

THE STATE OF THE U.S. CONSTITUTIONAL RIGHT TO TRAVEL TO CUBA

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Much has been written about the conditions that must be present for the United States Congress to lift the economic embargo against Cuba. Similarly, various diplomatic scenarios have been analyzed in terms of which foreign policy strategy the U.S. President should employ to foster democratic transition in Cuba. However, a catalytic dimension that is underappreciated, or at least underrepresented, in the literature, is the power of one U.S. citizen to mount a constitutional challenge to a large piece of the embargo—the travel ban.

Despite the Obama administration's historic announcement of December 2014, the current travel restrictions, which are relatively relaxed compared to those of the Bush administrations, can be undone and reversed with the stroke of a pen by the current or future president because it is apparently within his/her exclusive executive authority to do so. Or is it? The U.S. Supreme Court has heard only a handful of cases on the constitutional right to international travel, but its latest opinion that squarely addressed the issue was written 33 years ago. Much has changed since then, not the least of which is the fact that President Obama removed Cuba from the list of state sponsors of terrorism in 2015. Cuba's former placement on this list was one of the constitutional linchpins that enabled the president to use a war-time piece of legislation (the Trading with the Enemy Act)

to restrict travel to Cuba, a country with which we are not at war, in the name of foreign policy. Since that is no longer the case, this paper suggests that a constitutional moment is waiting to happen because the U.S. Supreme Court may find it timely to hear a challenge to the status quo on international travel—in the Cuba context.

This paper has three parts. First is a brief overview of the current travel restrictions and the recent changes after President Obama's December 2014 announcement. Second, the legal foundations of the right to international travel are surveyed and summarized. Third, the case for a novel constitutional challenge is made and a brief policy recommendation is proposed.

U.S. RESTRICTIONS ON TRAVEL TO CUBA

U.S. citizens are prohibited from general tourist travel in Cuba. Instead, there are only 12 categories of travel-related transactions that are currently allowed under the Cuban Assets Control Regulations.¹

- Family visits
- Official business of the U.S. government, foreign governments, and certain intergovernmental organizations
- Journalistic activity
- Professional research and professional meetings
- Educational activities
- Religious activities

1. Electronic Code of Federal Regulations. https://www.ecfr.gov/cgi-bin/text-idx?SID=05347b11b74c51b75e9eff11bd97705_a&mc=true&node=se31.3.515_1560&rgn=div8

- Public performances, clinics, workshops, athletic and other competitions, and exhibitions
- Support for the Cuban people
- Humanitarian projects
- Activities of private foundations or research or educational institutes
- Exportation, importation, or transmission of information or informational materials; and
- Certain export transactions that may be considered for authorization under existing Department of Commerce regulations and guidelines with respect to Cuba or engaged in by U.S.-owned or -controlled foreign firms.

The foregoing list is current as of July of 2017, while the breadth and categories of restrictions has varied between presidential administrations. The most monumental set of changes in recent years came shortly after President Obama made his historic announcement to restore diplomatic relations with Cuba on December 17, 2014. On January 15, 2015, the White House Office of the Press Secretary issued a press release to announce that the U.S. Departments of the Treasury's Office of Foreign Assets Control (OFAC) and Commerce's Bureau of Industry and Security (BIS) had published new regulations to amend certain sections of the Cuban Assets Control Regulations (CACR),² and the Export Administration Regulations (EAR).³ These amendments eased sanctions against Cuba by allowing increased travel to and from Cuba. They also allowed for commerce with the Cuban private sector and increased the flow of information to and from Cuba. They became effective on January 16, 2015.

Now in 2017, under the new Trump administration, Obama's policies can be reversed as quickly as they were implemented. President Trump criticized former President Obama's overtures to the Cuban government as a "terrible and misguided deal" during a visit to Miami earlier this year. The new administration modified the travel restrictions to eliminate "people to people" exchanges, narrowing the general

license available to American travelers. It is safe to say that the Trump administration will not do anything to relax the embargo any time soon. Neither does the U.S. Congress show any signs of modifying Helms-Burton. The more things change, the more they stay the same. The pattern is clear. Republican administrations will stick to a hardline stance on the embargo, believing that 50 years is not a long enough time for a strategy of isolation and slow economic asphyxiation to transform Cuba. Something must change, but the usual branches of government don't seem to hold the solution. Fortunately, there has been some positive change in Cuba over the last few years that might set the stage for a new solution.

Cuba's removal from the U.S. list of state-sponsors of terrorism is consequential in the analysis of the legal justification for the travel restrictions. There is a basic tension to understand. The right to travel outside of the United States has a constitutional history developed by Supreme Court precedents. The President's authority to manage foreign policy is also backed by textual reference to the Constitution. However, these two principles have never been fairly reconciled by the Court. The word *fairly* is used to reflect that although there have been cases decided where the right to travel yielded to the President's power to conduct foreign policy, the contemporary state of Cuba, and U.S.-Cuba relations, has changed. The next sections introduce and summarize the development of the legal bases for government travel restrictions on travel to Cuba.

LEGAL FOUNDATIONS OF THE EMBARGO

Congressional Acts and Regulations

The "economic embargo of Cuba" is generally defined as a set of restrictions on trade and transactions with Cuba, and on travel to or from Cuba.⁴ It was codified as the Cuban Liberty and Democratic Solidarity Act in March of 1996 (also known as Helms-Burton), shortly after the February 24th shooting down⁵ of two of the *Brothers to the Rescue* planes by a

2. 31 C.F.R. pt. 515.101–515.901.

3. 15 C.F.R. pts. 730.1–774.1.

4. 22 U.S.C.A. § 6023.

Cuban Air Force fighter jet approximately 9 nautical miles outside Cuban territorial airspace. This Act is a reaffirmation of the Cuban Democracy Act of 1992 and it provides that the President shall instruct the Secretary of the Treasury and the Attorney General to enforce the Cuban Assets Control Regulations (CACR). The embargo is to remain in effect until the President submits a determination to Congress that a transition government in Cuba is in power, after which the President is authorized to suspend the embargo.⁶ The CACR are implemented under the Trading With the Enemy Act of 1917 (TWEA).

TWEA authorizes the U.S. President, in times of national emergency, to impose embargoes on transactions between the U.S. and targeted countries.⁷ TWEA was passed during World War I. Congress delegated this power to the executive branch. For purposes of TWEA, the authority to regulate travel-related transactions is part of the President's general authority to regulate property transactions.⁸ In 1977, TWEA was amended to limit the President's power to act pursuant to that statute solely in times of war. At the same time, the International Emergency Economic Powers Act (IEEPA) was enacted to cover the President's exercise of emergency economic powers in response to any peacetime crisis. IEEPA provides that the authorities granted to the President may be exercised to deal with any unusual and extraordinary foreign threat to the national security, foreign policy, or economy of the U.S., if the President declares a national emergency with respect to such threat.⁹ However, rather than requiring the President to declare a new national emergency to continue then ex-

isting embargoes, including the one against Cuba, Congress grandfathered existing exercises of the President's national emergency authority. The grandfather clause also provided that the President may extend the exercise of such authorities for successive one-year periods with respect to a foreign country if the President deems it to be in the national interest of the U.S. With regards to Cuba, every president has done so since 1977.¹⁰ For purposes of this paper, the important aspect of these statutes is that they require a finding that Cuba is a national security threat in order to justify continued economic sanctions against it. So a critical question is: does a threat exist?

There is no evidence that Cuba currently poses a national security threat to the U.S., nor a terrorist threat generally. On April 14, 2015,¹¹ President Obama decided to lift the U.S. designation of Cuba as a state sponsor of terrorism after 33 years of the island's designation as such. Cuba was initially placed on the list in 1982 at the height of the cold war when it was an outspoken supporter of communist revolutionary movements, particularly in Latin America. Cuba's terrorist designation outlasted those of Iraq, Libya, and North Korea by several years. After Cuba's removal from the list, only Iran, Sudan, and Syria remain.¹² Indeed, the State Department recently chose to not even include Cuba in its Country Reports on Terrorism for 2016.¹³ The delisting is timely as Americans are far less concerned today than they used to be about Cuba posing a national security threat to the U.S.¹⁴ Thus, because Cuba does not pose a national security threat, the government's purpose for maintaining the travel ban is diminished.

5. See https://en.wikipedia.org/wiki/1996_shootdown_of_Brothers_to_the_Rescue_aircraft.

6. 22 U.S.C.A. § 6064.

7. 50 U.S.C.A. § 4301.

8. *Regan v. Wald*, 468 U.S. 222, 232, 104 S. Ct. 3026, 3033, 82 L. Ed. 2d 171 (1984).

9. 50 U.S.C. § 1701(a).

10. For electronic records since 1994, see generally: https://www.federalregister.gov/documents/search?conditions%5Bagency_ids%5D=538&conditions%5Bterm%5D=Cuba#.

11. On July 22, 2015, the BIS implemented the Secretary of State's removal of Cuba from the list of State Sponsors of Terrorism.

12. <https://www.state.gov/j/ct/list/c14151.htm>.

13. <https://www.state.gov/j/ct/rls/crt/2016/index.htm>.

14. https://www.washingtonpost.com/news/the-fix/wp/2014/12/18/whos-afraid-of-cuba-almost-nobody-anymore/?utm_term=.17fe0607ce82.

Yet the President continues to formally declare an emergency because, as one author notes, although the President can mitigate sanctions through licensing, he cannot fully terminate them without relinquishing his right to do so after a non-renewal of the emergency. In other words, the President continues to invoke sanctions under his grandfathered authority in order to maintain his control over sanctions under TWEA.¹⁵

Irrespective of the legal control over the embargo, whether executive or legislative, every law must abide by the U.S. Constitution. It is indisputable that the U.S. Supreme Court has the responsibility to enforce the limits on federal power by striking down acts of Congress that transgress those limits.¹⁶ All of the foregoing laws, as enacted and enforced by the political branches of government, must be consistent with the Constitution if they are to endure. The beauty of our democracy is that any one citizen has the power to access the courts in order to at least challenge the constitutionality of the law. With so much of this conversation historically focused on what Congress or the President may do about the embargo, this paper offers a reminder of a third option, sometimes forgotten, that may be exercised by any citizen who is willing to bring the challenge. Accordingly, the Court cannot act *sua sponte* unless and until a proper case or controversy is brought before it.¹⁷ The following section will identify the international travel cases that have been brought before the Court, and will

make the case for a new viable challenge to the travel ban using a novel legal basis.

Landmark Cases Defining Right to International Travel

The title of this section alone implies that there is a question as to where U.S. citizens are *allowed* to travel. What are the limits of a citizen's right to go outside American borders, to a country of his choice, and to return at his whim? Not many cases have tested these limits, but those that have, did so at different times and circumstances in our history that are distinguishable from the current state of affairs. Nevertheless, American courts are constrained by their jurisprudence. The principle of *stare decisis* dictates that courts must determine matters based on their interpretations of factually similar cases that have been decided. However, "great cases, like hard cases, make bad law".¹⁸ This section surveys the foremost Supreme Court precedents on the right to international travel. But first, it is necessary to outline some general guiding principles of constitutional interpretation in federal courts.

*Standards of Judicial Scrutiny.*¹⁹ When the constitutionality of a law is challenged, both state and federal courts will commonly apply one of two (and sometimes three) classical levels of judicial scrutiny. The level of scrutiny determines how a court will go about analyzing a law and its effects. It also determines which party (the challenger or the government) has the burden of proof.

15. Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, 54 Am. Bus. L.J. 293, 334 (2017).

16. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538, 132 S. Ct. 2566, 2579–80, 183 L. Ed. 2d 450 (2012) citing *Marbury v. Madison*, 5 U.S. 137, 175, 2 L. Ed. 60 (1803).

17. U.S. Const. art. III, § 2, cl. 1.

18. Justice Oliver Wendell Holmes, Jr. dissenting in *N. Sec. Co. v. United States*, 193 U.S. 197, 364, 24 S. Ct. 436, 468, 48 L. Ed. 679 (1904).

19. In the interest of brevity, this summary is an oversimplification of the intricacies of the Court's judicial approach, but nonetheless adequate to guide the reader through the legal issue of this paper.

Strict Scrutiny. This is the highest level of scrutiny applied by courts to government actions or laws. The Supreme Court has determined that legislation or government actions which discriminate based on race, national origin,²⁰ religion, and alienage must pass this level of scrutiny to survive a challenge that the policy violates constitutional equal protection. This level of scrutiny is also applied whenever any fundamental right is being threatened by a law. Strict scrutiny requires the *government* to prove that (1) there is a *compelling state interest* behind the challenged policy, and (2) the law or regulation is *narrowly tailored* to achieve its intended result. The challenger has often won these types of cases.

Rational Basis Review. This is the lowest level of scrutiny applied by courts to government actions or laws, and it has historically required very little for a law to pass constitutional muster. The rational basis test requires the person challenging the law (not the government) to prove either: (1) the government has *no legitimate interest* in the law or policy; or (2) there is *no reasonable, rational link* between that interest and the challenged law. This standard is highly deferential to the government. Courts will often deem a law to have a rational basis as long as that law had *any* conceivably rational basis. The challenger often loses this argument.

Considering these levels of scrutiny, the following cases are most relevant for understanding and contextualizing the state of the U.S. citizen's right to freely travel outside the U.S.

*Kent v. Dulles.*²¹ In 1958, the Court heard its first challenge. Two American citizens were denied passports by the U.S. Secretary of State. Mr. Kent intended to travel to England to attend a meeting of an organization known as the "World Council of Peace." The Director of the U.S. Passport Office denied a passport to Mr. Kent for two reasons: (1) Mr. Kent was a Communist; and (2) Mr. Kent had established his allegiance to the Communist Party. The Department advised him of his right to an informal hearing and informed him that he would need to submit an affidavit that attested to whether he was then or had ever been a Communist. Mr. Kent refused to submit the affidavit and sued in the District Court for declaratory relief. The District Court granted summary judgment in favor of the Secretary of State. Mr. Kent appealed and the appellate court affirmed the decision by a divided vote. The U.S. Supreme Court decided to ultimately hear the case and it reversed the lower courts' decisions as the majority held for the traveler, Mr. Kent.

Justice Douglas began the court's opinion with a historical discussion of passport regulation. He concluded by stating that for most of our history, a passport was unnecessary to enter or exit the country and that restrictions existed at certain intervals during the War of 1812 and the Civil War. The Act of 1918 was effective only in wartime. The initial discussion regarding the level of judicial scrutiny to apply to the government's regulations on travel began here. Justice Douglas wrote 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. He alluded to the historical importance of international travel by referencing the text of the Mag-

20. As an aside, the author is of the opinion that if someone had challenged the 2004–2008 version of the travel ban, which severely limited the right to visit family members in Cuba, he might have presented an interesting challenge. Ironically, the only way OFAC was able to discriminate in favor of Cuban families over non-Cuban families was precisely because people have a fundamental right to be with their families, and the executive office probably suspected that had they not carved out some exception for family members, the law would be stricken. Nevertheless, a law cannot simply be partially constitutional. Travel to visit family, unless that family is located in an area of war or pestilence, should always be vehemently protected and defended from politically inspired regulations with no compelling purpose.

21. 357 U.S. 116 (1958).

na Carta.²² The decision to reference Article 42 of the Magna Carta is arguably the court's establishment of a war-standard as the government's threshold basis for restricting travel. It was not until six years after *Kent* that the Court would revisit the constitutional question of international travel.

Aptheker v. Secretary of State.²³ The Court heard its second challenge in 1964. In this case the constitutionality of the Subversive Activities Control Act of 1950²⁴ was tested as the appellants, top-ranking Communist party leaders, filed complaints in response to their passport revocations. Their passports were revoked because the State Department believed that their use of passports would violate the Act. The appellants alleged that they were deprived of their Fifth Amendment liberty interests in international travel without affording them due process of law (consistent with *Kent*). The Government responded by conceding that although international travel is a Fifth Amendment right, the Due Process clause does not prevent reasonable regulation of that liberty. The reason for regulation being, in this case, that the world Communist movement presented a danger to U.S. national security. The Supreme Court reversed the lower court on the basis of the finding that it is unconstitutional to require a person to renounce his membership in an organization in order to travel internationally. The Court wrote that the freedom of association is guaranteed in the First Amendment and restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield membership in a given organization.

In its opinion, the Court added more definition to the *Kent* precedent on international travel as an important constitutional right. The court wrote that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the purpose can be more narrowly achieved. The legitimate purpose in this case was the congressional desire to protect national security. The Court considered this purpose with the caution that the powers of government “must be so exercised as not, in attaining a permissible end, unduly to infringe” a constitutionally protected right. Justice Goldberg warned of the danger of punishing an individual's lawful and constitutionally protected conduct due to an unprotected group purpose to which an individual member may not adhere (e.g. visit a sick relative, receive medical treatment, and for any other wholly innocent purpose).

Ultimately, the court adopted the approach established by *NAACP v. Button*²⁵ and *Thornhill v. Alabama*,²⁶ where the court held that precision must be the touchstone of legislation so affecting basic freedoms and since this case involves a personal liberty protected by the Bill of Rights, the proper approach to legislation curtailing that liberty must be to assess whether it is narrowly drawn to prevent the supposed evil. The shifting of the burden from the petitioner to the government is part of the analytical approach that the court has employed when it has decided a case involving a fundamental right. In *Aptheker*, Justice Goldberg concluded the first part of the majority opinion by relating the liberty of travel to the rights

22. Article 42 reads in pertinent part: “It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom...” The elements of the Article can be interpreted as follows: “for the future”—meaning to make the right inalienable; “to go out of our kingdom”—international exit; “unless it be in time of war”—only war-time restrictions are justified; “for some short space”—the restriction period cannot go on indefinitely.

23. 378 U.S. 500 (1964).

24. Section 6 provides in pertinent part: (a) When a Communist organization is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or (2) to use or attempt to use any such passport.

25. 371 U.S. 415 (1963).

26. 310 U.S. 88 (1940).

of free speech and association, which are rooted in the First Amendment. Justice Goldberg did this when he held that the appellant travelers should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel. So regardless of whether the *Aptheker* majority clearly categorized international travel as a First Amendment right by an explicit label, the court nevertheless, shifted that burden of proof to the government, as if it were a First Amendment case.

Justice Black and Justice Douglas also wrote separate majority opinions. Justice Black commented on the importance of protecting First Amendment freedoms of speech, press, religion, and assembly and associational rights. Justice Douglas wrote that “Freedom of movement is kin to the right of assembly and to the right of association. These rights may not be abridged...”. He also identified the only circumstance in which the freedom to travel internationally may be restricted when he stated that “[w]ar may be the occasion for serious curtailment of liberty. Absent war, I see no way to keep a citizen from traveling within or without *the country, unless there is power to detain him.*” Justice Douglas eloquently wrote about the use of travel as a conduit to enjoy other important rights as gathered from this excerpt:

“This freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person. America is of course sovereign; but her sovereignty is woven in an international web that makes her one of the family of nations. The ties with all the continents are close—commercially as well as culturally. Our concerns are planetary, beyond sunrises and sunsets. Citizenship implicates us in those problems and perplexities, as...well as in domestic ones. We cannot exercise and enjoy citizenship in world perspective without the right to travel abroad; and I see no constitution-

al way to curb it unless, as I said, there is the power to detain.”

By this opinion, the Court has clearly established that when a restriction on international travel interferes with a fundamental right, the Government is charged with the burden of showing that there is no other less restricted way to achieve its compelling purpose. So *Kent* and *Aptheker* solidify the principle that the government’s national security objectives may be scrutinized and may yield when those objectives encroach upon a citizen’s fundamental right. Still, these two cases involve the denial or revocation of a passport, without which a person cannot leave the U.S. to go to any country. The next pair of cases heard by the Court involves travel restrictions specific to one area—Cuba.

Zemel v. Rusk.²⁷ Two months after the Cuban Missile Crisis of October 1962, an American citizen sought to travel to Cuba. His passport was not validated. He filed a complaint against the Secretary of State that alleged, in part, that the government’s refusal to validate his passport violated his First and Fifth Amendment rights. The purpose of his travel according to his complaint was “...to satisfy [his] curiosity...and to make [him] a better informed citizen.”²⁸ The Supreme Court held that liberty can be inhibited with due process of law under certain circumstances. However, the majority did not accept the traveler’s contention that a First Amendment right was violated here because the right to speak and publish does not carry with it the unrestrained right to gather information. The petitioning traveler’s argument was not persuasive.

First, the timing of his complaint did not help him because even had he espoused a clear First Amendment purpose, the Government’s “weightiest considerations of national security” would have probably outweighed that purpose, at least temporarily due to the assumed threat of armed conflict with Cuba. However, the traveler’s desire to make a leisurely trip to Cuba did not raise the same constitutional concern as the issue posed in *Aptheker*. As the *Zemel*

27. 381 U.S. 1 (1965).

28. *Id.* at 4.

Court distinguished *Aptheker*, they noted that in *Zemel*, the traveler did not raise an associational claim and did not have as protected a purpose as *Aptheker*. This case did not test the limits of the President's authority in the same way that *Aptheker* did because of the different degree of constitutional protection that is afforded to First Amendment or other fundamental rights as compared with non-fundamental rights. The Court applied rational basis review and found an imbalance between the government's weighty national security interest and the purpose of Zemel's tourist trip to Cuba.

However, the *Zemel* majority identified an important boundary of the executive's authority to deal with foreign relations as it stated "[t]his does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice."²⁹ That is to say, executive decisions, even when made in the realm of foreign policy, are not immune from judicial scrutiny.

Regan v. Wald.³⁰ The last opportunity the Court had to decide the constitutionality of area restrictions was in 1984. Like *Zemel*, the travelers in this case were seeking to go to Cuba for no specific purpose other than to tour the island. Most of the opinion was dedicated to a lengthy discussion ultimately upholding the executive's authority to maintain the travel restrictions under TWEA as amended by the IEEPA. The Court once again found itself in the realm of foreign policy and deferred to the executive's judgment as the *Zemel* court did. The *Regan* Court, applying rational basis review, found an adequate basis under the Fifth Amendment Due Process Clause to sustain the President's decision to decrease the flow of hard currency to the Cuban government that could be used in support of "Cuban adventurism."³¹ Even in the absence of a missile crisis, the challengers could not surmount the foreign policy concern, which was still far more concerning than the present-day situation. The Court cited the State Department's input that Cuba had the political, economic,

and military backing from the Soviet Union, and that Cuba had provided widespread support for armed violence and terrorism in the Western Hemisphere, including maintaining close to 40,000 troops in various countries in Africa and the Middle East in support of inimical objectives. In light of those circumstances, the Court easily found a rational basis to sustain the travel restrictions. The challengers were not successful in the second area restriction case. The Court has not heard a case involving the CACR travel restrictions since *Regan*.

THE CASE FOR A NOVEL CONSTITUTIONAL CHALLENGE

To summarize the state of the constitutional law on international travel, regulations that deny passports conditioned upon the relinquishment of a first amendment right are unconstitutional under the rubric of strict scrutiny (*Kent & Aptheker*). Area restrictions that don't involve a traveler's fundamental or first amendment right will be upheld upon the Court's finding that the government has any rational basis for the restriction (*Zemel & Regan*). These results are seemingly intuitive because the government's restriction on a citizen's right to travel at all (a passport revocation) appears more severe than prohibiting a citizen from going to an isolated area that is rife with national security concerns. However, what if the travelers in *Zemel & Regan* had used a more fundamental (as opposed to procedural) constitutional basis to support their arguments? Is there a textual source for a constitutional right to international travel that is so fundamental to the very meaning of citizenship, that neither a traveler's purpose, nor the condition of the country are the deciding factors to the question of constitutionality? Furthermore, because the Court has not looked at this issue since, say, before the advent of the Internet, would the change and contemporary state of U.S.-Cuba relations factor into the Court's analysis today? As discussed below, the answers are yes and yes.

29. *Id.* at 17.

30. 468 U.S. 222 (1984).

31. *Id.*

First, it is important to remember that *Kent & Aptheker* set the stage for a procedural argument based on a Fifth Amendment Due Process analysis, which carried over into *Zemel & Regan*, which are arguably weaker sources for supporting foreign travel. A different constitutional basis has been advanced by a noted scholar on this issue.³² Surprisingly, the citizenship clause of the 14th Amendment³³ has never been used to argue that international travel is a fundamental right of all U.S. citizens, even though it has been successfully utilized in cases involving restrictions on interstate travel within the U.S. Indeed, the interstate travel has been solidified as a fundamental right, restrictions against which must be backed by a compelling government interest under strict scrutiny. Had the “privileges and immunities” clause been used by the travelers in *Zemel & Regan*, while the results may not have differed considering the problematic state of affairs in Cuba and U.S.-Cuba relations at the time, the legal question would have been a closer call for the Court. The Court would have had to juxtapose and analyze an arguably fundamental right weighed against the executive’s authority to conduct foreign policy. In a way, it began to do this in *Aptheker*, but the difference there was that it was a passport case involving a peripheral First Amendment right. In *Regan*, the 14th Amendment would have been used by the traveler to argue that the act of traveling itself is the fundamental right. Professor Jeffrey Kahn articulately makes a compelling case that the right to depart and reenter one’s own country is a right that by its very nature is inextricably linked to citizenship in a democratic republic. Additionally, the default notion that citizens can only travel to

countries that their government *allows* them to travel to is akin to being a serf or a subject of a monarchy needing permission to leave a defined parameter of land.³⁴ Another historical assumption on this issue is that citizen travelers have been deemed to be ambassadors of U.S. foreign policy regardless of their activities in the country of their choice, or that they must have some First Amendment expressive purpose inherent in their travel.³⁵ That should not necessarily be the case. A citizen’s travel should be an independent act, free from the paternalistic tendencies of government restrictions that are rooted in foreign policy concerns in times of peace. This idea is hundreds of years older than our republic³⁶. Of course, travelers also bear the risk of their own behavior in a foreign country,³⁷ while the U.S. has no obligation to bail them out.³⁸

Constitutional analysis under the 14th Amendment citizenship clause is the game changer. Coupling this with the previously discussed improvement in U.S. Cuba relations, as well as with the lack of evidence that Cuba is a national security threat, is the foundation for a viable challenge to the travel restrictions. As provided by *Marbury*, the Court cannot offer suggestions to improve arguments that were never made, nor can it decide a case that is not brought before it. The travel restrictions are focused on Cuba, but the government’s exercise of this power to preclude its citizens from going to a country with which we are not at war, and with which we are re-establishing diplomatic relations, if gone unchecked, has far reaching implications inimical to the very democracy that it is supposed to protect.

32. Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. Rev. 271 (2008).

33. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

34. See *Kahn*.

35. Jeanne M. Woods, *Travel That Talks: Toward First Amendment Protection for Freedom of Movement*, 65 Geo. Wash. L. Rev. 106 (1996)

36. See Article 42 of Magna Carta, *Supra* at footnote 23.

37. See case of Otto Warmbier in North Korea: https://en.wikipedia.org/wiki/Otto_Warmbier.

38. See *Kahn* at footnote 207.

POLICY RECOMMENDATION

A complete lifting of the embargo is not recommended here. Rather, the travel restrictions should be lifted, but perhaps with targeted qualifications that would promote social and economic interaction with the Cuban people, but not the government. This is obviously a challenge given that the Cuban government controls approximately 60% of the economy by way of GAESA, a conglomerate run by the armed forces³⁹ and innocent travelers may unknowingly stay in a government-owned hotel room or may use other

government services. However, since April of 2015, the private bed & breakfast industry has generated \$40 million in revenue, which is a significant and direct cash infusion to Cuban entrepreneurs.⁴⁰ One idea is to try to craft regulation that requires travelers to either stay on a cruise ship room or in a Cuban's home, but not in a government-controlled hotel. This could help connect more travelers, not just tourists, with the Cuban people—who should be the direct object of U.S. policy.

39. See “Donald Trump closes the door to Cuba—a bit,” *The Economist*, June 22nd, 2017

40. *Id.*