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UNITED STATES COMPLIANCE WITH THE HELSINKI FINAL ACT: THE TREATMENT OF ALIENS

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I. INTRODUCTION

A casualty, sorely if not fatally wounded, of the Soviet armed intervention in Afghanistan is the once widely-touted Final Act of the Conference on Security and Cooperation in Europe concluded in Helsinki on August 1, 1975.[1] The Conference was originally proposed by the Soviet Union in the 1950's in order to promote its perceived security interest in Europe and to legitimize its territorial boundaries in Eastern Europe. Though initially opposed to the idea, the United States finally supported it in 1972 as a means of promoting the "security that would come from an expansion of cooperation between East and West in a wide range of areas including economic, humanitarian, educational and

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1. The Final Act provides for the inviolability of frontiers and the territorial integrity of the participating States, which, except for Canada and the United States, are confined to European countries only. It is therefore not a document to be invoked on behalf of Afghanistan. The United Nations Charter suffices for this purpose. *See* G.A. Res. A/Res/ES 6-2, Jan. 14, 1980; U.N. CHARTER arts. 1-2; 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (1969).

cultural."[2]

Former Secretary of State Henry Kissinger described the Final Act of the Helsinki Conference as "providing the indispensable, political and legal basis for pursuing the issue of human rights in East-West relations."[3] The Helsinki achievement, claimed the Department of State Counselor in 1978, "was to fold human rights concerns into the developing fabric of East-West detente."[4]

The Final Act is comprised by three areas of agreement, commonly referred to as "Baskets," dealing with questions relating to security in Europe, cooperation in the fields of economics, science and technology, and the environment, and cooperation in humanitarian and other fields.[5] It is the third area which is the subject of this article with specific emphasis on United States compliance with the Act prior to the Soviet invasion of Afghanistan.[6]

II. Specific Provisions of the Helsinki Final Act

The Helsinki Final Act declares the aim of the participating States "to facilitate freer movement and contacts, individually and collectively, whether privately or officially among persons, in-

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2. Nimetz, *The Potential of the Helsinki Dialogue,* Dep't State Current Policy, No. 9 at 2 (Aug. 1978).

3. Kissinger, 15 Society 97, 99-102 (1977).

4. Nimetz, *supra* note 2, at 3.

5. *Conference on Security & Cooperation in Europe, Final Act, Helsinki, 1975* [hereinafter cited as *Final Act*], 73 Dep't State Bull. 323 (1975). *See* Appendix A *infra.*

6. The rupture of the Helsinki Act is evidenced by President Carter's decision to forbid United States participation in the 22d Olympiad in Moscow unless the Soviet armed forces are withdrawn from Afghanistan. Participation in the Moscow Olympics, President Carter informed the United States Olympic Committee, in the face of "continuing Soviet aggression and brutality in Afghanistan . . . would be against our national interest and would damage our national security." 16 Weekly Comp. of Pres. Doc. 616 (Apr. 8, 1980) (Mailgram to United States Olympic Committee, Apr. 5, 1980). *See also, U.S.-U.S.S.R. Exchanges,* GIST, Dep't State, Apr. 1980, and *Announcing Curtailment of Government-Funded Exchanges between the United States and the Soviet Union in the Fields of Education, Culture, Information, and Science and Technology,* 27 Science 1056, 1058 (1980). The presidential declaration, made in the conduct of the foreign relations of the United States, superseded the Helsinki Final Act, a political, non-enforceable legal document which provides, with regard to sports: "In order to expand existing links and cooperation in the field of sport, the participating States will encourage contacts and exchanges of this kind, including sports meetings and competitions of all sorts, on the basis of the established international rules, regulations, and practices." *Final Act,* Basket III, § 1 (g).

stitutions and organizations of the participating States, and to contribute to the solution of humanitarian problems that arise in that connection."[7] Specific steps to implement this aim, identified in Basket III of the Act, include the following:

(1) facilitation of travel by members of families in different countries;[8]
(2) reunification of family members by permitting emigration from the state of departure and immigration to the receiving state with "appropriate care with regard to employment for persons from other participating States who take up permanent residence in that State . . . and assurance that they are afforded opportunities equal to those enjoyed by [signatories'] own citizens for education, medical assistance and social security";[9]
(3) grant of exit or entry permits to persons "who have decided to marry a citizen from another participating State";[10]
(4) facilitation of travel for personal or professional reasons;[11]
(5) promotion of tourism;[12]
(6) encouragement of meetings among young people through educational exchanges, professional training, foreign language study, and youth programs;[13]
(7) expansion of sports activity;[14] and
(8) exchange of information in all fields of knowledge.[15]

There has been no lack of attention to the Soviet Union and other East European countries' non-compliance with specific provisions of the Final Act.[16] Less attention has been given, however, to the failure of the United States to comply fully with the promises made at Helsinki to eliminate barriers to travel and to promote family reunification. The Commission on Security and Cooperation in Europe, established by Congress to monitor implementation of the Final Act, noted in an August 1977 report that the United States compliance record has been mixed:

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7. *Final Act,* BASKET III, § 1 preamble, para. 5.
8. *Id.* at § 1(a).
9. *Id.* at § 1(b), para. 9.
10. *Id.* at § 1(c), para. 1.
11. *Id.* at § 1(d).
12. *Id.* at § 1(e).
13. *Id.* at § 1(f).
14. *Id.* at § 1(g).
15. *Id.* at § 2.
16. *See generally,* SEMI-ANNUAL REPORTS BY THE PRESIDENT TO THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE ON IMPLEMENTATION OF THE HELSINKI FINAL ACT, No. 1-8 (June 1, 1976 - May 31, 1980).

> The United States has taken action—under the stimulation of the Final Act—to bring its passport and visa issuance practices more nearly into compliance with implicit Helsinki standards. In March 1977, President Carter ordered the removal of what he called "the last remaining restrictions" on foreign travel by Americans, provisions which have made U.S. passports invalid for travel to Albania, Cuba and North Korea. He also announced that the United States 'will move to liberalize travel opportunities to America.'[17]

The promise remains unfulfilled, both with regard to short-term visitors to the United States and to persons, primarily family members, who seek to emigrate for permanent residence. In its 1977 report, the Commission also quoted findings of an Industry-Government Special Task Force in 1968:

> Entry procedures for vacation and business visitors to the United States are outmoded. They serve only to project an adverse image of this nation's willingness to receive foreign guests. They are overly defensive and bespeak an unfriendly attitude based upon feelings of suspicion. . . .
>
> In order that the United States rid itself of this stigma, a dramatic new policy of simplified procedures must be adopted, specifically geared to the short-term visitor.[18]

These procedures, the Commission reported in 1977, had "not changed significantly"[19] nor have they changed since.

III. Specific Provisions of the Immigration and Nationality Act

The problem arises under provisions of the Immigration and Nationality Act that mandate exclusion of certain categories of aliens from the United States. Section 212(a)(27) provides for the exclusion of aliens "who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States."[20] Section

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17. Commission on Security and Cooperation in Europe, Implementation of the Final Act of the Conference on Security and Cooperation in Europe: Findings and Recommendations Two Years after Helsinki 122 (Report transmitted to the House Committee on International Relations, Comm. Print 1977).

18. *Id.* at 122-23.

19. *Id.* at 123.

20. 8 U.S.C. § 1182(a)(27) (1976).

212(a)(28) provides for the exclusion of aliens,

> who are, or at any time have been . . . anarchists; advocate[s] . . . [of] . . . opposition to all organized government . . . Communists . . . advocate[s] . . . [of] . . . the overthrow by force and violence, or other unconstitutional means, of the Government of the United States or of all forms of law; or . . . [of] the duty, the necessity, [or the] propriety of the unlawful assaulting or killing of any . . . officers of the Government of the United States or any other organized government. . . .[21]

Section 212(a)(29) provides for the exclusion of aliens,

> whom the consular officer or the Attorney General knows or has reasonable grounds to believe probably would, after entry, (a) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder or any other activity subversive to the national security, (b) engage in any activity, the purpose of which is the opposition to, or the control or the overthrow of the Government of the United States by force, violence, or other unconstitutional means, or . . . (c) participate in the activities of any organization which is . . . required to be registered under Section 7 of the Subversive Activities Control Act of 1950.[22]

Section 212(d)(3) vests in the Attorney General, upon the recommendation of the Secretary of State or the consular officer, authority to waive the grounds of exclusion set forth in Section 212(a)(28).[23]

When these provisions were first enacted as part of the Internal Security Act of 1950 and later codified in the Immigration and Nationality Act of 1952, numerous persons were excluded from the United States much to the public embarrassment of this country. By 1975, 96 percent of those who were found excludable under Section 212(a)(28) were granted waivers of excludability and were approved for receipt of nonimmigrant visas.[24]

With the enactment of Section 112 of Public Law 95-105 on

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21. *Id.* at § 1182(a)(28).
22. *Id.* at § 1182(a)(29).
23. *Id.* at § 1182(d)(3).
24. *Basket III, Implementation of the Helsinki Accords: Hearings before the Commission on Security and Cooperation in Europe on United States Visa Policies,* Vol. IX, 96th Cong., 1st Sess. [hereinafter cited as *Hearings*] 76-77 (Apr. 5, 1979).

August 17, 1977,[25] the so-called McGovern Amendment, waivers were universally granted to every alien who was ordered excluded because of membership in a prescribed organization. The Amendment required the Secretary of State to recommend that the Attorney General grant a waiver within 30 days of receiving an application for a nonimmigrant visa by an alien who is excludable because of such membership, unless the Secretary of State certified to the Speaker of the House of Representatives and the Chairman of Senate Committee on Foreign Relations that "the admission of such alien would be contrary to the security interests of the United States."[26]

IV. SELECTIVE EXCLUSION OF ALIENS BY THE EXECUTIVE BRANCH

The effect of the McGovern Amendment was to remove some of the previous barriers to the admission of aliens who had been denied visas on political grounds. The individuals affected included trade union officials from the Soviet Union, Communist political leaders from other countries (such as Italy and Mexico) who sought to participate in conferences with members of the Communist Party of the United States, representatives of the Palestine Liberation Organization, and other persons who were previously ordered excluded because of membership in organizations prescribed by Section 212(a)(28).[27] The State Department avoided application of the provision in Section 212(a)(28) of the Amendment which required certification to Congress whenever a waiver was not recommended, however. They simply barred admission of aliens under other provisions of the statute, namely Section 212(a)(27) or, in rare cases, Section 212(a)(29).

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25. Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, § 112, 91 Stat. 848 (1977) (prior to 1979 amendment). The McGovern Act was itself subsequently modified by the Department of State Authorizations Act, Fiscal Years 1980 and 1981, Pub. L. No. 96-60, § 109, 93 Stat. 397 (1979). Section 109(d) permits the Secretary of State to refuse to recommend a waiver for aliens from signatory countries which are not in substantial compliance with the provisions of the Helsinki Final Act, particularly with the human rights provisions; Section 109(c) provides that the waiver provisions shall not be applicable to representatives of the Palestine Liberation Organization.

26. Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105. § 112, para. 2, 91 Stat. 848 (1977).

27. *See Hearings, supra* note 24, at 37-79 (statement by Hume Horan, Deputy Assistant Secretary for Consular Affairs, accompanied by Barbara Watson and Cornelius Scully).

Where aliens fall within the categories described by Section 212(a) (27) and (29), the Secretary of State and the Attorney General are specifically precluded under Section 212(d)(3) from recommending or approving a waiver of excludability. Thus, persons whose applications might have otherwise been reviewed by Congress are unable to apply for a waiver. When asked about this observation, the Department of Justice explained that paragraphs (27) and (29) are "quite distinct from those applicable to . . . paragraph (28)" and that it is "simply beside the point" that an applicant who may be ineligible under paragraph (28) may also be ineligible under (27) or (29).[28]

Little information has been made available by the Department of State and the Department of Justice regarding exclusions of aliens under these two provisions of the statute.[29] The Departments have uniformly taken the position that information regarding the grounds for exclusion under Section 212(a)(27) and (29) is classified. Applicants are left to guess the reasons for their exclusion, and they are unable to overcome the government's findings in the absence of specific information in rebuttal.

When these statutory provisions were first adopted by Congress in the Internal Security Act of 1950 and again in the Immigration and Nationality Act of 1952, President Harry Truman vetoed both bills. He called specific attention to the vague language set forth in Section 212(a)(27), referring to the terms "prejudicial to the public interest" appearing in Section 212(a)(27) and "subversive to the national security" appearing in Section 212(a)(29):

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28. *Id.* at 20 (statement by Michael T. Egan).

29. *See* Kleindeist v. Mandel, 408 U.S. 753 (1972). The 1976 Visa Report indicates that 69 non-immigrant visas and 5 immigrant visas were refused under subparagraphs 27 and 29. DEP'T STATE OFFICIAL ANN. REP. (1976). Testimony before the Commission on Security and Cooperation in Europe indicates that at least some of the visa applicants were found inadmissible to the United States because they were employed by hostile foreign intelligence services. *Hearings, supra* note 24, at 6-9. Then Associate Attorney General Egan urged that the Executive Branch should have:

> a very narrow discretion to admit into this country known or suspected agents and officers of foreign hostile intelligence services under tightly controlled circumstances. . . .
>
> [S]ituations in which the Federal Bureau of Investigation could be reasonably certain that . . . the visitor's activities [would be covered] while in this country would effectively neutralize the threat otherwise presented by the visitor.

Id. at 8.

> No standards or definitions are provided to guide discretion in the exercise of powers so sweeping. To punish undefined "activities" departs from traditional American insistence on established standards of guilt. To punish an undefined purpose is thought control. These provisions are worse than the infamous Alien Act of 1798, passed in a time of national fear and distrust of foreigners, which gave the President power to deport any alien deemed "dangerous to the peace and safety of the United States." Alien residents were thoroughly frightened and citizens much disturbed by that threat to liberty. Such powers are inconsistent with our democratic ideals. Conferring powers like that upon the Attorney General is unfair to him as well as to our alien residents. Once fully informed of such vast discretionary powers vested in the Attorney General, Americans now would and should be just as alarmed as Americans were in 1798 over less drastic powers vested in the President.[30]

The fact that these provisions have been embodied in our immigration policy for thirty years does not gainsay the validity of President Truman's veto messages to Congress in 1950 and 1952.

In the absence of definitive information regarding the basis of decisions by the Department of Justice and the Secretary of State, the public must vest an awesome amount of trust and responsibility in executive officers making judgments based on vague statutory phrases. What little we know about the Departments' decisions in alien cases does not warrant the grant of such heavy responsibility. The decisions are based upon information which is kept secret by persons who, like everyone else, are fallible.

Throughout the early history of the Immigration and Nationality Act, the Attorney General insisted upon his right to use confidential information in deciding whether to suspend deportation proceedings where "its disclosure would be prejudicial to the public interest, safety, or security;" after winning his point before the United States Supreme Court in *Jay v. Boyd*,[31] this policy was reversed. From 1956 until the present date, the Immigration and Naturalization Service has disclosed all adverse information in suspension cases without any apparent prejudice to the "public interest, safety, or security." In at least two cases in which aliens were denied entry to the United States based upon confidential

30. President's Message to Congress Explaining his Reasons for Vetoing the Immigration and Nationality Bill, 1 U.S. CODE CONG. & AD. NEWS, 82d Cong., 2d Sess. 921, 925 (1952).

31. 351 U.S. 345 at 360 (1956).

information which the government alleged would be prejudicial to the national security, the Court held that the government failed to sustain its burden of proof.[32] The evidence was such that not even the mouse roared. Both aliens were admitted to the United States after disclosure of the government's evidence.

There have been countless episodes involving American consuls who refused visas based upon "confidential information" that came to their attention through newspaper articles or, more often, by admissions of the applicants themselves. Information regarding aliens' political associations may have been corroborated by "third party informants."

One of the stated reasons for maintaining the confidentiality of charges against applicants is the fact that the source of information is from a "third party agency," that is, the Federal Bureau of Investigation or the Central Intelligence Agency. It is widely known that both of these agencies have had a tendency to classify virtually all of their information regardless of legitimate national security needs.[33] The propensity of government officials to overclassify material has been noted by the courts. The United States Court of Appeals for the District of Columbia observed that "[g]overnment officials who would not stoop to misrepresentation may reflect an inherent tendency to resist disclosure."[34]

The Congress has responded to the problem by enacting corrective legislation. In 1974, the Freedom of Information Act was amended expressly to permit judicial review of the substantive propriety of the classifications given to government documents.[35] Concerning this legislation, Senator Howard Baker, Jr. declared: " [R]ecent experience indicates that the Federal Government ex-

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32. Shaughnessy v. Mezei, 345 U.S. 206 (1953); Knauff v. Shaughnessy, 338 U.S. 537 (1950).

33. *See, e.g., N.Y. Times v. United States,* 403 U.S. 713 (1971), the "Pentagon Papers" case, in which the government claimed that the publication of various CIA documents would pose a "grave and immediate danger to the security of the United States;" *Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1365 (4th Cir. 1975),* involving publication of THE CIA AND THE CULT OF INTELLIGENCE by a former CIA employee. The CIA initially insisted on deletion of 339 items on the grounds that they were classified. It later reduced its requirement to 171 items, but on review by the United States District Court, the deletable items were reduced to only 26. *See also,* United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972).

34. Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1975).

35. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561-64 (later codified in 5 U.S.C. § 552 (1977)).

hibits a proclivity for over-classification of information; and I believe that this trend would continue if judicial review of classified documents applied a presumption of validity to the classification as recommended by the President."[36] No opportunity is afforded visa applicants to secure judicial review of State Department determinations of excludability and only the most limited judicial review is available to challenge the Attorney General's refusal to grant waivers of excludability.[37]

V. UNITED STATES VISA POLICY IN LIGHT OF THE HELSINKI FINAL ACT

Knowledge of current State Department policy indicates that many of its determinations are based on foreign policy and political considerations. Presumably the admission of persons with disfavored views "would be prejudicial to the public interest." For example, such diverse persons as those who support the objectives of the Palestine Liberation Organization and those who supported the former government in Zimbabwe have been denied visas to the United States under the provisions of Section 212(a)(27). At least one person was refused a visa because he was allegedly engaged in activities detrimental to the present government in Haiti.[38] Since there is no lack of people in the United States with views on these and other controversial topics, one must ask what "public interest" is served by excluding from the United States persons, albeit citizens of other countries, who engage in public activities in support of their "civil, political, economic, social, cultural, and other rights and freedoms."[39]

Apart from the treatment it gives those seeking entry to this country in order to promote their beliefs, the United States also fails to comply with the provisions of the Helsinki Final Act relating to family ties. Basket III on Cooperation in Humanitarian and Other Fields provides:

> In order to promote further development of contacts on the basis of family ties, the participating States will favorably consider applications for travel with the purpose of allowing persons to enter or leave their territory temporarily, and on a regular basis, if de-

36. 120 CONG. REC. 36874 (1974).
37. Kleindienst v. Mandel, 408 U.S. 753 (1972).
38. 1977 DIG. U.S. PRAC. INT'L L. 109-10.
39. *Final Act*, BASKET I, Declaration of Principles, Principle VII.

sired, in order to visit members of their families.[40]

It also provides with regard to reunification of families that "[t]he participating States will deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their families, with special attention being given to requests of an urgent character. . . ."[41] The section on "Marriage between Citizens of Different States" further states, "In dealing with requests from couples from different participating States, once married, to enable them and the minor children of their marriage to transfer their permanent residence to a State in which either one is normally a resident, the participating States will also apply the provisions accepted for family reunification."[42]

The provisions of the Immigration and Nationality Act which require exclusion of persons who are members of prescribed organizations do not permit waiver for spouses, children, or parents of United States citizens. The only grounds that a person who has been a member of a prescribed organization can assert for seeking admission to the United States as a permanent resident are that:

> (1) such membership was "involuntary," while under the age of sixteen, by operation of law, or for the purpose of obtaining employment, food rations, or other essentials of living; or
> (2) membership was terminated at least five years prior to the date of application for an immigrant visa and, in addition, he or she actively opposes the doctrines of the organization.

Persons who are able to establish these conditions, "to the satisfaction of a consular officer," must also obtain a determination by the Attorney General that their admission to the United States would be "in the public interest."[43] Needless to say, these requirements exalt political doctrine above the principle of family reunification.

Even for persons who are able to meet the onerous requirements of the present law, the procedures are overwhelming and favorable decisions are a long time in coming. Those persons who cannot convince an American consul that their membership in prescribed organizations was "involuntary," or that they have actively opposed a forbidden ideology, are without recourse. As a

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40. *Final Act,* BASKET III, § 1(a), para. 1.
41. *Id.* at § 1(b), para. 1.
42. *Id.* at § 1(c), para. 3.
43. 8 U.S.C. § 1182(a)(28) (1976).

result, in numerous cases, spouses of United States citizens have been forced to live outside the United States. This situation is relieved either by temporary visits abroad by the American spouse or by that spouse living, in effect, permanently abroad, separated from close family members who remain in the United States.

The Soviet Union's refusal to permit Russian fiancees and spouses to emigrate, frequently challenged by the United States, is matched by the statute which forbids the admission to this country of spouses who have been voluntary members of proscribed organizations unless they have been engaged in active opposition to the doctrines of such organizations for a period of at least five years. The over-elaborate provisions of the Immigration and Nationality Act discussed in this article, Section 212(a) (27), (28), and (29), are plainly a product of a political hysteria that has no place in a democracy founded upon the principles of freedom of thought and speech. They should be rooted out of the immigration policy of the United States.