Artl.S8.C18.8.8.2 Exclusion of Aliens

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

In *Boutilier v. Immigration & Naturalization Service*, the Court rejected an alien's constitutional vagueness challenge to a statute that barred the admission of homosexuals (who had been interpreted by immigration authorities to fall under the prohibition on the admission of "persons afflicted with psychopathic personality"), observing that "[i]t has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."[1]

In a similar vein, in 1972, the Supreme Court in *Kleindienst v. Mandel* rejected a First Amendment challenge to the application of a statute that barred the admission of aliens who advocated communism.[2] Notably, in *Mandel*, the Court considered a constitutional challenge to the exclusion of an alien that was not brought by the alien himself, but by a group of professors who had invited the alien to speak at their universities.[3] Recognizing that "plenary congressional power to make policies and rules for exclusion

of aliens has long been firmly established," the Court held that it would uphold, in the face of a constitutional challenge, an alien's exclusion as long as there is "a facially legitimate and bona fide reason" for the decision.[4] Thus, even when reviewing constitutional challenges brought by U.S. citizens, the Court has adopted a highly deferential standard for reviewing the decision to exclude an alien.

The Supreme Court in 1977 maintained this deferential posture in *Fiallo v. Bell*, a case in which a group of U.S. citizens and lawful permanent residents (LPRs) brought an equal protection challenge to a statute that granted special immigration preferences to the children and parents of U.S. citizens and LPRs, unless the parent-child relationship was that of a father and an illegitimate child.[5] Noting at the outset "the limited scope of judicial inquiry into immigration legislation," the Court upheld the statute in view of Congress's "exceptionally broad power to determine which classes of aliens may lawfully enter the country."[6] Importantly, the Court explained that "it is not the judicial role in cases of this sort to probe and test the justifications" for Congress's legislative policy distinctions between classes of aliens.[7]

Footnotes

1. ^ Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123 (1967).
2. ^ Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972).
3. ^ *Id.* at 762. Indeed, the Court observed that "Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise." (citing 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, 530–32 (1954).

4. ^ *Mandel*, 408 U.S. at 769–70. Applying this test, the Court upheld the alien's exclusion based on the government's explanation that the alien had abused visas in the past, and refused to "look behind" the government's justification to determine whether it was supported by any evidence. *Id.*
5. ^ Fiallo v. Bell, 430 U.S. 787, 788–89, 791 (1977); *see* 8 U.S.C. § 1101(b)(1)(D), (b)(2) (1977).
6. ^ *Fiallo*, 430 U.S. at 792–94, 798–800.
7. ^ *Id.* at 798–99. Although the Fiallo Court relied on Mandel in reaching its decision, it did not identify a "facially legitimate or bona fide reason" for the challenged statute. *Id.* at 794–95. Instead, the Court determined that Congress may have excluded illegitimate children and their natural fathers from preferential immigration status "because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations." *Id.* at 799; *see also* Miller v. Albright, 523 U.S. 420, 444–45 (1998) (upholding statutory requirement that children born abroad and out of wedlock to U.S. citizen fathers, but not to U.S. citizen mothers, obtain formal proof of paternity by age 18 in order to establish citizenship).