U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

November 16, 1992

Honorable Dan Quayle
President of the Senate
United States Senate
Washington, D.C. 20515

Attn: Michael Davidson
Senate Legal Counsel

Re: Rafeedie v. Immigration & Naturalization Service, No. 92-5270 (D.C. Cir.)

Dear Mr. President:

In accordance with 2 U.S.C. § 288k(b) and on behalf of the Attorney General, I write to inform you that the Department of Justice has determined against appeal in the above-captioned case. The government filed a notice of appeal on July 24, 1992, but no briefing schedule has yet been established. If we do not hear from you within 75 days from the date of this letter, we will assume that the Senate has no desire to intervene, and we will move to dismiss our appeal.

Plaintiff Fouad Yacoub Rafeedie is a permanent resident alien who was born in Jordan in 1957 and has lived in the United States since 1975. In April 1986 he applied for and received from the Immigration and Naturalization Service (INS) a permit to travel outside the United States. Rafeedie stated on his application that he wished to travel to Cyprus because his mother was having open heart surgery there. The INS, however, believes that, in fact, Rafeedie traveled to Damascus, Syria, to attend a meeting of a group closely associated with the Popular Front for the Liberation of Palestine (PFLP), a dangerous terrorist organization. Rafeedie was placed in exclusion proceedings upon his return to the United States in May 1986. Since that time he has been paroled into this country and has lived with his wife and children, first in Cleveland and now in Houston.

The INS's efforts to exclude Rafeedie were based on former 8 U.S.C. §§ 1182(a)(27) and 1182(a)(28)(F) (1988). Section 1182(a)(27) provided for the exclusion of

> [a]liens 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.

Section 1182(a)(28)(F) provided for the exclusion of

> [a]liens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage.

Rafeedie filed suit in the United States District Court for the District of Columbia, challenging the INS's use of summary exclusion proceedings and seeking to prevent the agency from relying on §§ 1182(a)(27) and 1182(a)(28)(F) in these proceedings. In an earlier appeal, the United States Court of Appeals for the District of Columbia held that the plaintiff was not required to exhaust administrative remedies and that Rafeedie, as a permanent resident alien, was entitled to some procedural due process protections in connection with his exclusion. 880 F.2d 506 (D.C. Cir. 1989). On remand, the district court (Joyce Hens Green, J.) entered a declaratory judgment that §§ 1182(a)(27) and 1182(a)(28)(F) were unconstitutional. The court explained that "[p]laintiff is entitled to the same First Amendment protections as United States citizens, including the limitations imposed by the overbreadth and vagueness doctrines." 793 F. Supp. at 22. Relying principally on Brandenburg v. Ohio, 395 U.S. 444 (1969), the court struck down § 1182(a)(28)(F) on the ground that "[a]lthough the government plainly may have a legitimate interest in regulating subversive conduct, it cannot broadly prohibit teaching or advocating unpopular tenets, or association with an organization that teaches or advocates such doctrines." Id. at 22-23. The court also held that "[b]ecause 8 U.S.C. § 1182(a)(27) fails to convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, the court must strike down the provision as an

abridgement of the freedom of speech." Id. at 23 (citations and internal quotations omitted).

In stating that "[p]laintiff is entitled to the same First Amendment protections as United States citizens," the district court ignored substantial Supreme Court authority recognizing that Congress possesses very broad power over immigration, and that legal standards governing congressional action in other areas cannot be mechanically applied to immigration decisions.

All that said, however, the statute at issue has been substantially amended by the Immigration Act of 1990, Pub. L. No. 101-649. The grounds for exclusion stated in former §§ 1182(a)(27) and 1182(a)(28)(F) no longer apply. In general, the 1990 Act drastically reduced the extent to which exclusion or deportation may be premised on expressive or associational activities that would be constitutionally protected in other contexts.

Rafeedie appears to be the only individual who is currently the subject of exclusion proceedings under §§ 1182(a)(27) and/or 1182(a)(28)(F). (At least two other aliens are potentially subject to a deportation provision of the old statute similar to § 1182(a)(28)(F).) In light of the limited continuing impact of the former statutory provisions, it is our view that the government lacks a substantial interest in their vindication by an appellate court.

The government does, of course, have a very substantial interest in defending the Immigration Act of 1990 against any constitutional challenge. In defending against such a challenge, we would emphasize that the remaining restrictions on expressive and associational activities are narrow and carefully calibrated. To insist upon appellate evaluation of the now superseded McCarran-Walter Act's approach can be of little benefit. Moreover, while our arguments in support of §§ 1182(a)(27) and 1182(a)(28)(F) would stress the broad deference owed to congressional decisions in the immigration field, the court in reviewing our submissions may well be influenced by the fact that Congress no longer deems these to be appropriate grounds for exclusion. We would therefore run the risk of an unfavorable decision that would impair our ability to defend the 1990 Act in possible subsequent litigation.

In sum, while we believe that a principled defense could be made of §§ 1182(a)(27) and 1182(a)(28)(F), we do not believe that an appeal would ultimately serve the government's interests. The 1990 Act effected substantial changes in this field, and in light of the limited continuing impact of the old statute, we see

little purpose in defending provisions that no longer represent Congress's best judgment as to the appropriate grounds for exclusion and deportation of aliens.

Sincerely,

STUART M. GERSON
Assistant Attorney General
Civil Division