park area, is prohibited, except upon proper authorization of the Superintendent." *Id.* at 985 (emphasis added). The court held that

[t]he regulation gives the Superintendent authority to grant permission to sleep in the park beyond the time limit specified, but it contains no "narrow, objective, and definite standards to guide the licensing authority" [citing *Shuttlesworth*] to guard against the danger of arbitrary action or *de facto* censorship of certain points of view. If the *Shuttlesworth* standard of "public welfare, peace, safety, health, decency, good order, morals, or convenience" is facially unconstitutional, the totally unfettered discretion granted to the Superintendent here cannot survive constitutional challenge.

Id. at 985-86. These principles apply equally to the totally unfettered discretion given to the police in § 22-1115. See *Cox v. Louisiana*, 379 U.S. 559, 573, 85 S.Ct.

26. The D.C. police line regulation, also cited by the majority and upheld by this court, specified five emergency situations in which police could set up an exclusionary zone and order people away. Because the regulation specified which specific situations triggered its use, and did so without "rely[ing] on subjective terms to define

476, 485, 13 L.Ed.2d 487 (1965); *Association of Community Organizations for Reform Now v. Municipality of Golden, Colorado*, 744 F.2d 739, 747 (10th Cir.1984).

Some sense of the amazing breadth of discretion accorded police to disperse congregations by § 22-1115 can be gleaned by comparing it to other statutes recently declared invalid by the courts. In *Beckerman v. City of Tupelo, Mississippi*, 664 F.2d 502 (5th Cir.1981), for example, the court invalidated a parade ordinance which authorized the chief of police to deny a permit upon finding that "the conduct of the parade will probably cause injury to persons or property or provoke disorderly conduct or create a disturbance." *Id.* at 507. The court held that the term "provoke disorderly conduct" was susceptible of a broad interpretation, which would allow the chief of police "to deny permits to those seeking to engage in protected activity," *id.* at 508, and explained that:

No narrowing construction has been offered by the Tupelo City Council or the Mississippi courts. Because we do not sit as a "super" state legislature, we may not impose our own narrowing construction onto the ordinance.... We fully recognize the fact that Tupelo enacted the ordinance in good faith and intends to apply it in a fair manner. We cannot, however, overlook the substantial potential for overbroad application of the ordinance.

Id. at 509. See also *Association of Community Organizations for Reform Now v. Municipality of Golden, Colorado*, 744 F.2d 739 (10th Cir.1984); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 571 (9th Cir.1984), cert. denied, — U.S. —, 105 S.Ct. 2115, 85 L.Ed.2d 480 (1985).

The majority tries to avoid the confrontation with these recent precedents²⁷, first

proscribed conduct," 566 F.2d at 117-18, it was also found to be constitutional.

27. The local District of Columbia courts have recognized the applicability of this doctrine in dealing with similar D.C. statutes in "sensitive" areas. In *United States v. Nicholson*, Nos. 20210-69A, et al. (D.C.Ct. of Gen.Sess. June 19,

by feebly attempting to distinguish *Shuttlesworth* and *Abney*. See Maj. op. at 1470-71. Even if these were the only cases on point, the distinction that the majority draws between permits in general and "sensitive areas," maj. op. at 1471, would be illogical. There is nothing about "sensitive areas" that makes it impossible to carefully draft a statute delineating the standards by which the police are to exercise their authority to disperse congregating groups.

The majority also suggests that "a court would [not] sustain a conviction under this statute for refusal to disperse upon a policeman's order if the policeman had acted out of personal malice [or] to prevent the sidewalk sale of neckties." Maj. op. at 1471-72. That answer, however, ignores the longstanding first amendment doctrine that "[p]roof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940); see also *Hynes v. Mayor of Oradell*, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976); *Staub v. City of Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

But the fact is that this is not even a case where a speaker is attempting to challenge a licensing scheme without having asked for and been denied a license. The plaintiffs here alleged that on multiple occasions the police used this standardless statute to prevent them, on penalty of arrest, from peacefully congregating. That is clearly enough for a facial attack on the

1969), *aff'd*, 263 A.2d 56 (D.C.1970), Chief Judge, now District Court Judge, Harold H. Greene held that policemen in the United States Capital could not constitutionally use a standardless unlawful entry on property statute to order the defendants to leave the Capitol. See *Dellums v. Powell*, 566 F.2d 167, 178-79 (D.C.Cir.1977) (discussing *Nicholson*). The *Nicholson* court then turned to D.C.Code § 9-113 which forbids anyone to "parade, stand, or move in processions or assemblages in said United States Capitol Grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or move-

statute, and I simply do not understand how the court can principledly avoid it. The dispersion portion of the law is patently void for lack of any governing criteria.

V. CONCLUSION

The majority opinion, by blindly deferring to the political branches and unquestioningly accepting their assertion of an ill-defined interest in protecting foreign emissaries from annoyance and insult, effectively gouges out an enormously important category of political speech from first amendment protection. The fact that *some* regulation of speech is needed to serve a compelling interest in preserving security, and the fact that *some* deference is due to coordinate branches, does not, however, mean that the court has no role in assuring that the regulatory scheme is fine-tuned in accordance with constitutional principles. If the court were to accept its mandate and invalidate this statute, Congress could easily draft an alternative that would be just as protective of security, but far less abhorrent to the first amendment.

The majority attempts to ignore well-settled constitutional principles by emphasizing what it perceives to be the trivial nature of the restrictions at issue here. See, e.g., maj. op. at 1476-77. But what may seem trivial to the majority is obviously not so trivial to those who brought this suit, nor to those anti-apartheid protestors whose arrests in front of the South African embassy we followed on the front pages and on the evening news for over a year; they have risked and suffered arrest in

ment" except with the permission of the Speaker of the House and the President of the Senate, or in their absence from Washington, the Capitol Police Board. See D.C.Code §§ 9-124, 9-125. The court held that this vesting of standardless discretion violated the principle that "in a government of laws, the regulation of conduct—particularly conduct in the sensitive area covered by the First Amendment—must be predicated on a set of definite rules, not on the opinions of police officers." See *Dellums*, 566 F.2d at 200 (reproduction of *Nicholson* decision) (emphasis added).

order to gain access to what they perceive to be the most effective forum in which to express their convictions.²⁸ There is, so far, no constitutional principle setting out hybrid rules of scrutiny for "trivial" viewpoint regulation of free speech.

Given the passage of a half century since § 22-1115 was enacted, and the dramatic developments in our first amendment jurisprudence during these five decades, I hope that Congress will revisit this statute and show it has the constitutional sense to do what this court will not.

I respectfully dissent.



**FEDERAL TRADE
COMMISSION, Appellant,**

v.

PPG INDUSTRIES, INC., et al.,

FEDERAL TRADE COMMISSION

v.

**PPG INDUSTRIES, INC., et
al., Appellants.**

Nos. 86-5206, 86-5269.

United States Court of Appeals,
District of Columbia Circuit.

Argued June 9, 1986.

Decided Aug. 22, 1986.

Federal Trade Commission brought action contesting merger as violation of Clayton Act. The United States District Court for the District of Columbia, Thomas Denfield Jackson, J., 628 F.Supp. 881, denied

28. Under the majority's "trivial question doctrine" many of the Supreme Court's important first amendment decisions might never have been delivered since there were undoubtedly alternative forums for communication and the thinking processes of the community were not noticeably mutilated. See, e.g., *United States v.*

preliminary injunction barring the acquisition but entered hold separate order pending completion of Commission's final decision on legality of the acquisition. Commission appealed. The Court of Appeals, Bork, Circuit Judge, held that: (1) evidence supported district court's conclusion that the proposed acquisition would be sufficiently inimical to competition to forbid the acquisition under the Clayton Act, but (2) district court should have entered preliminary injunction rather than hold separate order.

Affirmed in part, reversed in part, and remanded.

1. Monopolies ⇐24(4)

Evidence supported district court's conclusion that proposed acquisition of closely held corporation, which was world's largest manufacturer of acrylic aircraft transparencies, by publicly held manufacturer, which was world's largest producer of glass aircraft transparencies and was substantial supplier of acrylic and mixed glass/acrylic transparencies, would be sufficiently inimical to competition to forbid the acquisition under the Clayton Act, which bars merger if its effect may be substantially to lessen competition, or to tend to create a monopoly. Clayton Act, § 7, 15 U.S.C.A. § 18.

2. Monopolies ⇐24(7)

District court should have issued preliminary injunction against acquisition of closely held corporation, which was world's largest manufacturer of acrylic aircraft transparencies, by publicly held manufacturer, which was world's largest producer of glass aircraft transparencies and was substantial supplier of acrylic and mixed glass/acrylic transparencies, rather than entering hold separate order pending completion of final decision of Federal Trade

Grace, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (invalidating restrictions within vicinity of Supreme Court building); *Police Department v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (invalidating content-based restriction within 150 feet of school).

F.T.C. v. PPG INDUSTRIES, INC.

Cite as 798 F.2d 1500 (D.C. Cir. 1986)

Commission on legality of the acquisition, in view of district court's conclusion, supported by the evidence, that Federal Trade Commission established strong likelihood of success on merits of its claim that the acquisition would violate section 7 of the Clayton Act, which bars merger if its effect may be substantially to lessen competition or to tend to create a monopoly. Clayton Act, § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act, §§ 5, 13(b), 15 U.S.C.A. §§ 45, 53(b).

Appeal from the United States District Court for the District of Columbia (Civil Action No. 86-00022).

Steven A. Newborn, Atty., F.T.C., with whom Marcy J.K. Tiffany, Acting Gen. Counsel, Ernest J. Isenstadt, Asst. Gen. Counsel and Jerold D. Cummins, Deputy Asst. Gen. Counsel, F.T.C., were on the brief for F.T.C., appellant in No. 86-5206 and cross-appellee in No. 86-5269, Washington, D.C.

John V. Lacci, Atty., F.T.C., Washington, D.C., also entered an appearance for F.T.C.

Bertram Kantor, New York City, of the Bar of the Supreme Court of the State of N.Y., Second Dept. Appellate Div., pro hac vice by special leave of Court and Carla A. Hills, Washington, D.C., with whom Michael H. Byowitz, New York City, Irwin Goldbloom and Peter L. Winik, Washington, D.C., were on the brief for PPG Industries, et al., appellees in No. 86-5206 and cross-appellants in No. 86-5269.

Before WALD, Chief Judge, BORK and STARR, Circuit Judges.

Opinion for the Court filed by Circuit Judge BORK.

1. The district court initially entered a preliminary injunction "subject to a condition subsequent, namely, the entry of an appropriate hold separate order." *PPG Industries, Inc.*, 628 F.Supp. at 883. Following additional hearings the district court issued an order vacating the preliminary injunction and imposing a hold separate arrangement on appellees. The district court stayed the effect of its order, however, pending this court's consideration of the Commission's motion for injunction pending appeal. See *FTC v. PPG Industries, Inc.*, Civ.Action No.

BORK, Circuit Judge:

This is an appeal by the Federal Trade Commission of the district court's order denying its request for a preliminary injunction barring the acquisition of Swedlow, Inc. by PPG Industries, Inc. The court instead entered a hold separate order pending completion of the Commission's final decision on the legality of the acquisition. See *FTC v. PPG Industries, Inc.*, 628 F.Supp. 881 (D.D.C.1986).¹ The Commission maintains that this court's decision in *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072 (D.C.Cir.1981), compels entry of a preliminary injunction rather than a hold separate order when, as in the present case, the district court finds that the Commission has demonstrated a substantial likelihood of success on the merits. In their cross-appeal, PPG Industries, Inc. and Swedlow, Inc. also seek reversal of the district court's hold separate order but on the ground that the Commission, having demonstrated no likelihood of success on the merits, was entitled to no preliminary relief.

The underlying administrative proceeding is brought by the Commission to establish that the proposed acquisition would violate section 7 of the Clayton Act, 15 U.S.C. § 18 (1982), which bars a merger if its effect "may be substantially to lessen competition, or to tend to create a monopoly."² The Commission sought a preliminary injunction in the district court pursuant to section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) (1982), which permits the issuance of such an injunction upon the court's determination, after "weighing the equities and considering

86-0022 (Apr. 3, 1986). On May 7, 1986, this court granted the Commission's motion for injunction and appellees' motion for expedited consideration of the appeal.

2. The challenge is also based on § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982), which, for present purposes, may be assumed to be merely repetitive of § 7 of the Clayton Act.