

Area Restrictions And The Right To Travel Abroad

I. INTRODUCTION

A United States citizen plans to travel to the Far East and would like to visit North Korea. Upon receiving her passport in the mail, however, she notices the following language printed in the front of the passport:

United States courts have interpreted United States law in effect on the date this passport is issued as not restricting the travel of a United States citizen to any foreign country or area. However, the use of a United States passport for travel into or through any of the following areas is authorized only when specifically validated for such travel by the Department of State.¹

North Korea appears on the list.

She considers not going to North Korea, but then decides not to change her plans. The Department of State exercises its discretion and denies her application for special validation. Persisting in her desire to visit North Korea, she appeals the denial of her application. At some point she is likely to learn that the Department of State cannot enforce the restriction. She has always been free to go to North Korea because the lack of sanctions effectively vitiates the validation requirement. The result is that she has needlessly wasted personal, administrative, and judicial resources.

Department of State officials have conceded that area restrictions are little more than a relic.² Nevertheless, passports continue to be stamped with the restrictions. The individual right of United States citizens to travel abroad continues to be limited. Although they may want to travel to a restricted area, many citizens do not because it appears to them that United States law and administrative regulations prohibit such travel unless they request and secure special validation. Those who do travel to restricted countries are denied the advantages of the use of their passports in such travels.

The practice of imposing area restrictions is a vestige of the unchecked power the Passport Office and the Secretary of State once

¹This language is printed in the front of all passports presently issued. See text, section II D, for a discussion of the prior language.

²*N.Y. Times*, Sept. 16, 1969, § 1, at 16, col. 1.

wielded in order to control, in the name of the "national interest,"³ which nations Americans could visit. Judicial decisions have severely limited this power by curtailing the government's ability to restrict travel.

This article focuses on the problems which the continued practice of stamping passports invalid for travel to designated areas causes, and suggests alternative remedies. The article first discusses the development of area restrictions from both an administrative and judicial viewpoint. An analysis of the problems with the current status of area restrictions follows. The next sections are concerned with constitutional aspects of the governmental policy. The final section presents possible legislative alternatives to the present system of area restrictions.

II. BACKGROUND AND DEVELOPMENT OF AREA RESTRICTIONS

A. INITIAL IMPOSITION OF CONTROLS UPON THE RIGHT TO TRAVEL ABROAD

Although not specifically guaranteed in the Constitution, the right to travel abroad⁴ is generally agreed to be fundamental to Anglo-American jurisprudence.⁵ Travel control through passport regulation has become common in peacetime only since World War II.⁶ This has developed primarily through the initiative of the executive branch of government, with the Department of State using travel controls as a means of effecting foreign policy objectives.⁷ The Department of State bases its authority to impose these controls upon Title 22 of the United States Code, section 211(a), which states in pertinent part: "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe . . ." ⁸ That section confers upon the President the

³Letter from Frances G. Knight, Director of the Passport Office, to Senator Strom Thurmond, May 30, 1973, in *Hearing on S. 177 Before the Senate Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Comm. on the Judiciary*, 93d Cong., 1st Sess. 10-11 (1973) [hereinafter cited as *Hearing on S. 177*].

⁴See Rauh and Pollitt, *Restrictions on the Right to Travel*, 13 WEST. RES. L. REV. 128, 136 (1962).

⁵Clause 42 of the Magna Carta granted anyone the right to leave the country and return "except in time of war for some short time." See CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 184-88 (1956); Rauh and Pollitt, *supra* note 4, at 136-40.

⁶A. SCHWARTZ, *THE OPEN SOCIETY* 73-75 (1968) [hereinafter cited as SCHWARTZ]. See also Rauh and Pollitt, *supra* note 4, at 138.

⁷Travel controls were first used for political reasons in 1949. Rauh and Pollitt, *supra* note 4, at 132.

⁸22 U.S.C. § 211(a) (1964) provides: "The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul

authority "to designate and prescribe for and on behalf of the United States rules governing the granting, issuing, and verifying of passports." By Executive Order Number 11295,⁹ the President empowered the Secretary of State to exercise this authority "without the approval, ratification, or other action by the President."¹⁰

One of the regulations the Department of State promulgated imposed area restrictions. Holders of United States passports were informed that they could not travel to specified countries. The Supreme Court gave limited endorsement to this policy in *Zemel v. Rusk*,¹¹ a 1965 case which directly challenged the constitutionality of the area restriction on Cuba.¹²

B. *UNITED STATES v. LAUB* AND *LYND v. RUSK*: THE ELIMINATION OF SACTIONS

Notwithstanding the Supreme Court's limited endorsement of area restrictions in *Zemel*, two succeeding cases, *United States v. Laub*¹³ and *Lynd v. Rusk*,¹⁴ effectively eliminated the enforcement ability of the Secretary of State. In *Laub*, 58 United States citizens had been recruited for a trip to Cuba. All trip participants held valid United States passports, but lacked the requisite special permission for travel to Cuba. *Laub* and his companions were indicted for conspiracy to violate section 215(b) of the Immigration and Nationality Act of 1952. Section 215(b) makes entry to or departure from the United States without a valid passport unlawful when the President has proclaimed the existence of a national emergency.¹⁵ The defen-

generals, consuls, or vice consuls, when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

⁹31 Fed. Reg. 10603 (1966).

¹⁰A recent judicial interpretation of the extent of Exec. Order No. 11295 is found in *Woodward v. Rogers*, where the court decided that "on its face, it is undisputed that this language only provides authority to promulgate procedural rules governing the operations of the Passport Office, and not a grant of undefined substantive powers." *Woodward v. Rogers*, 344 F. Supp. 974, 983 (1972).

¹¹381 U.S. 1 (1965).

¹²The facts and holding of *Zemel v. Rusk* are discussed in text, sections III B and C. The fourth section of this article presents an analysis of the constitutional bases for area restrictions, in light of the major judicial pronouncements on the issues involved.

¹³385 U.S. 475 (1965).

¹⁴389 F.2d 940 (D.C. Cir. 1967).

¹⁵8 U.S.C. § 1185 (1970) (codification of section 215(b) of the Immigration and Nationality Act) reads, in pertinent part: "(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise by this section be imposed upon the departure of persons from and their entry into the

dants held valid passports, which had not, however, been specifically endorsed for travel to Cuba. The Supreme Court in *Zemel* had not reached the question of whether criminal sanctions might legally be imposed for a violation of area restrictions.¹⁶ *Laub* directly challenged that enforcement mechanism. Because it was a criminal statute, the Court narrowly construed¹⁷ section 215(b) and refused to apply it to violations of area restrictions.¹⁸ The Court said Congress should decide whether to provide criminal sanctions for enforcing area restrictions.¹⁹ Thus, while approving the particular area restriction imposed in *Zemel*, the Supreme Court in *Laub* refused to condone use of criminal sanctions to enforce the travel ban.

No longer able to enforce area restrictions by means of criminal sanctions, the Secretary of State then attempted to enforce them with various administrative sanctions.²⁰ These included revoking the passports of persons who had travelled to restricted areas and refusing to renew passports of persons who would not agree to stay out of restricted areas. In *Lynd v. Rusk*,²¹ the District Court overturned the use of these administrative sanctions to enforce area restrictions. Lynd had gone on a fact-finding mission to North Vietnam, a restricted area. Upon his return, his passport had been tentatively withdrawn. During a hearing on the matter, Lynd stated that he would not use the passport to travel to restricted areas, but refused to agree to stay out of restricted areas completely if not carrying his passport.²² The Hearing Officer recommended final withdrawal of the

United States, and shall make public proclamation thereof.... (b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

¹⁶ 381 U.S. at 19-20.

¹⁷ *United States v. Laub*, 385 U.S. 475, 480 (1965).

¹⁸ *Id.* at 486.

¹⁹ *Id.*

²⁰ The administrative sanctions were described in 22 C.F.R. § 51.74 (1965): "Travel to, in or through a restricted country or area without a passport specifically validated for such travel is ground for revocation or cancellation of a passport and for denial of an application for a passport or renewal of a passport until such time as the Secretary receives formal assurance and is satisfied that the person will not again travel in violation of the travel restrictions."

²¹ See note 14.

²² While most nations require tender of a valid United States passport upon entering and leaving such nation, some countries do not. They will permit a United States citizen to enter and leave at will; no stamp is placed upon the passport to indicate past presence there. Visitors taking advantage of this system usually leave their passports in safe-keeping elsewhere on their journey and pick them up again before returning to the United States or going to a country which requires display of the passport. Few Americans are even aware of this method of by-passing Department of State regulations. For those who are, it is predominantly employed for travel to nations on the "restricted areas" list. See, e.g., *N.Y. Times*, Mar. 28, 1968, § 1, at 1, col. 1.

passport. The Secretary of State complied with that finding and Lynd appealed.

The court decided that since section 215(b) requires a passport for most²³ travel outside the United States, the Secretary of State would be preventing travel to all countries by refusing to renew a passport in order to restrict certain areas. To do so, the court stated, would be an undue interference with a citizen's constitutional right to travel abroad.²⁴ Congress had not authorized, implicitly or explicitly, these sanctions which are "often equal to and sometimes more stringent than criminal sanctions without the protections inherent in the criminal process as a guarantee against executive excess."²⁵ The government did not appeal.²⁶

C. CURRENT STATUS OF AREA RESTRICTION REGULATIONS

As a result of *Lynd*, section 51.74 of Title 22 of the Code of Federal Regulations, which provided administrative sanctions for travel in violation of area restrictions, was deleted.²⁷ The Department of State reserved, however, the authority to restrict travel to designated areas for specified reasons. Thus Title 22 of the Code of Federal Regulations, section 51.72, provides that a passport will cease to be valid for travel to a country or area upon determination by the Secretary of State that it is:

- (a) a country with which the United States is at war,
- (b) a country or area where armed hostilities are in progress, or
- (c) a country or area to which travel must be restricted in the national interest, because such travel would seriously impair the conduct of U.S. foreign affairs.²⁸

Although travel to these areas is possible, the regulation prohibits physical use of the passport for such purposes. In addition, since the Department of State fails to explain that it is not necessary to carry and use the passport in some nations, the publication of area restrictions generally acts as a deterrent from any such journeys by Americans.

Section 51.72 also provides that the restrictions will be published

²³Mexico, Canada, and most Caribbean nations do not require a United States passport for visitors. Some other Western Hemisphere nations' requirements of passports for United States citizen visitors are based upon the duration of the stay within their nations. Telephone conversation of the authors with United States Passport Office official, San Francisco, California, February, 1975.

²⁴389 F.2d at 945.

²⁵*Id.* at 947.

²⁶The Department of State and the Department of Justice decided not to appeal *Lynd* because they expected to lose in the United States Supreme Court. *N.Y. Times*, Mar. 28, 1968, § 1, at 31, col. 1.

²⁷33 Fed. Reg. 5681 (1968).

²⁸22 C.F.R. § 51.72 (1974).

in the Federal Register, and unless extended will expire after a maximum period of one year. On March 19, 1975, the Secretary of State published his determination that Cuba, North Korea, and North Vietnam were countries to which travel must be restricted under section 51.72(c): "such travel would seriously impair the conduct of United States foreign affairs."²⁹ This restriction was to expire in six months,³⁰ subject to extension.

Section 51.73(a) allows special validation of passports for travel to restricted areas, but only when such validation is in the national interest of the United States. Subsection (b) defines certain groups of applicants whose travel will be considered to be in the national interest: (1) professional reporters, when the purpose in requesting special validation is to obtain and make available to the public, information about the area; (2) doctors or scientists in the field of medicine or public health, when the purpose in requesting special validation is directly related to their professional responsibilities; (3) scholars with postgraduate degrees whose purpose is to obtain information in their respective fields of research for public dissemination; and (4) representatives of the American Red Cross.³¹ Subsection (c) of section 51.73 defines other groups of applicants whose travel may be considered, in the discretion of the Secretary of State, to be in the national interest. These are: (1) persons other than professional reporters, when one of

²⁹40 Fed. Reg. 13011 (1975). This publishing procedure commenced in 1966, pursuant to Exec. Order No. 11295. 31 Fed. Reg. 16143 (1966). Cuba, North Vietnam, and North Korea have been included on the list since the inception of the practice of publication in the Federal Register. The reasons for these restrictions have been: Cuba, due to the actions voted by the OAS in 1964 and 1967 to isolate Cuba (*e.g.*, 40 Fed. Reg. 13011 (1975)); North Vietnam, as an area "where armed hostilities are in progress" (through March, 1973, *e.g.*, 37 Fed. Reg. 6118 (1972)), then due to the high tensions and unsettled conditions in Indochina and the danger of "impairing the conduct of United States foreign affairs" (beginning with 38 Fed. Reg. 7589 (1973), through the present, 40 Fed. Reg. 13011 (1975)); and North Korea, due to the hostility of the regime, the unsettled conditions along the demarcation line, United Nations recognition of only South Korea, and the "danger of impairing the conduct of United States foreign affairs" (with the added reason of seizure of the U.S.S. Pueblo, 34 Fed. Reg. 5446 (1969) through 36 Fed. Reg. 5439 (1971)). The People's Republic of China ("Mainland China") was included through March, 1971, due to possible "impairment of the conduct of United States foreign affairs" (first omitted in 36 Fed. Reg. 5439 (1971)). In June, 1967, countries in the Middle East were added to the restricted list due to the "armed hostilities in progress" (32 Fed. Reg. 8250 (1967)). The countries were dropped from the list as peace was re-established, until in March, 1968, the last Middle Eastern nation was removed from restricted status (33 Fed. Reg. 4341 (1968)).

³⁰Under 22 C.F.R. § 51.72 (1974), the restrictions may be imposed for one year. Occasionally, the Department of State has published them with only a six-month duration (*e.g.*, beginning in 34 Fed. Reg. 5446 (1969)). The first time this happened, China was dropped from the restricted area list after the fourth six-month publication (36 Fed. Reg. 5439 (1971)). The one-year duration was resumed in 37 Fed. Reg. 6118 (1972); then the Department reverted to six-month publications again (38 Fed. Reg. 7589 (1973)).

³¹22 C.F.R. § 51.73(b) (1974).

the news media is interested in publishing a report of the applicant's trip; (2) persons whose activities in cultural, athletic, commercial, educational, or professional fields or in public affairs indicate their trip would benefit the United States; and (3) persons whose trip "is justified by compelling humanitarian considerations."³²

D. THE PRESENT DILEMMA: AREA RESTRICTIONS AND THE INDIVIDUAL TRAVELLER

In summary, the Secretary of State may impose area restrictions. Until Congress passes legislation providing for either criminal or administrative sanctions for their violation, however, these restrictions are unenforceable if the passport is not used. Congress has failed to enact any such legislation although bills dealing with the issue of area restrictions have been introduced every session since 1958.³³ Nevertheless, the Passport Office continues to stamp passports as invalid for travel to specified restricted areas.³⁴ The current restrictions are imposed under Title 22, Code of Federal Regulations, section 51.72(c) on the ground that travel to these areas, in the determination of the Secretary of State, would seriously impair the conduct of foreign affairs. Title 22, Code of Federal Regulations, section 51.73, provides for special validation of passports for travel to restricted areas.

The average American citizen probably does not fit into the aforementioned categories of persons entitled to apply for special validation. Unless the traveller knows that no enforcement power lies behind the regulations and that he may travel to restricted areas without his passport, he is effectively deterred and thereby prevented from going to those areas on the restricted list.³⁵ Even for those persons who believe they qualify for special validation, however, securing Department of State permission for their proposed travel is not a simple matter. Applicants must document their reasons for special validation and their qualification for a particular category.³⁶ Permission to travel to restricted areas is not routinely granted; one

³² 22 C.F.R. § 51.73(c) (1974).

³³ Specific bill numbers are not cited because of the very large quantity of measures introduced on this issue. For a comprehensive list, see volumes of the CONG. REC. INDEX for the years 1958-75.

³⁴ See note 29.

³⁵ "We must, if we are to approach the constitutional issues presented by the appeal candidly, proceed on the assumption that the Secretary's refusal to validate a passport for a given area acts as a deterrent to travel to that area." *Zemel v. Rusk*, 38 U.S. 1, 13-14 (1965).

³⁶ For example, journalists and newsmen are requested to furnish a letter from a publication, news medium, etc., indicating the applicant is a professional on assignment; doctors, scientists, and scholars must produce information on their educational background and a letter of endorsement. Letter from Frances G. Knight, Director of the Passport Office, to the authors, February 21, 1975.

out of every nine final decisions in 1974 was a denial.³⁷ Area restrictions, as presently employed, are inequitable, both because they limit the constitutional right to travel abroad of only those citizens unaware of the intricacies of the actual law, and because they subject persons falling into categories qualifying for special validation to potentially unequal discretionary treatment from the Passport Office and the Department of State. Additionally, for those who ignore the area restrictions and travel despite the Department of State prohibition, the advantages of use of the passport are lost.

The present policy of stamping passports with unenforceable restrictions also may have an adverse impact upon the established legal order. To impose restrictions which may be defied at will is to assail the very fabric of the legal system. Law has been described as a "coercive order."³⁸ It consists of commands and sanctions.³⁹ Commands do not become law until some means exist of sanctioning conduct which violates the command.⁴⁰ The average citizen is led to believe that the law requires validation of a passport before one can travel to the delineated restricted areas.⁴¹ If this citizen then learns that some other persons have travelled to restricted areas without Department of State permission,⁴² such knowledge may well have a

³⁷*Id.* Some ambiguity exists in the statistics we obtained. Our questions were as follows: From 1967 to the present, how many persons have applied for special validation to travel to restricted areas? Into what categories specified in 22 C.F.R. § 51.73(b) and (c) did these applicants fit? How many of these applicants were granted special validations in each category? How many were denied in each category? In response, Mrs. Knight provided a chart and this explanation: "Statistics have not been kept on the number of inquiries or applications for travel to restricted areas.

Outline of total validations granted in each category for the years 1967-1974 and denials for the years 1971-1974:

Categories	1967	1968	1969	1970	1971	1972	1973	1974
Humanitarian	77	114	127	215	173	162	283	390
Journalists and Newsmen	98	106	69	45	59	49	60	143
Doctors and Scientists	7	6	15	3	10	7	14	37
Scholars	16	56	77	46	28	29	36	74
Others (Discretionary)	15	24	143	25	250	45	125	170
Total	213	306	431	334	520	292	518	814
Denials					44	8	36	95"

³⁸H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 4-5 (2nd ed. 1967).

³⁹Austin, *Law and the Sovereign's Command*, in *THE NATURE OF LAW* 82-83 (M.P. Golding ed. 1966).

⁴⁰*Id.*

⁴¹*Zemel v. Rusk*, 381 U.S. 1, 14 (1965).

⁴²Certain journeys to North Vietnam during the time United States forces were engaged in the Indochina conflict sparked vehement protests and charges of treasonous activities. The 1972 visits of Jane Fonda and Ramsey Clark were most notable. Both travelled without passports. Press coverage of the trips led to loud protests within the United States on three main points: (1) how the two

negative impact on his general view of law. The result may be an increased willingness to ignore certain laws which might be considered inconvenient. His decision would be rationalized by a reference to violations of area restrictions. Should this reaction occur, the deterrent function of all law would be adversely affected. Area restrictions therefore become incongruent with the concept of law as a "coercive order."

Finally, since all presently valid passports do not contain the same language, the scope of area restrictions is unclear. Passports issued through 1971, valid until late 1976, read:

Unless otherwise specifically endorsed, this passport is not valid for travel into or through countries or areas to which travel has been restricted by public notice issued by the Secretary of State.

This language explicitly notifies the bearer that he should not travel to restricted areas. Holders of older — yet valid — passports have less opportunity to discover the anomaly in the law.

Newer passports read:

United States courts have interpreted United States law in effect on the date this passport is issued as not restricting the travel of a United States citizen to any foreign country or area. However, the use of a United States passport for travel into or through any of the following areas is authorized only when specifically validated for such travel by the Department of State.

This new language is highly misleading. Although the first sentence of the paragraph says that travel is not restricted, the average citizen would likely read the second sentence as contradicting it. By warning that passports must be specifically validated for travel to the specified areas, the Department of State seems to imply that the courts have said that such travel may occur, but only with special permission. Those persons educated in the law on passports would know that a passport need not always be used, and hence that the validation is only a prerequisite to physical use of the document if traveling to restricted areas. But the average United States citizen believes a passport must be used for all travel abroad. He would be misled into assuming that a specially validated passport is an absolute prerequisite for travel to restricted areas. The statement in the passport is a technically correct explanation of the law. The phrasing, however, seems skillfully designed to further the purposes of the Department of State at the expense of free exercise of a constitutionally-

were able to travel to a restricted area; (2) why war protestors were permitted to go to North Vietnam when those supporters of the war who had sought special validations had been refused; and (3) why the government did not punish Fonda and Clark once they returned to the United States. *See* 118 CONG. REC. 25604-05 (1972) (remarks of Rep. Price) and 118 CONG. REC. 31423-24 (1972) (remarks of Rep. Ichord).

protected right of American citizens.⁴³

III. SUPREME COURT PRONOUNCEMENTS ON THE CONSTITUTIONALITY OF TRAVEL RESTRICTIONS

A. *KENT v. DULLES*: THE CONSTITUTION PROTECTS THE RIGHT TO TRAVEL ABROAD

The tension resulting from the government's control of citizen travel in order to implement its foreign policy, on the one hand, and the individual's claim to freedom of movement on the other, culminated in judicial consideration of the constitutionality of passport restrictions. In *Kent v. Dulles*,⁴⁴ the Supreme Court stated that the right to travel abroad was an individual right, embodied within the term "liberty," and protected by the Fifth Amendment.⁴⁵ Congress, it decided, had not delegated to the Executive the authority to abridge that right in the manner presented by the case.⁴⁶ The Passport Office had refused to issue a passport to Rockwell Kent, alleging that (1) Kent was a communist, and (2) he adhered to the Communist Party line. Regulations in force at the time required applicants to sign an affidavit stating whether they were or ever had been communists. Kent had refused to sign the form and asserted his right to obtain a passport.

The Court, relying upon the absence of Congressional authorization, ruled that the Secretary of State did not possess the discretionary right to refuse Kent a passport.⁴⁷ Justice Douglas based his majority opinion upon freedom of movement as a constitutional right.⁴⁸ Noting that the intellectual and social values of free travel constitute a part of our heritage,⁴⁹ the Court said regulation of that cherished liberty must derive from the legislative branch of government.⁵⁰ Any power to curtail or dilute the right to travel abroad must be delegated pursuant to the law-making functions of Congress, and such delegation would be narrowly construed.⁵¹ The standards

⁴³In an editorial sharply critical of the continuation of area restrictions, in light of *Laub* and *Lynd*, the *New York Times* stated: "The totalitarian impulse to control and manipulate American citizens as they move freely around the world still beats strongly in the State Department. . . . [T]he highest purpose of this nation's foreign policy is to protect the freedom of its citizens, not to constrict them. Rather than trying to fit the citizens to the policy, the Department of State would do better to adapt the policy to the citizens." *N.Y. Times*, Mar. 29, 1968, § 1, at 40 col. 1.

⁴⁴357 U.S. 116 (1958).

⁴⁵*Id.* at 125. The Solicitor General had conceded this fact.

⁴⁶*Id.* at 128.

⁴⁷*Id.* at 128-30.

⁴⁸*Id.* at 130.

⁴⁹*Id.* at 126-27.

⁵⁰*Id.* at 129.

⁵¹*Id.*

for exercising the discretionary power would have "to pass scrutiny by the accepted tests."⁵² The Court concluded that Congress had "made no such provision in explicit terms; and absent one, the Secretary may not employ that standard [an assessment of Kent's political beliefs and associations] to restrict the citizen's right of free movement."⁵³

In summary, four important points are revealed in *Kent*: (1) the right to travel abroad comes within the protection afforded by the Due Process Clause of the Fifth Amendment; (2) any necessary restriction of this right must be authorized by Congress; (3) any such Congressional authorization must be explicit; and (4) any authority so delegated by Congress would be narrowly construed.

The Court did not reach the issue of whether such a delegation of authority to deny passports would have been unconstitutional. The reference to freedom of personal beliefs and associations, however, imparts overtones of First Amendment considerations underlying the decision.⁵⁴

Immediately after the *Kent* decision, the Administration requested prompt Congressional action to legalize its practice of passport restriction. Members of both houses submitted bills on behalf of the Administration.⁵⁵ If Congress had approved this legislation, the Secretary of State would have been explicitly authorized to deny passports where their possession would seriously impair the conduct of foreign relations of the United States or would be inimical to the security of the United States. In his message to the Congress⁵⁶ on the need for such legislation, President Eisenhower discussed the travel regulation authority the Secretary of State had theretofore asserted:

Recently, the Supreme Court limited this power to deny passports under existing law. It is essential that the Government today have the power to deny passports where their possession would seriously impair the conduct of the foreign relations of the United States or would be inimical to the security of the United States. Moreover, the Secretary should have clear statutory authority to prevent Americans from using passports for travel to areas where their presence would conflict with our foreign policy objectives or be inimical to the security of the United States.⁵⁷

The executive branch thus recognized that it should obtain clear Congressional authorization to continue restricting travel by United

⁵²*Id.*

⁵³*Id.* at 130.

⁵⁴*Id.*

⁵⁵S. 4110, 85th Cong., 2d Sess. (1958); introduced by Senator Green on July 8, 1958, and referred to the Senate Foreign Relations Comm.; H.R. 13318, 85th Cong., 2d Sess. (1958): introduced by Congressman Keating on July 8, 1958, and referred to the House Foreign Affairs Comm.

⁵⁶H. DOC. NO. 417, 85th Cong., 2d Sess. (1958).

⁵⁷*Id.*

States citizens. Congress, however, did not pass such legislation, and thereby failed to give the Secretary of State the requested statutory authority.

B. *ZEMEL v. RUSK*: A LIMITED APPROVAL OF AREA RESTRICTIONS

Seven years later, in *Zemel v. Rusk*,⁵⁸ the Supreme Court upheld on both statutory and constitutional grounds, the authority of the Secretary of State to refuse to validate a passport for travel to Cuba. In January, 1961, the United States had broken diplomatic relations with Cuba and subsequently declared that all United States passports were invalid for travel to that country unless specifically endorsed by the Secretary of State. Zemel had requested this special permission for travel to Cuba in early 1962 and had been refused. He made another request in October, 1962, stating that he wished to satisfy his curiosity about the state of affairs in Cuba and thereby to become a better informed citizen. Again denied permission, Zemel appealed.

Chief Justice Warren, writing for the majority, found an implicit statutory delegation of authority in the broad language of Title 22 of the United States Code, section 211(a).⁵⁹ Looking to the legislative history of the statute, the Court cited the prior executive practice of imposing area restrictions during both wartime and peacetime.⁶⁰ Congress, the Court said, incorporated this executive practice into section 211(a) when it adopted the language of the Passport Act of 1926⁶¹ without substantial alteration.

The Court went on to determine that the restriction on travel to Cuba was constitutional in this case. The government had a substantial interest in regulating travel to Cuba, because of (1) the OAS policy of isolating the communist regime of Cuba,⁶² and (2) the danger of an international incident arising from the President's obligation to secure, by any means short of war, the release of United States citizens unjustly detained.⁶³ The Court also rejected Zemel's

⁵⁸ 381 U.S. 1 (1965).

⁵⁹ *Id.* at 7.

⁶⁰ *Id.* at 8.

⁶¹ *Id.* at 8-12.

⁶² See Resolution I, Ninth Meeting of Ministers of Foreign Affairs, OEA/Ser. F/11.9 (1964), adopted in Resolution III of the Twelfth Meeting of the OAS in 1967.

⁶³ *Zemel v. Rusk*, 381 U.S. 1, 14-15 (1965). The Presidential obligation to secure the release of United States citizens derives from 22 U.S.C. § 1732 (1964): "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so de-

First Amendment argument, stating that the First Amendment did not include the unrestricted right of the individual to gather information.⁶⁴ Finally, the Court sustained the statute against a constitutional attack on the broad delegation of discretionary power to the Executive. Deferring to the Executive's desire for greater flexibility in the conduct of foreign affairs, the Court concluded that Congress in that area "must paint with a brush broader" than when delegating authority in domestic affairs.⁶⁵

C. *KENT* AND *ZEMEL*: THE EXTENT OF THE RIGHT TO TRAVEL ABROAD

As previously noted, the Court in *Kent* emphasized that denial of the constitutional right to travel abroad must be explicitly authorized by Congress.⁶⁶ Refusal to give Kent a passport because of his beliefs and associations was impermissible given the absence of explicit authority. *Zemel* limited, but did not overrule, *Kent*.⁶⁷ *Zemel* was merely restricted from using his passport in a certain country; the Court in that instance found the implicit delegation of discretionary power by Congress sufficient. Although the two cases are compatible, despite the change from requiring explicit, to permitting implicit, delegation, the Court's reasoning in *Zemel* is suspect.

The Executive based its practice of imposing area restrictions on the broad language of the Passport Act of 1926.⁶⁸ In the 1952 Immigration and Nationality Act, Congress substantially re-enacted previous laws concerning passport use.⁶⁹ The Court indicated that Congress must have approved the post-1926 Executive use of area restrictions when it failed to alter that power in 1952.⁷⁰ That history of use was related to times of "war" and "national emergency."⁷¹ Those terms until 1952 had been virtually synonymous.⁷²

manded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to the Congress."

⁶⁴ 381 U.S. at 17.

⁶⁵ *Id.*

⁶⁶ 357 U.S. at 130.

⁶⁷ 381 U.S. at 14, 16.

⁶⁸ *Id.* at 9.

⁶⁹ See note 15.

⁷⁰ 381 U.S. at 11-12.

⁷¹ See note 15.

⁷² The national emergency doctrine is invoked by Presidential proclamation, thereby bringing into force approximately 470 provisions of Federal law. These provisions delegate extraordinary powers to the President — powers normally exercised by Congress — which in essence permit the President to bypass normal constitutional processes in a number of critical areas.

Lincoln first used the power during the Civil War, as Commander-in-Chief. Wilson also made use of the power, but always requested specific Congressional

Only one of the Court's examples of 1926-52 area restrictions encompassed a non-war situation.⁷³ The remainder of examples employed to substantiate its reasoning occurred after Congress enacted the Act in question.⁷⁴ If limited to placing area restrictions on war zones, the executive practice may accurately be said to have been condoned by Congress; however, the presumed Congressional intent should not be carried beyond that point.

Additionally, in discussing the early administrative use of area restrictions, the Supreme Court in *Zemel* made no mention of the prior relationship between passports and travel abroad. Passports were not always required for travel outside the United States until the 1952 Immigration and Nationality Act. Previous border control measures through passport requirements had been employed only during wartime. In peacetime, United States citizens had been free to travel abroad with or without a passport. Passport restrictions were not, in themselves, a restriction on the right to travel.⁷⁵

The Supreme Court may not have been justified in finding the broad implicit Congressional delegation of power asserted in *Zemel*. The Court's analysis would be accurate if narrowed to the use of the

authorization. Roosevelt, analogizing the Depression to a war, sought and immediately received broad emergency powers from the Congress. Thereafter, he assumed its concurrence when Congress failed to object to his use of new "emergency" powers. Truman continued this dilution of constitutional circumstances justifying the use of emergency powers by invoking them based upon an undeclared war. Nixon invoked the doctrine during two even less justifiable emergencies — the international monetary crisis and the Postal Service strike. States of emergency declared in 1933, 1950, 1970, and 1971 have not been terminated. SENATE SPECIAL COMM. ON TERMINATION OF THE NATIONAL EMERGENCY, S. REP. NO. 549, 93d Cong., 1st Sess. (1973).

Congress has given only perfunctory consideration to executive requests for new statutory emergency powers and to their constitutional repercussions. It has failed to retract powers which are used inappropriately. The inevitable result is indiscriminate declaration of a "national emergency." The derivative delegation of authority vests wide discretionary power in the executive branch. Passport regulation is but one example of the resultant unchecked executive prerogative to control citizens' actions.

⁷³That instance was the 1951 regulation of travel to Czechoslovakia. It was prompted by the arrest of AP newsman William Oatis. The Czechoslovakian government charged him with hostile acts and spreading secret information gained by spying. At his subsequent trial, Oatis confessed and was sentenced to 10 years' imprisonment. Two years of United States diplomatic pressure, threats, protests, and sanctions were required before the Czechs released him. For a detailed history, see *N.Y. Times*, 1951-53. The restriction on travel was undoubtedly prompted by both the cessation of diplomatic relations and fear of further arrests of American citizens.

⁷⁴381 U.S. at 10-11.

⁷⁵For extensive treatment of the history of requirement and use of passports, see Note, *Constitutional Law: Right to Travel versus Power to Conduct Foreign Affairs: Area Restrictions on Passports: Zemel v. Rusk*, 50 CORNELL L. REV. 262 (1964-65); Note, *The Right to Travel Abroad*, 42 FORDHAM L. REV. 838 (1973-74); Comment, *Judicial Review of the Right to Travel: A Proposal*, 42 WASH. L. REV. 873 (1967).

power in times of war or equivalent national emergency. Such a reading of the grant of discretionary power to the Executive would be consistent with *Kent*, where times of war were specifically exempted from consideration. The Court's reasoning was that coordination of legislative and executive functions, and a "showing of extremity" were prevalent under wartime conditions.⁷⁶ *Kent* required explicit delegation during peacetime. To the extent that *Zemel* found and upheld an implicit Congressional authorization in peacetime, it is inconsistent with *Kent*.

Despite an incorrect application of history in finding an implicit delegation of authority, *Zemel* may be reconciled with *Kent*. The Supreme Court did not discuss the relationship of *Kent*'s First Amendment rights to the denial of his passport. The Court simply stated its hesitancy to impute to Congress in 1952 a purpose to give the Secretary of State "unbridled discretion" to regulate passports "for any substantive reason he may choose."⁷⁷ The lack of explicit delegation of power was a sufficient basis for the decision. The relevant First Amendment considerations were more clearly articulated in a subsequent case, *Aptheker v. Rusk*.⁷⁸ The Court there held a statute permitting denial of a passport based upon Communist Party membership unconstitutional on its face.⁷⁹ *Aptheker* could not be forced to sacrifice his First Amendment freedom of association in order to secure free exercise of his Fifth Amendment right to travel abroad.⁸⁰ While recognizing the probable justification for the statute's purpose, the Court declared its sweep too broad:

The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel.⁸¹

Although not enunciated, similar factors existed in *Kent* — *i.e.*, denial of a passport because of mere membership in an organization. In *Zemel*, however, the Court specifically rejected the contention that mere desire to travel to a country involved First Amendment rights.⁸² Therefore, the rationale for the explicit/implicit distinction may be based upon the influence of First Amendment freedoms. An implicit delegation would be inherently vague.⁸³ This ambiguity

⁷⁶ *Kent v. Dulles*, 357 U.S. 116, 128 (1958).

⁷⁷ *Id.*

⁷⁸ 378 U.S. 500 (1963).

⁷⁹ *Id.* at 513-14.

⁸⁰ *Id.* at 507.

⁸¹ *Id.* at 514.

⁸² 381 U.S. at 16-17.

⁸³ Under basic principles of due process, a law is void for vagueness if its prohibi-

would inhibit citizens from exercising certain basic rights,⁸⁴ a vague limitation would be improper without a buffer zone for protected speech. Therefore, because relinquishment of sensitive freedoms cannot be the price for travel abroad, only in the absence of First Amendment considerations would an implicit delegation of authority be tolerated.

Whatever role First Amendment considerations may have played in *Kent*, on its facts the case is consistent with *Zemel*. The basic problem with passport regulation is not that the Secretary of State has discretion, but the manner in which it is exercised.⁸⁵ This is especially true with imposition of area restrictions, where the distinction is unclear as to when implicit, rather than explicit, delegation of authority is required. The Supreme Court appears to have been strongly influenced in *Zemel* by the tenor of international relations at that time. It noted the potential for exportation of Cuba's communist revolution throughout the Western Hemisphere and Castro's former practice of imprisoning Americans without charges.⁸⁶ The occasional need to restrict travel abroad was equated with restrictions on domestic travel in cases of flood, fire, or pestilence; a dangerous international incident might have been sparked if the President had been forced to tangle with the Cuban government over unlawful detention of an American.⁸⁷ The Court concluded the government had the right to forbid *Zemel* from travelling to Cuba because the restriction

is supported by the weightiest considerations of national security . . . perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant's complaint by less than two months.⁸⁸

Given this perspective, *Zemel* is not a radical departure from, nor substantial alteration of, the *Kent* rationale. Because of the international implications peculiar to the Cuban crisis in 1962, the Supreme Court was reluctant to interfere with the Secretary of State's exercise of discretion. Therefore, *Zemel* should not be divorced from its facts and historical timing. The weakness in the Court's analysis of the legislative history of area restrictions is an additional reason to limit *Zemel's* application. It should not be cited as justification for the continued or extended abridgement of a citizen's constitutional right to travel abroad.

tions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

⁸⁴ "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly defined." *Id.* at 109.

⁸⁵ *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

⁸⁶ 381 U.S. at 14-15.

⁸⁷ *Id.* at 15.

⁸⁸ *Id.* at 16.

IV. CONSTITUTIONALITY OF AREA RESTRICTIONS

A. THE STANDARD OF REVIEW

In determining the constitutionality of present area restrictions, it is first necessary to decide the standard of review. The Court has recognized that the right to travel abroad comes within those rights protected by the Due Process Clause of the Fifth Amendment,⁸⁹ and that any delegation or authority to restrict this right would be narrowly construed and would have to "pass scrutiny by the accepted tests."⁹⁰ The Court did not specifically name these tests but such scrutiny would entail some form of a balancing process under the Due Process Clause. Hopefully, the standard the Court adopts will account for the different results reached in *Kent* and *Zemel*.

The Court does not appear likely to impose a strict scrutiny test on area restrictions. It has not deemed the right to travel abroad a "fundamental" right which would warrant the most stringent standard of review.⁹¹ Although the restrictions placed on travel to Cuba were found to be supported by "the weightiest considerations," the Court carefully avoided imposing a strict scrutiny test in this area of foreign policy. Nor does the Burger Court seem disposed to add new individual interests to those already deemed "fundamental" for strict scrutiny purposes.⁹²

Nonetheless, the Supreme Court indicated in *Kent* that it is unwilling to give the Congress or the President free rein in this area.⁹³ The usual presumption of constitutionality should not be attached to legislation restricting the right to travel abroad. The test of minimum rationality normally applied to economic legislation is inadequate when applied to legislation restricting personal rights within the protection of the Constitution. The Court has recognized that the individual's right to travel abroad is an important constitutional right. As such, any limitation of it should be carefully scrutinized and narrowly construed. If the rigid two-tier standard of minimum rationality

⁸⁹ *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

⁹⁰ *Id.* at 129.

⁹¹ The right to travel abroad must be distinguished from the right to travel established in *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Shapiro* involves the individual's right to travel interstate, which the Court deemed to be a "fundamental" right, requiring strict scrutiny of any statute regulating it. Moreover, the Court appears to view the right to travel interstate in terms of the right to migrate and settle, and imposes a strict scrutiny test on statutes which restrict this aspect of it. See, e.g., *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), where a tax placed upon airport users was not subjected to strict scrutiny even though it was argued that the tax constituted an infringement of the fundamental right to travel.

⁹² See generally Yackle, *Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court*, 9 RICH. L. REV. 181 (1975).

⁹³ 357 U.S. at 129.

versus strict scrutiny is inapplicable, the standard of review must fall somewhere in between. Although the government interests asserted need not be compelling in order to limit the right as required by the strict scrutiny test, they should be substantial enough to outweigh the individual interests of constitutional dimension.

This test reflects the standard implicit in many recent decisions involving the Equal Protection Clause of the Fourteenth Amendment.⁹⁴ Although the Court in these cases refused to name additional suspect classes or fundamental rights, or to apply a strict scrutiny analysis, it did seem to require that the legislation restricting certain rights or classes withstand more than the minimum rationality test. These decisions seem to recognize several advantages in a more flexible approach in reviewing the constitutionality of restrictions on personal rights. Such an approach avoids the either/or dilemma of the two-tier analysis. Some interests, while not sufficiently "fundamental" to require strict scrutiny, do warrant more careful scrutiny than a cursory application of the minimum rationality test.⁹⁵ Also, because certain personal rights are constitutionally-protected, the Court should not automatically defer to the legislative judgment. Determining whether the legislative judgment conflicts with constitutional provisions designed to protect individual rights is a proper function of the Court.⁹⁶ This standard is also preferable in that it forces the Court to enunciate clearly its reasoning. Rather than simply concluding that an interest is fundamental and then applying the virtually determinative strict scrutiny formula, the Court must expressly weigh the interests asserted on each side and discuss the reasons for the result reached in the balancing process. This approach ensures a thorough treatment of the merits on each side of the balance rather than a mere statement of the Court's conclusions as to whether a certain interest is fundamental.⁹⁷ As the restriction on a right becomes more severe, the importance of the governmental interest at stake must increase commensurately in

⁹⁴See, e.g., *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Stanton v. Stanton*, 43 U.S.L.W. 4449 (U.S. Apr. 15, 1975). Mr. Justice Marshall discusses the standard implicitly applied in prior cases in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (Marshall, J., dissenting). Justice Marshall has long advocated a more flexible approach to determining what the standard of review should be in a particular case. See also the discussion on this point in Yackle, *supra* note 92 (Yackle views this as an evolving approach to equal protection analysis); and Gunther, *The Supreme Court, 1971 Term: Foreword, In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

⁹⁵*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 99, 104 (1973) (Marshall, J., dissenting).

⁹⁶*Id.* at 132.

⁹⁷*Id.* at 110.

order to withstand scrutiny.

When analyzed under such a standard, the decisions in *Zemel* and *Kent* are consistent. In *Kent*, the right to travel abroad had been totally restricted on grounds relating to freedom of speech. The Court implied that even if Congress had authorized the restriction, such legislation would have been unconstitutional.⁹⁸ In *Zemel*, however, the restriction on the right to travel abroad was more limited and not related to freedom of speech. When the Court spoke of the restrictions as being supported by "weightiest considerations" of national security flowing from the 1962 Cuban missile crisis, it appeared to be balancing the individual's interests against those of the government, and did not simply apply a minimum rationality test.⁹⁹ The dangers were not hypothetical, but instead were specific clear and present threats to national security. This consideration helped increase the government's interests and swing the balance in favor of upholding the restrictions.

B. THE STANDARD OF REVIEW APPLIED TO CURRENT RESTRICTIONS

The current restrictions, imposed to prevent the impairment of the conduct of foreign affairs, have not yet been tested to determine if they are supported by considerations sufficient to warrant impinging the individual's right to travel abroad. Since this area of the law is comparatively new and cases arise relatively infrequently, the balancing process has not been applied regularly enough to state with certainty that one set of interests will prevail. Where the Court strikes the balance in a particular case will depend upon the interests asserted on either side. At one extreme, the government's interests in restricting travel to a certain country will be weightier, where for example it is a country against whom the United States has declared war. At the other extreme, the individual's interests will be weightier, if for example travel to England were restricted because the Secretary of State did not like the music at a reception given in his honor. Somewhere between these extremes fall the current restrictions on travel to Cuba, North Korea, and North Viet Nam, which the Department of State justifies under 22 Code of Federal Regulations 51.72(c) as necessary to achieve the unimpaired conduct of foreign affairs. Whether these restrictions are valid will depend upon the relative weight of the particular interests asserted.

The right to travel abroad comes within the liberty which the Bill of Rights secures to the individual against undue governmental interference. The individual's interests in exercising his right to travel

⁹⁸ 357 U.S. at 129-30.

⁹⁹ 381 U.S. at 16.

abroad are of constitutional dimension. These include the traveller's personal interests in "seeing for himself," in satisfying a healthy curiosity about the world around him, and in achieving personal growth through acquaintance with other cultures and ideas. Although they may not rise to the level of First Amendment freedom of speech,¹⁰⁰ the importance of these interests has been frequently urged.¹⁰¹

Not only are personal interests affected, but so are the collective interests of a citizenry in knowing what is being done in its name. There is value in a responsible, mature citizenry forming its own opinion of the world situation and assessing its government's conduct in response. The information citizens consider in forming such an opinion should not be limited to the subjective view the government promulgates. Neither should the citizenry be forced to rely solely on the reports of official news correspondents.¹⁰² The Court in *Zemel* refused to strike down area restrictions as violative of *Zemel's* First Amendment rights.¹⁰³ While not controlling in themselves, however, the Court should weigh these interests along with the other asserted interests in striking the balance between the needs of the individual and those of the government.

The interests of the government are aligned on the other side of the balance. The government's stated purpose for current area restrictions is to avoid impairing the conduct of foreign affairs. We are not, therefore, concerned with restrictions imposed because the United States is at war with any of these areas,¹⁰⁴ or because armed hostilities are in progress in any of these areas.¹⁰⁵ The current areas are restricted solely because the Secretary of State has determined that travel to them will "impair the conduct of foreign affairs."¹⁰⁶

In balancing the individual right against the government's interests to determine whether particular area restrictions are valid, the Court should consider the extent to which discretionary power is delegated to executive officers and the extent to which standards are established for exercising that discretion. The Court has permitted a wider scope of Congressional delegation of power to the Executive in

¹⁰⁰ *Id.* at 16-17.

¹⁰¹ See, e.g., SCHWARTZ, *supra* note 6, at 95-97; *Developments in the Law — The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1148 (1972); Comment, *Executive Restriction on Travel: The Passport Cases*, 5 HOUSTON L. REV. 499 (1968).

¹⁰² *Hearings on 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. 36 (1973)* [hereinafter cited as *Hearings on H.R. 1594*] (testimony of Ramsey Clark).

¹⁰³ 381 U.S. at 16-17.

¹⁰⁴ 22 C.F.R. § 51.72(a) (1974).

¹⁰⁵ 22 C.F.R. § 51.72(b) (1974).

¹⁰⁶ 22 C.F.R. § 51.72(c) (1974). See also 40 Fed. Reg. 13011 (1975).

foreign affairs.¹⁰⁷ When the exercise of that power limits individual rights, however, it has been suggested that the same limitations on delegation of powers that the Court applies in domestic matters may well apply to delegation of power in foreign affairs.¹⁰⁸ At a minimum, the Court ought to apply a higher standard in reviewing the exercise of such delegated power where it impinges on an individual right.

This approach would seem particularly appropriate when the Secretary of State has complete discretion to determine when and under what circumstances a citizen's exercise of his constitutional right should be restricted because it will "impair the conduct of foreign affairs." The government has never expressly given content to that phrase.¹⁰⁹ Standards defining the situations which will give rise to the need to restrict travel under that rationale have never been established; the Secretary of State alone determines the rules. Where a constitutionally-protected right of the individual is concerned, the outlines of 22 Code of Federal Regulations 51.72(c) are too vague. When striking the balance between the individual right and the governmental interests, the absence of established standards to guide the Secretary of State's discretion in determining when travel will impair the conduct of foreign affairs should weigh against the government.

Although the government has not stated exactly what interests were included within the scope of the "conduct of foreign affairs," some possibilities have been mentioned:¹¹⁰ (1) United States citizens might become entangled in situations which would embarrass the United States government, and (2) foreign governments might use the presence and actions of United States citizens for propaganda purposes against the United States. Such potential problems may be considered to constitute a serious threat to unfettered governmental control over the foreign policy of the United States. A related concern is the President's statutory duty to secure the release of unjustly detained United States citizens by any means short of war.¹¹¹ The government wishes to prevent international incidents which might arise from carrying out this duty.¹¹²

The President's statutory obligation to secure the release of unjust-

¹⁰⁷ See, e.g., *Zemel v. Rusk*, 381 U.S. 1 (1965) and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹⁰⁸ L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 120 (1972) [hereinafter cited as HENKIN].

¹⁰⁹ See text, section IV B.

¹¹⁰ See, e.g., SCHWARTZ, *supra* note 6, at 70-75; Note, *The Right to Travel Abroad*, *supra* note 75; *Developments in the Law — The National Security Interest and Civil Liberties*, *supra* note 101.

¹¹¹ 22 U.S.C. § 1732 (1964); see note 63.

¹¹² *Zemel v. Rusk*, 381 U.S. 1, 15 (1965).

ly detained United States citizens, and the danger of international incidents arising therefrom, are perhaps the government's strongest interests. In weighing those interests, the Court should also consider whether and to what extent a conflict with the individual's rights can be avoided: can the government achieve its purpose in a way that is less intrusive on the constitutionally-protected right to travel abroad? An absolute ban on travel to certain areas may well be a more drastic action than the problem warrants. For example, instead of prohibiting all travel to certain areas, the Secretary of State could warn travellers of the possible dangers in travelling to those areas, and that the protection of the United States could not be guaranteed to those who choose to do so.

In fact, passports are currently stamped with a warning of this type: "If you travel in disturbed areas, you should keep in touch with the nearest American consular office."¹¹³ Although no definition of a disturbed area is given, it is distinguished from restricted areas by the fact that those wishing to travel to restricted areas must secure prior Department of State permission. Implicit in this warning is the recognition that citizens are endangered in areas of the world other than those subject to specific restriction. One should note that the President's duty of assistance arises as soon as an American is unjustly detained anywhere in the world;¹¹⁴ international incidents are always a potential result. If the Department of State deems a warning sufficient for travel to "disturbed areas," the need for totally curtailing travel to certain other areas is difficult to justify; in either case, the President's statutory obligation is the same.¹¹⁵

Apart from the President's obligation to rescue citizens and the government's fear of international incidents arising therefrom, the safety of the traveller himself is a concern.¹¹⁶ Here again, however, the means chosen to achieve the end are too broadly drawn; the individual's right is unnecessarily infringed. An official warning of the dangers risked is a more appropriate way to attain this goal. Short-term restrictions of areas may be justified where a danger exists to the public health and welfare.¹¹⁷ But an all-encompassing attempt by the Department of State to protect the traveller against his own desire to travel is misguided. If the traveller chooses to assume a personal risk in travelling to areas of danger, even though

¹¹³ This warning is printed in the back pages of the standard United States passport under the heading "Important Information."

¹¹⁴ 22 U.S.C. § 1732 (1964). See note 63.

¹¹⁵ It is interesting to note that restrictions were not placed upon Cambodia or South Vietnam during the hostilities in those nations in early 1975.

¹¹⁶ For example, the current inclusion of North Korea on the restricted areas list is based in part upon the "unsettled situation along the Military Demarcation Line," which may be read as inferring the presence of danger to personal safety in that region. See note 29.

¹¹⁷ *Zemel v. Rusk*, 381 U.S. 1, 25 (1965) (Douglas and Goldberg, JJ., dissenting).

warned that United States protection or assistance cannot be guaranteed, the Constitution should protect his right to do so.

Presumably, the government has decided that a blanket prohibition of travel by United States citizens to designated areas will prevent embarrassment or adverse propaganda. To suppose that travel bans will have this effect is unrealistic. The government's action is at most tangentially related to its purpose. Restricting travel to a few select areas cannot control the potential for similar problems elsewhere in the world. United States citizens can cause their government embarrassment in countries other than those subject to travel restriction. Propaganda adverse to United States interests can certainly result from travel to non-restricted areas. Although these problems may be more acute in restricted areas, a less intrusive solution could have a sufficiently salutary effect so that infringement of the exercise of a constitutional right would be unnecessary. Rather than prohibiting all travel, the government could request citizens to refrain from travelling to certain areas where the potential for such problems might be more acute. The same approach could be used if a temporary halt to travel were considered essential for a significant diplomatic reason. The traditional diplomatic practice of denying official recognition should be employed to express disapproval of a foreign government.

Finally, the Department of State has an interest in using travel as a direct tool in conducting foreign affairs. An example of this is the restriction on travel to Cuba, deriving from an OAS program of sanctions designed to isolate Cuba and to prevent the spread of communism.¹¹⁸ The ban on American travel to Cuba provides an economic sanction (the loss of tourists' dollars) and a demonstration of official disapproval of the Cuban government. Another example was the ban on travel to the Middle East from November 2, 1956, to April 1, 1957. Some believe that the restriction was an economic sanction imposed on Israel by stopping the flow of American tourists during the Christmas-Easter holidays.¹¹⁹

Although the courts have been reluctant to interfere in the realm of foreign affairs,¹²⁰ they have become more willing when the foreign affairs power impinges on individual rights.¹²¹ In general, Congress may delegate broad power to the Executive to conduct foreign affairs.¹²² The exercise of the foreign affairs power is not exempt from

¹¹⁸ *Zemel v. Rusk*, 381 U.S. 1, 14-15 (1965); 40 Fed. Reg. 13011 (1975).

¹¹⁹ Rauh and Pollitt, *supra* note 4, at 143; SCHWARTZ, *supra* note 6, at 74.

¹²⁰ See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹²¹ See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958); *Zemel v. Rusk*, 381 U.S. 1 (1965); and HENKIN, *supra* note 108, at 257.

¹²² HENKIN, *supra* note 108, at 252-53; see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

constitutional limitations, however,¹²³ when a person's liberty under the Due Process Clause is at stake.¹²⁴ Individual rights, guaranteed by the Bill of Rights, should carry equal weight when balanced against governmental foreign affairs interests as when balanced against the government's domestic interests.¹²⁵

Cuba is a clear illustration. Even if the initial imposition of OAS sanctions was justified, the policy has remained stagnant while circumstances have changed. In light of the recent OAS propensity to rescind the overall sanctions,¹²⁶ the U.S. government must re-evaluate its continuing denial of free travel by Americans to Cuba. The sacrifice of United States citizens' constitutional right to travel abroad, because rescission of the OAS sanctions on Cuba failed by one vote, is unjustified. The freedom of American citizens should not be converted into a bargaining tool.

By articulating its reasons for striking the balance in favor of one side or the other in each case, the Court will more clearly define those situations in which the government considerations are deemed weightier than the individual right. If the Court decides that the unimpaired conduct of foreign affairs is sufficiently weighty to overbalance the individual right involved, the reasons should be articulated. The government interests demonstrable in *Zemel*, however, are not necessarily present in the current restrictions. Until the Court determines that the government's present interests are equally weighty, *Zemel* ought not to be extended as authority to impose further restrictions for less weighty government interests. Absent a true crisis situation, foreign policy considerations should not justify restrictions on the exercise of a liberty guaranteed by the Bill of Rights.

Moreover, *Laub* and *Lynd* have rendered *Zemel* somewhat anomalous from a constitutional perspective. Whereas in *Zemel* the Court found restrictions on travel to Cuba warranted by the dangerous situation which existed there, the government's ability to enforce its interests was virtually eliminated in *Laub* and *Lynd*. The result is that the constitutional right of the ordinary traveller, who does not know that the restrictions are unenforceable, is being impinged,¹²⁷ but the governmental purpose is not actually being furthered. In addition, those who do travel to restricted countries despite the regulations lose the benefits and protections of the United States passport.

As mentioned above, the stated purpose of banning travel to the

¹²³ HENKIN, *supra* note 108, at 253.

¹²⁴ *Id.* at 257.

¹²⁵ *Id.* at 252.

¹²⁶ *L.A. Times*, Nov. 11, 1974, §1, at 16, col. 1.

¹²⁷ 381 U.S. at 13-14.

currently designated areas is to prevent impairing the conduct of foreign affairs. Assuming that such travel does have this effect, anyone aware of the lack of enforcement power behind area restrictions can impair the conduct of foreign affairs at will. While some Americans are deterred from travelling to areas on the restricted list, others realize they will suffer no sanction from ignoring the requirement of special validation. These travellers can, and indeed have,¹²⁸ exposed the government to potential private interference with its asserted need for exclusive control over the conduct of foreign affairs. Since those travellers who pose the greatest threat of interfering with the conduct of foreign affairs are perhaps those most likely to inform themselves of the sanctionless status of area restrictions,¹²⁹ the efficacy of such restrictions as a means of implementing the foreign policy of the State Department is greatly reduced, if not eliminated.

In a very real sense, then, the governmental purpose is not being fully achieved. As long as area restrictions remain unenforceable, the individual's constitutionally-protected right to travel abroad is being impinged without achieving a commensurate government purpose. This ought to be considered also in determining in whose favor the due process balance should swing. The unimpaired conduct of foreign affairs may be a sufficiently weighty interest to warrant limiting the individual's right to travel abroad. Even if it is, until that interest is actually achievable, the system of restrictions loses its relation to the governmental purpose, and the balance should be struck in favor of the constitutional right.

V. THE ALTERNATIVE OF EXPLICIT CONGRESSIONAL AUTHORIZATION OF AREA RESTRICTIONS

The executive branch has not appeared willing to relinquish its prerogative to impose area restrictions. Court adjudication, although preferable, must necessarily await a case challenging the present structure of area restrictions. In the immediate future, the best way to resolve the conflict between freedom of movement and a governmental policy impairing it lies in specific legislation. Any Congressional pronouncement should clarify the parameters of the executive branch's authority to impose area restrictions and provide sanctions with which they may be enforced. Once enacted, this explicit delegation of authority would, of course, be subject to judicial scrutiny to assure that no constitutional rights are unduly impinged.

¹²⁸ See note 42.

¹²⁹ *Id.*

A. LEGISLATION PROPOSED BY MEMBERS OF CONGRESS

Several bills which would provide criminal sanctions for violation of area restrictions have been introduced in the Congress.¹³⁰ These may be divided into two distinct approaches to the status of area restrictions.

The more narrowly drawn of the two approaches entails amending section 4(a) of the Internal Security Act of 1950¹³¹ by adding a provision allowing the President or Secretary of State to restrict travel by citizens or nationals to any country or area whose military forces are engaged in armed conflict with United States forces.¹³² The Secretary of State may¹³³ authorize travel to such areas when determined to be in the national interest of the United States.¹³⁴ The Secretary of State would not be permitted to restrict travel on the assertion that it would impair the conduct of foreign affairs to allow visits to the particular area.¹³⁵ Sanctions of a fine of up to \$5,000, or imprisonment for up to five years, or both, are included.¹³⁶ Proponents of this legislation were predominantly motivated in their approach by the effects on POW morale of the trips of Jane Fonda and Ramsey Clark to North Vietnam.¹³⁷ One such measure, H.R.

¹³⁰ Legislative measures have been introduced in every Congress since the 1958 Supreme Court decision in *Kent v. Dulles*, 357 U.S. 116 (1958). Throughout the following discussions, reference will be made to specific bills which had been pending during the 93d Congress (1973-74). These bills effectively died at the end of the second session (December, 1974). Members of Congress have informed the authors by letters that the bills will be introduced in essentially the same form in the 94th Congress. Similar measures introduced early in the 94th Congress will be noted for reference.

¹³¹ 50 U.S.C. § 783 (1951).

¹³² S. 177, introduced by Senator Thurmond on January 4, 1973, and referred to the Senate Judiciary Comm., delegated the authority to the President. S. 177, 93d Cong., 1st Sess. (1973). H.R. 1594, introduced by Congressman Ichord on January 9, 1973, and referred to the House Comm. on Internal Security delegated the authority to the Secretary of State. H.R. 1594, 93d Cong., 1st Sess. (1973). In the 94th Congress, a similar bill was introduced by Congressman Ashbrook on January 17, 1975; the bill was referred to the House Judiciary Comm. H.R. 1578, 94th Cong., 1st Sess. (1975). (The House Comm. on Internal Security was abolished in January, 1975. 33 CONG. Q. 117 (1975)).

¹³³ Ramsey Clark, a witness at the hearings on H.R. 1594, pointed out that use of the word "may" permits too much discretion: apparently, the Secretary of State may choose whether or not to authorize such travel, even when permitting the travel would be in the national interest. *Hearings on H.R. 1594*, *supra* note 102, at 35.

¹³⁴ *Id.* at 2, where the Committee noted that this authorization would be available to accredited news correspondents, diplomats, and certain other persons.

¹³⁵ Both the Department of State and the Department of Justice prefer the broader coverage of the second approach, discussed in text accompanying notes 139 and 140, but endorse this approach as well. *Id.* at 59, 62.

¹³⁶ The criminal sanction was \$10,000 or 10 years; this was reduced at the request of the Department of Justice. *Id.* at 58-59.

¹³⁷ *Id.* at 2, and *Hearings on S. 177*, *supra* note 3, at 10, 13, 17, and 19-22. It should not be inferred, however, that concern for the basic issue of area restric-

8023, was reported favorably out of Committee on June 3, 1974, but was not considered on the House floor.¹³⁸

The second approach in legislation on area restrictions is that which the executive branch recommends. This proposal would amend chapter 45 of Title 18 of the United States Code, by adding a new section 970: Travel in a Restricted Area. It incorporates section 51.72 of Title 22 of the Code of Federal Regulations, authorizing the Secretary of State to restrict any area: (1) which is at war, (2) where armed hostilities are in progress, (3) whose military forces are in armed conflict with United States forces, or (4) to which travel would seriously impair the conduct of United States foreign policy.¹³⁹ The proposal also provides that the Secretary of State may authorize travel to a restricted area by some citizens if such travel is deemed to be "not inconsistent with the national interest."¹⁴⁰ The circumstances under which these special validations will be granted are those provided for in Title 22, Code of Federal Regulations, section 51.73. The sanction for travel in violation of any area restriction would be a fine of not more than \$1,000, or imprisonment for not more than one year, or both.

In sharp contrast to these approaches are those that would abolish all power to impose area restrictions. One Member of Congress has proposed that all restrictions on travel be lifted and that the citizen's right to travel freely be expressly affirmed.¹⁴¹

tions was limited to travel violations occurring during the Vietnam war, or that they will be ignored in the future. As Congressman Preyer stated: "Jane Fonda's trip was probably the last straw that prodded Congress into action. But it would be unfortunate to let the timing of the bill obscure the important and unresolved policy question that is involved." 118 CONG. REC. 33191 (1972).

¹³⁸ The previous Congress, in October of 1972, an attempt was made to circumvent regular House procedures and force a floor vote on a virtually identical bill, H.R. 16742. Congressman Ichord moved to suspend the rules and pass the bill. A heated debate ensued, both on the merits of the proposed legislation and on the tactics being employed to secure its passage. The extraordinary procedure required a two-thirds majority approval; by 230-140, the move was defeated. The full text of the debate and vote is found at 118 CONG. REC. 33187-97 (1972).

¹³⁹ The Administration's measure was introduced in the House by Congressman Hutchinson (H.R. 7060, 93d Cong., 1st Sess. (1973), referred to the House Judiciary Comm.), and in the Senate by Senator Fulbright, by request (S. 1733, 93d Cong., 1st Sess. (1973), referred to the Senate Foreign Relations Comm.). Hearings were never held on the proposal during the 93d Congress. In the 94th Congress, a similar measure was introduced in the House by Congressman Flynt on Jan. 14, 1975, and referred to the House Judiciary Comm. H.R. 454, 94th Cong., 1st Sess. (1975).

¹⁴⁰ S. 1733, *supra* note 139, subdivision (c).

¹⁴¹ H. Con. Res. 203, 93d Cong., 1st Sess. (1973), was introduced by Father Drinan on Apr. 19, 1973, and referred to the House Foreign Affairs Committee. No action was taken on the resolution during the 93d Congress. Father Drinan informed the authors in a letter (November 18, 1974) that he may re-introduce the measure in the 94th Congress.

B. AUTHORS' PROPOSAL TO RESOLVE THE CONFLICT

It appears unlikely that final action on these measures will soon be forthcoming. Congress has failed to enact legislation in the past, and is apparently reluctant to accept the measures presently before it. The current Congressional anxiety over the recent aggrandizement of power by the executive branch¹⁴² renders even less likely legislation granting the Secretary of State broad discretion to conduct foreign affairs by means of restricting the individual right to travel. More importantly, there is little consensus as to the type of legislative initiative required, as demonstrated by the diversity of measures introduced.

Yet various measures dealing with area restrictions remain pending in Congressional committees, and pressure for action continues. In order to face squarely the issue of area restrictions and make an official Congressional pronouncement on the problems they involve, we believe some legislation should be enacted. Many Members of Congress, as their bills show, feel that the Executive deserves unbridled discretion to impose area restrictions in order to strengthen our foreign policy position. Yet in debates and hearings on this approach, many others have stressed that Congress should not legislate away valued constitutional rights. The final measure will have to satisfy enough Members to receive the support necessary to secure sufficient votes for passage. We have developed an approach to area restrictions which we believe would accommodate the opposing Congressional views. This proposal is designed to implement an approach consonant with the constitutional principles and prior judicial pronouncements outlined above.

Our recommendation consists of granting the President the right to institute area restrictions, but only pursuant to a United States declaration of war or an extreme danger to the health and welfare of our nation. Definite standards would determine what constitutes such an extreme danger. Routine foreign policy considerations would not justify curtailment of the right to travel. The President would not be permitted to delegate his power to the Secretary of State (although clearly that Department's recommendations would strongly influence Presidential exercise of the power). Removal of the overall authority to a lower level of the executive branch seems to invite

¹⁴² "President Ford was scheduled to address Congress on U.S. foreign policy at a time when that policy appeared to be in shambles around the world — its formulation and implementation an almost daily source of irritation and suspicion between Congress and the Administration. . . . Congress . . . insisted it had a legitimate role in policy formulation and that its legislative restrictions and refusal to acquiesce to every administration request were healthy checks against excessive executive branch authority." 33 CONG. Q. 688 (1975).

abuse of power. Our proposal is modeled upon recent legislation dealing with foreign relations.¹⁴³ Criminal sanctions would be provided for violation of the legally-imposed area restrictions.

We recommend that the authority of the President to impose area restrictions be exercisable only pursuant to: (1) a formal declaration of war by the Congress; (2) specific statutory authorization from Congress to deal with short-term isolated incidents; or (3) an emergency situation such as the delay necessitated by securing prior Congressional approval would pose a significant danger to the health or welfare of the United States and its citizens. Whenever possible, the President would be required to consult with Congress before instituting area restrictions.

If immediate action were essential, the President would be required subsequently to address to Congress a written report explaining his reasons for imposing the area restrictions. If Congress did not approve the President's action within a given period of time, the area restrictions would lapse. Such a provision would ensure that no implicit Congressional approval might later be presumed by a failure to negate or object to the Presidential action.

As long as Congressionally-approved area restrictions remained in effect, the Executive would be required to submit periodic reports to Congress on the continuing need for the travel ban. At any point that Congress decided the necessity for the restrictions had subsided, it could end the restrictions by a concurrent resolution.¹⁴⁴

This proposed legislation would protect the constitutional right to travel abroad by strictly limiting the circumstances under which it could be infringed. It would serve to supply explicit Congressional authorization for area restrictions when the governmental interests to be served thereby are clearly weightier than the individual's interest in freedom of movement. Finally, it would fill the existing void which has too long permitted the Department of State unilaterally to infringe the constitutionally-protected right to travel abroad.

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¹⁴³ The approach we adopt herein is analogous to that employed in the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973). The goal is to assure the President flexibility to act in emergencies without specific Congressional authorization. Congress must, however, be informed of the action and the reasons behind it; if Congress does not then approve the Presidential actions, within a given amount of time, all relevant orders cease to have effect. We employ this lapse provision in our proposal, but we do not recommend as rigid a time schedule for Congressional consideration since abuse of the war-making power of the President encompasses urgent and vital considerations not involved in area restrictions.

¹⁴⁴ A concurrent resolution would be veto-proof, thereby ensuring that the President would not be able to assert a superior authority. H. REP. NO. 93-287, 93d Cong., 1st Sess. (1973).

