

1984

The Nonreviewability of Consular Visa Decisions: An Unjustified Aberration from American Justice

Russell Wolff

Follow this and additional works at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law



Part of the [Law Commons](#)

Recommended Citation

Wolff, Russell (1984) "The Nonreviewability of Consular Visa Decisions: An Unjustified Aberration from American Justice," *NYLS Journal of International and Comparative Law*: Vol. 5 : No. 2 , Article 7.

Available at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol5/iss2/7

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of International and Comparative Law by an authorized editor of DigitalCommons@NYLS.

THE NONREVIEWABILITY OF CONSULAR VISA DECISIONS: AN UNJUSTIFIED ABERRATION FROM AMERICAN JUSTICE

RUSSELL WOLFF*

The Vienna Convention on Consular Relations establishes that the issuance of visas is a specific responsibility of consular officers.¹ This activity has been performed for decades by consuls throughout the world.² Consular issuance of visas, however, has received extensive critical examination in the United States, where the nonreviewability of visa decisions conflicts with recognized standards of fundamental fairness.³ Such determinations leave rejected immigration candidates little or no opportunity to enter this country. In a significant minority of situations, visa denials reflect nothing more than the caprice of a particular consular employee. It will be the objective of this article to analyze the United States system of visa approvals and to explicate the practicality of alleviating the alleged miscarriages of justice that have occurred through the adoption of a statutory provision for judicial review. Initially, a brief historical discussion will demonstrate the problem within the context of federal legislation.

HISTORICAL EVOLUTION

The idea of United States consuls inspecting applicants for immigration was discussed as early as the fiftieth Congress (1887-1888), but no formal legislation was enacted at that time.⁴ Specific regulations

* The author is presently a member of the United States Army Judge Advocate General's Office, stationed in the Federal Republic of Germany.

1. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, art. 5(d).

2. See E. HARPER & R. CHASE, *IMMIGRATION LAWS OF THE UNITED STATES* 65-67 (3d ed. 1975).

3. See generally Gordon, *The Need to Modernize Our Immigration Laws*, 13 SAN DIEGO L. REV. 1, 8-10 (1975); Rosenfield, *Consular Non-Reviewability: A Case Study in Administrative Absolutism*, 41 A.B.A. J. 1109 (1955); Note, *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 661-63 (1953).

4. E. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY* 588 (1981). The first promulgation that involved a consular visa function was actually passed on August 18, 1856. It provided that a United States consul would be responsible for issuing a visa any time a foreign government required a United States citizen to possess such a document. See *United States Consular Regulations* (1868), discussed in G. STUART, *AMERICAN DIPLOMATIC AND CONSULAR PRACTICE* 415 (1936).

were not forthcoming until the House approved a measure introduced in 1894, which suggested that no alien should gain admission into the United States without a certificate of approval from a United States consul.⁵ In spite of the need to restrict the ever escalating immigration, the Senate expressly objected to this legislation because a consular visa approval function was arguably unrecognized in international law.⁶ In 1896 the issue was discussed again in the House without generating a consensus.⁷

It was not until 1917 that United States consuls acquired the specific responsibility to issue visas. This grant of authority was the result of an administrative wartime security measure emanating from the Department of State.⁸ Three months later, a Joint Order of the Departments of State and Labor superceded the initial measure, and provided that "each passport of an alien intending to enter the United States should be visaed by the American Consulate or the Diplomatic Mission if specifically authorized," and that alien passports should not be visaed unless previously certified.⁹

This administrative decree was given statutory life the following year for the purpose of regulating entrances and departures from the United States during World War I.¹⁰ A Presidential Order later prescribed that the Secretary of State had final responsibility to supervise the admission of aliens into the United States.¹¹ In 1919, the joint en-

5. 26 CONG. REC. 7756 (1894) (remarks by Rep. Stone), reported in E.P. HUTCHINSON, *supra* note 4, at 111.

6. E. HUTCHINSON, *supra* note 4, at 112.

7. *Id.* at 115-16. Similarly, in 1901, President Theodore Roosevelt appealed to Congress to approve consular involvement in immigration matters, but no action was taken. *Id.* at 588.

8. On April 20, 1917, the State Department informed the Legation at the Hague that "[a]ll persons sailing for this country should be advised to have their passports visaed by a diplomatic or consular officer of the United States." 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 741 (1942).

9. Joint Order of the Department of State and the Department of Labor, Requiring Passports and Certain Information from Aliens Who Desire to Enter the United States During the War (July 26, 1917), reprinted in U.S. GOVERNMENT PRINTING OFFICE, LAWS APPLICABLE TO IMMIGRATION AND NATIONALITY 1042 (E. Avery ed. 1953) [hereinafter cited as Joint Order].

10. Act of May 22, 1918, 40 Stat. 559 (codified as amended at 22 U.S.C. §§ 223-26(b)). See E. HARPER & R. CHASE, *supra* note 2, at 66 n.14.

11. Proclamation No. 1478, Aug. 8, 1918. See Joint Order, *supra* note 9, at 1046 (U.S. Laws and Statutes) (an executive order issued the same day proscribed the granting of visas unless there was "a reasonable necessity" for entering the United States, which was "not prejudicial to the United States"). Executive Order No. 2932, § 32, Aug. 9, 1918. See E. HARPER & R. CHASE, *supra* note 2, at 166.

actment was temporarily reauthorized,¹² and in 1921 it was given an indefinite extension.¹³

In May, 1921, the first Quota Act was adopted, establishing annual limitations on the number of immigrants in excess of which consular officers could not issue visas.¹⁴ Consuls also could not permit entry to those prohibited from receiving visas under the wartime measures.¹⁵ Finally, the Immigration Act of 1924 articulated qualitative guidelines for consular officers to adjudge an alien's acceptability for admission into the United States.¹⁶ These procedures were reaffirmed in the Immigration and Naturalization Act of 1952;¹⁷ they remain today as the legislative authorization for the "visa function" performed by United States consuls.

These various codifications demonstrate that neither administrative nor judicial review is available for consular decisions that deny visa applications. This view has occurred in spite of legislative history which suggests that consular nonreviewability is contrary to the original expectations.

The initial Joint Order contained a provision which sought to ensure that some form of review would always be available.¹⁸ Consular officials were explicitly instructed to issue visas for aliens who could eventually be excluded upon arrival.¹⁹ This was mandated because aliens have the opportunity for appellate review following exclusion.²⁰ Moreover, the Commissioner-General of Immigration in 1919 directly emphasized the need for some kind of relief from decisions denying a visa.²¹ Congressman Albert Johnson of Washington, the author of the 1921 extension bill and the 1924 Immigration Act, also indirectly af-

12. Act of Nov. 10, 1919, 41 Stat. 353. This act, however, never took effect. See Rosenfield, *supra* note 3, at 1109 n.6.

13. Act of Mar. 2, 1921, 41 Stat. 1217. See Rosenfield, *supra* note 3.

14. Act of May 19, 1921, ch. 8, 42 Stat. 5. See E. HUTCHINSON, *supra* note 4, at 180.

15. See E. HARPER & R. CHASE, *supra* note 2, at 67.

16. Act of May 26, 1924, § 2, 43 Stat. 153, 8 U.S.C. §§ 201-04, repealed by Act of June 27, 1952, ch. 477, tit. IV, § 403(a)(23), (24), 66 Stat. 279.

17. 8 U.S.C. §§ 1181, 1185 (1982).

18. See Joint Order, *supra* note 9.

19. The receipt of a visa does not create an automatic right to enter the United States. An immigration officer at the United States border may unilaterally overrule a consul's decision to issue the entrance document. 8 U.S.C. §§ 1181, 1225 (1982).

20. See Rosenfield, *supra* note 3, at 1110 n.12.

21. The Commissioner-General adamantly insisted that consular decisions should not absolutely bar immigration and that their role extended no further than discouraging unqualified aliens from seeking admission. Each applicant was to decide individually the wisdom of pursuing immigration with full knowledge that rejection in the United States would be amenable to review. See ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION FOR 1919, H.R. Doc. No. 422, 66th Cong., 2d Sess. 386-87 (1919).

firmed support for such appellate review.²² Some avenue for relief was thus always considered a requisite aspect of consular legislation.

Although these earliest promulgations were designed to maintain access to official review, this concept was never elucidated in precise language. Legislators later obscured the intention when they expanded consular participation in visa authorizations without reference to this fundamental guarantee.²³ Consequently, a system of unbridled administrative discretion emerged from historical roots that were intended to retain the opportunity of appellate relief. The absence of available review is magnified in the controlling legislation.

CONSULAR VISA POWERS AND JUDICIAL REVIEW

Current immigration law, as previously noted, is largely contained within the Immigration and Naturalization Act of June 27, 1952 and its accompanying amendments.²⁴ The substantive provisions governing the consuls' role in regulating visa applications have remained largely undisturbed. The Act stipulates that a visa is necessary for any alien to enter the United States.²⁵ The issuance of visas is delegated directly to consular officials;²⁶ however, no procedural process for the review of denied visa applications is specifically authorized.²⁷ Instead, the Act emphasizes the finality of consular decisions by prescribing that the Secretary of State may supervise all consular activities, "except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas."²⁸ Even where a consul has acted arbitrarily or capriciously nonreviewability would prevail.²⁹

Although the Act does not explicitly preclude judicial review, two early appellate decisions have been utilized as a basis for rejecting its

22. He emphasized that consular agents could not "refuse applications for visés to persons for even apparent defects that would be certain to cause them to fail to get into the United States after arriving at our gates." Opportunities for review would in all cases be preserved. 60 CONG. REC. 3811 (1921) (remarks by Rep. Johnson).

23. Several bills drafted in the 1920's to ensure some form of review failed to secure confirmation. See E. HUTCHINSON, *supra* note 4, at 227, 230.

24. See *supra* note 17.

25. 8 U.S.C. §§ 1181(a), 1101(a)(16) (1982).

26. 8 U.S.C. §§ 1104(a)(1), 1201 (1982).

27. 8 U.S.C. §§ 1104(a), 1201 (1982).

28. *Id.* For a discussion of this provision, see generally Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 FORDHAM L. REV. 145, 151-52 (1958); PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 146 (1953) [hereinafter cited as PRESIDENT'S COMMISSION].

29. See *U.S. ex rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1928). See also *U.S. ex rel. Gruber v. Karnuth*, 29 F.2d 314 (D.C.N.Y. 1928), *aff'd*, 30 F.2d 242 (2d Cir.), *cert. denied*, 279 U.S. 850 (1929).

availability. In *United States ex rel London v. Phelps*,³⁰ the Court of Appeals for the Second Circuit addressed the case of a British subject who attempted to enter the United States via Canada to temporarily visit her children. Although her visa application had been refused, she entered this country and was detained at a United States immigration station.³¹ The court, upon a writ of habeas corpus, upheld the requirement of a visa for entry into the United States based upon the validity of an Executive Order issued in 1925.³² In conclusion the court added:

Whether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to visa a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. It is beyond the jurisdiction of the Court.³³

The following year, the Court of Appeals for the District of Columbia decided a case in which a United States citizen sought permission for his alien German spouse to enter the United States. In *United States ex rel Ulrich v. Kellogg*,³⁴ the alien's visa application was refused because she had committed four offenses involving moral turpitude, i.e., three cases of larceny and abetting a forgery.³⁵ Her husband appealed to the court to direct the consul to issue a visa on the ground that their marriage altered her alienage.³⁶ The court, citing the so-called Cable Act,³⁷ held that marriage did not automatically naturalize a spouse and that as an alien, plaintiff's wife was subject to exclusion.³⁸ Once again, the court found that the power to grant a visa was given to consular officers and that no "provision of the immigration laws . . . provides for an official review of the action of the consular officers in each case by a cabinet officer or other authority."³⁹

Although these two cases became the central authority for the proposition that judicial review is not available for consular visa action,⁴⁰ a

30. 22 F.2d 288 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1928).

31. *Id.* at 289.

32. *Id.* at 290.

33. *Id.*

34. 30 F.2d 984 (D.C. Cir.), *cert. denied*, 279 U.S. 868 (1929).

35. *Id.* at 985.

36. *Id.*

37. Act of Sept. 22, 1922, Pub. L. No. 346, ch. 411, 42 Stat. 1021-22.

38. 30 F.2d at 985, 986.

39. *Id.* at 986.

40. *E.g.*, *Burratato v. United States Dep't of State*, 523 F.2d 554, 555 n.2 (2d Cir. 1975) (dictum), *cert. denied*, 424 U.S. 910 (1976); *Loza-Bedoya v. I.N.S.*, 410 F.2d 343, 347 (9th Cir. 1969); *Estrada v. Aherns*, 296 F.2d 690, 692 n.2 (5th Cir. 1961) (dictum); *Sague v. United States*, 416 F. Supp. 217, 219, 221 (D.P.R. 1976); *Licea-Gomez v. Pilliod*,

closer examination of those holdings indicates that such a conclusion is inappropriate. In *London*, the court's only concern was with the need to obtain a visa prior to entering the United States and the validity of United States regulations mandating such a result. Only as an afterthought, and clearly as dicta, did the court in two of the last three sentences of the opinion mention the issue of visa nonreviewability. Similarly, in *Ulrich*, the court never directly addressed the question of judicial review, but merely noted that no *administrative* procedures existed to challenge a visa determination. Consequently, a legal truism became entrenched without legitimate theoretical underpinnings.⁴¹

A more recent United States Supreme Court case, *Kliendienst v. Mandel*,⁴² presents modern authority for the doctrine of nonreviewability of consular decisions.⁴³ In that case, a suit was filed to compel the Attorney General to issue a temporary nonimmigrant visa to the Belgian scholar and Marxist activist, Ernest Mandel.⁴⁴ As an alien, he was denied the visa on the grounds that he "advocated and published the economic, international and governmental doctrines of world communism."⁴⁵ On two previous occasions the Attorney General had waived Mandel's ineligibility, but he refused to permit this particular visit.⁴⁶ Deferring to the Attorney General's discretion, the Court stated that Congress possessed absolute power to regulate the entrance of aliens, and in this case, had granted authority to the Executive.⁴⁷ In response to that delegation, the Court would not interfere with the Attorney General's inaction regardless of the competing first amendment

193 F. Supp. 577, 582 (N.D. Ill. 1960).

41. For a more extensive discussion of these cases and their progeny, see Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. REV. 1137, 1142-50 (1977).

42. 408 U.S. 753 (1972).

43. *E.g.*, *Gomez v. Kissinger*, 534 F.2d 518, 519 (2d Cir.) (per curiam), *cert. denied*, 429 U.S. 897 (1976); *Wan Shih Hsieh v. Kiley*, 569 F.2d 1179 (2d Cir. 1978); *Ubiera v. Bell*, 463 F. Supp. 181, 186 (S.D.N.Y. 1978); *Chen Chaun-Fa v. Kiley*, 459 F. Supp. 762, 764-65 (S.D.N.Y. 1978); *Grullon v. Kissinger*, 417 F. Supp. 337, 338-39 (E.D.N.Y. 1976); *Pena v. Kissinger*, 409 F. Supp. 1182, 1186-87 (S.D.N.Y. 1976). Of the above cited cases the one most directly on point is *Gomez*, in which the Second Circuit Court of Appeals reviewed a one sentence summary judgment which had held that "[t]his court lacks jurisdiction to review the acts of American consular officials abroad in determining whether or not to issue a visa." *Gomez*, 534 F.2d at 518. They responded with a *per curiam* opinion which cited *Mandel* and stated that "the decisions of the Supreme Court . . . preclude any judicial review of the consular decision not to issue a visa in this case." *Id.* at 519. See also *Lukaszuk v. Haig*, 523 F. Supp. 1029, 1033 (N.D. Ill. 1981).

44. 408 U.S. at 756.

45. *Id.* at 755 (quoting 8 U.S.C. § 1182(a)(28)(D), (G)(v) (1982)).

46. *Id.* at 756.

47. *Id.* at 766-67.

concerns.⁴⁸ Quoting Justice Harlan in *Lem Moon Sing v. United States*,⁴⁹ the Court held:

The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, or to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.⁵⁰

This case, furthermore, does not directly support the blanket proposition that judicial review is unavailable for consular decisions. The factual circumstances in the *Mandel* adjudication did not involve a consular visa denial. The singular issue addressed was the propriety of the Attorney General's use of the waiver power in refusing to permit the entry of Ernest Mandel. The broad application of *Mandel* to consular officers would seem to constitute an abuse of precedential authority.⁵¹ Despite the questionable foundations of the doctrine, the fact remains that the judiciary will not review consular visa decisions.

THE EXISTENCE OF INTERNAL CONSULAR REVIEW⁵²

Some form of limited internal review has been established to mitigate the negative effects of consular absolutism. While the Secretary of State is precluded from expressly invoking authority in the visa application process,⁵³ guidelines have been promulgated to mandate adherence and direct consular behavior.⁵⁴ Primarily, these guidelines eluci-

48. *Id.* at 765, 768.

49. 158 U.S. 538, 547 (1895).

50. 408 U.S. at 766.

51. See generally Note, *supra* note 41, at 1148-50.

52. It is outside the scope of this article to elucidate the entire visa application process. For a thorough discussion of the procedure, see generally 1A C. GORDON & H. ROSENFIELD, *IMMIGRATION LAW AND PROCEDURE* § 3.7b (rev. ed. 1983); Comment, *How to Immigrate to the United States: A Practical Guide for the Attorney*, 14 SAN DIEGO L. REV. 193, 197-207 (1976) [hereinafter cited as Comment, *How to Immigrate*]. It is important to note, however, that consular officers do not conduct formal hearings for immigration candidates and that the burden of proof to establish eligibility for entry remains with the applicants. See Steiner, *Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot*, 48 FORDHAM L. REV. 471, 477-79 (1980); Gordon, *Finality of Immigration and Nationality Determinations—Can the Government be Estopped?*, 31 U. CHI. L. REV. 433, 436 (1964). See also Comment, *Aliens—Temporary Trainee Visas—Unification Church v. Attorney General*, 3 SUFFOLK TRANSNAT'L L.J. 119, 128 (1979).

53. See *supra* text accompanying note 28.

54. 22 C.F.R. § 42 (1983).

date the grounds upon which a visa application may be refused.⁵⁵ Unfortunately, these provisions have proven inadequate and are routinely disregarded.⁵⁶ Moreover, since the guidelines often prescribe amorphous considerations for deciding whether to reject a visa application, there is no decrease in discretionary decisionmaking.⁵⁷

In addition to the theoretical protection provided by these criteria, aliens may request reconsideration of a visa denial.⁵⁸ Immigration candidates must be notified of the reasons for an unauthorized visa and of any further relief that is available.⁵⁹ An applicant also receives a one hundred and twenty day grace period in which to accumulate additional or supplementary documentation to support a reversal.⁶⁰

While this system appears most efficacious,⁶¹ its application is seriously flawed. An alien, for example, has no right to examine the adverse evidence that supported the original rejection.⁶² Moreover, through selective classification of information, a consular agent can refuse to supply an applicant with a statement of the facts upon which the denial was based.⁶³ Finally, the inordinate number of reversals resulting from the presentation of additional evidence serves to implicate the very system upon which decisions are made.

Countless worthy candidates, thus, are denied admission for reasons wholly unrelated to their qualifications (e.g., an inability to locate sufficient supporting documentation). While many are apparently able to overcome this burden, it would seem undeniable that many others are not. Absent adequate review, these persons are unjustly prevented from immigrating to the United States.

Two additional types of internal review are also authorized. The

55. See generally Anderson & Gifford, *Consular Discretion in the Immigrant Visa-Issuing Process*, 16 SAN DIEGO L. REV. 76, 102-13 (1978).

56. *Id.* at 153.

57. As one author notes,

[d]epartmental guidelines are often vague and ill-defined. Different consular officers and consulates interpret the law, the regulations, and the guidelines in vastly dissimilar ways. Indeed, two officers may reach opposite determinations on the same question of fact and law. The system of checking these determinations is inadequate to ensure the uniform application of the law.

Id. at 152.

58. See C. GORDON & H. ROSENFELD, *supra* note 52, § 3.8c at 3-124.

59. 22 C.F.R. §§ 41.130(a), 42.130(a) (1983) (concerning refusal and revocation of nonimmigrant and immigrant visas, respectively).

60. *Id.* § 41.130(b).

61. One tabulation indicates that nearly one-half of all visas originally denied in 1975 were later granted following the presentation of further supporting information. See Anderson & Gifford, *supra* note 55, at 105 n.103.

62. D. CARLINER, *RIGHTS OF ALIENS* 37 (1977).

63. *Id.*

principal consular officer of a post reviews all rejected visas. If the principal officer agrees with the decision to refuse a visa, the denial is final and the case is closed.⁶⁴ On the other hand, if the superior officer disagrees with the original judgment, two alternatives are available: either to assume personal responsibility for the case, or to refer the application to the State Department for an "advisory opinion."⁶⁵

While in theory this procedure appears highly commendable, in practice its utility is almost nonexistent. Initially, the scope of review is very modest. Almost no explanatory information justifying the preliminary determination is given to the principal officer.⁶⁶ Moreover, those undertaking the review are either inadequately trained in the area of visa application review or lack independence from those officials formulating the original decision. Thus, refusals often receive *pro forma* acceptances or are returned with only cursory comments.⁶⁷ In some instances, no action is taken at all.⁶⁸ Finally, an applicant does not have access to this appellate process and cannot refute unjustified conclusions made by the initial decision-rendering officer.⁶⁹ The efficacy of this internal review is therefore limited.

An alternative process of review may occur when the principal officer chooses to elicit an advisory opinion from the United States State Department. The Department of State, through its Visa Office, also may intervene unilaterally and issue an advisory opinion upon the request of a congressperson, an applicant, an attorney, or any other individual with a genuine interest in the case.⁷⁰ These opinions involve either a legal interpretation or the application of law to a particular set of facts.⁷¹

Although typically consular officers will abide by State Department advisory opinions,⁷² formally these opinions are binding only as to questions of law.⁷³ If a consulate agent ignores the State Department's suggested application of the law to the facts, however, the agent must submit a statement explaining the rationale for his decision.⁷⁴

64. 22 C.F.R. §§ 41.130(b), 42.130(b) (1983).

65. *Id.* §§ 41.130(c), 42.130(c).

66. See Anderson & Gifford, *supra* note 55, at 108.

67. *Id.*; 22 C.F.R. §§ 41.130(c), 42.130(c) (1983). In the latter situation the original decision is typically altered.

68. See Anderson & Gifford, *supra* note 55, at 108.

69. *Id.* See generally PRESIDENT'S COMMISSION, *supra* note 28, at 149.

70. See E. HARPER & R. CHASE, *supra* note 2, at 483.

71. See Note, *supra* note 41, at 1140.

72. See Bacon, *Ideological Restrictions on Immigration*, 8 U. CAL. S.D. L. REV. 217, 219 (1975); Comment, *How to Immigrate*, *supra* note 52, at 206-07.

73. 22 C.F.R. §§ 41.130(c), 42.130(c) (1983).

74. 8 U.S.C. § 1104 (1982). Evidently, in some unusual circumstances, the State De-

Again, although this procedure appears acceptable on its face, it is replete with deficiencies in practice. Principally, only the most uncommon cases are actually reviewed by the Visa Office.⁷⁵ Consular officers lack trust in the Visa Office; it is frequently perceived as too far removed from actual circumstances and lacking in applicable experience to be of substantive assistance.⁷⁶ Moreover, the Visa Office has no established procedure for review and relies upon unpublished internal instructions to its staff.⁷⁷ An alien has no opportunity to appear before the appropriate officers, and the Office only occasionally has access to all the relevant data.⁷⁸ In addition, the opinions are "advisory," so a consul is not bound to repudiate an initial decision.

In practice, therefore, the internal consular review process is almost nonexistent. The insubstantial record generated during an interview largely precludes effective scrutiny. Neither consular nor State Department personnel seem to have the resources, the incentive or the collegial understanding to oversee responsibly the discretionary determinations of consular officers.⁷⁹ Consequently, the need for a mechanism of conscientious and impartial review is great.

THE CASE FOR ESTABLISHING JUDICIAL REVIEW

Before proposing a statutory solution to the problems of consular nonreviewability, three preliminary issues must be discussed. First, should the receipt of a visa be viewed as constituting either a privilege or a right? If the former, the retention of broad-based consular discretion is easier to defend. Second, what is the extent of the actual hardship that results from the present system of nonreviewability? If the suffering is limited, the need to institute a system of review is reduced. Third, does the Administrative Procedure Act⁸⁰ provide an adequate statutory basis upon which to authorize judicial review? If its presence is sufficient, no additional legislation is warranted.

partment could even reassign a particular visa case to a different officer. See Kiley, *The Rights of Aliens in the Visa Process, Part II*, 51 INTERPRETER RELEASES 149, 153 (1974).

75. See Anderson & Gifford, *supra* note 55, at 106-08 (if the reviewing officer does not concur in the refusal, he must refer the case to the Visa Office for an advisory opinion or take jurisdiction of the case himself. Apparently the practice of requesting an advisory opinion is a seldom utilized procedure).

76. See generally *id.* at 110-13.

77. See PRESIDENT'S COMMISSION, *supra* note 28, at 149, 150.

78. *Id.*

79. After surveying the severe shortcomings in the present review system, one commentator concluded that "it does not seem surprising that most officers deny that the prospect of review affects their determinations." See Anderson & Gifford, *supra* note 55, at 112.

80. 5 U.S.C. § 551 *et seq.* (1976).

The Senate Judiciary Committee Report preceding the enactment of the landmark 1952 Immigration and Naturalization Act addressed the first inquiry, stressing that a "right" to a visa was a misnomer and, correspondingly, an appeal from a visa denial was not required.⁸¹ The report stated that

to allow an appeal from a consul's denial of a visa would be to make a judicial determination of a right when, in fact, a right does not exist. An alien has no right to come to the United States and the refusal of a visa is not an invasion of his rights.⁸²

This declaration is irrefutable, and has been repeatedly affirmed by the courts,⁸³ reflecting an undeniable aspect of territorial sovereignty. The author contends that it is likewise irrelevant to the need for consular decision review.

If the United States desired to legislatively preclude the admission of *all* aliens, such behavior would be constitutionally legitimate.⁸⁴ Since the United States, however, has acknowledged that the exclusion of all aliens is unjustifiable as well as disadvantageous, a statutory right should be created to assure that the process of acceptance conforms with American standards of justice and equity. As one authority testified during the House hearings for the 1952 Act:

It has become a fundamental premise of our jurisprudence that the decision of weighty matters should almost never be placed in the power of a single individual free from the control of a superior reviewing body. We search in vain for any parallel in our institutions for this despotic consular absolutism. Relatively few decisions even of Federal judges are free from the possibility of appellate revision. But the consul is not only immune from review but from any other kind of check, even of

81. SENATE JUDICIARY COMMITTEE, *THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES*, S. REP. NO. 1515, 81st Cong., 2d Sess. 622 (1950).

82. *Id.*

83. In *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1949), for example, the Supreme Court stated that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." Exclusion of aliens is not subject to due process attacks because without a vested right of entry the matter is one of privilege to be granted or withheld as a matter of executive discretion. *Id.* at 542-44.

84. Moreover, it would be within the prescriptions of public international law which do not obligate a state to accept asylees, much less immigrants. See Universal Declaration of Human Rights, G.A. Res. 217, 3 U.N. GAOR Doc. 1/777, art. 14 (1948). For the *travaux préparatoires* of this article, see 3 U.N. GAOR C.3 (121st mtg.) at 331, A/C.3/SR.121 (1948) (statement of Mr. Baroody).

publicity. If there is such a thing as an axiom of law, it is that where there is power there must be safeguards against the abuse of power [i]t is indefensible to give to any man, acting in secret in a remote land, autocratic power to grant or withhold a privilege of such enormous value as that of entrance to this country.⁸⁵

The nonexistence of a specified right to immigrate does not diminish the obligation to provide due process protections when such an opportunity is extended. A legal system founded upon equitable principles cannot accommodate a process that removes procedural guarantees from a select, highly vulnerable minority.⁸⁶

As for the second issue, it is not possible to accurately determine the precise number of aliens who have been unjustly deprived of an opportunity to enter the United States.⁸⁷ It should be emphasized, however, that while only a statistically small percentage of visa applications are dismissed annually,⁸⁸ the number of rejected candidates may reach the tens of thousands.⁸⁹ Given the various discretionary grounds upon which visa applications are refused, it is incontrovertible that a significant minority of these applicants are treated unjustly.

Consular officers may not arbitrarily deny visa applications or interpose their own subjective judgments into the decisionmaking process.⁹⁰ The statute provides thirty-three broadly stated legislative

85. *Hearings before the President's Commission on Immigration and Naturalization, House Comm. on the Judiciary*, 82d Cong., 2d Sess. 1575, 1578 (1952) (statement of Professors Louis L. Jaffe and Henry M. Hart) [hereinafter cited as *House Hearings*]. See also H.R. REP. NO. 1193, pt. 2, 72d Cong., 1st Sess. (1932).

86. It should also be noted that the trend in United States constitutional law is to de-emphasize the privilege-right dichotomy as an anomaly with little legal vitality. See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). Courts now focus primarily upon statutory entitlement. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 (1969). This type of consideration would seem particularly applicable to an analysis of the "rights" of non-resident aliens. Since the capacity to immigrate is statutorily enshrined in United States law, the just enforcement of such laws should be ensured.

87. For a specific case study, see Weisskopf, *Report on the Visa Situation*, 8 BULL. ATOM. SCI. 221 (1952).

88. See Kiley, *supra* note 74, at 152.

89. BUREAU OF SECURITY AND CONSULAR AFFAIRS, U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 1, 76 (1975). Moreover, particular consuls seem to reject excessive numbers of applicants. For example, between July 1976 and June 1977, the Monterrey, Mexico consulate refused to grant 14,210 visas. See Anderson & Gifford, *supra* note 55, at 111 n.156.

90. 8 U.S.C. § 1201(g)(1) (1982). This notion has been similarly stated by the courts. See, e.g., *United States ex rel. Gruber v. Karnuth*, 29 F.2d 314, 316 (D.C. N.Y. 1928).

grounds upon which an alien can be found inadmissible.⁹¹ These include mental retardation, drug addiction and illiteracy, as well as having committed a crime involving moral turpitude or attempting to enter the country under circumstances of fraud.⁹² The Immigration and Naturalization Act stipulates that consular officers may deny a visa when there is "reason to believe" an applicant is ineligible under one of the legislatively mandated criteria.⁹³ Although this language was designed to impose a reasonable person standard,⁹⁴ the ambiguous nature of these guidelines leaves considerable room for consular discretion.

One category precluding admission addresses applicants "who in the opinion of the consular officer at the time of application for a visa are likely *at any time* to become public charges."⁹⁵ The imprecision of this language is apparent, since a prospective estimation reflecting contingencies beyond the capacity of presently ascertainable knowledge is required.⁹⁶ An individual consular agent must determine not only the level of income necessary for survival, but also an alien's prospects for attaining and maintaining such a standard. In addition, the legislature has failed to define the parameters of "public charge." Such wide discretion offers an agent undue opportunities for abuse. These interpretative complexities are compounded by the fact that consulate officers are merely individuals, plagued by such frailties of human nature as prejudice and mistaken judgment.⁹⁷

Several additional factors also improperly influence consular decisions. Traditionally, a limited amount of time is allotted to reflect upon visa applications. Operating under significant time constraints, consular agents are unable to conscientiously consider each individual candi-

91. 8 U.S.C. § 1182(a)(1)-(33) (1982).

92. *Id.*

93. *Id.*

94. 22 C.F.R. § 42.60 (1983).

95. 8 U.S.C. § 1182(a)(15) (1982) (emphasis added). One study in Mexico found that sixty-one percent of all initial refusals were based on this category. See Anderson & Gifford, *supra* note 55, at 113. In 1982, 20,796 applicants were initially refused immigrant visas because of their inability to satisfy the public-charge criteria. N.Y. Times, Apr. 10, 1983, at A17, col. 6.

96. Officers apparently look at bank and insurance statements, employment prospects, affidavits of support and posted bonds to make this determination. See Anderson & Gifford, *supra* note 55, at 114; Comment, *How to Immigrate*, *supra* note 52, at 201-06.

97. This statement is not meant to denigrate the integrity or competence of anyone serving as a consular agent. Rather, it simply reflects normal human inadequacies. Several writers have emphasized that one may assume consular officers represent an especially honest and ethical class without altering this contention. See, e.g., PRESIDENT'S COMMISSION, *supra* note 28, at 147; Rosenfield, *supra* note 3, at 1112.

date.⁹⁸ Similarly, inadequate resources vex most consulates.⁹⁹ Finally, the very nature of the process frequently involves complicated questions of foreign law, national security, political and social developments and other technical peculiarities. Consular employees confronted with these issues are typically junior and subordinate officers who lack the experience and precise knowledge requisite for such determinations.¹⁰⁰ Exacerbating the challenge of accurately classifying visa candidates,¹⁰¹ these numerous, complex variables support the contention that the very nature of the visa decision process inherently results in arbitrary rejection of a significant minority of immigration candidates.

The third issue of consequence is the availability of judicial review under the Administrative Procedure Act. The Administrative Procedure Act was adopted on June 11, 1946 for the express purpose of codifying the standard of judicial review for administrative decisions.¹⁰² Specifically, section 10 proclaims that a "person . . . adversely affected or aggrieved by an agency action within the meaning of a relevant statute is entitled to judicial review thereof."¹⁰³ While this language on its face mandates judicial review of consular decisions, the application of the Administrative Procedure Act is predicated upon a determination that judicial scrutiny is not precluded by one of the two exceptions to the Act.

Initially, the Administrative Procedure Act may not be utilized when the specific statute proscribes, either expressly or by implication,

98. One author notes that at some posts, visa issuing officers average twenty-five to thirty-five interviews per day with only five to fifteen minutes allowed per interview. See Anderson & Gifford, *supra* note 55, at 216 n.201.

99. *Id.* at 116.

100. See PRESIDENT'S COMMISSION, *supra* note 28, at 148.

101. The Immigration and Naturalization Act does provide for some form of relief if consular officers go beyond their authority and reject a visa application. It reiterates a provision initially adopted in 1856 which states that, "whenever any consul officer . . . is guilty of any willful malfeasance or abuse of power, or any corrupt conduct in his office, he shall be liable to all persons injured . . . for all damages occasioned thereby . . ." 22 U.S.C. § 1199, *repealed by* Act of Aug. 17, 1977, Pub. L. No. 95-105, tit. I, § 111(a)(1), 91 Stat. 848. Unfortunately, this is wholly inadequate as it requires knowledge on the part of visa applicants of the consular officer's specific action. Moreover, it necessitates intentional wrongdoing on the part of consuls, whereas much of the injustice reflects innocent or subconscious misuse of discretion. Consequently, the section has had little effect. See *Parravicino v. Brunswick*, 69 F.2d 383, 385 (D.C. Cir. 1934). Since it is an existing legal mechanism, however, opportunities should be pursued to expand its possible usefulness.

102. In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Court concluded that the Administrative Procedure Act "embodies the basic presumption of judicial review" for a broad spectrum of administrative actions. *Id.* at 140.

103. 5 U.S.C. § 702 (1982).

access to appellate review.¹⁰⁴ A presumption exists, however, that "an administrative act is subject to judicial review unless there is a persuasive reason to believe Congress decided to deny review."¹⁰⁵ An examination of the *travaux préparatoires* is necessary, therefore, to determine the relevant congressional intent.

In the hearings that preceded adoption of the Immigration and Naturalization Act of 1952, the issue of judicial review received surprisingly little direct discussion. The testimony did, however, indicate an intent to prohibit judicial review.¹⁰⁶ The idea of an explicit provision for review of consular decisions appears to have arisen on only one occasion, when an amendment was proposed to create a Visa Review Board within the Department of State.¹⁰⁷ The justification offered for the amendment was that the Immigration and Naturalization Act gave "the consular officer in every small place or large place in the world . . . absolute and untrammelled jurisdiction to deny an[y] alien a visa"¹⁰⁸ Upon hearing this explanation, one congressperson arose in objection and exclaimed,

. . . under the provisions of this amendment it would permit every alien to have his case brought to this country for final disposition. He could go before the visa review board, he could then take an appeal to the courts, and we would be clogged up for months and months with these matters. It would mean additional Federal judges.¹⁰⁹

Following this declaration, the amendment was promptly rejected.¹¹⁰ This reflex repudiation of administrative review on the grounds that it might lead to excessive judicial involvement provides strong evidence that Congress did not intend to make judicial scrutiny available. Most assuredly, if Congress was unwilling to permit judicial review directly, Congress would not have been amenable to its indirect availability through the Administrative Procedure Act.

Moreover, in attacking the adoption of the Immigration and Natu-

104. *Id.* § 701(a)(1).

105. *Graham v. Caston*, 568 F.2d 1092, 1096-97 (5th Cir. 1978).

106. The district court in *Knoetze v. United States* established the evidentiary standard necessary to demonstrate the nonapplicability of the Administrative Procedure Act to an administrative decision, stating, "[d]efendants . . . bear the heavy burden of overcoming the presumption of reviewability by presenting convincing evidence that it was the intent of Congress to preclude review." 472 F. Supp. 201, 205 (S.D. Fla. 1979), *aff'd*, 634 F.2d 207 (5th Cir.), *cert. denied*, 454 U.S. 823 (1981).

107. 98 CONG. REC. 4430 (1952) (statement of Rep. Javits).

108. *Id.* at 4431.

109. *Id.* (statement of Rep. Graham).

110. *Id.*

ralization Act, many members of Congress referred to the nonreviewability of consular decisions as one of its greatest deficiencies.¹¹¹ Senator Lehman of New York, for example, noted while discussing one of the exemptions to admission that "[t]his is one of many blanket provisions in the . . . bill which authorizes any consul to bar anybody. . . . And there is no appeal from a consul's decision. . . . [R]easonable and recognizable standards should be established, and, in the case of necessary discretion, provision must be made for review."¹¹² If, in fact, the Administrative Procedure Act was intended to apply, fear of arbitrary consular activity would never have been so extensive.

Finally, even though there had been much discussion of the utility of the Administrative Procedure Act within the context of deportation and exclusion hearings, it was not addressed in the context of visa denials.¹¹³ In fact, both the House and Senate sponsors of the bill had insisted that the Administrative Procedure Act would apply to deportation hearings.¹¹⁴ When an amendment was drafted to authorize unimpeded applicability of the Act to immigration issues, however, it was severely criticized.¹¹⁵ The Senate sponsor of the Immigration and Naturalization Act attacked this concept by proclaiming that

the substitute amendment . . . would have the effect of shackling the officials who are charged with the enforcement of our immigration and naturalization laws. . . . [T]he substitute amendment contains a sweeping provision that the provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens.¹¹⁶

In light of the above, although Congress was hesitant to extend the Act to deportation proceedings, it clearly did not intend to exclude consular decisions concerning visas from the Act. Numerous individuals testifying before the House in 1952 lamented its absence from the Immigration Act.¹¹⁷

111. See, e.g., *id.* at 5778 (statement of Sen. Moody), 5779 (statement of Sen. Humphrey).

112. *Id.* at 5114 (statement of Sen. Lehman).

113. See generally *id.* at 5778-89.

114. *Id.* at 4415, 4416 (statement of Rep. Walter), 5778 (statement of Sen. McCarran).

115. The amendment simply stated that "[t]he provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens." *Id.* at 5428 (introduced by Sen. Lehman).

116. *Id.* at 5625 (remarks of Sen. McCarran).

117. See, e.g., *House Hearings, supra* note 85, at 17 (statement of Edward J. Ennis), 518 (statement of Edward A. Brown), 545 (statement of Boris Joffe), 1566 (statement of John Cragun).

This evidence led the President's Commission on Immigration and Naturalization to conclude that "the Immigration and Naturalization Act of 1952 does not directly deal with the Administrative Procedure Act. . . . However, other directives of the statute force a pattern which reveals an unmistakable purpose to exempt immigration hearings from the procedural requirements of the Administrative Procedure Act."¹¹⁸ The federal courts have similarly shared this judgment.¹¹⁹ Consequently, congressional intent has been interpreted to exempt the provisions of the Administrative Procedure Act from the consular visa determinations authorized by the Immigration and Naturalization Act.¹²⁰

A STATUTORY SOLUTION TO THE PROBLEM OF VISA DENIALS

Given the shortcomings inherent in the status quo, the need exists to formulate a remedial statute.¹²¹ The following draft enactment is suggested.¹²²

118. See PRESIDENT'S COMMISSION, *supra* note 28, at 159.

119. In *Licea-Gomez v. Pilliod*, the court noted:

To allow plaintiff a hearing and adjudication of his eligibility for citizenship would completely circumvent the provisions of the Immigration and Naturalization Act of 1952 granting exclusively to consuls the right to issue visas. . . . This is certainly not what Congress intended in the statute, and the court cannot here undermine the statutory scheme and allow defendant by this proceeding to review the consul's action.

193 F. Supp. 577, 582 (N.D. Ill. 1960).

120. The second situation where the Administrative Procedure Act is inapplicable becomes irrelevant given the explicit congressional intent. This exception, however, would not be satisfied since it removes the Act's jurisdiction from administrative decisions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982). This is to be considered only when "there is no law to apply." See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). In the review of consular decisions, there would certainly be sufficient "law to apply." As previously mentioned, the Immigration and Naturalization Act stipulates thirty-two contingencies upon which visa applications may be legitimately denied. Moreover, an extensive amount of case law has developed concerning the issues of deportation and exclusion which could provide a basis for interpreting ambiguous statutory language. See Note, *supra* note 41, at 1162. Thus, absent clear congressional language to the contrary, there would be no legal rationale to ignore the Administrative Procedure Act's amenability to consular visa decisionmaking.

121. Several judicial opinions have demonstrated the need for congressional action before the idea of review would be acceptable. See, e.g., *Licea-Gomez v. Pilliod*, 193 F. Supp. at 577.

122. The author recognizes that certain aspects of this promulgation would be considered controversial and politically explosive. It is the author's intention to posit legislative language that would alleviate the magnitude of the inequalities that adhere to a system of nonreviewability. As a draft statute, however, the wording is open to modification.

*Judicial Review of Consular Visa Denials*¹²³

1. Judicial review may be pursued by all aliens whose visa applications have been rejected by a United States consular officer. This opportunity for appeal is subject to all existing constitutional stipulations.

2. All avenues of internal agency review must be exhausted prior to the pursuit of relief in the courts. Following a final confirmation of the consul's original rejection, the applicant shall receive written notice explaining the reason for denial and the opportunity to file a judicial appeal. The court remedy shall be called a writ for judicial review.

3. An applicant must file the writ within thirty days after receipt of notification that the final internal administrative remedy has proven unsuccessful. If no action is taken within that time, the decision of the consul is final.

4. The actual writ shall be filed within the United States by a family member, employer, or other third person who can document an injury in fact resulting from the visa denial.

5. Writs for review are to be brought in the United States district courts. Such suits shall be instituted in the district of the plaintiff's residence or place of business, as is appropriate.

6. A system of expedited consideration shall be adopted, modeled after the proceedings utilized for habeas corpus petitions.

7. This single review shall be the exclusive remedy. All decisions are final and subject to *res judicata*.

8. The consular officer must submit the complete record explicating his decision to refuse authorization of a visa. This record, however, shall not constitute the only source of evidence. The applicant has the right to produce any relevant material that tends to refute the determination of the officer. Moreover, the court will retain avenues for procuring additional factual information.

9. The court shall address exclusively issues of law and concepts of fundamental fairness, and shall not reconsider the facts of the controversy.

10. A judicial finding that a consular officer erred in the application of legal and equitable principles shall result in a mandatory order to issue a visa.

11. A narrow category of exceptions shall be drawn to preclude the filing of writs for judicial review where no genuine issue of dispute exists in a case.

123. Many ideas for this statute were gleaned from the PRESIDENT'S COMMISSION, *supra* note 28, at 169-70. See also *House Hearings*, *supra* note 85, at 1583-84 (statement of Louis L. Jaffe & Henry M. Hart), 1834-36 (statement of Henry Heineman).

12. The provisions of this statute shall be interpreted consistently with the language of the Immigration and Naturalization Act of 1952 and where inconsistent shall be given precedence.

Commentary: 1. Consistent with the desire to maintain American standards of justice, and with the concomitant distrust of any system of administrative absolutism,¹²⁴ an opportunity for judicial review of consular decisions is adopted. As previously demonstrated, courts have been disinclined to independently establish this remedy and have relied upon judicial precedent that has failed to address squarely the abnormality of consular nonreviewability.¹²⁵ Furthermore, the available legislative history indicates the nonapplicability of the Administrative Procedure Act to the relevant provisions of the Immigration and Naturalization Act.¹²⁶ A statutory remedy is thus imperative.

2. Three procedures have been articulated through which the internal review of a rejected visa may be pursued: (a) a direct appeal to the consular agent; (b) a reanalysis by the principal consular officer and (c) an advisory opinion from the Department of State.¹²⁷ More importantly, all of these avenues have been identified as hopelessly inadequate,¹²⁸ but they are by no means worthless and should not be dismissed.¹²⁹ Following an initial rejection, each visa applicant should initiate the process of internal review. At the conclusion of these procedures, the original consular agent will directly contact the applicant with information of the decision.¹³⁰ If a visa is refused, the specific le-

124. As one commentator has stated:

We do not think it is proper for any one man, for anybody—and this is no reflection at all upon the consul; we are not reflecting or impugning the consul—but we think no man, whether judge of a district court of the United States or an internal revenue officer or officer in any responsible position of the Government, or any subordinate official, should have the right to make a decision which is not reviewable.

Review of the Action of Consular Officers in Refusing Immigration Visas: Hearings on H.R. 8878 Before the Comm. on Immigration and Naturalization, 72d Cong., 1st Sess. 6 (1932) (statement of Isodore Herschfield).

125. See *supra* text accompanying notes 30-51.

126. See *supra* text accompanying notes 106-20.

127. See *supra* text accompanying notes 58-60, 64-65, 70-74.

128. See *supra* text accompanying notes 62-63, 66-69, 75-78.

129. See *supra* note 61. Moreover, the very possibility of judicial reversal will likely enhance the efficacy of these proceedings and encourage more conscientious determinations within the agency structure.

130. Arguably, there should exist some early communication with an applicant to indicate a likely visa denial by a consular officer. This communication could be accompanied by a request for further information if the desire to immigrate remains. See *House Hearings, supra* note 85, at 1835 (statement of Henry Heineman). The author, however, is afraid that this may become overly burdensome and unnecessarily duplicative since there will be opportunities to present additional illuminating details during the review

gal provision upon which the denial is based shall be articulated. This requirement of specificity should in itself reduce the capricious behavior of consuls. The notification of rejection shall not only clearly explain that the primary responsibility for issuing visas resides with consuls, but also that a court will reverse the internal agency decision only in an exceptional case, based on a prominent deficiency in the application of legal and equitable principles. This is not meant to intimidate or harass a visa applicant, but only to clarify the role of the judiciary and to discourage frivolous appeals.¹³¹ Specific questions regarding the filing of a writ for review shall be directed to the consul.

3. A relatively limited amount of time is allotted for a rejected applicant to file a writ for judicial review. This time limit is devised to enhance the degree of speed and finality of determinations—concepts often considered important attributes in a system of adjudicating relief. The designation of a thirty day period is an arbitrary selection which can readily be extended to sixty or ninety days if proved advantageous.¹³²

4. A key section of the legislative draft addresses the troublesome question of standing to bring writs for review. It would seem largely axiomatic that a non-resident alien while residing abroad lacks the requisite attributes to qualify for standing before federal courts.¹³³ This does not mean, however, that standing cannot constitutionally exist. The procedures through which standing could be established are delineated in this draft.

The test for standing to receive judicial review by a federal court of an agency determination has been expressly defined. A petitioner must allege that "the challenged action had caused [an] injury in fact . . . to an interest 'arguably within the zone of interests to be pro-

procedures. If it is believed, however, that such a "show cause" order as to why a visa should not be denied would be efficacious in reducing the number of reviews, such an amendment to the draft statute should be considered.

131. See generally *id.* at 1583 (statements of Louis L. Jaffe and Henry M. Hart).

132. A proposed draft statute for the judicial review of deportations authorized a sixty day filing period. See PRESIDENT'S COMMISSION, *supra* note 28, at 169.

133. See, e.g., *Brownell v. Tom We Shung*, 352 U.S. 180 (1956); *Chinese American Civic Council v. Attorney General*, 396 F. Supp. 1250 (D.D.C. 1975). But cf. *Estrada v. Aherns*, 296 F.2d 690, 695 (5th Cir. 1961) ("A person may be just as affected or aggrieved" by agency action if he is a nonresident and absent from the country as he would be if he were a resident and present; it depends on the case); *Mukadam v. United States Dep't of Labor*, 458 F. Supp. 164, 166 (S.D.N.Y. 1978) ("the courts properly confined themselves to ruling on the narrower ground that an employer's interest *alone* was sufficient to justify standing") (emphasis added). See also the decision of the trial court in *Mandel*, 325 F. Supp. 620, 631-32 (E.D.N.Y. 1971), which held that an alien had standing regarding "the effort to exclude him on a ground that denies citizens of this country their primary rights to hear . . . and debate with him."

tected or regulated' by the statutes that the agency . . . was claimed to have violated."¹³⁴ By emphasizing the need to show an injury in fact, the Supreme Court avoided requiring an injury to a "legal right."¹³⁵ Given the previous analysis which indicates the absence of a specific right to the receipt of a visa, the focus upon an injury in fact preserves the potential availability of standing to sue. The courts have held that the necessary injury does occur to certain parties.¹³⁶

Potential employers, for example, have been found to possess the requisite aspects for standing to sue over visa denials. In *Pesikoff v. Secretary of Labor*,¹³⁷ the court held that a Houston child psychiatrist (Dr. Pesikoff) could seek judicial review of a denial of a labor certification and the simultaneous refusal to grant a visa to a Mexican citizen (Ms. Quientero) whom he desired to hire as a live-in maid. The court concluded:

First, if Dr. Pesikoff is correct in alleging that he cannot find an American worker who is able to perform the domestic tasks which Ms. Quientero has contracted to perform, he has clearly suffered an "injury in fact" . . . Second, this injury is to an interest—that of American employers in obtaining qualified employees—arguably within the zone of interest to be protected . . .¹³⁸

Since this type of analysis has been repeatedly affirmed by the courts,¹³⁹ the draft statute identifies prospective employers as one category of persons who may have standing to file the writ for review on behalf of aliens.

Courts have similarly found that resident aliens possess standing to seek relief from visa denials for their spouses. In *Pena v. Kissinger*,¹⁴⁰ the court confronted a situation in which plaintiff, a lawful permanent resident, sought review of a visa denial for her alien husband. After discussing cases in which standing has been permitted, the court held that "[i]f would-be employers of aliens may [seek relief], it does not seem improper to confer a similar right of standing on an

134. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

135. *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153-54 (1970).

136. For a discussion of the question of standing under the Administrative Procedure Act, see generally Note, *supra* note 41, at 1151-55.

137. 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974).

138. *Id.* at 760.

139. See, e.g., *Digital, Inc. v. Secretary of Labor*, 495 F.2d 323 (1st Cir. 1974); *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973).

140. 409 F. Supp. 1182 (S.D.N.Y. 1976).

aggrieved spouse."¹⁴¹ The draft statute agrees with this contention and recognizes the rights of blood relatives within predetermined lines of consanguinity to possess standing to represent an alien's interest.

A third class of persons to whom standing would seemingly be granted under the draft statute is defined as those who suffer analogous injuries in fact as family members and employers. Potentially, this category includes persons who filed affidavits or placed bonds on behalf of an applicant or individuals through whom a visa candidate has sought non-quota or preference status.¹⁴² This category must receive broad interpretation while also satisfying the constitutional parameters of standing.¹⁴³

5. Writs for review would most appropriately be brought directly in the United States courts of appeals.¹⁴⁴ A concern over inundating these courts, however, leaves district courts as a more suitable forum. In the alternative, the District of Columbia would be the most logical setting for these determinations, but again, to avoid overburdening this court, the situs of plaintiff's residence or business shall determine venue.

In addition to standing, jurisdiction represents another controversial legal question confronted by those arguing for consular review within the status quo.

With the adoption of this draft statute, the issue of subject matter jurisdiction would no longer pose a problem. The absence of specific statutory authorization to undertake judicial review of consular actions has been repeatedly cited by courts as the reason for not independently providing such relief. In *Hsieh v. Kiley*,¹⁴⁵ the court held:

The jurisdiction of federal courts to review the Immigration and Naturalization Services action in conducting or completing an investigation requested by some other branch of the government, such as the State Department, would similarly depend on the existence of a statutory authorization or mandate from Congress. No such authorization is shown or appears to exist.¹⁴⁶

141. *Id.* at 1184.

142. See *House Hearings*, *supra* note 85, at 1836 (statement of Henry Heineman).

143. Cf. *Chinese American Civic Council v. Attorney General*, 396 F. Supp. 1250 (D.D.C. 1975) in which a refugee sponsorship organization was *denied* standing because it failed to allege "concrete injury to itself or to its members." *Id.* at 1252.

144. See generally *PRESIDENT'S COMMISSION*, *supra* note 28, at 169.

145. 569 F.2d 1179 (2d Cir. 1978).

146. *Id.* at 1181. The *Hsieh* court similarly added that "the Administrative Procedure Act does not provide subject matter jurisdiction." *Id.* at 1182.

The enactment of this statute, however, ensures the existence of subject matter jurisdiction.

Questions concerning personal jurisdiction over the defendant would similarly be eliminated. Although it is unresolved whether consular officers themselves are amenable to jurisdiction,¹⁴⁷ personal jurisdiction clearly can be obtained over the Secretary of State.¹⁴⁸ Consistent with past precedent which recognizes that "the real party in interest in such suits is the Government,"¹⁴⁹ this arrangement is especially convenient under the statute since it is from the final internal appeal to the State Department that a writ for review is filed. Consequently, the problem of jurisdiction will be circumvented by adoption of the statute.

6. To avoid the extensive delays that often burden civil suits in federal court, expedited review has been adopted.¹⁵⁰ Notions of speed and finality are essential when dealing with consular review. A writ for review shall thus be modeled after a petition for habeas corpus, in that it shall receive prompt presentation and examination by the district court.¹⁵¹

7. The granting of visas remains the primary responsibility of consular officers. Judicial relief is provided for exceptional cases only, where legal and equitable principles have been misapplied. This appellate avenue is limited to one review to enhance the objective of finality.

8. To ensure meaningful, efficacious review, the district court must have access to the complete record of the consular decision. Initially, the court is to receive all materials upon which a visa determination has been rendered. Since consular agents are presently required to provide a statement of their reasons for a visa denial,¹⁵² this presents no unique hardship. The consular statement alone, however, is inadequate.¹⁵³ Applicants must be permitted to submit all information they consider relevant via affidavits and notarized documents. Additionally, the party representing an applicant before the district court (e.g. coun-

147. See Note, *supra* note 41, at 1150-51 n.100.

148. See, e.g., *Gomez v. Kissinger*, 534 F.2d 518 (2d Cir.) (per curiam), cert. denied, 429 U.S. 897 (1976); *Lukasyuk v. Haig*, 523 F. Supp. 1029 (N.D. Ill. 1981); *Grullen v. Kissinger*, 417 F. Supp. 337 (E.D.N.Y. 1976).

149. *Estrada v. Ahrens*, 296 F.2d 690, 698 (5th Cir. 1961).

150. See PRESIDENT'S COMMISSION, *supra* note 28, at 170.

151. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Rules Governing Section 2254 Cases in the United States District Courts, Rule 4 (Feb. 1, 1976).

152. 22 C.F.R. § 41.130(b) (1983) (review of refusals at consular offices).

153. Recall that one of the most prominent shortcomings of the present system of internal relief is the paltry record upon which review is based. See *supra* text accompanying notes 66, 78.

sel, relative or employer) shall be able to present additional affidavits and testimony.¹⁵⁴ Finally, if the court is unable to resolve the legal controversy, the consular officer may be requested to answer written questions, and in extreme cases respond to depositions.¹⁵⁵ These procedures should be more than sufficient to generate a record upon which a competent review can be formulated. The very existence of this opportunity for review should create a climate conducive to more thorough fact-finding and complete record-keeping by consular officers. That information, coupled with an applicant's input, should result in an acceptable chronicle of the circumstances necessary for judicial resolution.

9. In consonance with standard appellate practice, findings of fact are not to be relitigated before the district court. Only questions concerning the misapplication of law and the concept of fundamental fairness are to be heard and considered. Under the Immigration and Naturalization Act many complex legal questions arise in the contemplation of candidate admissibility. The ultimate resolution of such considerations should remain with legal authorities.

10. Following the completion of judicial review, the court will: (a) affirm the determination of the consular agent as upheld by the internal review, or (b) reverse the decision as contravening legal and equitable principles. The latter conclusion shall be followed by an order of the consul office demanding prompt issuance of the visa. Cases shall not be remanded for further factual finding; sufficient procedures are available for adequate discovery of the necessary facts prior to the appellate decision.

11. Visa applications may presently be rejected for any one of thirty-three reasons.¹⁵⁶ Many of these justifications are subject to the whim and caprice of a consular officer and, therefore, give rise to the need for judicial review. Several, though, are purely factual determinations, most notably, quantitative limitations upon the number of permissible immigrants.¹⁵⁷ Decisions to reject a visa applicant based upon purely factual grounds shall not be subject to review. The writ for judicial review is to remain an exceptional remedy for legal questions. Its availability for all denials, even those based on incontrovertible statistics, could lead to frivolous filing of writs.

12. This draft enactment alters the general thrust of the Immigration and Naturalization Act in only one limited aspect. It institu-

154. See *House Hearings*, *supra* note 85, at 1583 (statements of Louis L. Jaffe and Henry Hart).

155. See *Note*, *supra* note 41, at 1164 n.206.

156. 8 U.S.C. § 1182(a)(1)-(33) (1982).

157. *Id.* § 1182(a)(21).

tionalizes an opportunity for judicial review in very select circumstances. Those provisions that are inconsistent with this intent are hereby superceded unless they can be given effect in conjunction with the new legislation. The remainder of the Immigration and Naturalization Act retains its full legal force.

CONCLUSION

Consular officers perform an important international function by issuing visas to candidates for immigration. This responsibility has been undertaken by American consuls since 1924 and is one of the most time consuming tasks of consular employees. More importantly, though, such decisions possess considerable impact. The rejection of a visa application terminates an alien's ability to enter the United States.

Curiously, in spite of the contrary legislative history of the earliest United States immigration enactments, a system of nonreviewability of these significant consular decisions has become entrenched. When an application is rejected, no effective opportunity for appeal exists. Certain administrative procedures have been implemented that permit aliens in limited circumstances to receive a further examination of their credentials. No actual statutory protection has been achieved, however, and a total absence of judicial review persists.

Since the potential consequences of this problem are so detrimental and its cure relatively painless, immediate action is warranted. An institutionalized system of judicial review based upon the proposed draft legislation should be adopted for those aliens whose visa applications are rejected. This statutory solution would not only enhance and develop the just application of United States immigration laws, but would also guard against the subjective circumvention of the present standards of admissibility. In the absence of a compelling opposing rationale, the acceptance of judicial scrutiny for consular visa decisions should be made a reality.

