

12-1-1993

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Recommended Citation

Andrea Strong, *Price v. INS* - "Liberty and Justice for Some", 19 Brook. J. Int'l L. 677 (1993).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol19/iss2/7>

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PRICE v. INS— **“LIBERTY AND JUSTICE FOR SOME”**

I. INTRODUCTION

The shores of this country once provided refuge to those suffocated by oppressive governments abroad. Immigrants were drawn here in hopes of living a life protected by the freedoms of the Bill of Rights. In the face of the Ninth Circuit decision in *Price v. INS*,¹ however, refuge for permanent resident aliens may be nothing more than an illusion.

In *Price*, the Court of Appeals for the Ninth Circuit widened the divide between the constitutional protections afforded permanent resident aliens and those provided to United States citizens. In holding that the appellant's First Amendment right to freedom of association was not violated² by questions on his naturalization application, which inquired into any and all associations he may have joined in or outside the United States at any period of his life,³ the court made a mockery of the constitutional freedoms allegedly afforded to all persons within the territorial jurisdiction of the United States.⁴

Specifically, the court applied only limited judicial review to Mr. Price's First Amendment challenge, instead of the strict scrutiny that cases involving preferred fundamental rights

1. 962 F.2d 836 (9th Cir. 1992).

2. *Id.* at 837.

3. *Id.* at 838 n.1.

4. See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (Black, J., dissenting); *Bridges v. Wixon*, 326 U.S. 135 (1945); *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989), *aff'd in part, rev'd in part, vacated, and remanded sub nom.*, 970 F.2d 501 (9th Cir. 1991); *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501 (9th Cir. 1992), *modifying* 940 F.2d 445 (9th Cir. 1991).

deserve.⁵ Citing to *Kleindienst v. Mandel*,⁶ an alien exclusion case, the *Price* court required only a "facially legitimate and bona fide" reason for the executive action, the exclusion of a foreign national, to pass constitutional muster.⁷ According to the majority, this deferential review was justified by the plenary powers and political question doctrines which propose that the courts refrain from substantive review in areas specifically within the powers of the executive branch, such as foreign affairs and political questions.⁸

The Ninth Circuit's decision in *Price* is fundamentally flawed and must be overturned. This Comment will first argue that sections 1424(a) and 1445 of the Immigration and Nationality Act⁹ are unconstitutional as applied in *Price*, as the inquiries authorized by the attorney general are beyond the scope of the statutes. Furthermore, these statutes falter on due process vagueness grounds, as they accord the attorney general the power of discretionary enforcement and are, therefore, void on their face.

Second, this Comment will argue that the plenary powers and political question doctrines, which have traditionally been employed by courts to avoid scrutinizing constitutional challenges by resident aliens, are unjustifiable abdications of judicial responsibility as applied to this case. These doctrines can no longer be permitted to shield courts from their role as guardians of the people's liberty.

5. In footnote four of *United States v. Carolene Prod.*, Justice Stone first spoke of the heightened degree of scrutiny to be applied to First Amendment rights, as opposed to the lesser degree of protection to be afforded economic rights. Specifically, he suggested a more exacting judicial scrutiny of legislation that "appears on its face to be within a specific prohibition of the Constitution such as those of the first ten amendments." 304 U.S. 144, 151-52 n.4 (1938). Furthermore, in *Palko v. Connecticut*, Justice Cardozo also characterized First Amendment rights as fundamental liberties, in part, because our history, political and legal, recognizes that freedom of thought and speech are "the indispensable condition, of nearly every form of freedom." 302 U.S. 319, 327 (1937). See also *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

6. 408 U.S. 753 (1972).

7. *Price*, 962 F.2d at 842 (quoting *Kleindienst*, 408 U.S. at 769).

8. *Id.* at 842.

9. 8 U.S.C. §§ 1424, 1445 (Supp. I 1988).

Third, this Comment will further contend that the limited standard of judicial review borrowed from the Supreme Court's decision in *Kleindienst*¹⁰ was erroneously applied to Mr. Price's First Amendment challenge. Courts have traditionally held that resident aliens are entitled to the same level of First Amendment protection as citizens of the United States.¹¹ Thus, the proper standard of review to be applied in the instant case should be the same as that applied to challenges made by citizens of the United States—strict scrutiny. Specifically, in order for a First Amendment challenge to be denied, the government must show a substantial relationship between the information sought and an overriding and compelling government interest.¹² Applying strict scrutiny to the facts of this case, this Comment will conclude that Mr. Price's First Amendment challenge should succeed, as the government did not choose means narrowly tailored enough to further its interest in screening applicants for citizenship.

Finally, this Comment will focus on future implications of the decisions denying resident aliens the appropriate level of constitutional protection. The Ninth Circuit's decision calls into question the rights allegedly afforded resident aliens. Does this case signal a change in the attitudes of some courts towards people not lucky enough to call themselves citizens? Does this decision mark the beginning of a slippery slope, at the end of which lies a desert barren of any constitutional freedoms? The fact that these issues are even in question highlights the grave error made by the Ninth Circuit in affirming *Price*.

10. 408 U.S. 753.

11. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945); *Bridges v. California*, 314 U.S. 252 (1941); *Parcham v. INS*, 769 F.2d 1001, 1004 (4th Cir. 1985); *Massignani v. INS*, 438 F.2d 1276, 1278 (7th Cir. 1971).

12. See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963).

II. BACKGROUND

A. *Freedom of Association under the First Amendment*

The right to associate freely, which is undisputably afforded to United States citizens, is derived from the constitutional protections of the First and Fourteenth Amendments.¹³ As stated by Justice Harlan: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."¹⁴ The right of peaceable assembly was considered by the framers of the United States Constitution to lie at the foundation of a government based on the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty.¹⁵ This right has been considered a priceless means of preserving other individual liberties as well.¹⁶ Thus, the First Amendment serves as a limitation on the government's ability to inquire into the beliefs and associations of its citizens.¹⁷

Courts have long recognized that an individual's freedom to speak and to petition the government for the redress of grievances cannot be adequately protected unless a corresponding freedom to participate in group effort toward those ends is also guaranteed.¹⁸ Without the right to associate, a free society cannot exist. What is the use of a right to free speech if those ideas cannot be spread to others? Associational freedoms are a necessary means to any meaningful notion of free speech. Self-government and a democratic state, the ideals of the fram-

13. See *NAACP v. Alabama*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *NAACP v. Button*, 371 U.S. 415 (1963).

14. *NAACP v. Alabama*, 357 U.S. at 460.

15. See *Bates*, 361 U.S. at 522-23.

16. See *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

17. See *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971).

18. See *Roberts*, 468 U.S. at 622.

ers of the Constitution, cannot materialize without freedom of association.

Thus, the highly prized First Amendment right of association is considered fundamental and has been accorded a corresponding high level of protection to give it the breathing space necessary to survive.¹⁹ In keeping with the notion that such freedom is the foundation of a free society, our courts have not looked kindly upon state action which infringes upon it. Strict scrutiny is the standard of review typically employed in determining whether a violation of one's associational right has occurred. Under this standard, if the government is to survive a First Amendment challenge, it must demonstrate a compelling interest which is pursued by the least restrictive means necessary to the fulfillment of its objective.²⁰

Included in those activities deemed protected under the right to associate freely is the right to keep membership lists to various organizations confidential. For example, in *NAACP v. Alabama*,²¹ the Supreme Court held that the State of Alabama could not constitutionally require the NAACP to produce records including lists of its members. In holding the state action to be in violation of the First Amendment, the Court emphasized that compelled disclosure of one's affiliation with groups, even those engaged in subversive advocacy, constituted an effective restraint on freedom of association.²²

The Supreme Court has also held that inquiries into associational activities are an unconstitutional infringement on First Amendment freedoms. In *Baird v. State Bar of Arizona*,²³ the petitioner refused to answer a question on a state

19. See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963).

20. *Id.* at 546; *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

21. 357 U.S. 449 (1958).

22. *Id.* at 462. The issue of membership disclosure was also addressed in *Bates*, where the Supreme Court affirmed its decision in *NAACP v. Alabama* and found that a municipal ordinance requiring disclosure of membership lists of local branches of the NAACP was an unconstitutional infringement on the associational rights of those members. 361 U.S. at 523.

23. 401 U.S. 1 (1971).

bar exam which asked her to state whether she had ever been a member of the Communist Party or any organization that advocates the overthrow of the United States government by force or violence.²⁴ On this basis, her application for admission to the bar was denied.²⁵ The Supreme Court concluded that the First Amendment protected the petitioner from being subjected to a question which was so potentially fatal to her associational liberty.²⁶

Thus, courts of this nation are highly protective of citizens' fundamental right to associate. Even if the state can show a compelling or legitimate interest, the state still faces the very heavy burden of proving that the means chosen to effectuate this goal were closely tailored to its achievement.²⁷ Means which are broader than necessary to achieve the end may have a chilling effect on associational rights. Because of a statute's broad scope, the challenger may refrain from protected First Amendment activity in fear that such action will be swept into the unprotected category. Thus, such a broad statute would effectively "chill" the challenger's associational rights and, as such, would be stricken as unconstitutional.²⁸

B. The Immigration and Nationality Act

Article I, section 8, clause 4 of the United States Constitution recognizes that Congress shall have the power "to establish [a] uniform rule of naturalization."²⁹ Pursuant to this authority, Congress passed the Immigration and Nationality Act (the Act)³⁰ in 1952 and recently amended it in 1990. The Act, Title Eight of the United States Code, was passed in recogni-

24. *Id.* at 4-5.

25. *Id.* at 5.

26. *Id.*

27. See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963).

28. *Id.* at 556.

29. U.S. CONST. art. I, § 8, cl. 4.

30. 8 U.S.C. §§ 1-1427 (1988).

tion of the plenary power of the executive branch to either prohibit or regulate immigration of aliens.³¹

The legislative history of the Act recognizes that certain classes of aliens may be denied admission to the United States. The list of characteristics which may bar an alien from this country includes physical, mental, and moral defects, membership in certain subversive organizations, and advocacy of certain subversive doctrines.³²

The Act was amended in 1990, incorporating changes in political attitudes since the 1950s. As amended, the Act prevents the exclusion of aliens on the basis of their past, current, or expected beliefs. It further prohibits the exclusion of aliens on the basis of statements or associations which would be lawful within the United States, unless it is determined by the Secretary of State that the admissions would pose a threat to a United States foreign policy interest.³³ Furthermore, it was the intent of the drafting conference committee that this authority be used sparingly and that it not be invoked merely in the event an alien might express some disenchantment with the United States government.³⁴ The conference committee also noted that exclusion on the basis of aliens' beliefs or associations could only occur in limited circumstances, such as where a compelling foreign policy interest was implicated.³⁵

In order to be naturalized under the Act, a petitioner must be a lawfully admitted, permanent resident alien³⁶ who has resided in the United States for at least five years prior to the filing of the naturalization petition and has been physically present for at least half of that time.³⁷ She must also have been a person "of good moral character, attached to the princi-

31. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 2 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1653.

32. *Id.* at 1703.

33. H.R. CONF. REP. NO. 101-955, 101st Cong., 2d Sess. 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6794.

34. *Id.*

35. *Id.*

36. Immigration Nationality Act, 8 U.S.C. § 1429 (1952 & Supp. I 1988).

37. *Id.* § 1427(a)(1)-(2).

ples of the Constitution of the United States, and well disposed to the good order and happiness of the United States" for five years before filing the petition and be so up to the time of admission to citizenship.³⁸

Finally, under one of the sections at issue in *Price*, section 1424(a)(1), a petitioner may not be a member of any of the organizations the statute specifically proscribes.³⁹ The section prohibits the naturalization of one "who advocates or teaches, or who is a member of or affiliated with any organization that advocates or teaches, opposition to all organized government."⁴⁰ Subsection 2 of this section prohibits the naturalization of anyone:

who is a member of or affiliated with (A) the Communist Party of the United States; (B) any other totalitarian party of the United States; (C) the Communist Political Association; (D) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state.⁴¹

38. *Id.* § 1427(a)(3).

39. *Id.* § 1424(a)(1).

40. *Id.*

41. Subsection 2 continues to prohibit affiliation with the following:

(E) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; (F) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt; . . . unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization (and not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist-front organization.

The following subsections prohibit the naturalization of one

(3) who, although not within any of the other provisions of this section, advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who is a member of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such

Section 1443(a) of the Act, however, limits the scope of the attorney general's questioning to:

inquiry concerning the applicant's residence, physical presence in the United States, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, ability to read, write, and speak English, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States.⁴²

organization or paid for by the funds of such organization; or

(4) who advocates or teaches or who is a member of or affiliated with any organization that advocates or teaches (A) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; or (B) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers . . . of the Government of the United States or of any other organized government because of his or their official character; or (C) the unlawful damage, injury, or destruction of property; or (D) sabotage; or

(5) who writes or publishes or causes to be written or published, or who knowingly circulates, distributes, prints, or displays, or knowingly causes to be circulated, distributed, printed, published, or displayed, or who knowingly has in his possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating (A) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (B) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers . . . of the Government of the United States or of any other organized government because of his or their official character; or (C) the unlawful damage, injury, or destruction of property; or (D) sabotage; or (E) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship; or

(6) who is a member of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subparagraph (5).

Id. §§ 1424(a)(2)-(6).

42. *Id.* § 1443(a).

In furtherance of the objective of obtaining information, the attorney general may designate Immigration and Naturalization Service (INS) employees to take testimony concerning any matter touching, or in any way affecting the admissibility of a petitioner for naturalization.⁴³ In addition, section 1445(a) permits the attorney general to make inquiries on a naturalization application which in her opinion may be material to naturalization and which are required to be proved under the Act.⁴⁴ Thus, the attorney general may make the inquiries necessary to fulfill the statutory requirements for naturalization.

C. Constitutional Protections Historically Afforded Resident Aliens

While First Amendment protections have not been extended to those nonresident aliens seeking to enter the United States,⁴⁵ courts have consistently held that resident aliens are entitled to its protections.⁴⁶ However, the extent of First Amendment protection afforded to lawful resident aliens is an issue which has been extensively debated by the courts.

The examination of this issue began in *Fong Yue Ting v. United States*,⁴⁷ in which the Supreme Court upheld the deportation of three Chinese laborers, lawfully admitted to the United States as resident aliens, based on their failure to obtain certificates of residence from Internal Revenue collectors, as required by an 1892 law.⁴⁸ In its decision, the Court declared that the power to exclude and deport aliens flows from the inherent power of a sovereign nation to conduct international relations.⁴⁹ The Court explained that power over aliens

43. *Id.* § 1446(b).

44. *Id.* § 1445(a).

45. *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

46. *See supra* note 11.

47. 149 U.S. 698 (1893).

48. *Id.* at 699-703, 729.

49. *Id.* at 704-07, 711-13.

is vested in the political branches of the government which may exercise this power in an absolute, unqualified manner.⁵⁰ Although the Court admitted that Congress's activities were subject to constitutional limitations and, thus, judicial review, the Court failed to significantly scrutinize the 1892 statute.⁵¹

However, three dissenters contested the majority's deferential approach.⁵² Justice Brewer noted that despite the majority's holding, the Constitution does not accord Congress uncircumscribed power over deportation.⁵³ He also recognized that many of the provisions of the Bill of Rights do not distinguish between citizens and other persons and, thus, concluded that these provisions apply to all persons within the territorial jurisdiction of the United States.⁵⁴

The deferential standard of review conceived by the *Fong Yue Ting* majority was affirmed forty years later in *Bridges v. Wixon*.⁵⁵ There, the Court considered a resident alien's First Amendment challenge to a statute providing for the deportation of aliens who were members of, or affiliated with, any organization believing in the forceful overthrow of the United States.⁵⁶ The majority concluded that Mr. Bridges' conduct and speech did not rise to the level of that proscribed by the statute, reasoning that the statute was not intended to equate affiliation with casual or innocent association.⁵⁷ Thus, while it acknowledged that First Amendment rights were afforded resident aliens, the Court declined to explore the level of First Amendment protection that should be afforded these aliens

50. *Id.* at 705-07.

51. *Id.* at 711 ("[T]he question now before the court is whether . . . Congress has exercised this right . . . consistent with the Constitution."); *id.* at 713 ("The power to exclude or to expel aliens . . . is to be regulated by treaty or by act of Congress . . . [subject to intervention by] the judicial department . . .").

52. *See id.* at 732, 734 (Brewer, J., dissenting). Justices Brewer, Fuller, and Field dissented, *see id.* at 732-62.

53. *Id.* at 738 (Brewer, J., dissenting).

54. *Id.* at 739 (Brewer, J., dissenting). Justices Field and Fuller expressed similar views. *Id.* at 749 (Fuller, J., dissenting); *id.* at 762 (Field, C.J., dissenting).

55. 326 U.S. 135 (1945).

56. *Id.* at 138.

57. *Id.* at 142-43, 147-49.

and, instead, chose to proceed on safer statutory interpretation grounds.

The concurring opinion, however, written by Justice Murphy, exhibited a firm commitment to the protection of the freedoms of speech and association for resident aliens.⁵⁸ He distinguished between resident aliens lawfully within the boundaries of the United States and those seeking entrance, noting that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."⁵⁹ According to Justice Murphy, the rights afforded resident aliens include those guaranteed by the First and Fifth Amendments and the Due Process Clause of the Fourteenth Amendment.⁶⁰ This conclusion rested on the absence of distinction between citizens and resident aliens in the text of these amendments.⁶¹ Thus, he concluded that these amendments extend their privileges to all persons, regardless of nationality, and "guard against infringement on those rights by federal or state authority."⁶² Perhaps most importantly, Justice Murphy further concluded that the plenary power of Congress in the area of immigration and naturalization should not be permitted to eclipse the rights protected by the Bill of Rights, as any other action would leave the protections of the Constitution applicable to only a select few.⁶³

A decade later in *Johnson v. Eisentrager*,⁶⁴ the Court expressed views similar to those of Justice Murphy in *Bridges*. Despite the Court's determination that German nationals, convicted of having engaged in military activity in China after

58. *Id.* at 160 (Murphy, J., concurring).

59. *Id.* at 161 (Murphy, J., concurring).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* In conclusion, Justice Murphy looked to the future ramifications of decisions involving the protections of resident aliens: "Our concern in this case does not halt with the fate of Henry Bridges The liberties of 3,500,000 other aliens in this nation are also at stake The Bill of Rights belongs to them as well as to all citizens." *Id.* at 165-66 (Murphy, J., concurring).

64. 339 U.S. 763 (1950).

the surrender of Germany, had no right to a writ of habeas corpus to test the legality of their detention, the Court nevertheless recognized that resident aliens are afforded an ascending scale of rights which increase with the alien's commitment to this country.⁶⁵

In *Harisiades v. Shaughnessy*,⁶⁶ decided less than a decade after *Bridges*, the Court reaffirmed Congress's inherent, plenary authority to expel and deport resident aliens and rejected the petitioners' arguments that the First Amendment prevented their deportation for membership in the Communist Party.⁶⁷ However, what is significant about the majority opinion is not so much its conclusion, but the reasoning behind it. The Court determined that under the prevailing First Amendment standard, the clear and present danger test,⁶⁸ the petitioners' speech and conduct could be proscribed; therefore, their deportations were consistent with the First Amendment.⁶⁹ Thus, while the Court did deport the aliens, which seems consistent with the *Fong Yue Ting* line of cases, the Court strayed from this precedent in one significant way. The Court applied the same standard used to judge the First Amendment activities of citizens to resident aliens and, thus, signaled a slight transition toward an expansion of the liberties afforded resident aliens.

However, according to the dissent, the majority's application of the clear and present danger test was not enough to bring this deportation within the realm of constitutionality.

65. The Court stated the following:

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in this country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes a preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Id. at 770-71.

66. 342 U.S. 580 (1952).

67. *Id.* at 592.

68. *Dennis v. United States*, 341 U.S. 494, 503 (1951).

69. *Harisiades*, 342 U.S. at 592.

Justices Black and Douglas reiterated the well settled principle that resident aliens are persons within the meaning of the Fifth and Fourteenth Amendments and are provided the protections of the First Amendment.⁷⁰ Noting that Congress's power to exclude, admit, or deport aliens is implied in the Constitution and that the right to life and liberty is expressly provided, Justices Douglas and Black questioned why implied powers were given priority over express rights.⁷¹

Justice Black had another opportunity to dissent on this issue in *Carlson v. Landon*.⁷² Here, the majority denied the writ of habeas corpus sought by four resident aliens arrested under the Internal Securities Act for being members of the Communist Party.⁷³ Blind to any First Amendment violation, the Court reasoned that as long as aliens fail to become naturalized, Congress's plenary power over immigration and naturalization permits their expulsion.⁷⁴ In his dissent, Justice Black spoke poignantly of the importance of the First Amendment, reasoning that freedom of speech is necessary for all or may eventually be available for none.⁷⁵ However, Justice Black's beliefs had not yet been reflected in a majority opinion.

The struggle to determine what level of First Amendment protections should be afforded resident aliens continued in *Kleindienst v. Mandel*.⁷⁶ *Kleindienst* was decided in 1972 and to date is the last Supreme Court case to address the First Amendment rights of aliens. The case involved a Belgian citizen and scholar who sought a visa to enter the United States and speak at a university on the topic of Marxist political theo-

70. *Id.* at 598-99 (Douglas & Black, JJ., dissenting). See also *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953); *Bridges v. Wixon*, 326 U.S. 135, 146 (1945); *Bridges v. California*, 314 U.S. 252 (1941); *Parcham v. INS*, 769 F.2d 1001, 1004-05 (4th Cir. 1985); *Massignani v. INS*, 438 F.2d 1276, 1278 (7th Cir. 1971).

71. *Harisiades*, 342 U.S. at 579-80 (Douglas & Black, JJ., dissenting).

72. 342 U.S. 524 (1952).

73. *Id.*

74. *Id.* at 534.

75. *Id.* at 555 (Black, J., dissenting).

76. 408 U.S. 753 (1972).

ry.⁷⁷ The attorney general denied his visa on the grounds that Mr. Mandel advocated the doctrines of world communism and had violated the terms of previous visas he had been granted.⁷⁸ Mr. Mandel and the United States citizens who had invited him to speak brought a lawsuit to enjoin the attorney general from denying Mr. Mandel's entry. They claimed that the denial of his visa was a violation of the citizens' First Amendment rights to hear, speak, and debate with Mr. Mandel in person and otherwise receive information.⁷⁹

As a preliminary matter, the Court held that since Mr. Mandel was a nonresident alien seeking entry into the United States, he was not entitled to the protections of the Constitution.⁸⁰ With regard to the citizens' challenge, the Court concluded that the fact that First Amendment rights were implicated did not render its decision dispositive.⁸¹ Rather, the Court once again pulled the plenary powers doctrine out of the closet, dusted it off, and used it to justify a lower First Amendment standard in this case because the admission of aliens was at issue. The Court held that:

[W]hen the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.⁸²

This standard of limited judicial review, under which only a bona fide and facially legitimate reason is sufficient to justify an infringement on First Amendment rights, was highly criticized by Justices Douglas, Marshall, and Brennan in their respective dissents.⁸³ They questioned the judicial basis and the

77. *Id.*

78. *Id.* at 756-59.

79. *Id.* at 760.

80. *Id.* at 762.

81. *Id.* at 765.

82. *Id.* at 770. In addition, the Court cited no case law to support this novel standard.

83. *Id.* at 770 (Douglas, J., dissenting); *id.* at 774 (Marshall & Brennan, JJ.,

origins of the low "facially legitimate and bona fide reason" standard employed by the majority.⁸⁴

Additionally, the dissenters disagreed with the majority's interpretation of the plenary powers doctrine. While conceding Congress's broad powers in the area of immigration and naturalization, the dissenting justices emphasized that deference to the legislative or the executive branches could not be tolerated when individual freedoms were at stake.⁸⁵

More recently, in 1989 in *American-Arab Anti-Discrimination Comm. v. Meese (American-Arab)*,⁸⁶ a federal district court followed the rationale of the *Kleindienst* dissents and provided resident aliens with the same level of First Amendment protection guaranteed to United States citizens.⁸⁷ In *American-Arab*, the INS commenced deportation proceedings against members of an organization advocating the economic doctrines of world communism.⁸⁸ The court dismissed the deportation actions and held that "aliens who are legally within the United States are protected by the First Amendment and that their First Amendment rights are not limited by the government's plenary immigration power."⁸⁹

The court based its holding on several principles which have been long recognized in cases involving resident aliens' constitutional challenges: first, aliens within the United States should enjoy the protections of the First Amendment of the Constitution;⁹⁰ and second, the plenary power of Congress to

dissenting).

84. Justices Brennan and Marshall attacked the standard applied by the majority: "It is established constitutional doctrine, after all, that government may restrict First Amendment rights only if the restriction is necessary to further a compelling governmental interest." *Id.* at 777. They also questioned the judicial basis for the standard. *Id.* at 782.

85. *Id.*

86. 714 F. Supp. 1060 (C.D. Cal. 1989).

87. *Id.* at 1082.

88. *Id.* at 1063.

89. *Id.* at 1084.

90. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953); *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1222 (9th Cir. 1988); *Parcham v. INS*, 769 F.2d 1001, 1004-05 (4th Cir. 1985); *Massignani v. INS*, 438 F.2d 1276, 1278 (7th Cir. 1971).

expel aliens must be exercised consistently with the Constitution.⁹¹ The court gleaned the latter principle from the Supreme Court's analysis in *Harisiades v. Shaughnessy*.⁹² As mentioned earlier,⁹³ although the Court in *Harisiades* found that the First Amendment did not prevent the resident alien's deportation, it applied the same First Amendment standard to aliens' claims as to United States citizens' First Amendment challenges—namely, the clear and present danger test.⁹⁴ The *American-Arab* court apparently read this case as a mandate to apply the same First Amendment standard to resident aliens as to United States citizens. In applying this standard, the court found that the deportation proceedings violated the First Amendment rights of the petitioners.⁹⁵ Thus, the *American-Arab* court acknowledged not only that resident aliens are protected by the First Amendment, but also that they are entitled to the same level of First Amendment protection as United States citizens, despite the plenary powers of Congress.

Two guiding principles emerge from this voluminous case law. First, while the power of Congress has been characterized as plenary in the area of immigration and naturalization, this implied power is subject to judicial review under the "paramount law of the Constitution."⁹⁶ Second, resident aliens are entitled to the protections of the Bill of Rights, including those guaranteed by the First Amendment.⁹⁷ However, the level of judicial scrutiny that should be applied to a resident alien's

91. *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1075 (C.D. Cal. 1989).

92. 342 U.S. 580 (1952). See also *supra* notes 45-54 and accompanying text.

93. See *supra* notes 66-71 and accompanying text.

94. *American-Arab*, 714 F. Supp. at 1077.

95. The *American-Arab* court used the contemporary First Amendment formula of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in coming to their conclusion. 714 F. Supp. at 1082 n.18. The *Brandenburg* Court held that consistent with the First Amendment, the government may only prohibit advocacy "directed to inciting or prohibiting imminent lawless action . . . and likely to produce such lawless action." 395 U.S. at 447.

96. *Carlson v. Landon*, 342 U.S. 524, 537 (1952).

97. See *supra* note 11.

First Amendment challenge is ambiguous in light of the combination of these two principles. As the law stands today, courts have used the plenary powers doctrine as a means of excusing themselves from any meaningful review of the alien's challenges where the First Amendment is at issue, despite the principle that the plenary powers doctrine has no place in challenges to fundamental rights.

D. Price v. INS: Facts and Procedure

John Eric Price, a citizen of the United Kingdom, was granted resident alien status in 1960.⁹⁸ Since then he has worked and resided in the United States.⁹⁹ Twenty-four years later, on April 24, 1984, Mr. Price petitioned for naturalization.¹⁰⁰ On his application, he responded in the negative to question 19 which asked whether he was or had ever been a member of, or associated with, the Communist Party, had ever knowingly aided or supported it, or had ever advocated, taught, believed in, or knowingly supported or furthered the interests of communism.¹⁰¹ Additionally, during the course of a preliminary examination Mr. Price swore:

I am not and have not been, within the meaning of the Immigration and Nationality Act, for a period of at least 10 years immediately preceding the date of this petition, a member of or affiliated with any organization proscribed by such Act, or any section, subsidiary, branch, affiliate or subdivision thereof, nor have I during such period believed in, advocated, engaged in, or performed any of the acts or activities prohibited by such Act.¹⁰²

He refused, however, to answer question 18¹⁰³ of the applica-

98. *Price v. INS*, 962 F.2d. 836, 837 (9th Cir. 1992).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Among the questions Mr. Price refused to answer were:

Are you now, or have you ever been, a member, or are you now affiliated, or have you ever been affiliated with any organization, associa-

tion on the grounds that it was too broad and violated his constitutional rights, specifically that this question chilled his First Amendment right to freedom of association.¹⁰⁴ Question 18 reads: "List your present and past membership in or affiliation with every organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place, and your foreign military service."¹⁰⁵ In the space provided for an answer to this question, Mr. Price wrote, "Please see attached statement." The statement was a detailed argument contending that question 18 violated his First Amendment right of association.¹⁰⁶

Mr. Price was given a copy of section 313 of the Act,¹⁰⁷ which describes prohibited organizations and activities, participation in which will bar an alien from being naturalized. After reviewing this section, he swore that he was not and had never been a member of or affiliated with any organization mentioned in that section and reaffirmed the averment he made at the first preliminary examination.¹⁰⁸

On the basis of his refusal to answer question 18, the district court denied Mr. Price's petition for naturalization as

tion, fund, foundation, party, club, society or similar group in the United States or in any other country or place?

Are you now or have you ever been in the United States, a member of any organization in the United States?

Have you ever been a member of any organizations outside the United States?

Have you ever been a member of a political organization in the United States?

Were you ever a member, outside the United States, of any organization that . . . is or was political?

Are you now or have you ever been a member of any association, fund, foundation, party, club, society or any similar groups?

Have you ever been affiliated with any organization, political or nonpolitical, in the United States?

Id. at 838 n.1.

104. *Id.* at 838.

105. *Id.* at 837.

106. *Id.* at 837-38.

107. *See supra* note 33.

108. *Price*, 962 F.2d at 838-39.

recommended by the INS.¹⁰⁹ On appeal, the Ninth Circuit Court of Appeals affirmed.¹¹⁰ Mr. Price was then granted a rehearing, in which the court affirmed its prior decision.¹¹¹ First, the court noted that Congress's power in the area of immigration and naturalization is plenary.¹¹² Second, the court stressed that the power to admit or expel aliens is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."¹¹³ Thus, the majority concluded that the same "reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."¹¹⁴

With the support of the plenary powers and political question doctrines, the Ninth Circuit Court of Appeals applied the limited judicial scrutiny standard set forth in *Kleindienst v. Mandel*,¹¹⁵ which required only a facially legitimate and bona fide reason to justify encroachments on First Amendment freedoms.¹¹⁶ The court held that question 18 was appropriate because the right to naturalize is not one possessed by aliens "unless all statutory requirements are complied with."¹¹⁷ The court continued:

Because a petitioner might be mistaken about whether an organization is of the type prohibited by section 1424(a) and because Question 18 could reasonably reveal information

109. *Id.* at 839.

110. *Price v. INS*, 941 F.2d 878 (9th Cir. 1991).

111. *Price*, 962 F.2d 836 (9th Cir. 1992).

112. *Id.* at 841.

113. *Id.* at 841 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792, 796 (1977)).

114. *Id.*

115. 408 U.S. 753 (1972). In *Kleindienst*, the Supreme Court held that when the Executive exercises this "power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests . . ." *Id.* at 770.

116. *Id.*

117. *Price*, 962 F.2d at 842-43. See also *Fedorenko v. United States*, 449 U.S. 490, 506 (1981).

relevant to other requirements for naturalization, the Attorney General's decision that Question 18 is relevant to determining qualification for naturalization is facially legitimate and bona fide.¹¹⁸

In his dissent, Judge Noonan criticized the majority's use of the *Kleindienst* standard.¹¹⁹ While he agreed that the power of Congress to set standards for naturalization is broad, he emphasized that it must fall within the parameters of the Constitution.¹²⁰ He also noted the critical factual distinctions between the two cases, namely that Mr. Mandel was seeking to enter the United States, while Mr. Price was a permanent resident alien who has "imbibed the air of freedom which permeates our culture."¹²¹ Judge Noonan applied the traditional First Amendment analysis, strict scrutiny, to Mr. Price's challenge and found the attorney general's inquiry to be unconstitutional. He suggested that as construed by the majority, the statute authorizing such questioning permits the INS to probe further than warranted by any governmental interest.¹²² According to Judge Noonan, a narrowly tailored question could be asked of the petitioner without infringing on his First Amendment rights.¹²³ However, since question 18 was not limited to specific association and was not directly responsive, it was not constitutionally permissible.¹²⁴ Thus, Judge Noonan found that the statute was unconstitutional, as it was without a rational purpose and infringed severely on the right to free association.¹²⁵

118. *Price*, 962 F.2d at 843-44.

119. *Id.* at 844 (Noonan, J., dissenting).

120. *Id.*

121. *Id.*

122. *Id.* at 844-45.

123. *Id.* at 845.

124. *Id.*

125. *Id.*

III. ANALYSIS

A. *Misapplication of 8 U.S.C. Sections 1424(a) and 1445(a)*

1. The Statutory Scope of Sections 1424(a) and 1445(a)

Question 18's sweeping inquiry into any and all associations joined by Mr. Price at any time and in any country is an impermissibly broad application of the government's authority under the Act. The government is authorized by section 1424(a) of the Act to inquire into any and all subversive or communist groups in which the petitioner may have been a member or with which the petitioner may have been affiliated.¹²⁶ In pursuit of this information, Mr. Price was asked question 19 which inquired into whether he had ever been a member of, or associated with, the Communist Party, had ever knowingly aided or supported it, or had ever "advocated, taught, believed in, or knowingly supported or furthered the interests of Communism."¹²⁷ Mr. Price answered all parts of this question in the negative.¹²⁸ Furthermore, he swore twice that he had never been a member of or associated with any such groups.¹²⁹ Thus, the government's interest regarding immigration and naturalization was satisfied by the inquiries of question 19.

While question 19 is within the limits of the scope of the attorney general's permissible inquiry under section 1424(a), the inquiry authorized by question 18 transcends the boundaries of the attorney general's authority, as its open-ended inquiry touches topics well beyond the scope of the statute.¹³⁰ First, the contention that the attorney general has limited power to screen applicants is supported by the language of section 1424. Section 1424 lists specific groups and ideologies

126. See *supra* notes 33-35 and accompanying text.

127. *Price*, 962 F.2d at 838.

128. *Id.*

129. *Id.*

130. See *supra* notes 107-08.

with which association will preclude naturalization.¹³¹ As Mr. Price contended, however, the section 1424(a) list is inclusive and prohibits the attorney general from denying naturalization on the basis of association with any organization other than those enumerated in the statute.¹³²

Therefore, it seems logical that the inquiries made by the attorney general in pursuit of naturalization must be limited to requiring petitioner to list groups that are proscribed under section 1424(a). To that end, Mr. Price swore under oath that he was not a member of any of the organizations proscribed by section 1424(a) and responded negatively to all inquiries concerning membership in any communist group or any organization advocating the violent overthrow of government.¹³³ The probing inquiry of question 18 does not conform to these limits, as it does not inquire only into Mr. Price's membership in the specific organizations listed in section 1424(a). This question represents a complete disregard for statutory guidelines, and, thus, it must be struck.

Second, the government does not have a legitimate interest in any organization that Mr. Price has ever joined, inside or outside the United States. Question 18 inquires not only into associations with political groups but also social organizations, groups that advocate a specific sexual preference, associations that disagree with current government policy, and others in which the government has no business. This inquiry is reminiscent of the Red Scare and seems to be closer to a witchhunt than to a legitimate inquiry by the United States government to determine the qualifications of its citizens. This question is underhanded censorship and, as such, is invalid. As stated by Justice Douglas in his *Kleindienst* dissent, "[T]hought control is not within the competence of any branch of . . . government . . . [and] the Congress did not undertake to

131. See *supra* notes 44-45 and accompanying text.

132. *Price*, 962 F.2d at 840. The court refuted Mr. Price's assumption on the basis that there was no legislative history to support his contention. *Id.*

133. *Id.* at 838-39.

make the attorney general a censor."¹³⁴ First Amendment freedoms are protected not only from blatant and obvious government encroachment but also from the stifling effects of more subtle interference, such as the inquiry of question 18.¹³⁵ Thus, question 18 must be struck, as its inquiry stretches beyond any legitimate government interest.

The *Price* court seeks to justify the sweeping inquiry of question 18 by relying upon section 1445 of the Act which authorizes the attorney general to require the applicant for naturalization to aver "all facts which in the opinion of the attorney general may be material to the applicant's naturalization, and required to be proved under this subchapter."¹³⁶ However, the attorney general's discretionary power must still meet minimum constitutional standards.

The language of section 1445 does not suggest that the authority of the attorney general in screening applicants for naturalization is limitless. Rather, it states that any inquiry made by the attorney general must be "material" to the petition for naturalization.¹³⁷ Questions concerning Mr. Price's affiliation with communist organizations or other organizations which advocate the violent overthrow of government may be relevant to his petition, as such subversive activity could be deemed material to the determination of Mr. Price's naturalization.

However, the inquiry authorized by question 18 is far from material. It does not focus on subversive groups, or those groups which advocate the violent overthrow of government or the achievement of a Communist state. Rather than focusing on material associations, it is a fishing expedition without rational purpose. In requiring petitioner to list all his associations regardless of their relevance to the application, the attorney general exceeded the scope of his authority under both sections 1424(a) and 1445 of the Act.

134. *Kleindienst v. Mandel*, 408 U.S. 753, 772 (Douglas, J., dissenting).

135. *See, e.g., Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

136. Immigration and Nationality Act, 8 U.S.C. § 1445(a) (Supp. I 1988).

137. *Id.*

Thus, contrary to the court's conclusion, neither of these sections accord the attorney general the power to ask question 18. The scope of both sections 1424 and 1445 extends only to inquiries regarding membership in the organizations listed in section 1424(a).

2. Due Process

The reasoning offered by the *Price* court to justify the broad scope of question 18 falters on due process grounds of notice. In allowing the attorney general to determine which organizations are proscribed by section 1424(a), the court ignores the concept of notice as required by the Due Process Clause of the Fourteenth and Fifth Amendments.

As a preliminary matter, resident aliens are afforded the protections of the Due Process Clause of the Fifth and Fourteenth Amendments. Since resident aliens are "persons," they are entitled to the same protections of the Due Process Clause as citizens receive.¹³⁸ Thus, Mr. Price should be protected by the guarantees of the Due Process Clause.

Concepts of notice have been at the core of the Due Process Clause from the time of the birth of our nation. When a government agency or a court considers terminating or impairing an individual's constitutionally cognizable life, liberty, or property interest, notice must be given to the individual whose interest is at stake.¹³⁹ Due process requires that statutory language convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."¹⁴⁰

In the context of the First Amendment, this "notice" requirement is manifested in the "void for vagueness" doctrine. In order to prevent a chilling of the exercise of preferred or fundamental constitutional rights such as freedoms of speech,

138. *Galvan v. Press*, 347 U.S. 522, 530 (1954).

139. JOHN E. NOWAK, ET AL., *CONSTITUTIONAL LAW* § 13.8, 529-30 (4th ed. 1991).

140. *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951).

assembly, and association, this doctrine requires strict scrutiny in judicial review of laws touching upon these valued liberties.¹⁴¹

To the extent that a law is vague and relates to a preferred right, it has, as one consequence, the ability to deter or chill persons from engaging in constitutionally protected speech or activity.¹⁴² This "chilling effect" is a consequence of statutes which do not adequately provide members of a community with notice of what conduct is protected by the First Amendment. Without proper notice, community members will censor their own behavior and forego constitutionally protected behavior in fear that it will be considered impermissible by the vague statute. Thus, as a direct consequence of the legislature's imprecise drafting, protected First Amendment activities are chilled. Therefore, a heightened degree of judicial scrutiny should be accorded to statutes implicating fundamental rights in order to guard against a chilling effect.

Aside from the deterrence of the chilling effect, the void-for-vagueness doctrine is premised upon the necessity for clear guidelines to govern law enforcement. Without such standards, officials are given too much discretion to enforce statutes on a selective basis.¹⁴³ For example, in *Kolender v. Lawson*, Justice O'Connor struck a statute on vagueness grounds and stressed that the most important aspect of the void-for-vagueness doctrine is the imposition of guidelines which prohibit arbitrary, selective enforcement of statutes in a constitutionally suspect manner.¹⁴⁴

As a result of the chilling effect and discretionary enforcement concerns, the void-for-vagueness doctrine requires the invalidation of statutes which infringe upon speech in terms

141. NOWAK, *supra* note 139, § 16.9, at 950-51.

142. NOWAK, *supra* note 139, § 16.9, at 950.

143. NOWAK, *supra* note 139, § 16.9, at 950. *See also* *City of Lakewood v. Plain Dealer Publishing Co.*, noting that "without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." 486 U.S. 750, 763 (1988).

144. 461 U.S. 352, 357 (1983).

that are so vague as to either prohibit protected speech or leave an individual without clear guidelines as to the nature of the punishable speech.¹⁴⁵

In *Price*, the government argued that the INS must determine whether particular organizations are of the prohibited type, since the petitioner may wrongly believe that an organization with which he is affiliated does not fall within section 1424(a):

A petitioner who does not know he is a member of a communist-front organization would not list that organization in responding to questions regarding 1424(a) type organizations . . . only by examining all organizations with which the petitioner is affiliated can the attorney general determine whether the petitioner had "reason to believe" the organization is or was a Communist-front.¹⁴⁶

The court of appeals agreed with the INS, stating that "[i]t is completely reasonable to assume that knowing the organizations with which petitioner is associated will be relevant to one or more of the requirements for citizenship."¹⁴⁷ However, allowing the attorney general to make an ad hoc determination of whether a group falls within those proscribed by the statute permits an unconstitutionally broad delegation of powers to the attorney general which clashes with fundamental notions of due process.

The Ninth Circuit's construction of sections 1424 and 1445 has two fatal due process flaws. First, it does not provide notice to resident aliens about which groups are proscribed, as it does not limit the attorney general's inquiry to those groups listed in section 1424 or to those that may be material to its investigation. Rather, the government's inquiry is limited only by the discretion of the attorney general. Second, it permits arbitrary and capricious decision making by the attorney gen-

145. NOWAK, *supra* note 139, § 16.9, at 847.

146. *Price v. INS*, 962 F.2d 836, 840 (9th Cir. 1992).

147. *Id.*

eral, as there are no standards to guide his or her decision making.

For example, suppose Mr. Price answered question 18 and admitted to membership in the "Betty Crocker Cooking Group" which the attorney general decided was a front for a Communist government organization and on this basis denied Mr. Price's petition for naturalization.

In this hypothetical, Mr. Price was not put on notice that membership in the Betty Crocker Cooking Group would bar naturalization, because, as set forth by the *Price* court, it is the attorney general who will decide if a specific group is one which falls within section 1424(a).¹⁴⁸ Under the Ninth Circuit's formula, an alien may have no idea that he is a member of a group that will prevent naturalization until the attorney general says so, at which point such information is useless. Thus, the lack of notice implicates the concerns of the chilling effect doctrine. Mr. Price's freedom of association is chilled because he cannot become a member of any group or organization with confidence that such affiliation will not preclude naturalization. The statutory vagueness of section 1424 unjustifiably chills his associational freedoms and, in turn, violates his due process rights.

In addition, the above Betty Crocker Cooking Group example reveals the problem of discretionary enforcement. The attorney general's subjective determination of whether a group or organization falls within those prohibited by section 1424(a) is precisely the type of decision making frowned upon by the Supreme Court.¹⁴⁹ Too much discretion by a government agency leads to censorship, as an overbroad grant of authority "contains an obvious invitation to discriminatory enforcement."¹⁵⁰ The system advocated by the *Price* court allows the attorney general to make the determination of whether mem-

148. *Id.* See also *supra* notes 40-44 and accompanying text.

149. See *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Kolender v. Lawson*, 461 U.S. 352 (1983); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

150. *Coates*, 402 U.S. at 616.

bership in a group such as Betty Crocker may preclude naturalization on the basis of his or her own subjective feelings, not on the basis of legally recognized, objective standards.

In the absence of structured standards, this statute must be struck as facially invalid¹⁵¹ because courts have always required stringent guidelines when government officials are making decisions concerning First Amendment rights.¹⁵² Mr. Price's case can be no different. The power of Congress to lay down the law in the area of immigration and naturalization, while considered plenary by most courts, does not include a concomitant power to be arbitrary.¹⁵³ Our system of checks and balances calls upon the judiciary to ensure that unfettered official discretion is not permitted to invade the areas of constitutional freedoms, even by direction of Congress.¹⁵⁴ The Ninth Circuit's construction of sections 1424 and 1445 confers impermissibly broad authority on the attorney general. Some check on the attorney general's authority must be employed so that future abuses of discretion do not occur. Sections 1424 and 1445, narrowly interpreted, contain the necessary standards. Section 1424 provides a list of those associations that may preclude naturalization,¹⁵⁵ and section 1445 emphasizes that any inquiry made by the attorney general must be material to naturalization.¹⁵⁶ However, the Ninth Circuit's present broad construction of these statutes, allowing for an open-ended inquiry into all of Mr. Price's associational activities, violates his due process rights.

151. *Id.* See also *Lakewood*, 486 U.S. 750; *Freedman v. Maryland*, 380 U.S. 51, 56 (1985). These cases stand for the proposition that when a statute permits excessive administrative discretion, a facial challenge is appropriate. Without proper standards, the statute in question will be stricken. See *Lakewood*, 486 U.S. at 763.

152. See *Kuntz v. New York*, 340 U.S. 290, 293-95 (1951); *Houston v. Hill*, 482 U.S. 451 (1987).

153. Phillip Monrad, *Ideological Exclusion, Plenary Power and the PLO*, 77 CAL. L. REV. 831, 860 n.145 (1989) [hereinafter *Ideological Exclusion*] (quoting Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953)).

154. *Id.*

155. See *supra* notes 44-45 and accompanying text.

156. See *supra* note 48 and accompanying text.

In conclusion, the *Price* court's applications of sections 1424(a) and 1445(a) are unauthorized by the statute and unconstitutional. First, question 18's sweeping inquiry into any and all associations joined by Mr. Price at any time and in any country is an impermissibly broad application of the government's authority under the Act. Second, the attorney general's ad hoc determination of which group memberships may preclude naturalization amounts to a due process violation on grounds of lack of notice and vagueness.

B. The Plenary Powers and Political Question Doctrines

United States courts have consistently used the plenary powers and political question doctrines to justify their restraint from scrutinizing the constitutional claims of resident aliens, thereby denying them their basic constitutional rights.¹⁵⁷

The *Price* court also used the political question doctrine to justify its decision not to apply traditional strict scrutiny analysis to First Amendment claims. This doctrine espouses that certain matters, which are political in nature, are best resolved by the "body politic" rather than by judicial review.¹⁵⁸ The most important consequence of the political question doctrine is that it renders the government action in question immune from judicial review.¹⁵⁹ The Ninth Circuit Court reasoned that because the functions of the INS implicate questions of foreign relations and touch upon political issues, deference should be given to its decisions.¹⁶⁰

Additionally, the *Price* court justified its deferential standard of judicial review with the plenary powers doctrine. This doctrine rests on the following principle: "Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as a fundamental

157. See *Ideological Exclusion*, *supra* note 153, at 848-61.

158. NOWAK, *supra* note 139, § 2.15, at 102.

159. NOWAK, *supra* note 139, § 2.15, at 102.

160. *Price v. INS*, 962 F.2d 836, 841 (9th Cir. 1992) (relying on *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

sovereign attribute exercised by the Government's political departments largely immune from judicial control."¹⁶¹ Since power over immigration is inherent in sovereignty, Congress's power is plenary in this area, and the judiciary must defer to its decisions in this field.¹⁶²

The Ninth Circuit's reliance on these doctrines to justify limited judicial review in areas of fundamental freedoms is misplaced. First, while Congress and the executive branch do have explicitly granted power over foreign relations, and questions implicating the exercise of those powers may be deemed political and, thus, nonjusticiable by the courts, these issues are not raised in *Price*. If the political question doctrine is invoked, a court must abstain completely from review on the merits.¹⁶³ However, the court did not abstain in this case, rather it used the political question theory to support limited judicial review, stating that the policies that preclude judicial review of political questions also support a limited standard of judicial review of decisions implicating immigration and naturalization.¹⁶⁴ This middle level of scrutiny completely defies the political question doctrine which demands that courts refrain completely from review on the merits. The notion of separation of powers cannot be tossed aside with such ease. If, as the Ninth Circuit suggests, this challenge implicates the political question doctrine, the court had no place reviewing Mr. Price's challenge.

The majority continued by saying that the *Kleindienst* standard of limited review was appropriate because the naturalization process implicates the political conduct of government.¹⁶⁵ Such judicial deference, however, has no place in the context of First Amendment challenges which in no way involve political questions.

161. *Price*, 962 F.2d at 841 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792, 796 (1977)).

162. *Ideological Exclusion*, *supra* note 153, at 857.

163. *See Baker v. Carr*, 369 U.S. 186 (1962).

164. *Price*, 962 F.2d at 841.

165. *Id.* at 842.

As mentioned earlier in this section, issues of foreign relations which would normally trigger the political question doctrine are not present in this case. Mr. Price's citizenship application does not fall within one of the categories enunciated by the Supreme Court which will preclude judicial review.¹⁶⁶ While it has been argued that the area of immigration and naturalization may fall within a political question category, namely a "textually demonstrable commitment of the issue to a coordinate political department,"¹⁶⁷ this is not conclusive upon the judiciary. The Supreme Court has stated that the appearance of political overtones within issues implicating constitutional violations does not mechanically invoke the political question doctrine.¹⁶⁸ The Court reasoned:

[I]f this turns the question into a political question, virtually every challenge to the constitutionality of a statute would be a political question No policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts.¹⁶⁹

Thus, while this First Amendment challenge does arise in the context of immigration and naturalization, this is not, in itself, a justification for limited judicial review.

166. In *Baker*, the Court enumerated reasons for finding an issue to be nonjusticiable as a political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

167. *Id.*

168. *INS v. Chadha*, 462 U.S. 919, 921 (1983).

169. *Id.* at 941-42.

Furthermore, concerns about institutional competence of the courts to deal with issues of foreign relations do not surface in this case. While immigration is one issue, the dominant theme presented in *Price* is one of First Amendment jurisprudence, an area in which the courts of this country, not the executive branch or Congress, are skilled. In his *Kleindienst* dissent, Justice Marshall emphasized that judicial deference to the executive branch in the face of governmental overreaching is tantamount to an abandonment of the courts' role as guardians of individual liberty. He concluded that the notion of judicial deference, based on the premise that political branches of government cannot be hindered by the courts in making foreign policy decisions, has no place in cases involving First Amendment rights.¹⁷⁰

In further seeking to justify the application of the Supreme Court's *Kleindienst* facially legitimate and bona fide reason standard, one of limited judicial review, to Mr. Price's First Amendment challenge, the *Price* court also invoked the plenary powers doctrine.

In *Harisiades v. Shaughnessy*,¹⁷¹ Justice Frankfurter described the plenary powers doctrine as resting on the premise that the conditions for entry of every alien are concerns of Congress, wholly outside those of our courts.¹⁷² Several rationales have been advanced to support this doctrine. Most notable is the theory that the powers of Congress and the executive branch over immigration are "inherent in sovereignty."¹⁷³

While congressional powers over immigration may, in fact, be inherent, there is no justification for the blatant refusal of courts to safeguard the liberties guaranteed to all persons within the territorial jurisdiction of the United States. Furthermore, the notion that the federal government need not

170. *Kleindienst v. Mandel*, 408 U.S. 753, 785 (1972) (Marshall, J., dissenting).

171. 342 U.S. 580 (1952).

172. *Id.* at 596-97 (Frankfurter, J., concurring).

173. The Court first used this phrase in *Nishimura v. United States*, 142 U.S. 651, 659 (1892). This rationale has been used in modern cases as well. See *Kleindienst*, 408 U.S. at 765.

follow the letter of the Constitution in its treatment of aliens is based upon a warped and restrictive view of the Constitution's scope and purpose.¹⁷⁴ If this country's judicial system is to remain the champion of individual liberties it was intended to be, it must not allow principles of judicial restraint to eclipse its primary role as a guardian of freedom and liberty. This infectious judicial trend which sacrifices individual liberty to notions of plenary power and political questions must not be allowed to continue.

Additionally, it is well settled that when a claim is made that a particular legislative inquiry infringes substantially upon First Amendment associational rights of individuals, the courts must fulfill their constitutional mandate and review the challenged actions on their merits.¹⁷⁵ Moreover, when Congress's exercise of one of its enumerated powers clashes with the Bill of Rights, it is the judiciary that must undertake the delicate and difficult task of determining whether the resulting restriction is permissible.¹⁷⁶ Consequently, in *American-Arab*, the district court held that "even conceding Congress's authority in the area of immigration, we are not relieved of our duty to ensure that Congress exercises its power within constitutional limits."¹⁷⁷

In addition, the Supreme Court itself has stated that the power to expel aliens is not free from judicial review to ensure conformity with the Constitution.¹⁷⁸ In *INS v. Chadha*,¹⁷⁹ for the first time the Court found immigration legislation to be unconstitutional. The statute in question dealt with a section

174. *Ideological Exclusion*, *supra* note 153, at 861.

175. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 545 (1963).

176. *United States v. Robel*, 389 U.S. 258, 264 (1967).

177. *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1076 (C.D. Cal. 1989).

178. *Carlson v. Landon*, 342 U.S. 524, 537 (1951). *See also* *INS v. Chadha*, 462 U.S. 919, 941 (1983). Here, the Court stated that "Congress has plenary authority in all [areas] in which it has substantive legislative jurisdiction . . . so long as the exercise of that authority does not offend some other constitutional restriction." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 132 (1976)).

179. 462 U.S. 919.

of the Immigration and Naturalization Act which permitted the attorney general to suspend the deportation of an otherwise deportable alien but gave a legislative veto over such suspension to either house of Congress.¹⁸⁰ The statute was struck as a violation of the separation of powers required by the Constitution.¹⁸¹

One of the explicit defenses to the constitutional challenge in *Chadha* was grounded in the plenary powers doctrine.¹⁸² However, the Court summarily dismissed the defense, stating that while the plenary authority of Congress over aliens is not debatable, the issue of whether Congress has chosen a constitutionally permissible means of implementing that power is.¹⁸³ In this case, the Court did not defer to legislative judgment but rather made its own determination of whether the statute comported with constitutional doctrine. In *Chadha*, the Court expressly rejected the view that the plenary power doctrine empowers Congress with uncircumscribed power over immigration.¹⁸⁴ Rather, the Court ascribed to the view of Chief Justice Marshall in *Cohens v. Virginia*.¹⁸⁵ Where issues of fundamental rights and plenary powers overlap, the Chief Justice noted, "[q]uestions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."¹⁸⁶

Congress's plenary power over immigration and naturalization does not license courts to employ limited judicial review. It does not relieve courts of the duty and responsibility to contain Congressional exercises of power within the limits of the Constitution.¹⁸⁷ Courts cannot justify their deference by

180. Immigration and Nationality Act, 8 U.S.C. § 244(c)(2), *repealed by* § 1254(a) (1982).

181. *Chadha*, 462 U.S. at 921.

182. *Id.* at 940.

183. *Id.* at 940-41.

184. *Ideological Exclusion*, *supra* note 153, at 866.

185. 19 U.S. (6 Wheat.) 264 (1824).

186. *Id.* at 291.

187. *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060,

claiming that they have no place in the area of foreign affairs and immigration. Our courts must realize that *they* have the vital responsibility of guarding fundamental civil liberties. That either foreign affairs or immigration find their way into the same case with First Amendment challenges cannot justify such a blatant abdication of judicial responsibility. The Ninth Circuit's deferential attitude drains the Bill of Rights of its value and triggers its transformation into a skeletal shadow of what our founding fathers intended it to be.

C. The Standard of Constitutional Protection Afforded Resident Aliens

The *Price* court erroneously concluded that the appropriate standard of judicial review to be applied was that of *Kleindienst v. Mandel*. This standard calls on the government to show a "facially legitimate and bona fide reason"¹⁸⁸ for its inquiry. Under this standard, courts will not look behind a legislature's exercise of discretion and will not test the legislative action by balancing its justification against those First Amendment interests implicated.¹⁸⁹

Though the Court in *Kleindienst* did not label this test, the standard resembles the rational basis test frequently employed by courts to address economic challenges under the Constitution.¹⁹⁰ Typically, if state action is challenged on the basis that it infringes on economic rights of an individual or a business, there is a presumption that the action is constitutional unless it is not grounded upon a rational basis.¹⁹¹ While such limited judicial inquiry may be acceptable in challenges which implicate commerce and the economy, this standard is not defensible in the area of preferred fundamental rights. A mere rational or facially legitimate relationship cannot justify in-

1076 (C.D. Cal. 1989).

188. *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972).

189. *Id.*

190. See Robert Esig Beinstock, *Immigration and the First Amendment*, 73 CAL. L. REV. 1889, 1906 (1985).

191. *United States v. Carolene Prod.*, 304 U.S. 144, 152 (1938).

fringement upon fundamental rights.¹⁹² Thus, the standard should not have been applied in *Price* where First Amendment associational rights were at stake.¹⁹³

Furthermore, the *Kleindienst* standard should not have been used in *Price* because the cases are completely distinguishable. Mr. Mandel was a revolutionary Marxist and a citizen of Belgium seeking to enter the United States to speak at several universities.¹⁹⁴ The lawsuit was brought by Mr. Mandel and United States citizens who alleged that the denial of Mr. Mandel's visa was a violation of their right to receive information under the First Amendment.¹⁹⁵ The issue in *Kleindienst* was whether the professor's First Amendment rights were violated when his entry to the United States was barred and whether this violation could compel the attorney general to issue a visa to Mr. Mandel.¹⁹⁶

Mr. Price, on the other hand, is *not* seeking to enter the United States. He is a permanent resident alien seeking naturalization. It is clear that a foreign national, unadmitted to the United States, has no constitutional right of entry into this country.¹⁹⁷ While deference to congressional immigration decisions may be defensible when the alien is outside the United States seeking to enter,¹⁹⁸ it is not warranted in Mr. Price's situation. Resident aliens have traditionally been granted

192. See *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

193. This "facially legitimate" standard was questioned by Justice Marshall in his *Kleindienst* dissent in which Justice Brennan joined:

I do not understand the source of this unusual standard. Merely "legitimate" governmental interests cannot override constitutional rights. Moreover, the majority demands only "facial" legitimacy and good faith, by which it means that this Court will never "look behind" any reason the Attorney General gives. No citation is given for this kind of unprecedented deference to the Executive, nor can I imagine (nor am I told) the slightest justification for such a rule.

408 U.S. at 777-78 (Marshall, Brennan, J.J., dissenting).

194. *Id.* at 756.

195. *Id.* at 759.

196. *Id.* at 762.

197. *Id.*

198. *Price v. INS*, 962 F.2d 836, 844 (9th Cir. 1992) (Noonan, J., dissenting).

constitutional protection. According to the Supreme Court in *Bridges v. Wixon*, "once an alien lawfully enters and resides in this country, he becomes invested with the rights guaranteed by the Constitution to all people within our borders."¹⁹⁹

Furthermore, the Court in *Johnson v. Eisentrager* noted that aliens are "accorded a generous and ascending scale of rights" as they increase their affiliation with the United States.²⁰⁰ Therefore, according to this line of cases, Mr. Price, a permanent resident alien for almost three decades, is entitled to a higher level of constitutional protection than that afforded Mr. Mandel, a nonresident alien with no ties to this country. A stricter level of scrutiny is merited in this case.

The deferential standard of review authorized in *Kleindienst* further loses merit, as it relates to the First Amendment, in light of the Court's decision in *Landmark Communications v. Virginia*.²⁰¹ Here Chief Justice Burger emphasized that deference to a legislative decision cannot limit judicial inquiry where First Amendment rights are at stake.²⁰² He continued that if it were otherwise, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified."²⁰³ Therefore, he concluded that courts must look behind "the legislative determination and examine" for themselves the constitutional legitimacy of the particular act in question.²⁰⁴

199. *Bridges v. Wixon*, 326 U.S. 135, 160 (1935) (Murphy, J., concurring); see also *supra* note 11. In addition, the Supreme Court has held that the Constitution assures resident aliens large measure of equal economic opportunity. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Taux v. Raich*, 239 U.S. 33 (1915). They may invoke the writ of habeas corpus to protect their personal liberty. See *Nishumura Ekiu v. United States*, 142 U.S. 651, 660 (1892). In criminal proceedings against them they must be accorded the protections of the Fifth and Sixth Amendments. *Wong Wing v. United States*, 163 U.S. 228 (1896); and unless they are enemy aliens, their property cannot be taken without just compensation. See *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

200. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

201. 435 U.S. 829 (1978).

202. *Id.* at 843.

203. *Id.*

204. *Id.* at 843-44.

The Ninth Circuit majority in *Price* attempted to further justify the deferential, rational basis standard by analogizing the burden of proof required in deportation proceedings to the appropriate level of judicial scrutiny to be applied. The court pointed out that in deportation proceedings, the government must prove its case by "clear, unequivocal and convincing evidence."²⁰⁵ However, the alien carries the burden in naturalization proceedings.²⁰⁶ This difference, according to the majority, explains why "despite the sliding-scale theory of alien rights, . . . aliens at naturalization are not necessarily entitled to the full protection of the First Amendment arguably afforded in deportation hearings."²⁰⁷

The *Price* court reasoned that the judicial scrutiny should be greater when the government bears the burden of proof. This equation is illogical. Burden of proof has never been a talismanic indicator of an appropriate level of judicial scrutiny. The Constitution does not tolerate such simplistic conclusions. While the typical burden of proof in the rational basis test, as used in economic constitutional challenges, rests with the challenger, in strict scrutiny cases challenging fundamental rights the burden is shifted to the government; these correlative relationships are not conclusive of the appropriate standard of judicial review to be applied.

It is completely unprecedented and unmerited to propose that because the burden of proof lies on the petitioner in naturalization proceedings, the courts of this country may apply less than strict scrutiny to a First Amendment challenge. The court permitted Mr. Price, a permanent resident alien of thirty years, to suffer a violation of his right to associate freely because the burden falls on him to prove his allegiance to this country. While this burden of proof may be justifiable, its translation into a lower level of judicial scrutiny for challenges implicating fundamental constitutional rights is not. Such

205. *Price v. INS*, 962 F.2d 836, 843 n.7 (9th Cir. 1992) (quoting *Berenyi v. INS*, 385 U.S. 630, 636 (1967)).

206. *Id.*

207. *Id.*

conclusions have no place in the judicial system of a land that professes liberty and justice for all.

United States courts have recognized that resident aliens are protected by the First Amendment²⁰⁸ and have noted that this attitude is crucial in a democratic society which requires that every idea be equally protected whether set forth by a citizen or an alien.²⁰⁹ Congress has also acknowledged that it is "not in the interests of the United States to establish one standard of ideology for citizens and another for foreigners who wish to visit the United States."²¹⁰ Moreover, nothing in the Constitution restricts the protections of the First Amendment to citizens. The Bill of Rights does not discriminate in the distribution of its protections.²¹¹ Rather, it is color blind, gender neutral, and applicable to both citizens and resident aliens alike. As Professor Henkin of Columbia University has concluded, "[T]he rights our ancestors recognized as inherent and unalienable knew neither bounds nor state boundaries."²¹² Thus, discriminatory distribution of the First Amendment freedoms is intolerable, as it stands in stark opposition to the drafters' intent that the Bill of Rights protect all persons within the United States from the power of government.²¹³

Finally, resident aliens should be afforded the same level of First Amendment protection as United States citizens because of basic notions of mutuality. Resident aliens live among us, obey our laws, pay their taxes, and reasonably expect some protection in return. As expressed by Justice Brennan, "If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prose-

208. See *supra* note 11.

209. *Anti-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1078 (C.D. Cal. 1989).

210. *Id.*

211. See *Bridges v. Wixon*, 326 U.S. 135, 160 (1945) (Murphy, J., concurring). See also *supra* note 199.

212. Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 34 (1985).

213. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 287 (1990) (Brennan, J., dissenting).

cute and punish them."²¹⁴ President Madison discussed mutuality when he spoke out against the Alien and Sedition Acts:

It does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary disobedience, they are entitled, in return, to their protection and advantage.²¹⁵

The Ninth Circuit Court's decision puts these fundamental principles in question. Instead of adding to the uncertainty surrounding the level of constitutional protections afforded to resident aliens, the judiciary must implement these well settled traditions once and for all and decide that judicial deference has no place in the context of First Amendment challenges by resident aliens. Thus, rather than employ this deferential standard to Mr. Price's challenge, the traditional First Amendment strict scrutiny analysis should have been applied.

D. The Application of Strict Scrutiny

Infringements on the First Amendment rights of resident aliens are to be accorded the same level of judicial scrutiny applied to the First Amendment challenges of citizens. Under the standard applied to citizens, when fundamental constitutional rights are violated, the government action in question will be prohibited unless the government can prove that the restriction was necessary to further a compelling governmental interest.²¹⁶ Applying this standard to the facts of Mr. Price's

214. *Id.* at 284 (Brennan, J., dissenting).

215. *Id.* at 259 (quoting Madison's Report on the Virginia Resolutions (1800)), reprinted in 4 Elliot's Debates 556 (2d ed. 1836)).

216. *Kleindienst v. Mandel*, 408 U.S. 753, 777 (1972) (Marshall & Brennan, JJ., dissenting). See also *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (referring to a "legitimate and substantial" government purpose).

challenge, the government's action—its denial of his petition for naturalization—is unconstitutional.

The government interest in proscribing the naturalization of applicants who have been associated with communist groups is legitimate but is not compelling. While such an interest might have been deemed compelling enough to infringe on First Amendment rights during the 1950s, the time of the Red Scare, such interest is not compelling in the face of the post-Cold War era of the 1990s. The Soviet Union no longer exists. The Iron Curtain is now a tattered sheet. Communism no longer poses a threat to the United States, and arguably never did. Today, our threats lie elsewhere—in the Persian Gulf, and in the emerging mystery of a new world order—not in a lawful resident alien such as Mr. Price who has sworn several times over that he has never been a member of any of the groups proscribed by section 1424(a) of the Act. In light of the changing political climate of our world, it is difficult to see any justification, let alone any compelling justification, for the sweeping, suspicious inquiries of question 18. In the time of the 1940 Smith Act²¹⁷ prosecutions, Justice Black dissented in *Dennis v. United States*²¹⁸ and wrote:

Public opinion what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.²¹⁹

217. The post-World War II prosecutions of Communist Party leaders were brought under the Smith Act of 1940, which made it unlawful for any person to advocate the overthrow of government by force or to organize persons who teach the overthrow of government by force. See *Dennis v. United States*, 341 U.S. 494 (1951).

218. *Id.* The defendants in *Dennis* were charged with violating the Smith Act in that they willfully organized the Communist Party of the United States—an organization that teaches and advocates the violent overthrow of the United States government. The defendants' convictions were affirmed by the Supreme Court and the statute was held constitutional under clear and present danger First Amendment analysis. *Id.* at 517.

219. *Id.* at 581.

The calmer times spoken of by Justice Black are clearly upon us. The restoration of First Amendment liberties to their preferred status in the context of resident aliens, however, has yet to occur.

Even assuming a compelling state interest, this interest alone does not justify the infringement upon Mr. Price's First Amendment rights, as the government's method of effectuating these goals was impermissible. In the case at hand, the means by which the government chose to exercise its power, namely by asking question 18, are *not* necessary to the achievement of the government's objective. In *Shelton v. Tucker*,²²⁰ the Supreme Court emphasized that while the government interest may only need to be "legitimate and substantial . . . [it] cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."²²¹ Alternative and effective means of obtaining the information necessary to effectively screen naturalization applicants are available. Namely, the government may pose responsive questions, such as question 19, which specifically inquire into whether the petitioner has been a member of organizations proscribed by section 1424(a). Also, character references may be requested. Thus, other means of obtaining information are available to the government to ensure that resident aliens meet the qualifications of citizenship. However, questions which disregard the constitutional requirement of narrow tailoring are not permissible.²²²

220. 364 U.S. 479 (1960).

221. *Id.* at 488.

222. Judge Noonan dissented in *Price v. INS* and wrote:

A narrowly tailored question could be asked of any petitioner without infringing on First Amendment rights. A petitioner could be asked if he had belonged to any organizations dedicated to the overthrow of the government or advocating or using terrorism or if he belonged to any foreign military, paramilitary or intelligence organization. Such a question would have an obvious relevance to the government's legitimate concerns. A question without bounds as to association has no relation to governmental concerns.

962 F.2d 836, 845 (9th Cir. 1992).

Mr. Price did all that was necessary to satisfy the government's interest when he answered negatively to all questions inquiring into his association with groups proscribed by section 1424(a).²²³ Furthermore, he swore twice that he had never been a member of or associated with any such groups.²²⁴ Any further probing by the government is unnecessary to the pursuit of a legitimate or compelling governmental objective. It is absurd for the government to contend that Mr. Price might not know if a group he has joined was proscribed by the Act. Mr. Price, a citizen of Great Britain living and working in the United States for almost three decades, surely has the capability of determining whether or not he is a member of a Communist or subversive group. The philosophies of such groups are not so mysterious. If Mr. Price were a member of a group advocating the violent overthrow of government, it is safe to assume he would be aware of it. Furthermore, if he were unaware of the nature of the organization to which he belonged, how dangerous could he be? The government's highly speculative concerns regarding Mr. Price's possible associations cannot override his First Amendment rights. No legitimate state interest is furthered by questions which tread into areas of belief and association protected from government intrusion.²²⁵

The government's limitless inquiry in *Price* is also inconsistent with *Baird v. State Bar of Arizona*, where the Supreme Court held that the First Amendment prevented the state bar review committee from inquiring into whether applicants to the bar had been members of the Communist Party.²²⁶ While the Court conceded that the state had a legitimate interest in ensuring the high moral character of those admitted to practice law, the Court found that the state's means were unnecessary to achieve its objective.²²⁷ Since the petitioner had already

223. *Id.* at 838-39.

224. *Id.*

225. *In re Stolar*, 401 U.S. 23, 31 (1971).

226. 401 U.S. 1 (1971).

227. *Id.* at 7.

supplied the committee with extensive personal and professional information²²⁸ relevant to her fitness to practice law,²²⁹ such as lists of employers, law school professors, and other references,²³⁰ any other inquiries were held to violate her First Amendment rights.

A similar conclusion was reached in *In re Stolar*.²³¹ There, the petitioner refused to answer questions on his bar application which inquired into his affiliation with groups advocating the violent overthrow of government.²³² The application also requested a *list of any and all associations* of which he was or ever had been a member.²³³ This question, which is hauntingly similar to that upheld in *Price*, was struck down by the Supreme Court. Justice Black concluded that Mr. Stolar had supplied the state with extensive information with which it could determine his fitness to practice law.²³⁴ Citing *Baird* and *Shelton*, the Court held that the petitioner's refusal to answer both questions was protected by the First Amendment²³⁵ which bars a state from penalizing a person solely because he or she is a member of a particular organization.²³⁶

Similarly, the government action in *Price* is clearly unconstitutional, because the means employed—question 18—were not narrowly tailored to the achievement of a legitimate government objective. Question 18 is precisely the type of inquiry admonished and invalidated by our courts when protecting citizens' fundamental rights. As it would with citizens, this question infringed on Mr. Price's associational freedoms and inquired into areas in which the government has no legitimate interest. Since the question's sweeping inquiry is analogous to

228. *Id.* at 4-5.

229. *Id.* at 7.

230. *Id.*

231. 401 U.S. 23 (1971).

232. *Id.* at 26-27.

233. *Id.*

234. *Id.* at 29.

235. *Id.* at 31.

236. *Id.* at 29.

those criticized and prohibited by the Supreme Court in *Shelton*, *Baird* and *Stolar*, it too must be eliminated.

In defense of government action, the *American-Arab* court pointed out that the government's interests in immigration and naturalization "are adequately protected . . . by the prevailing First Amendment standard allowing for the deportation of individuals who advocate imminent lawless action and whose speech is likely to induce such action."²³⁷ These interests are safeguarded, as the government may also deport when membership in an association threatens national security.²³⁸ Additionally, the government can enact laws to further its compelling interests as long as they are narrowly tailored.²³⁹ Thus, the government's interests are adequately safeguarded within the parameters of traditional First Amendment tests,²⁴⁰ but Congress's overzealous pursuit of its interests in immigration and naturalization must be contained.

Therefore, Mr. Price's right to associate freely may not be curtailed in the manner sought by the government. Question 18 unnecessarily invaded his privacy and crossed the line from legitimate inquiry to abuse of power. Even though the attorney general's inquiry was made under the shelter of plenary powers of immigration and naturalization, such naked abuses of power and blatant violations of preferred rights cannot survive constitutional review.

When strict scrutiny is applied, Mr. Price's First Amendment challenge must succeed. The government's interest, during this post-Cold War era, is not of sufficient weight to merit an abridgment of Mr. Price's First Amendment rights. Second, even assuming, *arguendo*, that the government's interest is substantial, the means chosen to effectuate its objective were not narrowly tailored. Rather, question 18's nonresponsive, sweeping inquiry chills Mr. Price's associational rights in a

237. *Anti-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1082 n.18 (1989) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

238. *Id.* (quoting *Healy v. James*, 408 U.S. 169, 186 (1972)).

239. *Id.*

240. *Id.*

manner that is unacceptable under the Constitution. Mr. Price's First Amendment rights, guaranteed to him as a permanent resident alien by the Bill of Rights,²⁴¹ were violated. The Ninth Circuit's refusal to correct this violation is a sad commentary on the insight and awareness of our judicial system.

IV. CONCLUSION

The Ninth Circuit's decision in *Price* denied John Eric Price the First Amendment protections he is afforded by the Bill of Rights. First, the court's reading of the Act was impermissibly broad, as it sustained question 18's inquiry into associations and organizations not listed in section 1424(a) and not material to his naturalization petition.²⁴² Furthermore, in allowing the attorney general to conduct an ad hoc determination of what groups may be proscribed by the Act, the court allowed Mr. Price's associational rights to be chilled and his due process rights to notice violated.

Second, the Ninth Circuit improperly used the plenary power and political question doctrines to refrain from a meaningful review of Mr. Price's First Amendment challenge. These doctrines cannot excuse our courts from performing their vital function as guardians of liberty. Rather, the powers of Congress and the executive, even in the area of foreign affairs, must be consistently exercised within the parameters of the Constitution. If such deferential review is to continue, the dreams of those people drawn to our country in hopes of escaping tyranny and oppression will remain visions of a far-off future not realized in today's lifetime.

Instead of applying the deferential standard of *Kleindienst*, which curiously demands mere legitimate and bona fide reasons for the exercise of governmental restrictions, the court should have applied the traditional strict scrutiny analysis to Mr. Price's constitutional challenge. Under this standard, ques-

241. See *supra* note 11.

242. See *supra* notes 41-44 and accompanying text.

tion 18 cannot pass constitutional muster, for it is not a necessary means to the fulfillment of a compelling government objective.

With its decision in *Price*, the Ninth Circuit Court of Appeals joins the ranks of courts which, under the guise of the plenary power and political question doctrines, turn a blind eye to violations of First Amendment rights.

John Eric Price has lived in this country for almost thirty years. He pays taxes and obeys the laws imposed upon him by this government as every good citizen of this nation does. Does being an American boil down to having a piece of paper with the word "citizen" written across it? Absent that document, is Mr. Price any less deserving of protection than those born here? Apparently so, according to the Ninth Circuit.

This decision makes certain facts painfully clear. The First Amendment of the United States Constitution does not now protect resident aliens from government abuses. Courts may ignore infringements upon constitutional rights of resident aliens and justify their blinders by invoking the plenary powers and political question doctrines. The United States is no longer a country which affords liberty and justice for all, but, rather, is one that dishes out its freedoms only to those lucky enough to be called citizens.

This decision puts in question the other fundamental rights allegedly afforded resident aliens under the Constitution.²⁴³ Does limited First Amendment protection mean the rest of the Bill of Rights will suffer the same fate? Will its protections shrink at the sight of a person not bearing the papers of a citizen? Will police officers be able to arrest resident aliens on the basis of a reasonable suspicion, rather than probable cause? What "process" is now due resident aliens? Will the full protections of the Fifth and Fourteenth Amendments be afforded non-citizens, while those of the First Amend-

243. Among those rights afforded resident aliens are those contained in the First and Fifth Amendments and the Due Process Clause of the Fourteenth Amendment. See *Bridges v. Wixon*, 326 U.S. 135, 160 (Murphy, J., concurring); see also *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

ment are selectively distributed? After *Price*, the answers to these questions lie somewhere in a future that is both a mystery and a potential nightmare.

Andrea Strong

