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NOTES

THE RIGHT TO TRAVEL ABROAD

There is no clause in the Constitution which explicitly supports a right to travel abroad. Yet consistent with our common law heritage,¹ Americans have exercised the right of international travel free of substantial restrictions for the greater part of our history. Passports, which appeared in America as early as 1796,² were not issued initially to restrict or control travel abroad, but were regarded as an informal privilege to facilitate foreign travel by identifying the bearer as an American citizen.³ Today, the issuance of passports is governed by the Passport Act of 1926, which provides that "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on the behalf of the United States . . ."⁴ The construction of the word "may" in this statute has been the focal point of much of the recent passport litigation. A broad reading of the word is the basis for the State Department's contention that it has absolute discretion in the issuing of passports.⁵ The question made scant difference to the right of Americans to travel, as long as a passport remained a convenience, rather than a prerequisite, for foreign travel. Freedom for foreign travel was in fact the general rule in this country until well into the present century. Passports were required briefly during the Civil War and World War I, but "[t]he exceptions that developed in war-time merely emphasized the general rule."⁶ As late as 1929, some authorities felt that the ten dollar passport fee was a wrongful interference with the right to travel.⁷

However, unfettered movement of American citizens abroad ended as a practical matter in 1941, when Congress extended the 1918 wartime passport requirement to include "national emergencies."⁸ While the national emergency to which

1. The first formal recognition of a right to foreign travel at common law was ch. 42 of the Magna Carta. The power of the King to prevent departures through the writ of *Ne Exeat Regno* was at one time a potent weapon of the monarchy, but the writ fell into disuse. For the common law background see Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 *Geo. L.J.* 63, 64-70 (1952) [hereinafter cited as *Passports and Freedom of Travel*]. In America, *Ne Exeat Regno* survived as an equitable writ against absconding debtors. Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 *Va. L. Rev.* 853, 868 (1954).

2. 12 *Colum. J. Transnat'l L.* 387, 392 (1973).

3. A passport "is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is . . . a political document, by which the bearer is recognised, in foreign countries, as an American citizen . . ." *Urtetiqui v. D'Arcy*, 34 *U.S.* (9 *Pet.*) 692, 698 (1835).

4. 22 *U.S.C.* § 211a (1970).

5. See *Bauer v. Acheson*, 106 *F. Supp.* 445, 449 (D.D.C. 1952).

6. Boudin, *The Constitutional Right to Travel*, 56 *Colum. L. Rev.* 47, 60 (1956) [hereinafter cited as *Boudin*].

7. *Id.* at 47.

8. Act of June 21, 1941, ch. 210, 55 *Stat.* 252, amending Act of May 22, 1918, ch. 81, 40 *Stat.* 559 (codified at 8 *U.S.C.* § 1185(a), (b) (1970)).

the 1941 legislation related was declared officially at an end on April 28, 1952,⁹ Congress continued its provisions until June 1, 1952,¹⁰ and in the interim passed the Immigration and Nationality Act of 1952, which repealed the 1941 law and re-enacted it as § 215 of the new Act.¹¹ At this time a national emergency was in effect, as proclaimed by the President in 1951 as a result of the Korean War,¹² and, in 1953, President Truman's proclamation of need triggered the criminal sanctions of the Act.¹³ The requirement of a passport for exit from and re-entry into¹⁴ the United States has been modified by the State Department, however, to permit freedom of travel in the Western Hemisphere, with the exception of Cuba.¹⁵

A passport thus became a license for foreign travel, rather than a convenience to the traveler. Consequently, "a serious question arose as to the nature and extent of the ordinary freedom of an American citizen to leave the United States and return as he pleased, and the nature and extent of the protection which the law afforded him in the enjoyment of that freedom."¹⁶ The Secretary of State, moreover, still claimed absolute discretion in issuing passports under the Passport Act of 1926. Passport refusals to controversial figures on the vague basis that their travel would not be in the "best interests of the United States" began to receive widespread coverage by the press.¹⁷ As public attention was brought to bear, so too the courts began to focus on the problem, and the concept of a passport as a privilege began to give way to a judicially constructed right to travel.

In *Bauer v. Acheson*,¹⁸ a three-judge district court rejected the State Department's claim of absolute discretion in the issuance of passports. The plaintiff, an American journalist working in Paris, had her passport revoked without hearing or notice. The Secretary of State refused to renew or validate the passport except to allow return to the United States, explaining that the plaintiff's activities were not in the best interests of the United States.¹⁹ Plaintiff emphasized the denial of a hearing rather than any deprivation of a right to travel, and the court concluded that the revocation was without authority at law and ordered a hearing.²⁰ The court also expressed the novel view that a right to foreign travel existed

9. Proc. No. 2974, 66 Stat. C31 (1952), 3 C.F.R. 158 (1949-1953 Comp.).

10. Act of Apr. 14, 1952, ch. 204, § 40, 66 Stat. 54.

11. Act of June 27, 1952, ch. 2, § 215, 66 Stat. 181 (codified at 8 U.S.C. § 1185(a), (b) (1970)).

12. 3 C.F.R. 99 (1949-1953 Comp.).

13. *Id.* at 180.

14. In *Worthy v. United States*, 328 F.2d 386, 394 (5th Cir. 1964), it was held that a citizen could not constitutionally be convicted of re-entry into the United States without a passport, for an absent citizen's right to return "is inherent in the concept of citizenship."

15. 22 C.F.R. § 53.2(b) (1973).

16. *Passports and Freedom of Travel* 64.

17. See 1 T. Emerson, D. Haber & N. Dorsen, *Political and Civil Rights in the United States* 1274-76 (3d ed. 1967).

18. 106 F. Supp. 445 (D.D.C. 1952).

19. *Id.* at 448.

20. *Id.* at 452-53.

in the Constitution. Analogizing to *Williams v. Fears*,²¹ in which the Supreme Court connected interstate travel to the "liberty" of the due process clause of the fourteenth amendment,²² the *Bauer* court stated that "it is difficult to see where, in principle, freedom to travel outside the United States is any less an attribute of personal liberty."²³ However, the court cautioned that the right to travel abroad was not an absolute liberty, but was subject to reasonable regulation, over which the Secretary of State had "wide," though not absolute, discretion.²⁴

Judge Fahy, who sat on the *Bauer* panel,²⁵ later commented that, in setting aside the revocation of the plaintiff's passport unless a hearing was granted within a reasonable time, "*Bauer* thus applied the standards of procedural due process to the methods by which the federal government could restrict travel; that is, the right to travel was held to be a liberty protected by the Fifth Amendment from deprivation without a hearing."²⁶ *Bauer* did not lay passport refusals to rest;²⁷ rather, its "significance [was] its frank recognition of the . . . conflict between the right of international travel and the privilege of retaining a valid passport."²⁸

The conflict was resurrected three years later in *Shachtman v. Dulles*,²⁹ when the national chairman of the Independent Socialist League was refused a passport solely because of the listing of his organization as subversive by the Attorney General.³⁰ Judge Fahy, writing for the court of appeals, stated that the right to travel was a "natural right,"³¹ which must be accorded due process protection. Since a hearing of sorts had been granted prior to revocation, the issue was not procedural, but rather substantive, due process, *i.e.*, was the refusal arbitrary?³² The subversive listing was held insufficient of itself to justify denial of a passport to travel to Europe: it was arbitrary.³³ Judge Fahy later looked upon the decision as extending to the right to travel "the protection of substantive due process; that is, not only must the method of restraint be fair and appropriate but the substantive content of executive criteria for travel control must not be

21. 179 U.S. 270 (1900).

22. "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty . . ." *Id.* at 274.

23. 106 F. Supp. at 451 (footnote omitted).

24. *Id.* at 451-52.

25. Judge Fahy dissented on jurisdictional grounds. *Id.* at 453 (Fahy, J., dissenting).

26. Fahy, *The Right to Travel*, 6 *Natural L.F.* 109, 115 (1961) [hereinafter cited as Fahy].

27. Passport refusals became even more topical after *Bauer*. Playwright Arthur Miller, for example, was refused a passport in 1954 to attend the opening in Brussels of his play "The Crucible." Z. Chafee, *Three Human Rights in the Constitution of 1787*, at 197 (1956).

28. *Passports and Freedom of Travel* 85.

29. 225 F.2d 938 (D.C. Cir. 1955).

30. *Id.* at 943.

31. *Id.* at 941.

32. *Id.*

33. *Id.* at 943.

unreasonable, and the question of reasonableness was to be considered in light of the high character of the liberty sought to be restrained."³⁴

The Supreme Court did not review either case, since the Secretary of State acquiesced and granted the parties their passports. But in 1958, the case of Rockwell Kent and Dr. Walter Briehl, who were refused passports because they would not submit affidavits to the Secretary of State that they were not members of the Communist Party, was heard by the Supreme Court in *Kent v. Dulles*.³⁵

The Court examined the extent of the authorization which Congress had vested in the Secretary to curtail travel abroad. While this power was phrased broadly in the Passport Act of 1926,³⁶ apparently it had been exercised in only two narrow areas—involving the questions of allegiance and citizenship on one hand, and unlawful and illegal conduct on the other.³⁷ The Court hesitated to find in the Immigration and Nationality Act of 1952 (which made a passport a prerequisite for foreign travel³⁸) the intent to authorize passport refusals on grounds other than these two.³⁹ Therefore, the Court concluded that neither statute delegated authority to the Secretary of State to withhold a passport because of a citizen's beliefs or associations.⁴⁰

The case was thus decided on the statutory level. Even so, the ruminations of Justice Douglas, writing for the Court, on the "basic" role of free travel in our scheme of values,⁴¹ lend support to the argument that the right to travel abroad is a constitutional one. The Court's opinion at one point stated that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."⁴²

The underlying constitutional issues came to the surface in *Aptheker v. Secretary of State*.⁴³ Appellants, ranking members of the Communist Party, had their passports revoked under section 6 of the Subversive Activities Control Act of 1950,⁴⁴ which provided that a member of a Communist organization which has registered or has been ordered to register, commits a crime by either applying for, or attempting to use, a passport. In effect, the section provided a statutory basis, absent in *Kent*, for the denial of passports because of political associations or beliefs. The appellants attacked section 6 as an unconstitutional deprivation of their liberty under the due process clause of the fifth amendment on its face and as applied to them.⁴⁵

The Court assumed the existence of the right to travel abroad on the basis of

34. Fahy 115.

35. 357 U.S. 116 (1958).

36. 22 U.S.C. § 211a (1970); see text accompanying note 4 supra.

37. 357 U.S. at 127.

38. 8 U.S.C. § 1185(b) (1970).

39. 357 U.S. at 128.

40. *Id.* at 129-30.

41. *Id.* at 126 (dictum).

42. *Id.* at 125 (dictum).

43. 378 U.S. 500 (1964).

44. Subversive Activities Control Act of 1950, ch. 1024, § 6, 64 Stat. 987.

45. 378 U.S. at 505.

Kent,⁴⁶ and found section 6 "unconstitutional on its face" in that it "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."⁴⁷ The Court objected to the creation of an "irrebuttable presumption" that members of the specified organizations would engage in activity threatening to the national security of the United States while abroad.⁴⁸ In addition, the section failed to consider the "security-sensitivity" of the area to which travel was sought,⁴⁹ and whether or not the individual was a knowing member of the suspect organization.⁵⁰

The plurality opinion,⁵¹ written by Justice Goldberg, has been subjected to two conflicting interpretations. The point of contention is whether *Aptheker* is a first or fifth amendment decision. "The first interpretation is that the right to travel is a Fifth Amendment right which, because it is closely linked to First Amendment rights, must be given something like a preferred status and stringent protection."⁵² The prime support for this interpretation is the opinion itself, since Justice Goldberg referred to travel as a fifth amendment right.⁵³ However, the conclusion that the restriction was a violation of due process was reached by combining first and fifth amendment standards, the Court relying on first amendment decisions⁵⁴ to provide a standard of reviewing the restriction on its face.⁵⁵ This interpretation would mean that "some members of the Court have adopted the view that the right to travel, being a personal rather than [a] property right, is entitled to protection under the fifth amendment commensurate with the protection afforded rights of expression and association under the first amendment."⁵⁶ This would establish a standard of protection under the fifth amendment for the right to travel abroad beyond the rule of reasonableness normally required by substantive due process.⁵⁷

46. *Id.* at 505-06. The dissent also accepted the existence of a constitutional right to travel abroad. *Id.* at 525 (dissenting opinion).

47. *Id.* at 514 (opinion of the Court).

48. *Id.* at 511-12.

49. *Id.* at 512.

50. *Id.* at 510.

51. Justice Black, 378 U.S. at 517, and Justice Douglas, 378 U.S. at 519, concurred separately. Three Justices dissented. 378 U.S. at 521.

52. L. Turner, *The Right to Travel and the Problem of Unenumerated Constitutional Rights* 182 (1972) (unpublished dissertation in the University of California at Los Angeles Library, on file with Fordham L. Rev.) [hereinafter cited as Turner].

53. 378 U.S. at 505, 508, 514. See *id.* at 523 (dissenting opinion).

54. *Id.* at 516-17. Justice Goldberg relied on *NAACP v. Button*, 371 U.S. 415 (1963), and *Thornhill v. Alabama*, 310 U.S. 88 (1940).

55. Challenges to a statute on its face usually are entertained only if first amendment rights are involved. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940); cf. Comment, *The Hatch Act Reaffirmed: Demise of Overbreadth Review?*, 42 *Fordham L. Rev.* 161 (1973).

56. Comment, *Judicial Review of the Right to Travel: A Proposal*, 42 *Wash. L. Rev.* 873, 880 (1967) (footnote omitted) [hereinafter cited as *Judicial Review*].

57. The dissenters thought that the passport denial was "reasonably related to the national security." 378 U.S. at 527 (dissenting opinion). But see *id.* at 512-13 (opinion of the Court).

The second, and seemingly more widely accepted, interpretation of Justice Goldberg's majority opinion is that "First Amendment rights are related to the right to travel in only certain specific situations, such as in the immediate case; and thus only in such instances would travel be treated as a preferred right, and then not on account of the infringement of travel itself but rather because some other right had been invaded as well."⁵⁸ Under this interpretation, *Aptheker* really involved freedom of association,⁵⁹ and so first amendment standards of review were appropriate. If, however, the right to travel in a particular case involved no first amendment rights,⁶⁰ it would receive no extra protection. On the other hand, Justice Douglas would place every travel situation within the ambit of the first amendment, since "[f]reedom of movement is kin to the right of assembly and to the right of association."⁶¹

The concept of an emerging substantive right to travel involving first amendment considerations was short lived, for in 1961, the State Department issued a ban on American travel to Cuba.⁶² In *Zemel v. Rusk*,⁶³ the State Department refused to validate appellant's passport to travel to Cuba as a tourist for the purpose of informing himself as to conditions there. The statutory issues raised by *Kent* and the constitutional issues of *Aptheker* thus merged in *Zemel*, which considered whether the Secretary of State was authorized by the Passport Act of 1926 to refuse to validate passports of United States citizens for travel to Cuba, and whether the exercise of the authority was constitutionally permissible.

Chief Justice Warren, writing for the Court, upheld the action of the State Department. The Court held that the language of the Passport Act "is surely broad enough to authorize area restrictions."⁶⁴ *Kent*, which prohibited passport denials because of an individual's beliefs, was distinguishable, for the *Zemel* restriction involved "foreign policy considerations affecting all citizens."⁶⁵ This distinction aside, it is clear that *Zemel's* broad interpretation of the Passport Act of 1926 is inconsistent with the narrow construction applied in *Kent*, for the Court there stated that "[w]here activities . . . such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."⁶⁶ It is difficult to see how—in the vague language of the Passport Act of 1926,⁶⁷ and

58. Turner 182.

59. Cf. 378 U.S. at 517.

60. Travel for health, for business, or for pleasure have been suggested to be concepts which are "not ideological." Comment, Executive Restriction on Travel: The Passport Cases, 5 Houston L. Rev. 499, 506 (1968) [hereinafter cited as Passport Cases].

61. 378 U.S. at 520 (Douglas, J., concurring). Justice Black also concurred in the result, but disagreed that the "liberty to travel abroad at will" was protected by due process. *Id.* at 518 (Black, J., concurring).

62. 26 Fed. Reg. 492 (1961).

63. 381 U.S. 1 (1965).

64. *Id.* at 8.

65. *Id.* at 13.

66. *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

67. 22 U.S.C. § 211a (1970). The Secretary is not expressly authorized to deny passports. Passport Cases 508.

by the narrow construction given that Act by *Kent*⁶⁸—area restrictions are authorized and class restrictions are not. Moreover, the *Zemel* Court cautioned that, “simply because a statute deals with foreign relations,” it may not “grant the Executive totally unrestricted freedom of choice.”⁶⁹ Yet the automatic exemptions from travel bans given to certain classes of individuals,⁷⁰ do in fact confer a “totally unrestricted freedom of choice.”

As inconsistent as *Zemel* is with *Kent* on the statutory level, it seems even more inconsistent with *Aptheker* on the constitutional level. The Court specifically rejected *Zemel*'s first amendment claim and distinguished *Kent* and *Aptheker*, which concerned individual denials based on deprivation of the rights of expression and association.⁷¹ *Zemel* thus supports the second interpretation of *Aptheker*, *i.e.*, that it was a first amendment decision.⁷² However, *Zemel*'s right to travel was a due process right, and controlled by the balancing test of the fifth amendment.⁷³ The Court, noting that the Cuban missile crisis had preceded the filing of *Zemel*'s complaint by less than two months,⁷⁴ found the restriction on travel to Cuba to be supported by “the weightiest considerations of national security.”⁷⁵

It is arguable that *Zemel* is limited to the validation of the particular area restriction imposed on Cuba in the circumstances of the time, and that the decision does not uphold the constitutionality of area restrictions in general.⁷⁶ But it must be admitted that an area restriction—which applies to all travelers⁷⁷—lacks the inherent arbitrariness of a class restriction, which is based on an individual's beliefs and associations.⁷⁸ Indeed, *Zemel* may have added content to the constitutional right to travel abroad. In emphasizing that area restrictions are valid if they are not made on the basis of the character of the individual applicant, as

68. 357 U.S. at 127-29. See 381 U.S. at 30 (Goldberg, J., dissenting).

69. 381 U.S. at 17.

70. The travel to restricted areas by reporters, doctors and scientists, certain scholars, and representatives of the American Red Cross, will automatically be considered in the “national interest of the United States,” and is thus exempt from travel restrictions. 22 C.F.R. § 51.73(b) (1973).

71. 381 U.S. at 16.

72. See text accompanying notes 58-60 *supra*.

73. 381 U.S. at 14-16.

74. *Id.* at 16.

75. *Id.*

76. “Travel restrictions fall logically into one of two categories: class restrictions, which deny passports to particular classes of persons; and area restrictions, which deny passports for travel to certain areas of the world. The restrictions imposed in both *Kent* and *Aptheker* were class restrictions—they forbade Communists or those associated with the Communist Party from obtaining passports. The restriction imposed in *Zemel* was an area restriction—it forbade all citizens from traveling to Cuba.” *Judicial Review* 882.

77. But see note 70 *supra*.

78. Justice Douglas rejected this distinction between *Zemel* and *Aptheker*, for, to him, *Zemel*'s right to visit Cuba was “peripheral to the enjoyment of First Amendment guarantees . . .” 381 U.S. at 25 (Douglas, J., dissenting).

are class restrictions, *Zemel* appears to have expanded *Aptheker* (which applied solely to section 6 of the Subversive Activities Control Act), so that "as a practical matter . . . class restrictions could never be constitutionally supported."⁷⁹

Zemel's result may well be defended as a product of the "political and social sensitivity of the Court,"⁸⁰ and of the deference shown the Executive in the area of foreign policy.⁸¹ Its method, however, "implies an *ad hoc* approach to passport restrictions, making each case largely dependent upon its factual setting and thus further curtailing adequate constitutional predictability."⁸² The *Zemel* decision gives the right to travel abroad an uncertain status, which would seem, necessarily, to precipitate litigation each time a new limitation on the right is imposed.

Litigation involving the area restriction on Cuba again reached the Supreme Court in *United States v. Laub*,⁸³ in which the petitioner was indicted for conspiracy to violate § 215(b) of the Immigration and Nationality Act⁸⁴ by arranging for a group of citizens, all of whom possessed valid passports, to travel to Cuba. As it had in *Kent*, the Court decided the case solely on the statutory level and concluded that, while the Passport Act of 1926 authorized area restrictions, violation of the travel ban did not trigger criminal sanctions.⁸⁵ The criminal provisions of the Act penalized only departures from the United States without a valid passport, and a valid passport was not rendered invalid by State Department disapproval of travel to the particular destination.⁸⁶ The petitioner, therefore, was indicated for "conspiracy to violate a nonexistent criminal prohibition."⁸⁷ The State Department then turned to *administrative* sanctions: it threatened passport revocation and non-renewal, until it was assured that the individual would not travel in the future in violation of any restriction.⁸⁸ This practice was declared invalid in *Lynd v. Rusk*,⁸⁹ and shortly thereafter, in 1968, the State Department eliminated all sanctions for violations of its area restrictions.⁹⁰

Both *Laub* and *Lynd* were decided on the statutory level; the constitutionality of the restrictions was not considered.⁹¹ The two cases indicate that, absent ex-

79. Judicial Review 900.

80. *Id.* at 896.

81. See 1966 Duke L.J. 233, 242-43.

82. *Id.*

83. 385 U.S. 475 (1967).

84. 8 U.S.C. § 1185(b) (1970).

85. 385 U.S. at 487.

86. *Id.* at 480-81.

87. *Id.* at 487.

88. 31 Fed. Reg. 13,544 (1966).

89. 389 F.2d 940 (D.C. Cir. 1967).

90. 33 Fed. Reg. 5681 (1968).

91. Another opportunity to review *Zemel* in a "noncrisis" factual setting was lost when Bobby Fischer, who had been refused passport validation to compete in Cuba in 1965, acquiesced and competed via telegraph. Note, Travel and the First Amendment: *Zemel v. Rusk*, 13 U.C.L.A.L. Rev. 470, 481 (1966).

PLICIT congressional approval of sanctions, the State Department can impose area restrictions, but cannot enforce them.

These restrictions are, in effect, unenforceable warnings to the traveler that the State Department disapproves his travel. Unfortunately, the very travelers whom the State Department would most like to restrain—those whose travel would be inimical to the interests of the nation—are the ones most likely to avail themselves of the absence of sanctions. On the other hand, “the restrictions do limit the movement of the great number of travelers who either respect the government judgment embodied in the restriction or who are confused or uninformed about the absence of sanctions.”⁹² Furthermore, the sanctionless status of area restrictions may present a standing problem to one seeking to re-challenge their constitutional validity in the courts.⁹³

This sanctionless status, however, appears likely to change. The ninety-third Congress has been presented six different bills which would authorize the imposition of sanctions for the violation of restrictions on travel by Americans to hostile areas.⁹⁴ These bills would confer on the State Department a broad measure of control,⁹⁵ and authorize stringent penalties.⁹⁶ The House Committee on Internal Security has reported favorably on one of the bills, H.R. 8023.⁹⁷ In considering this proposed legislation, Congress should re-examine the policy justifications for area restrictions.

The first policy sought to be implemented by area restrictions is the “safe-passage” theory of area restrictions, *i.e.*, the concern for the safety of the individual traveling to such areas. The protection of travelers, which is insured by blanket prohibitions on travel to “unsafe” areas, has been the chief argument advanced by the government in support of restrictions,⁹⁸ and is the chief argument advanced in support of the new legislation which would impose new sanctions.⁹⁹ The argument is buttressed by the statutory duty of the President to

92. Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1144 (1972) (footnote omitted) [hereinafter cited as Security Interest].

93. *Id.* at 1149-50.

94. Hearings on Restraints on Travel to Hostile Areas H.R. 1594 (Clean Bill H.R. 8023), H.R. 278, H.R. 297, H.R. 2691, H.R. 3999, H.R. 6047 Before the House Comm. on Internal Security, 93d Cong., 1st Sess. 1 (1973) [hereinafter cited as Hearings]. The subject is before Congress partly as a result of the emotion generated by the trips to wartime North Vietnam of such controversial figures as David Dellinger, Rennie Davis, Tom Hayden, and Jane Fonda, and partly due to the efforts of the Justice Department since 1967 to secure such legislation. *Id.* at 16, 58.

95. H.R. 7060, the administration's proposed bill, would authorize the Secretary of State to restrict travel by United States citizens and nationals if he determines, for example, that the area is “[o]ne to which travel would impair U.S. foreign policy.” Hearings 58.

96. For example, H.R. 1594 would punish violators by a \$10,000 fine, and/or up to 10 years' imprisonment. Hearings 1-2.

97. House Comm. on Internal Security, Restraints on Travel to Countries or Areas Engaged in Armed Conflict with the United States, H.R. Rep. No. 93-248, 93d Cong., 1st Sess. 16-17 (1973) [hereinafter cited as Report].

98. *E.g.*, *United States v. Laub*, 385 U.S. 475, 484 (1967).

99. “We believe that, in order to protect United States citizens in situations other than

“use such means, not amounting to acts of war, as he may think necessary and proper”¹⁰⁰ to secure the release of American citizens unjustly imprisoned in foreign countries. The Supreme Court, however, pointed out in *Aptheker* that, in reviewing travel restrictions, “it is also important to consider that Congress has within its power ‘less drastic’ means of achieving the congressional objective of safeguarding our national security.”¹⁰¹ It has been contended that the President’s statutory duty to protect Americans abroad may be achieved by a simple warning to travelers of the dangers involved in travel to certain areas.¹⁰² A warning, in the nature of advice rather than a blanket restriction, seemingly would fulfill the highly discretionary wording of the statutory duty of protection, while at the same time leave unhindered the right of those Americans who wished to assume the risks attendant to such travel. Any possible conflict with the statutory duty of protection could be alleviated by simple amendment to that statute providing for this warning in lieu of protection.¹⁰³

The “safe-passage” theory would, however, justify an area restriction imposed to prevent the spread of contagion, since the “safety” of American travelers can include their health. In the instance of disease, a warning to travelers would not suffice because the interests of those persons the traveler might infect must be considered. For the same reason, inoculation and quarantine would not be a “less drastic,” though equally viable alternative,¹⁰⁴ for similar measures would have to be applied to those returning Americans the traveler came into contact with outside the restricted area.¹⁰⁵ This type of area restriction is not currently authorized,¹⁰⁶ but would be a legitimate, though limited, “safe-passage” restriction.¹⁰⁷

The second, and perhaps least persuasive, policy aim behind area restrictions is the avoidance of the possible embarrassment caused by American citizens abroad to their government. “Americans abroad can ‘embarrass’ the United States in many ways, ranging from assassinating foreign leaders to vociferously

those in which our own Armed Forces are engaged, it should be possible to restrict travel into or through areas which are at war, or in which there is armed insurrection, or into which travel would be contrary to our national interest on foreign policy grounds.” Report 19 (views of the State Department).

100. 22 U.S.C. § 1732 (1970). The Zemel Court saw in this statutory duty a justification for the Secretary’s conclusion that travel to Cuba by American citizens might involve the United States in “dangerous international incidents,” since “in the early days of the Castro regime, United States citizens were arrested and imprisoned without charges.” *Zemel v. Rusk*, 381 U.S. 1, 15 (1965).

101. *Aptheker v. Secretary of State*, 378 U.S. 500, 512-13 (1964) (footnote omitted).

102. *Passport Cases*, supra note 60, at 511.

103. Another possible means of avoiding possible conflict with the statutory duty of protection would be to create a second type of “no protection” passport. Cf. Gould, *The Right to Travel and National Security*, 1961 Wash. U.L.Q. 334, 364.

104. *Passport Cases* 511.

105. Security Interest 1144-45 n.50.

106. 22 C.F.R. § 51.72 (1973), sets forth the criteria utilized in the present area restriction system.

107. Cf. *Zemel v. Rusk*, 381 U.S. 1, 25 (1965) (Douglas, J., dissenting).

denouncing an ally's domestic policy."¹⁰⁸ The flaw in this argument is that there is no guarantee that Americans who commit embarrassing acts while abroad will do so only in the few countries under the travel bans—presently Cuba, North Korea, and North Vietnam—and will remain on their best behavior while elsewhere.¹⁰⁹

The third policy aim is the avoidance of the propaganda and bargaining advantages which may result from the visits of certain Americans to certain nations. The House Committee on Internal Security was persuaded by the testimony of experts in psychological warfare, and of returned prisoners of war, that the appearance of American delegations in Hanoi "served to lower the morale of our servicemen," and advance "the enemy's interest at the expense of our own."¹¹⁰ While there is certainly validity to the position that the physical presence in foreign countries of certain opponents of this country's policies may demonstrate solidarity with the enemy, most of the bad propaganda effects could be accomplished without ever leaving the United States. It is again questionable whether this fear of harmful propoganda can justify the drastic, wholesale prohibition of travel, since "the most egregious instances of giving 'aid and comfort' to the enemy may be punishable as treason. And even in less extreme instances, area restrictions are a crude method of preventing such conduct, since they serve to deter the travel of many Americans who would not engage in the offending activity."¹¹¹

The most persuasive policy asserted in defense of area restrictions is the embargo theory, which utilizes area restrictions as "a tool of foreign policy similar to an embargo on the shipment of arms or materials critical for war."¹¹² Restrictions may be useful in curtailing aggression, preventing United States involvement, or simply to punish foreign countries by cutting off their access to United States tourism. The Supreme Court alluded to the value of area restrictions as a tool of foreign policy in *Zemel v. Rusk*:

Cuba is the only area in the Western Hemisphere controlled by a Communist government. It is, moreover, the judgment of the State Department that a major goal of the Castro regime is to export its Communist revolution to the rest of Latin America. The United States and other members of the Organization of American States have determined that travel between Cuba and the other countries of the Western Hemis-

108. Security Interest 1145.

109. *Id.* at 1146.

110. Report 4. The Committee stated that there has "developed a vast body of information which reveals that a substantial number of United States citizens have traveled abroad to hostile areas and have there engaged in a variety of activities which necessarily give aid and encouragement to the enemy and have in a variety of ways caused direct injury to our fighting men, including the torturing of prisoners of war. Moreover it is not unreasonable to say that our citizens by such conduct have actually prolonged the war with its attendant pain, suffering, and waste." *Id.* at 3.

111. Security Interest 1147 (footnote omitted).

112. Report 2.

phere is an important element in the spreading of subversion, and many have therefore undertaken measures to discourage such travel.¹¹³

While there is little doubt that in the instance of Cuba the area restriction has proved a useful tool of foreign policy both as a bargaining lever and as a form of economic pressure, it is arguable that similar results, to some degree, could have been accomplished by less drastic methods. "Denying or withdrawing diplomatic recognition can serve as a means of expressing moral disapproval, as well as a bargaining tool in negotiations. Government statements discouraging travel to a specific country will, to some degree, discourage tourism."¹¹⁴

Should Congress authorize the imposition of sanctions, new travel litigation will surely result, the outcome of which will depend on the particular constitutional approach chosen by the courts. The balancing test of *Zemel* has been applied in two recent district court cases.

In *Woodward v. Rogers*,¹¹⁵ the loyalty oath required of all applicants for passports was held a violation of the fifth amendment's protection of the right to travel abroad. Balancing the national interest against the liberty restricted, the court found that the loyalty oath was an unnecessary exercise of power. Applying a strict construction to the Passport Act of 1926, as was done in *Kent v. Dulles*,¹¹⁶ the court stated that no authority could be implied under the language of the Act to authorize the oath. The court pointed out that only in the one instance of *Zemel v. Rusk* did the Supreme Court read the statute to imply authority in the executive to do anything other than formulate procedural rules.¹¹⁷ In balancing the interests, the court concluded that the loyalty oath was not "reasonably justified" by any governmental need to inform citizens of their legal duties to the United States.¹¹⁸

In *Berrigan v. Sigler*,¹¹⁹ the same district court held that the refusal of the Parole Board to allow the plaintiffs, Philip and Daniel Berrigan,¹²⁰ to travel to North Vietnam during the ceasefire was not an arbitrary exercise of discretion, since the Board's action had a rational relationship to its administrative responsibility of protecting the public interest.¹²¹ It is clear that the court likened the situation more to *Zemel* than to *Kent* or *Aptheker*, when it stated that the action was reasonable because the Parole Board was adhering to a policy—which applied to all parolees—of prohibiting travel to certain parts of the world. It was an "administrative action [based] on broad policy considerations without refer-

113. 381 U.S. at 14-15 (footnotes omitted).

114. Security Interest 1148.

115. 344 F. Supp. 974 (D.D.C. 1972).

116. See text accompanying notes 35-42 & 66 supra.

117. 344 F. Supp. at 985-86.

118. *Id.* at 988.

119. 358 F. Supp. 130 (D.D.C. 1973), *aff'd*, No. 73-1563 (D.C. Cir., May 1, 1974).

120. The court emphasized plaintiffs' status as parolees. "[I]t is generally accepted that the parolee's freedom is much more circumscribed than the average citizen who is not serving a sentence for a criminal offense." *Id.* at 134.

121. *Id.* at 141.

ence to any characteristic peculiar to plaintiffs."¹²² In reaching its decision, the court applied both the test of *Zemel* in balancing the national interest and the liberty restricted, and the test of substantive due process set out earlier in *Shachtman v. Dulles*.¹²³ The court did not review the Parole Board's policy on its face, as was done in *Aptheker*, but stated that "[t]he appropriate test of substantive due process is whether a government regulation or restriction is unreasonable, arbitrary or capricious under the circumstances of a particular case."¹²⁴ Since the plaintiffs had been convicted for criminal activity related to their protest against this country's Southeast Asia policy, the court in applying the tests concluded that it was "not a totally unreasonable proposition" that their presence in North Vietnam might be inimical to the interests of the United States.¹²⁵

An alternative approach is to place the right to travel abroad expressly within the protection of the first amendment. The *Berrigan* court, in rejecting plaintiffs' first amendment claims, stated that "no controlling legal authority has ever held that the right to travel abroad is a right explicitly protected under the First Amendment."¹²⁶ On appeal, the applicability of the first amendment was denied explicitly.¹²⁷ Yet, the contention that "[f]reedom of movement is kin to the right of assembly and to the right of association,"¹²⁸ is not without authority in the Supreme Court,¹²⁹ or among the commentators.¹³⁰ This result would, however, produce "a strained interpretation which violates the letter and spirit of the [first] amendment,"¹³¹ and is in fact unnecessary to insure the foreign traveler a high degree of protection.

It is submitted that the method of facial review outlined by the first interpretation of *Aptheker*,¹³² would achieve a first amendment standard of review, while retaining the right to travel as an interest in liberty protected by the fifth amendment due process clause.¹³³ Such an approach would avoid tipping the

122. *Id.* at 140.

123. See text accompanying notes 29-34 *supra*.

124. 358 F. Supp. at 138.

125. *Id.* at 141.

126. *Id.* at 137.

127. *Berrigan v. Sigler*, No. 73-1563, at 10 (D.C. Cir., May 1, 1974).

128. *Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

129. *Zemel v. Rusk*, 381 U.S. 1, 25 (1965) (Douglas, J., dissenting); *Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

130. "If the right to travel is 'an attribute of personal liberty' or a 'natural right,' it is as deserving of protection as freedom of speech." Boudin, *supra* note 6, at 58. See Hearings, *supra* note 94, at 37 (statement of Ramsey Clark); Velvel, *Geographical Restrictions on Travel: The Real World and the First Amendment*, 15 U. Kan. L. Rev. 35 (1966); Note, *Travel and the First Amendment: Zemel v. Rusk*, 13 U.C.L.A.L. Rev. 470 (1966). But see Note, *Passports and Travel: Towards a Rational Policy of Area Restriction Enforcement*, 8 Harv. J. Legis. 518, 522 (1971).

131. *Passport Cases*, *supra* note 60, at 506. See note 60 *supra* and accompanying text.

132. See notes 52-57 *supra* and accompanying text.

133. See 381 U.S. at 14; 378 U.S. at 505. The right of locomotion was one of the first

scales in favor of the traditional deference shown the Executive in matters of foreign policy and national security,¹³⁴ resulting in the routine validation of travel restrictions. A return to *Aptheker* is not foreclosed by *Zemel*,¹³⁵ which concerned the "weightiest considerations" of the Cuban missile crisis. Nor would *Aptheker*, which held the right to travel abroad to be within the protection of the due process clause, be too inflexible a standard to uphold restrictions in facts similar to *Zemel*.

The suggested approach would not entirely rule out the effectiveness of area restrictions, but it would apply a rigorous standard of review¹³⁶ to legislation which restricts the constitutional right of Americans to travel abroad.¹³⁷ It would also have the effect of protecting a citizen's "right to know" which in fact enhances the effectiveness of our foreign policy. "One of the best ways for the American people to become informed about their foreign policy is through free and independent examination of its operation."¹³⁸ This "right to know" is the bottom line of the American citizen's ability and right to travel abroad. It highlights the chief danger in a system of travel restrictions, and a strong reason against the adoption of any sanctions for their violation: "[t]here is a particular danger that area restrictions will become a self-protective device for those in power, utilized to keep the public ignorant and thereby to quiet criticism of policy decisions."¹³⁹

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and most basic meanings given to the term "liberty." 1 W. Blackstone, Commentaries *134.

134. *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

135. It is arguable that the *Zemel* Court did not depart completely from Justice Goldberg's approach in *Aptheker* of looking at the statute on its face, for the Court, at least ostensibly, did review the area restriction substantively. *Id.* at 14-16.

136. The Supreme Court has afforded a high standard of protection to interstate travel by according it the status of a "fundamental right." *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

137. Rep. Robert F. Drinan, in examining the proposed travel legislation, discussed at text accompanying notes 94-99 *supra*, has concluded that under *Aptheker* "[l]egislation specifically prohibiting the delivery of usable armaments might pass the constitutional test. But legislation which permits the prohibition of all travel, at the whim and caprice of the Executive, upon a finding of 'armed conflict' by the Executive, cannot pass that test." Report 30 (dissenting view).

138. Ass'n of the Bar of the City of New York, Report of the Special Comm. to Study Passport Procedures: Freedom to Travel 36 (1958).

139. Security Interest 1148 (footnote omitted).