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Constitutional Law - Right to Travel - Area Restrictions

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From its own rigid prohibition in *Wilson*, to its application of the self-incrimination clause of the fifth amendment to the States in *Malloy*, the Court in *Griffin* by closing the circle has imposed the federal standard upon the States; for the procedural self-incrimination clause must not only be "a matter of local concern."¹⁴

The concept of prohibiting self-incrimination grew out of the protests against the inquisitorial methods of the English ecclesiastical courts and the Court of Star Chamber, which tortured persons accused of heresy or treason to obtain confessions. By the latter half of the seventeenth century the privilege was well-established in English law and subsequently adopted in the United States.¹⁵ Proponents of the comment rule point to this history and argue that the self-incrimination clause of the fifth amendment has outlived its usefulness, for the coercive methods it sought to exterminate are no longer a part of reality. They contend, as the dissent in *Griffin* does, that ". . . the lurid realities which lay behind enactment of the Fifth Amendment, [are] a far cry from the subject matter of the case before us."¹⁶ It is submitted, however, that the *Griffin* Court, completely cognizant of the far reaching implications of so subtle a procedural device as the "comment rule," contributed much to the safeguard of such a fundamental protection as the Constitution, through the fifth amendment, accords to those accused of crimes. It is a certainty that the Supreme Court will continue, as it did in *Griffin*, to condemn any practice, however slight, of imputing sinister meaning to the exercise of a person's constitutional right under the fifth amendment.¹⁷

Frank Intrieri

CONSTITUTIONAL LAW—Right to Travel—Area Restrictions—Congressional intent of Passport Act of 1926 and Immigration & Nationality Act of 1952.

Zemel v. Rusk, 381 U. S. 1, 85 Sup. Ct. 1271 (1965).

On March 31, 1962, plaintiff, a Connecticut ski-resort operator, applied by letter to the Director of the Passport Office for permission to have his passport validated for travel to Cuba as a tourist. This request was denied with the explanation that only persons whose travel might be in the best interests of the United States, such as newsmen and businessmen with previously established interest, could travel to Cuba, and that

14. See dissenting opinion, *Id.* at 1237.

15. 1 Tresolini, *AMERICAN CONSTITUTIONAL LAW* 548 (1959).

16. See dissenting opinion, *Griffin v. California*, *supra* note 4, at 1236.

17. *Self Incrimination and the Duty to Testify*, 16 *JOURNAL OF POLITICS* 509 (1954).

tourists were specifically excluded. Plaintiff persisted in his attempts to validate his passport for travel to Cuba but to no avail. He then instituted an action in equity seeking a declaratory judgement decreeing that the Passport Act of 1926¹ and the Immigration and Nationality Act of 1952² are unconstitutional and a prohibitory injunction directing the Secretary of State not to enforce the objectionable regulation.³ The prayer was denied in the lower court⁴ and certiorari was granted by the United States Supreme Court.⁵

The questions for decision were whether the Secretary of State is statutorily authorized to refuse to validate the passports of United States citizens for travel to Cuba and, if he is, whether the exercise of that authority is constitutionally permissible. The majority of the Court answered both questions in the affirmative.⁶

Chief Justice Warren, writing for the majority, held that, while the legislative history of the Passport Act of 1926⁷ and its predecessor⁸ does not affirmatively indicate a congressional intent to authorize area restrictions, its language is broad enough to include them. This is further substantiated by the fact that prior to the enactment of the 1926 Act and

1. 22 U.S.C. § 211a (1958 ed.); Wherein it is stated: "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 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."

2. 8 U.S.C. § 1185 (1958 ed.); "(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 than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful. . . . (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 otherwise provided by the President, and subject to such limitations and exceptions 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."

3. C.F.R. § 51.75: "The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries."

4. *Zemel v. Rusk*, 228 F. Supp. 65 (D.C.D. Conn. 1964). Pursuant to 28 U.S.C. § 2282, a three-judge court was impanelled. The Supreme Court upheld the validity of this procedure in its decision.

5. *Zemel v. Rusk*, 379 U.S. 809 (1964).

6. Justices Black, Douglas and Goldberg wrote separate dissenting opinions.

7. See note 1, *supra*.

8. Act of August 18, 1856, 11 Stat. 52, 60, 61.

preceding the passage of the Immigration and Nationality Act of 1952,⁹ the State Department on various occasions, in both times of peace and periods of war, had imposed area restrictions. Utilizing the State Department's interpretation of these statutes¹⁰ and the failure of Congress to reject their interpretation,¹¹ the Court concluded that Congress intended to authorize area restrictions.

In deciding that statutorily authorized area restrictions do not violate the due process clause of the fifth amendment, the Court said: "the requirements of due process are a function not only of the extent of governmental restrictions imposed, but also of the extent of the necessity for the restriction."¹² By balancing the interest of the United States against the deprivation of liberty of the individual, the Court concluded that the due process clause did not give Zemel the right to travel to Cuba. The international repercussions of unrestricted travel to Cuba would, in light of the present status of the "cold war," in all probability involve the United States in international entanglements which can and are being avoided by area restriction.

The first amendment objections to travel bans found in *Kent v. Dulles*¹³ and in *Aptheker v. Secretary of State*¹⁴ were of a diminished qualitative value in *Zemel v. Rusk*. In the former cases the petitioners were refused passports because of their association with Communism; whereas in *Zemel* the area rather than the person was restricted. The Court therefore rejected appellant's argument that the restriction had deprived him of his first amendment liberties.

One issue that was left unanswered by the Court was the constitutionality of criminal prosecutions for those persons who travel abroad without passports.¹⁵ The Court deliberately avoided this issue because there was no threat of prosecution in the *Zemel* case.

The Supreme Court in *Zemel*, with an extremely loose interpretation of statutory language,¹⁶ has placed limitations on the individual's liberty to travel and at the same time increased the centralized authority of the government, and especially that of the executive branch, over international travel. At one end of the pendulum is the fear of an "iron curtain" method

9. See note 2, *supra*.

10. *Udall v. Tallman*, 380 U.S. 1 (1964).

11. *Norwegian Nitrogen Product Co. v. United States*, 288 U.S. 294 (1933); *Costanzo v. Tillinghast*, 287 U.S. 341 (1932); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

12. *Zemel v. Rusk*, 381 U.S. 1, 14, 85 Sup. Ct. 1271, 1279 (1965).

13. 357 U.S. 116 (1958).

14. 378 U.S. 500 (1964).

15. See 8 U.S.C. § 1185(c) (1958 ed.).

16. Justice Goldberg in his dissent argued that Congress in 1926 merely tried to "centralize the issuance of passports," which were once wildly dispensed by United States mayors and even notaries.

of travel restriction and at the opposite end lurks the danger of international entanglements and violations of the rights of American citizens in foreign countries caused by unrestrained liberty to travel to countries which have shown themselves to be irresponsible to the demands of international law. While recognizing these two extremes, the Court has balanced the probabilities of their development. Area restriction, unlike that which faced the Court in earlier travel cases,¹⁷ has a lesser potential for creating undue burdens on the individual's liberty; whereas it has an increased potential over other types of restrictions in shielding the government and the traveler from entanglements with irresponsible foreign governments. By balancing these factors the Court has come to a reasonable compromise with the earlier cases.¹⁸

F. Regan Nerone

17. Compare, *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

18. *Ibid.*

