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Syllabus

KLEINDIENST, ATTORNEY GENERAL, ET AL. *v.* MANDEL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 71-16. Argued April 18, 1972—Decided June 29, 1972

This action was brought to compel the Attorney General to grant a temporary nonimmigrant visa to a Belgian journalist and Marxian theoretician whom the American plaintiff-appellees had invited to participate in academic conferences and discussions in this country. The alien had been found ineligible for admission under §§ 212 (a) (28) (D) and (G) (v) of the Immigration and Nationality Act of 1952, barring those who advocate or publish "the economic, international, and governmental doctrines of world communism." The Attorney General had declined to waive ineligibility as he has the power to do under § 212 (d) of the Act, basing his decision on unscheduled activities engaged in by the alien on a previous visit to the United States, when a waiver was granted. A three-judge District Court, although holding that the alien had no personal entry right, concluded that citizens of this country had a First Amendment right to have him enter and to hear him, and enjoined enforcement of § 212 as to this alien. *Held:* In the exercise of Congress' plenary power to exclude aliens or prescribe the conditions for their entry into this country, Congress in § 212 (a) (28) of the Act has delegated conditional exercise of this power to the Executive Branch. When, as in this case, the Attorney General decides for a legitimate and bona fide reason not to waive the statutory exclusion of an alien, courts will not look behind his decision or weigh it against the First Amendment interests of those who would personally communicate with the alien. Pp. 761–770.

325 F. Supp. 620, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 770. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 774.

Deputy Solicitor General Friedman argued the cause for appellants. On the briefs were *Solicitor General Griswold, Assistant Attorney General Mardian, A. Raymond Randolph, Jr., Robert L. Keuch, Edward S. Christenbury,* and *Lee B. Anderson.*

Leonard B. Boudin argued the cause for appellees. With him on the brief were *Victor Rabinowitz* and *David Rosenberg.*

David Carliner and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The appellees have framed the issue here as follows:

> "Does appellants' action in refusing to allow an alien scholar to enter the country to attend academic meetings violate the First Amendment rights of American scholars and students who had invited him?" [1]

Expressed in statutory terms, the question is whether §§ 212 (a)(28)(D) and (G)(v) and § 212 (d)(3)(A) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U. S. C. §§ 1182 (a)(28)(D) and (G)(v) and § 1182 (d)(3)(A), providing that certain aliens "shall be ineligible to receive visas and shall be excluded from admission into the United States" unless the Attorney General, in his discretion, upon recommendation by the Secretary of State or a consular officer, waives inadmissibility and approves temporary admission, are unconstitutional as applied here in that they deprive American citizens of freedom of speech guaranteed by the First Amendment.

[1] Brief for Appellees 1.

The challenged provisions of the statute are:

"Section 212 (a). Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . . . .

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

. . . . .

"(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship . . . .

. . . . .

"(G) Aliens who write or publish . . . (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship; . . .

"(d)

. . . . .

"(3) Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) . . . may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General . . . ."

Section 212 (d)(6) provides that the Attorney General "shall make a detailed report to the Congress in any

case in which he exercises his authority under paragraph (3) of this subsection on behalf of any alien excludable under paragraphs (9), (10), and (28) . . . ."

I

Ernest E. Mandel resides in Brussels, Belgium, and is a Belgian citizen. He is a professional journalist and is editor-in-chief of the Belgian Left Socialist weekly La Gauche. He is author of a two-volume work entitled Marxist Economic Theory published in 1969. He asserted in his visa applications that he is not a member of the Communist Party. He has described himself, however, as "a revolutionary Marxist."[2] He does not dispute, see 325 F. Supp. 620, 624, that he advocates the economic, governmental, and international doctrines of world communism.[3]

Mandel was admitted to the United States temporarily in 1962 and again in 1968. On the first visit he came as a working journalist. On the second he accepted invitations to speak at a number of universities and colleges. On each occasion, although apparently he was not then aware of it, his admission followed a finding of ineligibility under § 212 (a)(28), and the Attorney General's exercise of discretion to admit him temporarily, on recommendation of the Secretary of State, as § 212 (d)(3)(A) permits.

On September 8, 1969, Mandel applied to the American Consul in Brussels for a nonimmigrant visa to enter the United States in October for a six-day period, during which he would participate in a conference on

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[2] E. Mandel, Revolutionary Strategy in the Imperialist Countries (1969), reprinted in App. 54–66.

[3] Appellees, while suggesting that § 101 (a)(40), defining "world communism," and § 212 (a)(28)(D) are unacceptably vague, "do not contest the fact that appellants can and do conclude that Dr. Mandel's Marxist economic philosophy falls within the scope of these vague provisions." Brief for Appellees 10 n. 8.

Technology and the Third World at Stanford University.[4] He had been invited to Stanford by the Graduate Student Association there. The invitation stated that John Kenneth Galbraith would present the keynote address and that Mandel would be expected to participate in an ensuing panel discussion and to give a major address the following day. The University, through the office of its president, "heartily endorse[d]" the invitation. When Mandel's intended visit became known, additional invitations for lectures and conference participations came to him from members of the faculties at Princeton, Amherst, Columbia, and Vassar, from groups in Cambridge, Massachusetts, and New York City, and from others. One conference, to be in New York City, was sponsored jointly by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference; Mandel's assigned subject there was "Revolutionary Strategy in Imperialist Countries." Mandel then filed a second visa application proposing a more extensive itinerary and a stay of greater duration.

On October 23 the Consul at Brussels informed Mandel orally that his application of September 8 had been refused. This was confirmed in writing on October 30. The Consul's letter advised him of the finding of inadmissibility under § 212 (a)(28) in 1962, the waivers in that year and in 1968, and the current denial of a waiver. It said, however, that another request for waiver was being forwarded to Washington in connection with Mandel's second application for a visa. The Department of State, by a letter dated November 6

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[4] Entry presumably was claimed as a nonimmigrant alien under § 101 (a)(15)(H) of the Act, 8 U. S. C. § 1101 (a)(15)(H), namely, "an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability . . . ."

from its Bureau of Security and Consular Affairs to Mandel's New York attorney, asserted that the earlier waivers had been granted on condition that Mandel conform to his itinerary and limit his activities to the stated purposes of his trip, but that on his 1968 visit he had engaged in activities beyond the stated purposes.[5] For this reason, it was said, a waiver "was

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[5] MR. JUSTICE DOUGLAS in his dissent, *post*, at 773 n. 4, states that Mandel's noncompliance with the conditions imposed for his 1968 visit "appear merely to have been his speaking at more universities than his visa application indicated." The letter dated November 6, 1969, from the Bureau of Security and Consular Affairs of the Department of State to Mandel's New York counsel observed: "On his 1968 visit, Mr. Mandel engaged in activities beyond the stated purposes of his trip. For this reason, a waiver of ineligibility was not sought in connection with his September visa application."

Counsel's affidavit in support of appellees' motion for the convening of a three-judge court and for the issuance of a preliminary injunction stated:

"Mr. Mandel further assured the Consul by letter on November 10, 1969 that he would not appear at any assembly in the United States at which money was solicited for any political cause. This was apparently in response to a charge that he had been present at such a solicitation during his 1968 tour. (See also Exhibit L.)

"Of course, just as Mr. Mandel had no prior notice that he was required to adhere to a stated itinerary in 1968, so Mr. Mandel was not aware that he was forbidden from appearing where contributions [were] solicited for political causes. I have been advised by Mr. George Novack, an American citizen, who coordinated Mr. Mandel's 1968 tour, that in fact the event in question was a cocktail reception held at the Gotham Art Theatre in New York City on October 19, 1968. Mr. Mandel addressed the gathering on the events in France during May and June. Later that evening posters by French students were auctioned. The money was sent to aid the legal defense of students who had taken part in the spring demonstrations. Mr. Mandel did not participate in the fund raising. (See Ex. L, Oct. 30, 1969 letter.)"

The asserted noncompliance by Mandel is therefore broader than mere acceptance of more speaking engagements than his visa application indicated.

not sought in connection with his September visa application." The Department went on to say, however, that it had now learned that Mandel might not have been aware in 1968 of the conditions and limitations attached to his visa issuance, and that, in view of this and upon his assurances that he would conform to his stated itinerary and purposes, the Department was reconsidering his case. On December 1 the Consul at Brussels informed Mandel that his visa had been refused.

The Department of State in fact had recommended to the Attorney General that Mandel's ineligibility be waived with respect to his October visa application. The Immigration and Naturalization Service, however, acting on behalf of the Attorney General, see 28 U. S. C. § 510, in a letter dated February 13, 1970, to New York counsel stated that it had determined that Mandel's 1968 activities while in the United States "went far beyond the stated purposes of his trip, on the basis of which his admission had been authorized and represented a flagrant abuse of the opportunities afforded him to express his views in this country." The letter concluded that favorable exercise of discretion, provided for under the Act, was not warranted and that Mandel's temporary admission was not authorized.

Mandel's address to the New York meeting was then delivered by transatlantic telephone.

In March Mandel and six of the other appellees instituted the present action against the Attorney General and the Secretary of State. The two remaining appellees soon came into the lawsuit by an amendment to the complaint. All the appellees who joined Mandel in this action are United States citizens and are university professors in various fields of the social sciences. They are persons who invited Mandel to speak at universities and other forums in the United States or who expected to participate in colloquia with him so that,

as the complaint alleged, "they may hear his views and engage him in a free and open academic exchange."

Plaintiff-appellees claim that the statutes are unconstitutional on their face and as applied in that they deprive the American plaintiffs of their First and Fifth Amendment rights. Specifically, these plaintiffs claim that the statutes prevent them from hearing and meeting with Mandel in person for discussions, in contravention of the First Amendment; that §212 (a)(28) denies them equal protection by permitting entry of "rightists" but not "leftists" and that the same section deprives them of procedural due process; that § 212 (d)(3)(A) is an unconstitutional delegation of congressional power to the Attorney General because of its broad terms, lack of standards, and lack of prescribed procedures; and that application of the statutes to Mandel was "arbitrary and capricious" because there was no basis in fact for concluding that he was ineligible, and no rational reason or basis in fact for denying him a waiver once he was determined ineligible. Declaratory and injunctive relief was sought.

A three-judge district court was duly convened. The case was tried on the pleadings and affidavits with exhibits. Two judges held that, although Mandel had no personal right to enter the United States, citizens of this country have a First Amendment right to have him enter and to hear him explain and seek to defend his views. The court then entered a declaratory judgment that § 212 (a)(28) and § 212 (d)(3)(A) were invalid and void insofar as they had been or might be invoked by the defendants to find Mandel ineligible for admission. The defendants were enjoined from implementing and enforcing those statutes so as to deny Mandel admission as a nonimmigrant visitor. 325 F. Supp. 620 (EDNY 1971). Judge Bartels dissented. *Id.*, at 637. Probable jurisdiction was noted. 404 U. S. 1013 (1972).

II

Until 1875 alien migration to the United States was unrestricted. The Act of March 3, 1875, 18 Stat. 477, barred convicts and prostitutes. Seven years later Congress passed the first general immigration statute. Act of Aug. 3, 1882, 22 Stat. 214. Other legislation followed. A general revision of the immigration laws was effected by the Act of Mar. 3, 1903, 32 Stat. 1213. Section 2 of that Act made ineligible for admission "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law." By the Act of Oct. 16, 1918, 40 Stat. 1012, Congress expanded the provisions for the exclusion of subversive aliens. Title II of the Alien Registration Act of 1940, 54 Stat. 671, amended the 1918 Act to bar aliens who, at any time, had advocated or were members of or affiliated with organizations that advocated violent overthrow of the United States Government.

In the years that followed, after extensive investigation and numerous reports by congressional committees, see *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 94 n. 37 (1961), Congress passed the Internal Security Act of 1950, 64 Stat. 987. This Act dispensed with the requirement of the 1940 Act of a finding in each case, with respect to members of the Communist Party, that the party did in fact advocate violent overthrow of the Government. These provisions were carried forward into the Immigration and Nationality Act of 1952.

We thus have almost continuous attention on the part of Congress since 1875 to the problems of immigration and of excludability of certain defined classes of aliens. The pattern generally has been one of in-

creasing control with particular attention, for almost 70 years now, first to anarchists and then to those with communist affiliation or views.

III

It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise. *United States ex rel. Turner* v. *Williams,* 194 U. S. 279, 292 (1904); *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537, 542 (1950); *Galvan* v. *Press,* 347 U. S. 522, 530–532 (1954); see *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 592 (1952).

The appellees concede this. Brief for Appellees 33; Tr. of Oral Arg. 28. Indeed, the American appellees assert that "they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien." Brief for Appellees 14. "Dr. Mandel is in a sense made a plaintiff because he is symbolic of the problem." Tr. of Oral Arg. 22.

The case, therefore, comes down to the narrow issue whether the First Amendment confers upon the appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country or, in other words, to compel the Attorney General to allow Mandel's admission.

IV

In a variety of contexts this Court has referred to a First Amendment right to "receive information and ideas":

> "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily

> protects the right to receive . . . .' *Martin* v. *City of Struthers,* 319 U. S. 141, 143 (1943) . . . ." *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969).

This was one basis for the decision in *Thomas* v. *Collins,* 323 U. S. 516 (1945). The Court there held that a labor organizer's right to speak and the rights of workers "to hear what he had to say," *id.,* at 534, were both abridged by a state law requiring organizers to register before soliciting union membership. In a very different situation, MR. JUSTICE WHITE, speaking for a unanimous Court upholding the FCC's "fairness doctrine" in *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 386–390 (1969), said:

> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." *Id.,* at 390.

And in *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965), the Court held that a statute permitting the Government to hold "communist political propaganda" arriving in the mails from abroad unless the addressee affirmatively requested in writing that it be delivered to him placed an unjustifiable burden on the addressee's First Amendment right. This Court has recognized that this right is "nowhere more vital" than in our schools and universities. *Shelton* v. *Tucker,* 364 U. S. 479, 487 (1960); *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250 (1957) (plurality opinion); *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1967). See *Epperson* v. *Arkansas,* 393 U. S. 97 (1968).

In the present case, the District Court majority held:

> "The concern of the First Amendment is not with a non-resident alien's individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien enter and to hear him explain and seek to defend his views; that, as *Garrison* [v. *Louisiana*, 379 U. S. 64 (1964)] and *Red Lion* observe, is of the essence of self-government." 325 F. Supp., at 631.

The Government disputes this conclusion on two grounds. First, it argues that exclusion of Mandel involves no restriction on First Amendment rights at all since what is restricted is "only action—the action of the alien in coming into this country." Brief for Appellants 29. Principal reliance is placed on *Zemel* v. *Rusk*, 381 U. S. 1 (1965), where the Government's refusal to validate an American passport for travel to Cuba was upheld. The rights asserted there were those of the passport applicant himself. The Court held that his right to travel and his asserted ancillary right to inform himself about Cuba did not outweigh substantial "foreign policy considerations affecting all citizens" that, with the backdrop of the Cuban missile crisis, were characterized as the "weightiest considerations of national security." *Id.*, at 13, 16. The rights asserted here, in some contrast, are those of American academics who have invited Mandel to participate with them in colloquia, debates, and discussion in the United States. In light of the Court's previous decisions concerning the "right to receive information," we cannot realistically say that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement. In *Thomas* the registration requirement on its

face concerned only action. In *Lamont,* too, the face of the regulation dealt only with the Government's undisputed power to control physical entry of mail into the country. See *United States* v. *Robel,* 389 U. S. 258, 263 (1967).

The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches, and because "technological developments," such as tapes or telephone hook-ups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary here in light of the discussion that follows in Part V—we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.

V

Recognition that First Amendment rights are implicated, however, is not dispositive of our inquiry here. In accord with ancient principles of the international law of nation-states, the Court in *The Chinese Exclusion Case,* 130 U. S. 581, 609 (1889), and in *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1893), held broadly, as the Government describes it, Brief for Appellants 20, that the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government . . . ." Since that time, the Court's general reaffirmations of this principle have

been legion.[6] The Court without exception has sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Boutilier* v. *Immigration and Naturalization Service*, 387 U. S. 118, 123 (1967). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909). In *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547 (1895), the first Mr. Justice Harlan said:

> "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, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

Mr. Justice Frankfurter ably articulated this history in *Galvan* v. *Press*, 347 U. S. 522 (1954), a deportation case, and we can do no better. After suggesting, at 530, that "much could be said for the view" that due process places some limitations on congresssional power in this area "were we writing on a clean slate," he continued:

> "But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with

[6] See, for example, *Ekiu* v. *United States*, 142 U. S. 651, 659 (1892); *Fok Yung Yo* v. *United States*, 185 U. S. 296, 302 (1902); *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 294 (1904); *Keller* v. *United States*, 213 U. S. 138, 143–144 (1909); *Mahler* v. *Eby*, 264 U. S. 32, 40 (1924); *Shaughnessy* v. *Mezei*, 345 U. S. 206, 210 (1953); cf. *Graham* v. *Richardson*, 403 U. S. 365, 377 (1971).

the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. . . .

"We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens . . . ." *Id.*, at 531–532.

We are not inclined in the present context to reconsider this line of cases. Indeed, the appellees, in contrast to the *amicus*, do not ask that we do so. The appellees recognize the force of these many precedents. In seeking to sustain the decision below, they concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by §§ 212 (a)(28)(D) and (G)(v), and that First Amendment rights could not override that decision. Brief for Appellees 16. But they contend that by providing a waiver procedure, Congress clearly intended that persons ineligible under the broad provision of the section would be temporarily admitted when appropriate "for humane reasons and for reasons of public interest." S. Rep. No. 1137, 82d Cong., 2d Sess., 12 (1952). They argue that the Executive's implementation of this congressional mandate through decision whether to grant a waiver in each individual case must be limited by the First Amendment rights of persons like appellees. Specifically, their position is that the First Amendment rights must prevail, at least where the Gov-

ernment advances no justification for failing to grant a waiver. They point to the fact that waivers have been granted in the vast majority of cases.[7]

Appellees' First Amendment argument would prove too much. In almost every instance of an alien excludable under § 212 (a)(28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well known, and the popular. Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under § 212 (a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or

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[7] The Government's brief states:

"The Immigration and Naturalization Service reports the following with respect to applications to the Attorney General for waiver of an alien's ineligibility for admission under Section 212 (a)(28):

"Year	Total Number of Applications for Waiver of Section 212 (a) (28)	Number of Waivers Granted	Number of Waivers Denied
1971	6210	6196	14
1970	6193	6189	4
1969	4993	4984	9
1968	4184	4176	8
1967	3860	3852	8"

Brief for Appellants 18 n. 24. These cases, however, are only those that, as § 212 (d)(3)(A) provides, come to the Attorney General with a positive recommendation from the Secretary of State or the consular officer. The figures do not include those cases where these officials had refrained from making a positive recommendation.

courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious. Indeed, it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive.

Appellees seek to soften the impact of this analysis by arguing, as has been noted, that the First Amendment claim should prevail, at least where no justification is advanced for denial of a waiver. Brief for Appellees 26. The Government would have us reach this question, urging a broad decision that Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given. See *Jay* v. *Boyd,* 351 U. S. 345, 357–358 (1956); *Hintopoulos* v. *Shaughnessy,* 353 U. S. 72, 77 (1957); *Kimm* v. *Rosenberg,* 363 U. S. 405, 408 (1960). This record, however, does not require that we do so, for the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver. And that reason was facially legitimate and bona fide.

The Government has chosen not to rely on the letter to counsel either in the District Court or here. The fact remains, however, that the official empowered to make the decision stated that he denied a waiver because he concluded that previous abuses by Mandel made it inappropriate to grant a waiver again. With this, we think the Attorney General validly exercised the plenary power that Congress delegated to the Executive by §§ 212 (a) (28) and (d)(3).

In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been

firmly established. In the case of an alien excludable under § 212 (a)(28), Congress has delegated conditional ex[illegible] We hold 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 of those who seek personal communication with the applicant. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

Under *The Chinese Exclusion Case,* 130 U. S. 581, rendered in 1889, there could be no doubt but that Congress would have the power to exclude any class of aliens from these shores. The accent at the time was on race. Mr. Justice Field, writing for the Court, said: "If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects." *Id.,* at 606.

An ideological test, not a racial one, is used here. But neither, in my view, is permissible, as I have indicated on other occasions.[1] Yet a narrower question is raised here. Under the present Act aliens who advocate or teach "the economic, international, and governmental doctrines of world communism" are ineligible to receive

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[1] See *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 598 (dissenting opinion); *Galvan* v. *Press,* 347 U. S. 522, 533 (dissenting opinion).

thought, it may well draw distinctions between one who was an alien and one who was naturalized at the time of conviction, based on the manner in which citizenship was lost, the type of offense committed, and the lapse of time between conviction and denaturalization. These serious differentiations should not be disregarded by giving a ruthlessly undiscriminating construction to the statute before us not required by what Congress has written.

UNITED STATES EX REL. KNAUFF v. SHAUGHNESSY, ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 54. Argued December 5–6, 1949.—Decided January 16, 1950.

The alien wife of a citizen who had served honorably in the armed forces of the United States during World War II sought admission to the United States. On the basis of confidential information the disclosure of which, in his judgment, would endanger the public security, the Attorney General denied a hearing, found that her admission would be prejudicial to the interests of the United States, and ordered her excluded. *Held:* This action was authorized by the Act of June 21, 1941, 22 U. S. C. § 223, and the proclamations and regulations issued thereunder, notwithstanding the War Brides Act of December 28, 1945, 8 U. S. C. § 232 *et seq.* Pp. 539–547.

(a) The admission of aliens to this country is not a right but a privilege, which is granted only upon such terms as the United States prescribes. P. 542.

(b) The Act of June 21, 1941, did not unconstitutionally delegate legislative power to prescribe the conditions under which aliens should be excluded. Pp. 542–543.

(c) It is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien. P. 543.

(d) Any procedure authorized by Congress for the exclusion of aliens is due process, so far as an alien denied entry is concerned. P. 544.

(e) The regulations governing the entry of aliens into the United States during the national emergency proclaimed May 27, 1941, which were prescribed by the Secretary of State and the Attorney General pursuant to Presidential Proclamation 2523, were "reasonable" within the meaning of the Act of June 21, 1941. P. 544.

(f) Presidential Proclamation 2523 authorized the Attorney General as well as the Secretary of State to order the exclusion of aliens. P. 544.

(g) Petitioner, an alien, had no vested right of entry which could be the subject of a prohibition against retroactive operation of regulations affecting her status. P. 544.

(h) The national emergency proclaimed May 27, 1941, has not been terminated; a state of war still exists; and the Act of June 21, 1941, and the proclamations and regulations thereunder are still in force. Pp. 545–546.

(i) A different result is not required by the War Brides Act, which waives some of the usual requirements for the admission of certain alien spouses only if they are "otherwise admissible under the immigration laws." Pp. 546–547.

173 F. 2d 599, affirmed.

The District Court dismissed a writ of habeas corpus obtained to test the right of the Attorney General to exclude from the United States, without a hearing, the alien wife of a citizen who had served honorably in the armed forces of the United States during World War II. The Court of Appeals affirmed. 173 F. 2d 599. This Court granted certiorari. 336 U. S. 966. *Affirmed*, p. 547.

Gunther Jacobson argued the cause and filed a brief for petitioner.

Philip R. Monahan argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell, Joseph W. Bishop, Jr.* and *Robert S. Erdahl.*

Jack Wasserman filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE MINTON delivered the opinion of the Court.

May the United States exclude without hearing, solely upon a finding by the Attorney General that her admission would be prejudicial to the interests of the United States, the alien wife of a citizen who had served honorably in the armed forces of the United States during World War II? The District Court for the Southern District of New York held that it could, and the Court of Appeals for the Second Circuit affirmed. 173 F. 2d 599. We granted certiorari to examine the question especially in the light of the War Brides Act of December 28, 1945. 336 U. S. 966.

Petitioner was born in Germany in 1915. She left Germany and went to Czechoslovakia during the Hitler regime. There she was married and divorced. She went to England in 1939 as a refugee. Thereafter she served with the Royal Air Force efficiently and honorably from January 1, 1943, until May 30, 1946. She then secured civilian employment with the War Department of the United States in Germany. Her work was rated "very good" and "excellent." On February 28, 1948, with the permission of the Commanding General at Frankfurt, Germany, she married Kurt W. Knauff, a naturalized citizen of the United States. He is an honorably discharged United States Army veteran of World War II. He is, as he was at the time of his marriage, a civilian employee of the United States Army at Frankfurt, Germany.

On August 14, 1948, petitioner sought to enter the United States to be naturalized. On that day she was temporarily excluded from the United States and detained at Ellis Island. On October 6, 1948, the Assistant Commissioner of Immigration and Naturalization recommended that she be permanently excluded without a hearing on the ground that her admission would be

prejudicial to the interests of the United States. On the same day the Attorney General adopted this recommendation and entered a final order of exclusion. To test the right of the Attorney General to exclude her without a hearing for security reasons, *habeas corpus* proceedings were instituted in the Southern District of New York, based primarily on provisions of the War Brides Act. The District Court dismissed the writ, and the Court of Appeals affirmed.

The authority of the Attorney General to order the exclusion of aliens without a hearing flows from the Act of June 21, 1941, amending § 1 of the Act of May 22, 1918 (55 Stat. 252, 22 U. S. C. § 223).[1] By the 1941 amendment it was provided that the President might, upon finding that the interests of the United States required it, impose additional restrictions and prohibitions on the entry into and departure of persons from the United States during the national emergency proclaimed May 27, 1941. Pursuant to this Act of Congress the President on November 14, 1941, issued Proclamation 2523 (3 CFR, 1943 Cum. Supp., 270–272). This proclamation recited that the interests of the United States required the imposition of additional restrictions upon the entry into and

[1] "When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

"(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe . . . ."

departure of persons from the country and authorized the promulgation of regulations jointly by the Secretary of State and the Attorney General. It was also provided that no alien should be permitted to enter the United States if it were found that such entry would be prejudicial to the interests of the United States.[2]

Pursuant to the authority of this proclamation the Secretary of State and the Attorney General issued regulations governing the entry into and departure of persons from the United States during the national emergency. Subparagraphs (a) to (k) of § 175.53 of these regulations specified the classes of aliens whose entry into the United States was deemed prejudicial to the public interest. Subparagraph (b) of § 175.57 provided that the Attorney General might deny an alien a hearing before a board of inquiry in special cases where he determined that the alien was excludable under the regulations on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.[3]

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[2] "(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

"No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General." 3 CFR, 1943 Cum. Supp., 271.

[3] "In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be, excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry shall be held until after

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It was under this regulation § 175.57 (b) that petitioner was excluded by the Attorney General and denied a hearing. We are asked to pass upon the validity of this action.

At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides. *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 659; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711.

Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But there is no question of inappropriate delegation of legislati[illegible]liens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. *United States* v. *Curtiss-Wr[illegible] Export Corp.,* 299 U. S. 304; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 713. When Congress prescribes a procedure [illegible] dealing alone with a legislative power. It is implementing an inherent executive power.

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the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." 8 CFR, 1945 Supp., § 175.57 (b).

Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien. *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659–660; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713–714; *Ludecke* v. *Watkins*, 335 U. S. 160. Cf. *Yamataya* v. *Fisher*, 189 U. S. 86, 101. Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, *e. g.*, as was done here, for the best interests of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent. What was said in *Lichter* v. *United States*, 334 U. S. 742, 785, is equally appropriate here:

> "It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. . . . Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. 'They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.'"

Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned. *Nishimura Ekiu* v. *United States, supra; Ludecke* v. *Watkins, supra.*

In the particular circumstances of the instant case the Attorney General, exercising the discretion entrusted to him by Congress and the President, concluded upon the basis of confidential information that the public interest required that petitioner be denied the privilege of entry into the United States. He denied her a hearing on the matter because, in his judgment, the disclosure of the information on which he based that opinion would itself endanger the public security.

We find no substantial merit to petitioner's contention that the regulations were not "reasonable" as they were required to be by the 1941 Act. We think them reasonable in the circumstances of the period for which they were authorized, namely, the national emergency of World War II. Nor can we agree with petitioner's assertion that Proclamation 2523 (see note 2, *supra*) authorized only the Secretary of State, and not the Attorney General, to order the exclusion of aliens. See Presidential Proclamation 2850 of August 17, 1949 (14 Fed. Reg. 5173), amending and clarifying Proclamation 2523. We reiterate that we are dealing here with a matter of *privilege*. Petitioner had no vested *right* of entry which could be the subject of a prohibition against retroactive operation of regulations affecting her status.

It is not disputed that the Attorney General's action was pursuant to the 8 CFR regulations heretofore discussed.[4] However, 22 U. S. C. § 223,[5] authorizes these special restrictions on the entry of aliens only when the United States is at war or during the existence of the

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[4] See note 3, *supra*.

[5] See note 1, *supra*.

national emergency proclaimed May 27, 1941.[6] For ordinary times Congress has provided aliens with a hearing. 8 U. S. C. §§ 152, 153. And the contention of petitioner is that she is entitled to the statutory hearing because for purposes of the War Brides Act, within which she comes, the war terminated when the President proclaimed the cessation of hostilities.[7] She contends that the War Brides Act, applicable portions of which are set out in the margin,[8] discloses a congressional intent that special restrictions on the entry of aliens should cease to apply to war brides upon the cessation of hostilities.

The War Brides Act provides that World War II is the period from December 7, 1941, until the proclaimed termination of hostilities. This has nothing to do with the period for which the regulations here acted under were

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[6] And at certain other times not material here.

[7] Proclamation 2714 of December 31, 1946, 3 CFR, 1946 Supp., 77.

[8] "That notwithstanding any of the several clauses of section 3 of the Act of February 5, 1917, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of the effective date of this Act, be admitted to the United States . . . .

"Sec. 2. Regardless of section 9 of the Immigration Act of 1924, any alien admitted under section 1 of this Act shall be deemed to be a nonquota immigrant as defined in section 4 (a) of the Immigration Act of 1924.

. . . . .

"Sec. 5. For the purpose of this Act, the Second World War shall be deemed to have commenced on December 7, 1941, and to have ceased upon the termination of hostilities as declared by the President or by a joint resolution of Congress." 59 Stat. 659, 8 U. S. C. §§ 232–236.

authorized. The beginning and end of the war are defined by the War Brides Act, we assume, for the purpose of ascertaining the period within which citizens must have served in the armed forces in order for their spouses and children to be entitled to the benefits of the Act. The special procedure followed in this case was authorized not only during the period of actual hostilities but during the entire war and the national emergency proclaimed May 27, 1941. The national emergency has never been terminated. Indeed, a state of war still exists. See *Woods* v. *Miller Co.*, 333 U. S. 138, n. 3. Thus, the authority upon which the Attorney General acted remains in force. The Act of June 21, 1941, and the President's proclamations and the regulations thereunder are still a part of the immigration laws.

The War Brides Act does not relieve petitioner of her alien status. Indeed, she sought admission in order to be naturalized and thus to overcome her alien status. The Act relieved her of certain physical, mental, and documentary requirements and of the quota provisions of the immigration laws. But she must, as the Act requires, still be "otherwise admissible under the immigration laws." In other words, aside from the enumerated relaxations of the immigration laws she must be treated as any other alien seeking admission. Under the immigration laws and regulations applicable to all aliens seeking entry into the United States during the national emergency, she was excluded by the Attorney General without a hearing. In such a case we have no authority to retry the determination of the Attorney General. *Ludecke* v. *Watkins*, 335 U. S. 160, 171–172.

There is nothing in the War Brides Act or its legislative history[9] to indicate that it was the purpose of Congress,

[9] See H. R. Rep. No. 1320, 79th Cong., 1st Sess. (1945); S. Rep. No. 860, 79th Cong., 1st Sess. (1945); 91 Cong. Rec. 11738, 12342 (1945).

by partially suspending compliance with certain requirements and the quota provisions of the immigration laws, to relax the security provisions of the immigration laws. There is no indication that Congress intended to permit members or former members of the armed forces to marry and bring into the United States aliens that the President, acting through the Attorney General in the performance of his sworn duty, found should be denied entry for security reasons. As all other aliens, petitioner had to stand the test of security. This she failed to meet. We find no legal defect in the manner of petitioner's exclusion, and the judgment is

Affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, dissenting.

If the essence of statutory construction is to find the thought beneath the words, the views expressed by MR. JUSTICE JACKSON, in which I fully concur, enforce the purpose of Congress. The contrary conclusion substantially frustrates it.

Seventy years ago began the policy of excluding mentally defective aliens from admission into the United States. Thirty years ago it became our settled policy to admit even the most desirable aliens only in accordance with the quota system. By the so-called War Brides Act Congress made inroads upon both these deeply-rooted policies. (Act of December 28, 1945, 59 Stat. 659, 8 U. S. C. § 232 *et seq.*) It lifted the bar against the exclusion even of "physically and mentally defective aliens." It did this in favor of "alien spouses and alien minor children of citizen members who are serving or have served honorably in the armed forces of the United States during World War II." H. R. Rep. No. 1320 and S. Rep. No. 860, 79th Cong., 1st Sess. (1945).

penses out of the assets in the hands of the liquidator, upon the ground that the court was without jurisdiction to make such an allowance, any right of the appellants under the Federal Constitution has been infringed. The question is one of state practice and remedy. The motions to dismiss the appeals are granted and the appeals are dismissed for the want of a substantial federal question. *Iowa Central Ry. Co.* v. *Iowa,* 160 U. S. 389, 393; *Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 280, 281; *McDonald* v. *Oregon Navigation Co.,* 233 U. S. 665, 669, 670; *Gasquet* v. *Lapeyre,* 242 U. S. 367, 369, 370; *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 166.

Dismissed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

UNITED STATES *v.* CURTISS-WRIGHT EXPORT CORP. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 98. Argued November 19, 20, 1936.—Decided December 21, 1936.

1. A Joint Resolution of May 28, 1934, provided: "That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reëstablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their coöperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress." Violation was made punishable as a

crime. The President issued two proclamations, one on the date of the Resolution, putting it into operation; the other on November 14, 1935, revoking the first proclamation. *Held:*

(1) The Joint Resolution is not an unconstitutional delegation of legislative power to the Executive. Pp. 314, 329.

(2) The powers of the Federal Government over foreign or external affairs differ in nature and origin from those over domestic or internal affairs. P. 315.

(3) The broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the States such portions as it was thought desirable to vest in the Federal Government, leaving those not included in the enumeration still in the States. *Id.*

(4) The States severally never possessed international powers. P. 316.

(5) As a result of the separation from Great Britain by the Colonies, acting as a unit, the powers of external sovereignty passed from the Crown, not to the Colonies severally, but to the Colonies in their collective and corporate capacity as the United States of America. *Id.*

(6) The Constitution was ordained and established, among other things, to form "a more perfect Union." Prior to that event, the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. Though the States were several their people in respect of foreign affairs were one. P. 317.

(7) The investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. P. 318.

(8) In the international field, the sovereignty of the United States is complete. *Id.*

(9) In international relations the President is the sole organ of the Federal Government. P. 319.

(10) In view of the delicacy of foreign relations and of the power peculiar to the President in this regard, Congressional legislation which is to be made effective in the international field must

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often accord to him a degree of discretion and freedom which would not be admissible were domestic affairs alone involved. P. 319.

(11) The marked difference between foreign and domestic affairs, in this respect, is recognized in the dealings of the houses of Congress with executive departments. P. 321.

(12) Unbroken legislative practice from the inception almost of the national government supports the conclusion that the Joint Resolution, *supra*, is not an unconstitutional delegation of power. P. 322.

(13) Findings of jurisdictional facts in the first proclamation, following the language of the Joint Resolution, were sufficient. P. 330.

(14) The revocation of the first proclamation by the second did not have the effect of abrogating the Resolution or of precluding its enforcement by prosecution and punishment of offenses committed during the life of the first proclamation. P. 331.

2. Upon an appeal by the United States under the Criminal Appeals Act from a decision holding an indictment bad on demurrer, this Court has jurisdiction of questions involving the validity of the statute on which the indictment was founded which were decided by the District Court in favor of the United States. P. 329.

14 F. Supp. 230, reversed.

Appeal, under the Criminal Appeals Act, from a judgment quashing an indictment for conspiracy.

Mr. Martin Conboy, with whom *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *Charles A. Horsky* were on the brief, for the United States.

There is no unconstitutional delegation of legislative power. From the beginning of the Government like delegations have been customary in the field of foreign relations.

The policy of Congress is clearly stated; the standards are simple and definite; and a finding by the President is required. The case is controlled by *Hampton & Co.* v. *United States,* 276 U. S. 394, and *Field* v. *Clark,* 143 U. S. 649.

The objection that the President is allowed to make simply an estimate of the future efficacy of the law rather than a finding of present facts rests upon a misconstruction of the Resolution, which requires the finding of a present fact, viz., whether the prohibition on arms will contribute to reëstablishment of peace in the Chaco now.

Delegations of power to make present determinations of future effect are commonly upheld, e. g., in rate-cases.

The other grounds urged below in support of the demurrer, and overruled by the District Court, are not properly before this Court under the Criminal Appeals Act. In any event, they are without merit. By his proclamation the President complied with every requirement of the Resolution, making all findings of fact that were necessary.

Nor did the second proclamation, revoking the first, terminate liability for offenses committed in the interim. The authority for the prosecution is the Resolution, not repealed. Moreover, even if the proclamation can be considered as a repeal of the Resolution, the prosecution is authorized by R. S., § 13.

Mr. George Z. Medalie, with whom *Messrs. J. Edward Lumbard, Jr.*, and *Theodore S. Hope, Jr.*, were on the brief, for John S. Allard et al., appellees.

The Joint Resolution attempts an invalid delegation in at least four respects. First, its going into operation is made dependent upon the President's determination whether it may have the capacity to bring about the result desired by the Congress, to-wit, the reëstablishment of peace in the Chaco. Second, its going into operation is further conditioned upon the President's uncontrolled discretion. Third, it delegates to the President a power to repeal the Resolution which is coördinate with that of the Congress itself. Fourth, it grants to the President the power to except from and limit the statutory prohibi-

tion, as he may see fit, guided by no rule or standard whatsoever.

The proclamation which was designed to put the Resolution into operation was ineffectual, because of the President's failure to find essential jurisdictional facts.

The acts charged in the indictment are no longer an offense against the laws of the United States. The prosecution is not saved by R. S., § 13 and there is no other saving clause.

This Court may consider all grounds urged in support of the judgment which go to the validity or construction of the Joint Resolution.

Mr. William Wallace, with whom *Mr. Robert D. Shea* was on the brief, for the Curtiss-Wright Export Corp. et al., appellees.

The Criminal Appeals Act permits consideration on this appeal of any ground of invalidity in addition to the one upon which the court below sustained the demurrers. *United States* v. *Bitty,* 208 U. S. 398, 400; *United States* v. *Biggs,* 211 U. S. 507, 522; *United States* v. *Keitel,* 211 U. S. 370, 398; *United States* v. *Kissel,* 218 U. S. 606; *United States* v. *American Railway Express Co.,* 265 U. S. 425, 435; *Langnes* v. *Green,* 282 U. S. 531, 538; *United States* v. *Hastings,* 296 U. S. 188; *United States* v. *Nixon,* 235 U. S. 231; *United States* v. *Shreveport Grain Co.,* 287 U. S. 77; *United States* v. *Mescall,* 215 U. S. 26, 31.

The Joint Resolution was invalid because it was not to go into operation until after an optional proclamation which the President might never make. Making or refusing to make a law is essentially a legislative function which may not be delegated or surrendered by the Congress. *Mutual Film Corp.* v. *Ohio Industrial Comm'n,* 236 U. S. 245; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 538.

Some of the cases relied on by the Government, like *Hampton & Co.* v. *United States,* 276 U. S. 394; *Field* v. *Clark,* 143 U. S. 649, are under tariff acts. Others deal with powers confided to the Interstate Commerce Commission on rate regulations, etc. (*Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *New York Central Securities Co.* v. *United States,* 287 U. S. 12; see also, *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1). Still others have to do with control of the radio, film and similar industries. (*Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266; *Mutual Film Corp.* v. *Ohio Industrial Comm'n,* 236 U. S. 245; see also, *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176.) One deals with the functions of the Secretary of War, confided to him under the constitutional power to control navigable waters. (*Union Bridge Co.* v. *United States,* 204 U. S. 364.)

In all those cases the question arose under legislation already in operation and with respect to delegation of power over administrative details incident to its enforcement. No one of them involved a determination of a condition upon the happening of which a law not yet in effect was or was not to be put into operation.

Distinguishing also: *The Aurora,* 7 Cranch 382; *United States* v. *Chavez,* 228 U. S. 525; *United States* v. *Mesa,* 228 U. S. 533; *Talbott* v. *United States,* 208 Fed. 144, cert. den., 232 U. S. 722; and *United States* v. *Lucas,* 6 F. (2d) 327. Cf. *Langworth* v. *Kadel,* 141 Kan. 256.

In the present case, the President was under no compulsion to issue his Proclamation unless he should choose to do so. It seems clear that under the principle of the *Field* and *Panama* cases, such lack of explicit directions and mandatory force is fatal to the validity of the Resolution.

The Resolution is invalid because its duration, if ever it went into operation, was left likewise to the uncontrolled discretion of the President.

The power to prescribe limitations and exceptions invalidates the Resolution.

The prohibition of the sale of arms and munitions never went into effect because the President failed to comply with the conditions prescribed by the Joint Resolution. While the courts will not investigate the manner in which the President or any other high official has carried out an executive or administrative function (*Philadelphia & Trenton Ry.* v. *Stimpson,* 14 Pet. 448), the rule has no application where a delegation of legislative power is involved. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 433.

The rule is well established (*Wichita Railroad & Light Co.* v. *Public Utilities Comm'n,* 260 U. S. 48, 59; *Mahler* v. *Eby,* 264 U. S. 32, 44) that, where legislative power has been delegated, not only a substantial compliance with the conditions laid down by the legislative body is required, but also an affirmative showing that this has been done.

From the proclamation it appears that the President consulted with the Governments of other American Republics and that he secured assurances of the coöperation of such Governments as he deemed necessary. There is no express declaration—no affirmative statement—that "such Governments as I have deemed necessary" included any American Republic.

The phrase "as contemplated by the said Joint Resolution" is not sufficient to indicate unequivocally that the President was asserting a full compliance.

But even if the proclamation be construed as asserting such compliance in general terms, or as a conclusion of the President, this would not resolve the difficulty. The broader underlying question would still remain, whether such a general phrase amounts to an affirmative showing of compliance. This Court has held otherwise in *Mahler* v. *Eby, supra.*

The Joint Resolution is not presently valid, or alive for the purpose of sustaining prosecution for offenses heretofore committed thereunder.

The Joint Resolution was intended as a temporary provision, to be in force during the period between the first proclamation putting the prohibition into effect, and the later proclamation removing it. It was to be effective "until otherwise ordered by the President or by Congress." That time limit was reached when the revoking proclamation was issued. Having then expired, no further judicial proceedings could be had thereunder, unless competent authority had kept it alive for that purpose. *Yeaton* v. *United States*, 5 Cranch 281, 283–4; *United States* v. *Chambers*, 291 U. S. 207; *The Rachel*, 6 Cranch 329.

Revised Statutes, § 13, by its terms, is applicable only where a statute has been "repealed." The word "repeal" means the abrogation of one statute by another statute.

Mr. Neil P. Cullom was on the brief for Barr Shipping Corp. et al., appellees.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On January 27, 1936, an indictment was returned in the court below, the first count of which charges that appellees, beginning with the 29th day of May, 1934, conspired to sell in the United States certain arms of war, namely fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States pursuant to authority conferred by § 1 of the resolution. In pursuance of the conspiracy, the commission of certain overt acts was alleged, details of which need not be stated. The Joint Resolution (c. 365, 48 Stat. 811) follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reëstablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their coöperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

"Sec. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both."

The President's proclamation (48 Stat. 1744), after reciting the terms of the Joint Resolution, declares:

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reëstablishment of peace between those countries, and that I have consulted with the governments of other American Republics and have been assured of the coöperation of such governments as I have deemed necessary as contemplated by the said joint resolution; and I do hereby admonish all citizens of the

United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Bolivia and Paraguay, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

"And I do hereby enjoin upon all officers of the United States charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

"And I do hereby delegate to the Secretary of State the power of prescribing exceptions and limitations to the application of the said joint resolution of May 28, 1934, as made effective by this my proclamation issued thereunder."

On November 14, 1935, this proclamation was revoked (49 Stat. 3480), in the following terms:

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to Bolivia or Paraguay will no longer be necessary as a contribution to the reëstablishment of peace between those countries, and the above-mentioned Proclamation of May 28, 1934, is hereby revoked as to the sale of arms and munitions of war to Bolivia or Paraguay from and after November 29, 1935, provided, however, that this action shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under the aforesaid Proclamation of May 28, 1934, or the Joint Resolution of Congress approved by the President on the same date; and that the said Proclamation and Joint Resolution shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Appellees severally demurred to the first count of the indictment on the grounds (1) that it did not charge facts sufficient to show the commission by appellees of any offense against any law of the United States; (2) that this count of the indictment charges a conspiracy to violate the joint resolution and the Presidential proclamation, both of which had expired according to the terms of the joint resolution by reason of the revocation contained in the Presidential proclamation of November 14, 1935, and were not in force at the time when the indictment was found. The points urged in support of the demurrers were, first, that the joint resolution effects an invalid delegation of legislative power to the executive; second, that the joint resolution never became effective because of the failure of the President to find essential jurisdictional facts; and third, that the second proclamation operated to put an end to the alleged liability under the joint resolution.

The court below sustained the demurrers upon the first point, but overruled them on the second and third points. 14 F. Supp. 230. The government appealed to this court under the provisions of the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, as amended, U. S. C. Title 18, § 682. That act authorizes the United States to appeal from a district court direct to this court in criminal cases where, among other things, the decision sustaining a demurrer to the indictment or any count thereof is based upon the invalidity or construction of the statute upon which the indictment is founded.

First. It is contended that by the Joint Resolution, the going into effect and continued operation of the resolution was conditioned (a) upon the President's judgment as to its beneficial effect upon the reëstablishment of peace between the countries engaged in armed conflict in the Chaco; (b) upon the making of a proclama-

tion, which was left to his unfettered discretion, thus constituting an attempted substitution of the President's will for that of Congress; (c) upon the making of a proclamation putting an end to the operation of the resolution, which again was left to the President's unfettered discretion; and (d) further, that the extent of its operation in particular cases was subject to limitation and exception by the President, controlled by no standard. In each of these particulars, appellees urge that Congress abdicated its essential functions and delegated them to the Executive.

Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the law-making power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except

those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 294. That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, "the Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."

As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure

without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. *See Penhallow* v. *Doane,* 3 Dall. 54, 80–81. That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between his Brittanic Majesty and the "United States of America." 8 Stat.—European Treaties—80.

The Union existed before the Constitution, which was ordained and established among other things to form "a more perfect Union." Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one. Compare *The Chinese Exclusion Case,* 130 U. S. 581, 604, 606. In that convention, the entire absence of state power to deal with those affairs was thus forcefully stated by Rufus King:

"The states were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty,—they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign. They had not even the organs or faculties of defence or offence, for they could not of themselves raise troops, or equip vessels, for war." 5 Elliott's Debates 212.[1]

[1] In general confirmation of the foregoing views, see 1 Story on the Constitution, 4th ed., §§ 198–217, and especially §§ 210, 211, 213, 214, 215 (p. 153), 216.

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356); and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation (*Jones* v. *United States*, 137 U. S. 202, 212), the power to expel undesirable aliens (*Fong Yue Ting* v. *United States*, 149 U. S. 698, 705 *et seq.*), the power to make such international agreements as do not constitute treaties in the constitutional sense (*Altman & Co.* v. *United States*, 224 U. S. 583, 600–601; Crandall, Treaties, Their Making and Enforcement, 2d ed., p. 102 and note 1), none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.

In *Burnet* v. *Brooks*, 288 U. S. 378, 396, we said, "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." Cf. *Carter* v. *Carter Coal Co.*, *supra*, p. 295.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

"The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch." U. S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24.

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an

exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. In his reply to the request, President Washington said:

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely

impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent." 1 Messages and Papers of the Presidents, p. 194.

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field

of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in *Mackenzie* v. *Hare,* 239 U. S. 299, 311, "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers.*" (Italics supplied.)

In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day.

Let us examine, in chronological order, the acts of legislation which warrant this conclusion:

The Act of June 4, 1794, authorized the President to lay, regulate and revoke embargoes. He was "authorized" "whenever, in his opinion, the public safety shall so require" to lay the embargo upon all ships and vessels in the ports of the United States, including those of foreign nations "under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper." C. 41, 1 Stat. 372. A prior joint resolution of May 7, 1794 (1 Stat. 401), had conferred *unqualified* power on the President to grant clearances, notwithstanding an existing embargo, to ships or vessels belonging to citizens of the United States bound to any port beyond the Cape of Good Hope.

The Act of March 3, 1795 (c. 53, 1 Stat. 444), gave the President authority to permit the exportation of arms, cannon and military stores, the law prohibiting such ex-

ports to the contrary notwithstanding, the only prescribed guide for his action being that such exports should be in "cases connected with the security of the commercial interest of the United States, and for public purposes only."

By the Act of June 13, 1798 (c. 53, § 5, 1 Stat. 566), it was provided that if the government of France "shall clearly disavow, and shall be found to refrain from the aggressions, depredations and hostilities" theretofore maintained against vessels and property of the citizens of the United States, "in violation of the faith of treaties, and the laws of nations, and shall thereby acknowledge the just claims of the United States to be considered as in all respects neutral, . . . it shall be lawful for the President of the United States, being well ascertained of the premises, to remit and discontinue the prohibitions and restraints hereby enacted and declared; and he shall be, and is hereby authorized to make proclamation thereof accordingly."

By § 4 of the Act of February 9, 1799 (c. 2, 1 Stat. 615), it was made "lawful" for the President, "if he shall deem it expedient and consistent with the interest of the United States," by order to remit certain restraints and prohibitions imposed by the act with respect to the French Republic, and also to revoke any such order "whenever, in his opinion, the interest of the United States shall require."

Similar authority, qualified in the same way, was conferred by § 6 of the Act of February 7, 1800, c. 10, 2 Stat. 9.

Section 5 of the Act of March 3, 1805 (c. 41, 2 Stat. 341), made it lawful for the President, whenever an armed vessel entering the harbors or waters within the jurisdiction of the United States and required to depart therefrom should fail to do so, not only to employ the land and naval forces to compel obedience, but "if he

shall think it proper, it shall be lawful for him to forbid, by proclamation, all intercourse with such vessel, and with every armed vessel of the same nation, and the officers and crew thereof; to prohibit all supplies and aid from being furnished them" and to do various other things connected therewith. Violation of the President's proclamation was penalized.

On February 28, 1806, an act was passed (c. 9, 2 Stat. 351) to suspend commercial intercourse between the United States and certain parts of the Island of St. Domingo. A penalty was prescribed for its violation. Notwithstanding the positive provisions of the act, it was by § 5 made "lawful" for the President to remit and discontinue the restraints and prohibitions imposed by the act at any time "if he shall deem it expedient and consistent with the interests of the United States" to do so. Likewise in respect of the Non-intercourse Act of March 1, 1809, (c. 24, 2 Stat. 528); the President was "authorized" (§ 11, p. 530), in case either of the countries affected should so revoke or modify her edicts "as that they shall cease to violate the neutral commerce of the United States," to proclaim the fact, after which the suspended trade might be renewed with the nation so doing.

Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs. Many, though not all, of these acts are designated in the footnote.[2]

[2] Thus, the President has been broadly "authorized" to suspend embargo acts passed by Congress, "if in his judgment the public interest should require it" (Act of December 19, 1806, c. 1, § 3, 2 Stat. 411), or if, "in the judgment of the President," there has been such suspen-

It well may be assumed that these legislative precedents were in mind when Congress passed the joint resolutions of April 22, 1898, 30 Stat. 739; March 14, 1912, 37 Stat. 630; and January 31, 1922, 42 Stat. 361, to prohibit the export of coal or other war material. The resolution of 1898 authorized the President "in his discretion, and with such limitations and exceptions as shall seem to him expedient" to prohibit such exportations. The striking identity of language found in the second resolution mentioned above and in the one now under review will be

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sion of hostilities abroad as may render commerce of the United States sufficiently safe. Act of April 22, 1808, c. 52, 2 Stat. 490. See, also, Act of March 3, 1817, c. 39, § 2, 3 Stat. 361. Compare, but as to reviving an embargo act, the Act of May 1, 1810, c. 39, § 4, 2 Stat. 605.

Likewise, Congress has passed numerous acts laying tonnage and other duties on foreign ships, in retaliation for duties enforced on United States vessels, but providing that if the President should be satisfied that the countervailing duties were repealed or abolished, then he might by proclamation suspend the duties as to vessels of the nation so acting. Thus, the President has been "authorized" to proclaim the suspension. Act of January 7, 1824, c. 4, § 4, 4 Stat. 3; Act of May 24, 1828, c. 111, 4 Stat. 308; Act of July 24, 1897, c. 13, 30 Stat. 214. Or it has been provided that the suspension should take effect whenever the President "shall be satisfied" that the discriminating duties have been abolished. Act of March 3, 1815, c. 77, 3 Stat. 224; Act of May 31, 1830, c. 219, § 2, 4 Stat. 425. Or that the President "may direct" that the tonnage duty shall cease to be levied in such circumstances. Act of July 13, 1832, c. 207, § 3, 4 Stat. 578. And compare Act of June 26, 1884, c. 121, § 14, 23 Stat. 53, 57.

Other acts, for retaliation against discriminations as to United States commerce, have placed broad powers in the hands of the President, "authorizing" even the total exclusion of vessels of any foreign country so offending (Act of June 19, 1886, c. 421, § 17, 24 Stat. 79, 83), or the increase of duties on its goods or their total exclusion from the United States (Act of June 17, 1930, c. 497, § 388, 46 Stat. 590, 704), or the exclusion of its goods or the detention, in certain circumstances, of its vessels, or the exclusion of its vessels or nationals from privileges similar to those which it has denied to citizens of the United States (Act of September 8, 1916, c. 463, §§ 804–806, 39 Stat.

seen upon comparison. The resolution of March 14, 1912, provides:

"That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the Presi-

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756, 799–800). As to discriminations by particular countries, it has been made lawful for the President, by proclamation, which he "may in his discretion, apply . . . to any part or all" of the subjects named, to exclude certain goods of the offending country, or its vessels. Act of March 3, 1887, c. 339, 24 Stat. 475. And compare Act of July 26, 1892, c. 248, 27 Stat. 267. Compare, also, authority given the Postmaster General to reduce or enlarge rates of foreign postage, among other things, for the purpose of counteracting any adverse measures affecting our postal intercourse with foreign countries. Act of March 3, 1851, c. 20, § 2, 9 Stat. 587, 589.

The President has been "authorized" to suspend an act providing for the exercise of judicial functions by ministers, consuls and other officers of the United States in the Ottoman dominions and Egypt whenever he "shall receive satisfactory information" that the governments concerned have organized tribunals likely to secure to United States citizens the same impartial justice enjoyed under the judicial functions exercised by the United States officials. Act of March 23, 1874, c. 62, 18 Stat. 23.

Congress has also passed acts for the enforcement of treaties or conventions, to be effective only upon proclamation of the President. Some of them may be noted which "authorize" the President to make proclamation when he shall be "satisfied" or shall receive "satisfactory evidence" that the other nation has complied: Act of August 5, 1854, c. 269, §§ 1, 2, 10 Stat. 587; Act of March 1, 1873, c. 213, §§ 1, 2, 17 Stat. 482; Act of August 15, 1876, c. 290, 19 Stat. 200; Act of December 17, 1903, c. 1, § 1, 33 Stat. 3. *Cf.* Act of June 11, 1864, c. 116, § 1, 13 Stat. 121; Act of February 21, 1893, c. 150, 27 Stat. 472.

Where appropriate, Congress has provided that violation of the President's proclamations authorized by the foregoing acts shall be penalized. See, *e. g.*, Act of June 19, 1886; Act of March 3, 1887; Act of September 8, 1916; Act of June 17, 1930—all *supra*.

dent shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.

"SEC. 2. That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both."

The third resolution is in substantially the same terms, but extends to any country in which the United States exercises extraterritorial jurisdiction, and provides for the President's action not only when conditions of domestic violence exist which *are* promoted, but also when such conditions *may be* promoted, by the use of such arms or munitions of war.

We had occasion to review these embargo and kindred acts in connection with an exhaustive discussion of the general subject of delegation of legislative power in a recent case, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421–422, and in justifying such acts, pointed out that they confided to the President "an authority which was cognate to the conduct by him of the foreign relations of the government."

The result of holding that the joint resolution here under attack is void and unenforceable as constituting an unlawful delegation of legislative power would be to stamp this multitude of comparable acts and resolutions as likewise invalid. And while this court may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if beyond all rational doubt it finds them to be so, an impressive array of legislation such as we have just set forth, enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem. A legislative practice such as we have here, evidenced not by only occasional instances,

but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined.

In *The Laura*, 114 U. S. 411, 416, this court answered a challenge to the constitutionality of a statute authorizing the Secretary of the Treasury to remit or mitigate fines and penalties in certain cases, by repeating the language of a very early case (*Stuart* v. *Laird*, 1 Cranch 299, 309) that the long practice and acquiescence under the statute was a "practical exposition . . . too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." In *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 57, the constitutionality of R. S. § 4952, conferring upon the author, inventor, designer or proprietor of a photograph certain rights, was involved. Mr. Justice Miller, speaking for the court, disposed of the point by saying: "The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive."

In *Field* v. *Clark*, 143 U. S. 649, 691, this court declared that " . . . the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land." The rule is one which has been stated and applied many times by this court. As examples, see

Ames v. *Kansas,* 111 U. S. 449, 469; *McCulloch* v. *Maryland,* 4 Wheat. 316, 401; *Downes* v. *Bidwell,* 182 U. S. 244, 286.

The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.

We deem it unnecessary to consider, *seriatim,* the several clauses which are said to evidence the unconstitutionality of the Joint Resolution as involving an unlawful delegation of legislative power. It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reëstablishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly; and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject.

Second. The second point raised by the demurrer was that the Joint Resolution never became effective because the President failed to find essential jurisdictional facts; and the third point was that the second proclamation of the President operated to put an end to the alleged liability of appellees under the Joint Resolution. In respect of both points, the court below overruled the demurrer, and thus far sustained the government.

The government contends that upon an appeal by the United States under the Criminal Appeals Act from a decision holding an indictment bad, the jurisdiction of the court does not extend to questions decided in favor of the United States, but that such questions may only be re-

viewed in the usual way after conviction. We find nothing in the words of the statute or in its purposes which justifies this conclusion. The demurrer in the present case challenges the validity of the statute upon three separate and distinct grounds. If the court below had sustained the demurrer without more, an appeal by the government necessarily would have brought here for our determination all of these grounds, since in that case the record would not have disclosed whether the court considered the statute invalid upon one particular ground or upon all of the grounds alleged. The judgment of the lower court is that the statute is invalid. Having held that this judgment cannot be sustained upon the particular ground which that court assigned, it is now open to this court to inquire whether or not the judgment can be sustained upon the rejected grounds which also challenge the validity of the statute and, therefore, constitute a proper subject of review by this court under the Criminal Appeals Act. *United States* v. *Hastings*, 296 U. S. 188, 192.

In *Langnes* v. *Green*, 282 U. S. 531, where the decree of a district court had been assailed upon two grounds and the circuit court of appeals had sustained the attack upon one of such grounds only, we held that a respondent in certiorari might nevertheless urge in this court in support of the decree the ground which the intermediate appellate court had rejected. That principle is applicable here.

We proceed, then, to a consideration of the second and third grounds of the demurrers which, as we have said, the court below rejected.

1. The Executive proclamation recites, "I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reëstablishment of peace between those countries,

and that I have consulted with the governments of other American Republics *and have been assured of the coöperation of such governments as I have deemed necessary as contemplated by the said joint resolution.*" This finding satisfies every requirement of the Joint Resolution. There is no suggestion that the resolution is fatally uncertain or indefinite; and a finding which follows its language, as this finding does, cannot well be challenged as insufficient.

But appellees, referring to the words which we have italicized above, contend that the finding is insufficient because the President does not declare that the coöperation of such governments as he deemed necessary included any American republic and, therefore, the recital contains no affirmative showing of compliance in this respect with the Joint Resolution. The criticism seems to us wholly wanting in substance. The President recites that he has consulted with the governments of other American republics, and that he has been assured of the coöperation of such governments as he deemed necessary *as contemplated by the joint resolution.* These recitals, construed together, fairly include within their meaning American republics.

2. The second proclamation of the President, revoking the first proclamation, it is urged, had the effect of putting an end to the Joint Resolution, and in accordance with a well-settled rule, no penalty could be enforced or punishment inflicted thereafter for an offense committed during the life of the Joint Resolution in the absence of a provision in the resolution to that effect. There is no doubt as to the general rule or as to the absence of a saving clause in the Joint Resolution. But is the case presented one which makes the rule applicable?

It was not within the power of the President to repeal the Joint Resolution; and his second proclamation did not

purport to do so. It "revoked" the first proclamation; and the question is, did the revocation of the proclamation have the effect of abrogating the resolution or of precluding its enforcement in so far as that involved the prosecution and punishment of offenses committed during the life of the first proclamation? We are of opinion that it did not.

Prior to the first proclamation, the Joint Resolution was an existing law, but dormant, awaiting the creation of a particular situation to render it active. No action or lack of action on the part of the President could destroy its potentiality. Congress alone could do that. The happening of the designated events—namely, the finding of certain conditions and the proclamation by the President—did not call the law into being. It created the occasion for it to function. The second proclamation did not put an end to the law or affect what had been done in violation of the law. The effect of the proclamation was simply to remove for the future, a condition of affairs which admitted of its exercise.

We should have had a different case if the Joint Resolution had expired by its own terms upon the issue of the second proclamation. Its operative force, it is true, was limited to the period of time covered by the first proclamation. And when the second proclamation was issued, the resolution ceased to be a rule for the future. It did not cease to be the law for the antecedent period of time. The distinction is clearly pointed out by the Superior Court of Judicature of New Hampshire in *Stevens* v. *Dimond,* 6 N. H. 330, 332, 333. There, a town by-law provided that if certain animals should be found going at large between the first day of April and the last day of October, etc., the owner would incur a prescribed penalty. The trial court directed the jury that the by-law, being in force for a year only, had expired so that the defendant could not be called upon to answer for a violation which

occurred during the designated period. The state appellate court reversed, saying that when laws "expire by their own limitation, or are repealed, they cease to be the law in relation to the past, as well as the future, and can no longer be enforced in any case. No case is, however, to be found in which it was ever held before that they thus ceased to be law, unless they expired by express limitation in themselves, or were repealed. It has never been decided that they cease to be law, merely because the time they were intended to regulate had expired. . . . A very little consideration of the subject will convince any one that a limitation of the time to which a statute is to apply, is a very different thing from the limitation of the time a statute is to continue in force."

The first proclamation of the President was in force from the 28th day of May, 1934, to the 14th day of November, 1935. If the Joint Resolution had in no way depended upon Presidential action, but had provided explicitly that, at any time between May 28, 1934, and November 14, 1935, it should be unlawful to sell arms or munitions of war to the countries engaged in armed conflict in the Chaco, it certainly could not be successfully contended that the law would expire with the passing of the time fixed in respect of offenses committed during the period.

The judgment of the court below must be reversed and the cause remanded for further proceedings in accordance with the foregoing opinion.

Reversed.

MR. JUSTICE MCREYNOLDS does not agree. He is of opinion that the court below reached the right conclusion and its judgment ought to be affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.