



1960

# The Right to Travel Versus Passport Area Restrictions

G. W. Shadoan  
*University of Kentucky*

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## Recommended Citation

Shadoan, G. W. (1960) "The Right to Travel Versus Passport Area Restrictions," *Kentucky Law Journal*: Vol. 48 : Iss. 4 , Article 6.  
Available at: <https://uknowledge.uky.edu/klj/vol48/iss4/6>

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THE RIGHT TO TRAVEL VERSUS PASSPORT  
AREA RESTRICTIONS

I am lost like a beast in an enclosure  
Somewhere are people, freedom and light, . . .

Here I am cut off from everything  
Whatever shall be is the same to me.

But what wicked thing have I done?  
I the murderer and villain;  
I who forced the whole world  
To cry over the beauty of my land.

But in any case I am near my grave  
And I believe the time will come  
When the Spirit of good  
Will conquer wickedness and infamy.

*Boris Pasternak*<sup>1</sup>

An international incident was created when Boris Pasternak rejected the Nobel Prize for his non-conformist novel, *Doctor Zhivago*, which is banned in Russia. Over a year later British and American newspapers printed the above poem, again focusing the world's attention upon this example of totalitarianism.

Frighteningly similar are the allegations of the eminent American chemist, Dr. Linus Pauling.<sup>2</sup> As presented before the Senate Subcommittee on Constitutional Rights in 1955, they appear as follows: Linus Pauling, an American of native born parents, had earned the Presidential Medal for Merit, the highest award given to civilians, for his work on highly sensitive military projects during World War II. In 1951 the Royal Society in London called a special symposium in order to hear him describe his latest discoveries. After numerous trips to Washington, non-Communist affidavits, and repeated postponements of the engagement, Pauling had the Royal Society cancel the meeting. Despite his Army and Navy certificates for war work and the Presidential Medal for Merit, he had been denied a passport because of his associations with groups on the Attorney General's list of subversive organizations. Domestically the action was criticized severely because he was denied a passport without any

<sup>1</sup> The poem appeared in the *Louisville Courier-Journal*, Feb. 14, 1959, page 12, which quoted the poem as published in the London *Daily Mail*, Feb. 2, 1959.

<sup>2</sup> The substance of Pauling's allegations appears in the Hearings on Security and Constitutional Rights Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 84th Cong., 2d Sess. 103-40 (1955).

sort of trial, hearing or appeal.<sup>3</sup> In addition, Sir Robert Robertson, President of the Royal Society, wrote a letter in the May 5th edition of the *Times* deploring Pauling's confinement.<sup>4</sup>

Following this incident Pauling was issued a passport to go abroad to address different societies. Then in 1953 Pauling again applied for a passport. This time he was to appear in Israel before the Weitzman Institute, in Athens for a week's lecture at the University, in India (at the invitation of the government) to address the Indian Science Congress and participate with Nehru in dedicating a new science laboratory, and then in Thailand and Japan. After thirty-eight communications with the State Department, trips to New York and Washington, and the ineffectual hiring of a lawyer, Pauling reluctantly started cancelling the engagement as the passport refusal dragged on. He later testified that he signed numerous non-Communist affidavits and was most concerned over the fact that his proposed tour as a good will ambassador was being converted into a propaganda tool for anti-American sentiment. But despite Pauling's efforts, no passport was forthcoming. All engagements were cancelled except the commitment in India; the Indian government was not to be discouraged. In 1954, however, Pauling received a letter from the passport office which stated:

The Department . . . has concluded on the basis of evidence at hand that your activities during the years following World War II have demonstrated a consistent and prolonged adherence to the Communist Party line on a variety of issues, and through shifts and changes of that line. . . .<sup>5</sup>

Thirty-two days later Pauling was awarded the Nobel Prize for Chemistry. Unlike Pasternak, Pauling received at this point an unrestricted passport.

Another incident of even greater prominence may be found in the series of events surrounding the passport of Judge William Clark which culminated in *Clark v. Dulles*.<sup>6</sup> In a 1957 hearing before the

<sup>3</sup> See Strout, "Win a Prize—Get a Passport," *New Republic*, Nov. 28, 1955, p. 11. This account, an accurate summary of the information disclosed in the Subcommittee Hearings, is at points paraphrased in this note. It states (p. 12):

[A] sample of the feeling in scientific circles was a letter signed by the all full professors of the Institute of Nuclear Physics at the University of Chicago except one who was not a citizen. The list included Enrico Fermi, Edward Teller, Willard F. Libby (one of the Atomic Energy Commissioners at the time) and in fact the majority of those who were responsible for the development of the A-bomb and H-bomb. . . . To withdraw his passport, they said, without a trial, without a hearing and without recourse to an appeal was shocking.

<sup>4</sup> *Id.* at 12.

<sup>5</sup> Letter from R. B. Shipley to Linus Pauling, Oct. 1, 1954, in Hearings on Security and Constitutional Rights Before the Subcommittee on Constitutional Rights of the Senate Committee on Judiciary, 84th Cong., 2d Sess. 137 (1955).

<sup>6</sup> *Clark v. Dulles*, 129 F. Supp. 950 (D.D.C. 1955).

Senate Foreign Relations Committee, Judge Clark read a statement which summarizes his experience:

Until I was commissioned in the Army a month after Pearl Harbor, I had been successively a member of the court of appeals of my state, a United States district judge, and a member of the Court of Appeals for the Third Circuit.

After my discharge from the Army, I was appointed legal consultant to General Clay, then military governor of the United States occupied zone of Germany.

I was reappointed chief justice [of the civilian court system of Germany] on January 7, 1950, by Secretary Acheson when the State Department took over the administration of the occupied zone of Germany. I served as such until I made the mistake (sic) of objecting to the oppression of American citizens by the Nazi-type German police and judicial authorities. I was then relieved on the false and ridiculous allegation that I was surplus and, with the State Department's accompanying statement—and I quote—"We have no place in Germany for a judge of Judge Clark's ability and experience."<sup>7</sup>

He later observed: Nothing to my mind has made the United States look more ridiculous in the eyes of the world than our policy of tyranny by passport control.<sup>8</sup>

The most spectacular event concerning Judge Clark occurred outside the United States. After his removal he refused to leave Germany because his commission had one year remaining. While carrying on his fight with the State Department over his right to the job, he took a Christmas vacation to the Canary Islands. This was his mistake. While on vacation he was met by a State Department official, who, with the aid of a platoon of armed Spanish gendarmes, forcibly took Judge Clark's passport from him and gave him a one-way passport home without even allowing the judge to return to Germany for winter clothes.<sup>9</sup>

\* \* \* \*

The above discussion involves the denial of a citizen's right to travel freely outside his nation's boundary. In the 1958 case of *Kent v. Dulles*,<sup>10</sup> the Supreme Court recognized that "the 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."<sup>11</sup> passports on the basis of political beliefs and thereby restrict the The Court held that the State Department lacked authority to deny

<sup>7</sup> Hearings on Nominahon of Scott McLeod Before the Senate Committee on Foreign Relations, 85th Cong., 1st Sess. 25 (1957).

<sup>8</sup> *Id.* at 27.

<sup>9</sup> *Id.* at 30-31. See also Hearings on Security and Constitutional Rights. Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 84th Cong., 2d Sess. 144-45 (1955).

<sup>10</sup> *Kent v. Dulles*, 357 U.S. 116 (1958).

<sup>11</sup> *Id.* at 125.

travel of suspected Communists or Communist sympathizers. Since that time, there has been no legal controversy concerning travel control through the denial of passports. But the State Department has continued its policy of stamping passports "not valid for use in the following designated countries. . . ." This has been called the "geographical area restriction" device and is of general application to all passport holders, though the ban is customarily waived for any person whose travel is deemed by the Secretary to be in the "best interest of the United States." The Circuit Court of Appeals for the District of Columbia originally upheld the Department's passport denial policy in *Briehl v. Dulles*<sup>12</sup> but was reversed in *Kent v. Dulles*.<sup>13</sup> Recently this court again upheld the Department's travel control policy, this time in the form of a passport area restriction.<sup>14</sup> The Supreme Court denied certiorari in the case<sup>15</sup> and thus refused to rule on the validity of this policy.

The aim of this paper is to consider the basis for authorizing the State Department's present power in restricting passport use to certain areas. Avoiding legal verbiage, the problem involves two basic questions: (1) Is there something so significant about the travel of United States citizens that the Secretary of State cannot adequately perform his duties without controlling this travel? and (2) Is there any rational basis for distinction between denying passports and restricting passport use to certain areas? The purpose for reciting the experiences of Pasternak, Pauling and Clark is to anticipate in advance the arguments of those who maintain that modern Americans' need not fear abuse if the State Department be allowed the discretionary power to control the travel of American citizens to particular areas. There seems no apparent reason to believe that the present power to restrict passport use as to area will be exercised any more reasonably than was the former power to deny passports as shown in the Pauling and Clark cases.

It is true that a more or less general ban on travel to a particular country has a different impact from denying particular individuals the right to travel anywhere outside the country. Thus the justification for, and the consequences of, the power to restrict passport use presents a different question from the passport denial problem in the *Kent* case. However, the right of free movement is the constitutional value being regulated; the only difference is in the manner and degree of the restriction. In determining whether the State Department

<sup>12</sup> 248 F.2d 561 (D.C. Cir. 1957), but see the brilliant dissent of Bazelon, *id.* at 579, for a superb legal analysis which was vindicated on appeal.

<sup>13</sup> 357 U.S. 116 (1958).

<sup>14</sup> *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959).

<sup>15</sup> 80 Sup. Ct. 255 (1959).

has the power to impose the present type of restriction, the Court necessarily will be bound to support its decision with much the same legal precedent called upon in the *Kent* case. The legal rationalization may be moulded to fit whatever result one's bias suggests.<sup>16</sup> Therefore the decision facing the Court, the Congress, and the people must ultimately be resolved by their evaluation of the social factors involved. In such a situation where *stare decisis* does not compel a particular decision, the conventional legal expression for the judicial decision-making process is called "balancing the interests."

Until the last decade the government imposed no general area restrictions on the right to travel except when this country was at war with the interdicted country, or that country was involved in hostilities with a third country or undergoing a civil war.<sup>17</sup> In justification of the recent practices, three basic arguments have emerged: (1) the presence of Americans in certain areas materially increases the danger of a third world war through international incidents which they are prone to provoke; (2) United States citizens should be denied the right to travel in areas where the State Department cannot afford them protection; and (3) the power to declare certain areas of the earth off-limits to American citizens is a necessary adjunct to effectuation of our foreign policy.

That the travel of Americans to sensitive areas may cause international incidents precipitating war was the primary rationalization of Judge Prettyman in *Worthy v. Herter*,<sup>18</sup> where the State Department was sustained in its refusal to permit a newspaper reporter, William Worthy, to travel in Communist China. The court pointed out that Worthy's freedom was subject to restriction and that his contemplated activity was so dangerous as to warrant prohibition. As this is the only significant decision rendered upon the validity of area restrictions, it will be analyzed in some detail. Excerpts from the court's opinion and consideration thereof follow:

In case of a reasonably anticipated threat to security or to law and order, many acts my individuals can be restricted. An assembling mob bent on disorder can be dispersed. A man with a contagious

<sup>16</sup> See, for example: Barnett, "Passport Administration and the Courts," 32 Oregon L. Rev. 193 (1953); Doman, "A Comparative Analysis: Do Citizens Have the Right To Travel," 43 A.B.A.J. 307 (1957); Parker, "The Right To Go Abroad: To Have And To Hold A Passport," 40 Va. L. Rev. 853 (1954); Wyzanski, "Freedom to Travel," Atlantic Monthly, October, 1952, p. 66. For an illuminating and up-to-date student discussion, see Note, "The Right to Travel Considered in the Light of Executive, Legislative, and Judicial Determinations to Date," 22 Ga. B. J. 254 (1959).

<sup>17</sup> Report of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, Freedom to Travel 16 (1958).

<sup>18</sup> 270 F.2d 905 (D.C. Cir.), *cert. denied*, 80 sup. ct. 255 (1959).

disease can be locked in his house. Potentially dangerous actions must be restricted in order to prevent harm to others. So we have sanitation, fire, building and speeding regulations.<sup>19</sup>

This passage seems a questionable application of truisms to support the particular decision of the court, *i.e.*, that Worthy's travel could be restricted. The court ignored the fact that, although "a man with a contagious disease can be locked in his house," a man with the "contagious" disease of Communism and "bent on disorder" in the international neighborhood cannot now be "locked" in his country. The *Kent* case was distinguished with brisk observation: [T]he point presented here in no wise resembles the matter decided by the Supreme Court in *Kent v. Dulles*. . . . In the case at bar no beliefs, associations, or personal characteristics are involved.<sup>20</sup> Approximately two pages followed again establishing the power to restrict individual action by pointing to regulations far less closely analogous than the restriction involved in the *Kent* case which the court dismissed as being in no wise similar. For example, the court stated:

A man who asserts his own uninhibited freedom to go where he pleases is a menace and is quickly put in his place. He may not park where he pleases, or drink where he pleases, or spit where he pleases. In the community the police take care of these matters, and in so doing the officers act as servants of the rest of the community; they are the government.<sup>21</sup>

In addition to the remoteness of the analogies drawn upon, one may also observe that the court here ignores that although the police "take care" of these matters, they are not the "government" as they have only the power to enforce impartially the regulations promulgated by the legislative body. It is well settled that any legislation allowing the police discretion in such matters is unconstitutional.<sup>22</sup>

In further support of the power to restrict the right to travel, the court said:

The peace-loving have rights. Those who recognize the fundamental necessities of liberty as a delicate product of order have power to protect themselves and their liberty. . . . The people have a right to protect their liberty, no matter from whence the threat. . . . The customary prompt transformation of unrestrained liberty into dictatorship is one of the poignant lessons of history.<sup>23</sup>

It is submitted that the generalizations cited by the court in the above passage do not afford real help in resolving the ultimate issue

<sup>19</sup> *Id.* at 908.

<sup>20</sup> *Id.* at 907.

<sup>21</sup> *Id.* at 908.

<sup>22</sup> *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Saia v. New York*, 334 U.S. 558 (1947); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>23</sup> 270 F.2d at 908-09.

of whether Worthy's passport could be restricted. In evaluating his observation of the "poignant lessons of history," the reader might be well advised to focus attention upon perhaps the most penetrating and profound analysis ever made of America and democratic institutions in general. Alexis de Tocqueville in *Democracy in America* presented somewhat different views from the court:

I am persuaded, however, that anarchy is not the principal evil which democratic ages have to fear, but the least. For the principle of equality begets two tendencies: the one leads men straight to independence, and may suddenly drive them into anarchy; the other conducts them by a longer, more secret, but more certain road, to servitude.

. . . The love of public tranquility is frequently the only passion which these nations retain, and it becomes more active and powerful amongst them in proportion as all other passions droop and die. This naturally disposes the members of the community constantly to give or to surrender additional rights to the central power, which alone seems to be interested in defending them by the same means that it uses to defend itself.

. . . After having thus successively taken each member of the community in its powerful grasp, and fashioned him at will, the supreme power then extends its arm over the whole community. It covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting: such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals, of which the government is the shepherd.

. . . It is therefore most especially in the present democratic ages that the true friends of the liberty and the greatness of man ought constantly to be on the alert to prevent the power of government from lightly sacrificing the private rights of individuals to the general execution of its designs.

. . . As the ordinary notions of equity and morality no longer suffice to explain and justify all the innovations daily begotten . . . the principle of public utility is called in, the doctrine of political necessity is conjured up, and men accustom themselves to sacrifice private interest without scruple, and to trample on the rights of individuals in order more speedily to accomplish any public purpose. . . . [I]t is ever to be feared that revolutionary tendencies, becoming more gentle and more regular, without entirely disappearing from society, will be gradually transformed into habits of subjection to the administrative authority of the government.<sup>24</sup>

<sup>24</sup> Alexis de Tocqueville, *Democracy in America* 302, 308, 333, 341, 342 (Reeve Transl. 1900). Lest we think the observations of De Tocqueville be outdated, consider the recent observations of a great modern commentator, Ernst Cassirer in *The Myth of the State* 362 & n. 4 ( . . . ).

To fulfill this demand becomes especially hard in times of a severe and dangerous social crisis when the breakdown of the whole public life seems to be imminent. At these times the individual begins to

But to return to the opinion in the *Worthy* case, in addition to establishing to its satisfaction that the right to travel could be restricted by the government and that the *Kent* case was not in point, the court also explained why the restriction in the *Worthy* case was justified with the following language:

[T]here is presently in the world a deadlock of antagonistic forces, susceptible of erupting into a fatal cataclysm. The capacity of incidents arising from the conduct of individuals to ignite that conflagration is well proven.

. . . In foreign affairs . . . an individual's uninhibited yen to go and to inquire may be circumscribed. A blustering inquisitor avowing his own freedom to go and do as he pleases can throw the whole international neighborhood into turmoil.<sup>25</sup>

The likelihood of a modern war resulting from the meddling of individual Americans abroad may be questioned as an easy assumption and one which is not "well proven." We have seen numerous examples of the most extreme treatment of innocent Americans. The unhappiness visited upon American missionaries and others by the Chinese is a case in point. The William Otis case is also well known. These incidents caused considerable tension. The State Department certainly can deal more effectively with the countries involved when it can seal off those countries from the travel of American citizens. But these incidents did not "ignite that conflagration" into the "fatal cataclysm" suggested by Judge Prettyman. One may reasonably question the possibility and probability of a chance ignition of a hydrogen war by the blunderings of Americans abroad. It is possible that, with all countries fearing such a war, only deliberate action will precipitate major combat. If it is true that there is less chance of war through the action of luckless travelers today than in

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feel a deep mistrust of his own powers. Freedom is not a natural inheritance of man. In order to possess it we have to create it. If man were simply to follow his natural instincts he would not strive for freedom; he would rather choose dependence. Obviously it is much easier to depend upon others than to think, to judge, and to decide for himself. That accounts for the fact that both in individual and in political life freedom is so often regarded much more as a burden than a privilege. Under extremely difficult conditions man tries to cast off this burden. Here the totalitarian state and the political myths step in. . . .

"To a German grocer, not unwilling to explain things to an American visitor," relates Stephen Raushenbush, "I spoke of our feeling that something invaluable had been given up when freedom was surrendered. He replied: 'But you don't understand at all. Before this we had to worry about elections, and parties and voting. We had responsibilities. But now we don't have any of that. Now we're free.'"

See Raushenbush, *The March of Fascism* 40 (1939).

<sup>25</sup> 270 F.2d at 910-11.

the past, it may be relevant to question why control of Americans' travel to sensitive global areas was historically thought unnecessary prior to 1949,<sup>26</sup> but is now a necessary ingredient of government.

A typical example of the "duty of protection" argument is the statement of the Deputy Undersecretary of State before the Senate Committee on Foreign Relations investigating Department of State passport policies in 1957:

[T]he Secretary of State may, from time to time, decide that the safety of American citizens cannot be fully protected in certain countries. This is one of the reasons for the . . . recent ban on travel to the four nations in the Middle East: Israel, Egypt, Jordan, and Syria.

. . . When the Secretary believes that the current situation in any particular country is stable once more, he then may lift the ban on travel there either for particular groups or for all citizens. Yesterday, as the most recent case in point, as I have said, the situation in the Middle East was considered to have stabilized sufficiently for the four country ban to be removed.<sup>27</sup>

The impact of the middle-eastern ban referred to by Undersecretary Murphy may be shown graphically by statistics taken from the Passport Office files.<sup>28</sup>

Passport Holders Visiting Israel		Number	Percentage of Total Passport Recipients
Pre-ban	January-September 1956	2,983	?
During ban	January-September 1957	192*	?
Post-ban	July-September 1958	3,868	3%

\* The ban was lifted on April 1, 1957 and some of the 192 passports were undoubtedly issued after the ban was removed. Some of the 192 passports probably represent those passports issued during the ban to people whose travel was considered in the "best interest of the United States."

This table demonstrates that a one-country ban can frustrate a significant number of would be travellers.

In protest of this ban representatives of the 300,000 member American Jewish Congress have repeatedly appeared before congressional committees. Their statement before the Senate Committee on Foreign Relations contained several interesting arguments.<sup>29</sup> It first observed that "despite departmental claims that the prohibition derived from official contention that 'the safety of American citizens could not be fully protected', . . . it was in fact continued long past

<sup>26</sup> See note 15 *supra*.

<sup>27</sup> Hearings on Department of State Passport Policies Before the Senate Committee on Foreign Relations 85th Cong., 1st Sess. 3-4 (1957).

<sup>28</sup> Hearings on the Right to Travel Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess. 385, 395 (1957).

<sup>29</sup> Hearings on Passport Legislation Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess. 141-51 (1959).

the time when disorder had ceased and allowed to operate instead as a form of economic sanction or pressure upon Israel sorely in need of the springtime Passover and Easter tourist traffic."<sup>30</sup> It noted that Syria and Jordan were covered by the ban although they were not involved in the hostilities, and that Lebanon, a member of the Arab League who had not yet signed a peace treaty with Israel, was not. The statement also pointed out that the ban was imposed on November 8, 1956, two days after all four of the parties to the hostilities had formally agreed to a cease-fire and was continued until April 1, 1957.

The Jews were particularly incensed that although such travel as was considered in the national interest was permitted to continue, the centuries-old pilgrimage of Jewish religious leaders to the Holy Land was not considered within that category.

In further refutation of the "protection" argument, the statement asserted "Great Britain, France, and Canada, and in fact every other country in the world imposed no such ban upon their nationals, contenting themselves merely with advising them about the risks of travel in this area."<sup>31</sup>

It continued:

[Despite] wholesale kidnaping of American nationals in Cuba, there has never for a single day been a ban upon travel to that country. Even more remarkably, although yesterday our Government was called upon to land the Marine forces in Lebanon, the State Department did not at that time find it necessary to curb travel to that country, relying only upon admonitions addressed to the discretion of private travelers.<sup>32</sup>

In view of these arguments, the contention that the Secretary imposes area restrictions as a protective measure for travelers seems in some instances unrealistic.

One can hardly question the argument that the power of travel control would enhance the efficiency of the State Department in performing its function in foreign affairs. But one can question whether the increased efficiency is worth the price. Is travel control a tool essential to effecting an adequate foreign policy? Has some world change occurred since the second world war which requires this new power? Has the value traditionally accorded this individual freedom lost currency in the modern world? The problem was well stated by the late Justice Robert Jackson:

It seems to me that these traditional freedoms are less in danger of any sudden overthrow than of being gradually bartered or traded

<sup>30</sup> *Id.* at 146.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

for something else on which people place a higher current value. In this anxiety-ridden time, many are ready to exchange some of their liberties for a real or fancied increase in security against external foes, internal betrayers or criminals. Others are eager to bargain away local controls for a federal subsidy. Many will give up individual rights for promise of collective advantages. The real question posed by the Fascist and Communist movements, which together have captivated a large part of the world's population, is whether, today, liberty is regarded by the masses of men as their most precious possession. Certainly in the minds of many foreign peoples our type of individual liberty has been outvalued by promises of social welfare and economic security, which they want too passionately to be critical of the price. If this indifference to traditional values should spread to us, it would be the greatest threat to our own liberties.<sup>33</sup>

In the early 1950's it seemed that the country was seriously endangered by the threat of internal communism. Certainly the executive could have dealt more effectively with the problem of ferreting out the hidden Communists but for the traditional safeguards provided the individual by the fourth and fifth amendments. Despite frightful cries of "Fifth Amendment Communist," the loss in efficiency was not thought too great a price to pay for the values protected by the safeguards—though inroads have been made which were later noted by distinguished commentators.<sup>34</sup>

In determining whether the resultant greater efficiency justifies the regulation of the right to travel, we may want to consider the specific interests affected by such regulations. In this consideration only substantive matters will be discussed. Procedural matters such as the right to a hearing and the right to equal treatment under the law will not be evaluated in relation to this problem. The substantive interests involved might be summarized as follows:

(1) The public has the power and the duty to hold the administration accountable at the polls for its foreign policies and their execution. But the public cannot do this if its knowledge of foreign events can be inhibited by the power of the State Department to isolate whole areas of the earth from American news reporting.

(2) We are in an international struggle for the minds of men. Both sides claim the banner of freedom. The uncommitted nations of the world believe only what they see and today they see the United States denouncing the "Iron" and "Bamboo" curtains while partially curtailing the travel of its own citizens. The Chinese are

<sup>33</sup> Jackson, "The Task of Maintaining Our Liberties: The Role of the Judiciary," 39 A.B.A.J. 961, 963 (1953).

<sup>34</sup> Chafee, *Three Human Rights in the Constitution of 1787*, at 193-98 (1956); Cushman, *Civil Liberties in the United States* 113-116 (1956); Gellhorn, *Individual Freedom and Governmental Restraints* 14-15 (1956); O'Brain, *National Security and Individual Freedom* 38-48 (1955).

able to say that the United States is afraid to let their people know the truth about the "Peoples Republic." When government-selected news reporters are allowed to go to China by the State Department, the Communist propaganda is that we select trusted representatives to report as the government dictates. Consider our newspapers' comment when Russia allows a few representatives to travel to the United States.<sup>35</sup>

(3) The ultimate hope for peace and human understanding can only be achieved by the freest sort of human intercourse. The fears and misunderstandings of mankind can only be removed by associating with and finding out about the unknown and suspected people.

(4) Gradual centralization of power in derogation of individual freedom poses a greater threat of autocracy than the external forces of Communism. The words of Justice Frankfurter in the *Youngstown Steel* case more eloquently present this argument than any paraphrase this author could formulate:

The Founders of this nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. . . . These long-headed statesmen had no illusion that our people enjoyed biological psychological or sociological immunities from the hazards of concentrated power. . . . The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.<sup>36</sup>

. . . A scheme of government like ours no doubt at times feels the lack of power to act with complete, all embracing, swiftly moving authority. No doubt a government with distributed authority labors under restriction from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.<sup>37</sup>

### *Conclusion*

For the first time in history Americans must decide whether their executive should be left with the authority to determine to what areas of the earth they shall be allowed to travel. Conservatives and moderates urge that the danger of international incidents and

<sup>35</sup> It is not the author's intent to equate the minimum restrictions of the United States with the almost complete isolation technique of the Communist world. Rather it is to suggest that our techniques have provided effective propaganda tools for anti-American sentiment. Perhaps the advice of Sir Winston Churchill speaking before the Commons, May 12, 1916, is appropriate here:

In war, if you are not able to beat your enemy at his own game, it is nearly always better to adopt some striking variant and not to be content with doing the same thing your enemy is doing, only not doing it quite so well or on quite so large a scale.

<sup>36</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593-94 (1952).

<sup>37</sup> *Id.* at 613.

the furtherance of an effective foreign policy in this atomic age require that the State Department be allowed this discretion. The liberals argue that this great nation is not so perilously poised upon the brink of national disaster as to require such restrictive power; that it is unconstitutional for the executive to assume the paternalistic prerogative of using citizens and their travel as tools in the everyday vacillations of foreign diplomacy; that what must be repeated here, and reaffirmed, is the right of Americans to go, as Americans have always gone, to all parts and corners of the world to look, see, wonder, criticize and learn. And, in the absence of active hostilities in which this country is a participant, to do so without prior permission or restraint by the President, the Secretary of State or any other official or functionary of the government.<sup>38</sup>

Finally, the inarticulate fears of many about the executive's power over foreign relations find their roots in the idea expressed in a letter by Madison to Jefferson in 1798 where he said:

The management of foreign relations appears to be the most susceptible of abuse of all the trust committed to a Government, because they can be concealed or disclosed, or disclosed in such parts and at such times as will best suit particular views; and because the body of the people are less capable of judging and are more under the influence of prejudices, on that branch of their affairs, than of any other. Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.<sup>39</sup>

G. W. Shadoan

<sup>38</sup> See the statement of the American Jewish Congress cited in note 29 *supra*, at 146-47.

<sup>39</sup> Padover, *The Complete Madison* 257-58 (1953).