CHAPTER 1

The Right to Travel

Several airline passengers who were citizens and lawful permanent residents of the United States (including four veterans of the United States Armed Forces) were not allowed to board flights to or from the United States or over United States airspace.

They believe they were denied boarding because they are on the No-Fly List, a government terrorist watch list of individuals who are prohibited from boarding commercial flights that will pass through or over United States airspace. Federal and local government officials told some of the passengers that they are on the No-Fly List.

Each aggrieved passenger submitted applications for redress through the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP"). Despite their requests to officials and agencies for explanations as to why they were not permitted to board flights, explanations were not provided and the passengers do not know whether they will be permitted to fly in the future.

Latif v. Holder, 28 F. Supp. 3d 1134 (D. Ore. 2014)

A. OVERVIEW

More than 5,000 airplanes, millions of people, and tons of cargo fly over the United States at any given moment, shuttling between different cities for countless commercial, recreational, and government purposes. It is easy to take the excitement of air travel for granted in this context. But, air travel is an enduring and constantly emerging activity from a legal and socio-technological perspective.

At the outset of the jet age, Max Lerner, in his influential 1957 book *America as a Civilization: Life and Thought in the United States*, captured the American origins and fascination with aviation, writing that the Air Age had furthered the mobility

of Americans and made the far-away vacation possible for "the boss's secretary as well as for the boss." Roger Bilstein, in an essay, *The Airplane and The American Experience* (2005), similarly celebrated the internationally democratizing impact of flight, writing that transoceanic leisure travel consumed many days of travel before World War II, when only the wealthy could afford the expense and time of air travel. But, postwar transatlantic flights "fit both the pocketbook and allocated vacation time for an astonishing cross-section of travelers." Equally important as these developments, and at the center of this chapter and this book, are the laws that facilitate the movement of people and things across the world.

Dating back perhaps to the Magna Carta, the freedom to travel is a fundamental liberty guaranteed by the U.S. Constitution. As U.S. Supreme Court Justice William Douglas wrote in *Kent v. Dulles*, 357 U.S. 116 (1958) (see, Part B, *supra*), the socio-political value of travel is central to the American experience, past and present:

> Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons close to the core of personal life—marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home.

Given the broad importance of mobility, studying the laws and policies that govern the movement of people and things across boundaries is a sensible starting point for the study of aviation law. Consider that exercising many of the freedoms and rights in the U.S. Constitution, and the Bill of Rights particularly, depends strictly on free movement. For example, how else can citizens enjoy "the right of the people peaceably to assemble" as is guaranteed by the First Amendment, without a corresponding privilege to travel? Indeed, without travel rights, many of the most basic rights enjoyed under the U.S. Constitution are valueless.

Alternatively, travel rights are not—and should not be—unlimited. Governments have the authority to restrict the travel of people or things that threaten the health, safety, or welfare of others. The terrorism of September 11, 2001, for example, prompted global travel restrictions in the nature of protocols and scanning machines that are now fixtures at airports around the world. In 2017, President Donald J. Trump signed an executive order banning all entries to the United States from people from seven Muslim-majority countries—an action upheld by the U.S. Supreme Court. Opposition to these measures—including protests and lawsuits—played out at airports and on airplanes in the United States and abroad. But, the fact remains that the government has broad powers to restrict the movement of its citizens and enforce its borders to others.

How the government goes about restricting travel rights and whether the government does so consistent with the law is enormously important, of course. With this background in mind, this chapter will focus or the origin and application of the right to travel under the U.S. Constitution. In doing so, the materials in this chapter examines how executives, legislators, and judges expand or restrict travel rights in anticipation of or reaction to changes in the national and international political, security, and economic environments.

Table 1-1. Global Survey: Source and Scope of Freedom of Movement

Canada	"Mobility Rights" enshrined in Section 6 of the Canadian Charter of Rights and Freedoms: "Every citizen of Canada has the right to enter, remain in and leave Canada."
China	*Hukou* passport-type system "immobilize China's large rural population," limiting public services to the birthplace of the holder. *See* Andreas Fulda, *In China, There's No Freedom of Movement, Even Between Country and City*, CITYMETRIC, 2017.
Ireland	In 1992, the Republic of Ireland adopted by referendum the Thirteenth Amendment, specifying that a legal prohibition on abortion would not limit freedom to travel in and out of the state.
Israel	Basic Law: Human Dignity and Liberty—"all persons are free to leave Israel; every Israeli national has the right of entry into Israel from abroad."
Kuwait	Kuwaiti law prohibits domestic companies from conducting business with Israeli citizens. *See* Jad Mouawad, *Kuwait Airways Drops Flights to Avoid Israeli Passengers*, N.Y. TIMES, Jan. 15, 2016.
North Korea	Article 62 of the Criminal Code bans citizens from travelling to another country without permission.
Russia	Russian Constitution, Article 27: "Everyone who is lawfully in the territory of the Russian Federation has the right to freely move and choose a place of stay or living . . . Everyone may freely exit the territory of the Russian Federation. Citizens of the Russian Federation may return onto the territory of the Russian Federation without hindrance."

In studying aviation law, you will be reading primarily federal court decisions addressing the constitutionality of national regulations and international treaties with respect to travel rights. The judicial power to say whether a citizen (or non-citizen) can traverse borders is substantial, raising important questions about the limitations on lawmakers and courts, the role of sovereign governments in defining and enforcing travel rights, and the opportunity for the governed (or regulated) to petition authorities to safeguard their rights. This chapter proceeds in three sections:

- Part B presents *Saenz v. Roe* and *Kent v. Dulles*, cases that explore the government's justification for limiting the movement of citizens across state lines and the right to travel internationally, respectively.
- Part C examines specific due process and equal protection clause issues connected to international travel presented in *Lee v. China Airlines, Ltd.*, as well as airport security protocols such as the "selectee list" examined in *Beydoun v. Sessions*.
- Finally, Part D explores whether the Constitutional right to travel includes a right to the most convenient form of travel, which is often by commercial airline (*Gilmore v. Gonzales*), and how economic policies impact the right to travel domestically (*Houston v. Fed. Aviation Admin*).

Following each case in this chapter and throughout the book are review-type questions intended to sharpen your understanding of the main legal and policy underpinnings of the right to travel. This is intended to inform your understanding of the materials throughout this book relevant to aviation law. Additional commentary and insight are offered in notes following select cases.

At the conclusion of this chapter, the reader should understand the constitutional basis and limits of the right to travel and how courts have interpreted the right in the context of interstate and international air travel. Moreover, with this understanding, readers should be able to anticipate how lawmakers and courts will approach future issues implicating the right to travel. And, more broadly, readers should begin to appreciate how courts analyze legal problems and issues (*e.g.* interpreting text and effecting policy) and whether they do so independently of national and international political realities.

B. CONSTITUTIONAL MATTERS

SAENZ V. ROE

526 U.S. 489 (1999)

JUSTICE STEVENS delivered the opinion of the Court.

In 1992, California enacted a statute limiting the maximum welfare benefits available to newly arrived residents. The scheme limited the amount payable to a family that had resided in the State for less than 12 months to the amount payable by the State of the family's prior residence, i.e., a durational residency requirement. In order to make a relatively modest reduction in its vast welfare budget, the California Legislature enacted § 11450.03 of the state Welfare and Institutions Code. That section sought to change the California Aid to Families with Dependent Children program by limiting new residents, for the first year they live in California, to the benefits they would have received in the State of their prior residence. Because in 1992 a state program either had to conform to federal specifications or receive a waiver from the Secretary of Health and Human Services in order to qualify for federal reimbursement, § 11450.03 required approval by the Secretary to take effect. In October 1992, the Secretary issued a waiver purporting to grant such approval.

On December 21, 1992, three California residents who were eligible for AFDC benefits filed an action in the Eastern District of California challenging the constitutionality of the durational residency requirement in § 11450.03. Each plaintiff alleged that she had recently moved to California to live with relatives in order to escape abusive family circumstances. One returned to California after living in Louisiana for seven years, the second had been living in Oklahoma for six weeks and the third came from Colorado. Each alleged that her monthly AFDC grant for the ensuing 12 months would be substantially lower under § 11450.03 than if the statute were not in effect. Thus, the former residents of Louisiana and Oklahoma would receive $190 and $341 respectively for a family of three even though the full California grant was $641; the former resident of Colorado, who had just one child, was limited to $280 a month as opposed to the full California grant of $504 for a family of two.

One of the questions presented was whether the 1992 statute was constitutional when it was enacted.

The word "travel" is not found in the text of the Constitution. Yet the "constitutional right to travel from one State to another" is firmly embedded in our jurisprudence. Indeed, as Justice Stewart reminded us in *Shapiro v. Thompson*,

394 U.S. 618 (1969), the right is so important that it is "assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all."

In *Shapiro*, we reviewed the constitutionality of three statutory provisions that denied welfare assistance to residents of Connecticut, the District of Columbia, and Pennsylvania, who had resided within those respective jurisdictions less than one year immediately preceding their applications for assistance. Without pausing to identify the specific source of the right, we began by noting that the Court had long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." We squarely held that it was "constitutionally impermissible" for a State to enact durational residency requirements for the purpose of inhibiting the migration by needy persons into the State. We further held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause "unless shown to be necessary to promote a compelling governmental interest," and that no such showing had been made.

Components of the Right to Travel

The "right to travel" discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

It was the right to go from one place to another, including the right to cross state borders while enroute, that was vindicated in *Edwards v. California*, 314 U.S. 160 (1941), which invalidated a state law that impeded the free interstate passage of the indigent. We reaffirmed that right in *United States v. Guest*, 383 U.S. 745 (1966), which afforded protection to the "right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." The right of "free ingress and regress to and from" neighboring States, which was expressly mentioned in the Articles of Confederation, may simply have been "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."

The second component of the right to travel is, however, expressly protected by the text of the Constitution. The first sentence of Article IV, § 2, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of

Citizens in the several States." Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. This provision removes "from the citizens of each State the disabilities of alienage in the other States." Those protections are not "absolute," but the Clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States."

At issue in this case is this third aspect of the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is plainly identified in the opening words of the Fourteenth Amendment: "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." Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the *Slaughter-House Cases*, 83 U.S. 36 (1872), it has always been common ground that this Clause protects the third component of the right to travel.

Standard of Review

That newly arrived citizens "have two political capacities, one state and one federal," adds special force to their claim that they have the same rights as others who share their citizenship. Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year. The appropriate standard may be more categorical than that articulated in *Shapiro*, but it is surely no less strict.

Because this case involves discrimination against citizens who have completed their interstate travel, the State's argument that its welfare scheme affects the right to travel only "incidentally" is beside the point. Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits. But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.

CHIEF JUSTICE REHNQUIST, with JUSTICE THOMAS joining, dissenting.

The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment—a Clause relied upon by this Court in only one other decision, *Colgate v. Harvey*, 296 U.S. 404 (1935), overruled five years later by *Madden v. Kentucky*, 309 U.S. 83 (1940). It uses this Clause to strike down what I believe is a reasonable measure falling under the head of a "good-faith residency requirement." Because I do not think any provision of the Constitution—and surely not a provision relied upon for only the second time since its enactment 130 years ago—requires this result, I dissent.

Much of the Court's opinion is unremarkable and sound. The right to travel clearly embraces the right to go from one place to another, and prohibits States from impeding the free interstate passage of citizens. The state law in *Edwards v. California*, 314 U.S. 160 (1941) which prohibited the transport of any indigent person into California, was a classic barrier to travel or migration and the Court rightly struck it down. Indeed, for most of this country's history, what the Court today calls the first "component" of the right to travel, was the entirety of this right.

But I cannot see how the right to become a citizen of another State is a necessary "component" of the right to travel, or why the Court tries to marry these separate and distinct rights. A person is no longer "traveling" in any sense of the word when he finishes his journey to a State which he plans to make his home. Indeed, under the Court's logic, the protections of the Privileges or Immunities Clause recognized in this case come into play only when an individual stops traveling with the intent to remain and become a citizen of a new State. The right to travel and the right to become a citizen are distinct, their relationship is not reciprocal, and one is not a "component" of the other.

EXERCISE 1-1. *SAENZ V. ROE*—COMPONENTS OF THE RIGHT TO TRAVEL

1. What are the elements of the right to travel as expressed in *Saenz v. Roe*, and which is at issue in the case?
2. How is the right to travel and the right to citizenship related under *Saenz v. Roe*?
3. In what provision of the Constitution are citizens guaranteed a right to travel according to the Court?
4. What does the *Saenz v. Roe* court establish as the standard of review?
5. Articulate the main point of the dissenting opinion.

KENT V. DULLES

357 U.S. 116 (1958)

JUSTICE DOUGLAS delivered the opinion of the Court.

This case concerns two applications for passports, denied by the Secretary of State. One was by Rockwell Kent who desired to visit England and attend a meeting of an organization known as the "World Council of Peace" in Helsinki, Finland. The Director of the Passport Office informed Kent that issuance of a passport was precluded by the Regulations promulgated by the Secretary of State on two grounds: (1) that he was a Communist and (2) that he had had "a consistent and prolonged adherence to the Communist Party line." Kent was told that, before a passport would be issued, he would need to submit an affidavit as to whether he was then or ever had been a Communist.

Kent took the position that the requirement of an affidavit concerning Communist Party membership "is unlawful and that for that reason and as a matter of conscience," he would not supply one. He did, however, have a hearing at which the principal evidence against him was from his book "It's Me O Lord," which Kent agreed was accurate.

Fifth Amendment

The right to travel is a part of the "liberty" of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage.

> *The right to travel is a part of the "liberty" of which the citizen cannot be deprived without the due process of law under the Fifth Amendment . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage.*

Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. "Our nation," wrote Chafee, "has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." Freedom of movement also has large social values. As Chafee put it:

> Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with

> colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons close to the core of personal life—marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home.

Freedom to travel is, indeed, an important aspect of the citizen's "liberty." We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment. The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly.

Matters of Allegiance and Legality

So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary, for the command of Congress was that "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." Second, was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States. The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.

War Measure

More restrictive regulations were applied in 1918 and in 1941 as war measures. In a case of comparable magnitude, *Korematsu v. United States*, 323 U.S. 214 (1944), we allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of "the gravest imminent danger to the public safety." There the Congress and the Chief

Executive moved in coordinated action; and, as we said, the Nation was then at war. No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen has been made here.

Scope of Authority

Thus we do not reach the question of constitutionality. We only conclude that the law does not delegate to the Secretary the kind of authority exercised here. We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations. They do not seek to escape the law nor to violate it. They may or may not be Communists. But assuming they are, the only law which Congress has passed expressly curtailing the movement of Communists across our borders has not yet become effective. It would therefore be strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations. We would be faced with important constitutional questions were we to hold that Congress had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.

MR. JUSTICE CLARK, with whom MR. JUSTICE BURTON, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER concur, dissenting.

The Secretary's action clearly must be held authorized by Congress if the requested information is relevant to any ground upon which the Secretary might properly refuse to issue a passport. The Court purports today to preclude the existence of such a ground by holding that the Secretary has not been authorized to deny a passport to a Communist whose travel abroad would be inimical to our national security. In thus construing the authority of the Secretary, the Court recognizes that all during our history he has had discretion to grant or withhold passports. This discretionary authority, which we previously acknowledged in *Perkins v. Elg*, 307 U.S. 325 (1939), was exercised both in times of peace and in periods of war. During war and other periods of national emergency, however, the importance of the Secretary's passport power was tremendously magnified by a succession of "travel-control statutes" making possession of a passport a legal necessity to leaving or entering this country.

Travel-Control Statues

The first of these was enacted in 1815 just prior to the end of the War of 1812, when it was made illegal for any citizen to "cross the frontier" into enemy territory without a passport. After the same result was accomplished during the Civil War without congressional sanction, World War I prompted passage in 1918 of the second travel-control statute. The 1918 statute, directly antecedent to presently controlling legislation, provided that in time of war and upon public proclamation by the President that the public safety required additional travel restrictions, no citizen could depart from or enter into the country without a passport. Shortly thereafter, President Wilson made the required proclamation of public necessity, and provided that no citizen should be granted a passport unless it affirmatively appeared that his "departure or entry is not prejudicial to the interests of the United States."

Orders promulgated by the Passport Office periodically have required denial of passports to "political adventurers" and "revolutionary radicals," the latter phrase being defined to include "those who wish to go abroad to take part in the political or military affairs of foreign countries in ways which would be contrary to the policy or inimical to the welfare of the United States."

Were this a time of peace, there might very well be no problem for us to decide, since petitioners then would not need a passport to leave the country. Either war or national emergency is prerequisite to imposition of its restrictions. Indeed, rather than being irrelevant, the wartime practice may be the only relevant one, for the discretion with which we are concerned is a discretionary control over international travel. Yet only in times of war and national emergency has a passport been required to leave or enter this country, and hence only in such times has passport power necessarily meant power to control travel.

EXERCISE 1-2. *KENT V. DULLES*—LIMITATIONS ON THE RIGHT TO TRAVEL

1. Identify the parties and their respective claims and defenses.
2. Detail the different personal and social values the court associates with the "freedom of movement."
3. The court notes that cases involving the refusal of passports generally fell into two categories. Explain.
4. The court refers extensively to concepts of liberty and Due Process arising out of the Fifth Amendment of the Constitution. Yet, *Kent v. Dulles* is not about the

constitutionality of the right to travel. What is the issue, then? And, what is the holding of the case?

5. What, according to the dissenting opinion, are "travel-control" statutes, and how would that justify denial of a passport in *Kent v. Dulles*?

NOTES ON *KENT V. DULLES*—TRAVEL IN CONTEXT

1. *Who Is Dulles?*

The defendant in *Kent v. Dulles* is John Foster Dulles, not personally, but in his capacity as the U.S. Secretary of State. He is the namesake of Dulles International Airport in Northern Virginia. The airport is described in more detail in *Houston v. Fed. Aviation Admin.*, *supra*, as follows:

> Completed in 1962, situated 26 miles west of downtown in the rolling green hills of Loudoun and Fairfax Counties in Virginia, Dulles boasts one of the most spectacular terminals in the world. Designed by the architect Eero Saarinen, the terminal possesses a roof that defies both gravity and common sense, modern facilities, comfortable mobile lounges that carry passengers from the terminal building out to an awaiting plane and thus eliminate much of the walking endemic to airports, and, what is central here, three 10,000-foot runways that can accommodate any and all airplanes currently constructed. The first airport in the nation planned for jet aircraft, Dulles services the bulk of nonstop flights from Washington to the West Coast and abroad.

For further insight see John Kelly, *Why Name and Airport "Dulles"?*, WASH. POST, Dec. 1, 2012. And, for an interesting video history of the airport see *Dulles International Airport*, https://www.youtube.com/watch?v=6fYPDXaWty8.

2. *Interstate Travel.*

Though sometimes read expansively as the case in which the Supreme Court announced or confirmed a right to travel, *Kent v. Dulles*, by its own terms, is narrower in scope—at most, a case or an opinion not about the Constitution, but merely about the fact that Congress had not authorized the Secretary of State to deny certain passports.

In any event, a right to *inter*state travel is well-established and its origins appear to reflect a concern over state discrimination against outsiders rather than concerns over the general ability to move about, *i.e.*, a right to movement. *See Saenz v. Roe*, 526 U.S. 489 (1999) (grounding at least one component of the right to interstate travel in the Privileges and Immunities Clause of the Fourteenth Amendment); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (describing the right as deriving from general principles

of federalism); *United States v. Guest*, 383 U.S. 745 (1966) (describing the right to interstate travel as originating in the Articles of Confederation and as being a "necessary concomitant of the stronger Union the Constitution created"); *Zobel v. Williams*, 457 U.S. 55 (1982) (O'Connor, J., concurring) (describing the right as originating in the Privileges and Immunities Clause of Art. IV); *Edwards v. California*, 314 U.S. 160 (1941) (describing the right as being grounded in the Commerce Clause).

3. ***An International Right.***

Note that the international right to travel involved in *Kent v. Dulles* is distinct from a right to *interstate* travel. Courts have opined that *international* travel is no more than an aspect of liberty that is subject to reasonable government regulation within the bounds of due process, whereas *interstate* travel is a fundamental right subject to a more exacting standard. *See Haig v. Agee*, 453 U.S. 280 (1981) (upholding constitutionality of regulation authorizing the revocation of passport on the ground that the regulation authorized revocation only where the holder's activities in foreign countries are causing or are likely to cause serious damage to national security). As such, the right to travel is not an unlimited right, as the Supreme Court stated in *Zemel v. Rusk*, 381 U.S. 1 (1965):

> The right to travel within the United States is of course also constitutionally protected, but that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole. So it is with international travel.

4. ***Travel or Movement?***

Apart from a right to *travel*, federal law has recognized a generalized freedom or right of *movement*:

> Freedom of movement, at home and abroad, is important for job and business opportunities—for cultural, political, and social activities—for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.

Aptheker v. Sec. of State, 378 U.S. 500 (1964) (Douglas, J., concurring). *See also Kent v. Dulles*, 357 U.S. 116 (1958), *supra* ("Freedom of movement is basic in our scheme of values"); *United States v. Guest*, 383 U.S. 745 (1966) (proclaiming that citizens of the United States "must have the right to pass and repass through every part of [the country] without interruption, as freely as in [their] own states"); *Williams v. Fears*, 179

U.S. 270 (1900) (indicating that the "right of locomotion," like the "right to contract," is protected by substantive due process). *But see Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) ("[e]ven a bona fide residence requirement would burden the right to travel if travel meant merely movement").

Modernly, the creation and activities of the Transportation Security Administration ("TSA") have brought attention to the issue of freedom of movement. The TSA was established by the Aviation and Transportation Security Act of 2001, by which the TSA's mission is to "protect the nation's transportation systems to ensure freedom of movement for people and commerce." As detailed in *Gilmore v. Gonzales*, 434 F.3d 1125 (9th Cir. 2006) *infra*, some TSA measures, including the "No Fly List" and "Selectee List" may impede movement without also infringing on the Constitution.

Moreover, the Air Transportation Security and Anti-Hijacking Acts of 1974 (P.L. 93–366), which relate to weapons-detecting screening of all passengers and carry-on property, requires or permits airlines to refuse to transport passengers and property in certain circumstances:

49 U.S.C. § 44902 ("Refusal to transport passengers and property")

(a) Mandatory Refusal. The Under Secretary of Transportation for Security shall prescribe regulations requiring an air carrier, intrastate air carrier, or foreign air carrier to refuse to transport—

(1) a passenger who does not consent to a search . . . establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance; or

(2) property of a passenger who does not consent to a search of the property establishing whether the property unlawfully contains a dangerous weapon, explosive, or other destructive substance.

(b) Permissive Refusal. Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.

See also Chapter 7, *infra*, Part C.

5. ***Travel as Speech.***

Under *Kent v. Dulles's* approach, the right to travel is an aspect of a citizen's liberty under the Fifth Amendment. But, is it more accurate to think of the right to travel as arising out of the First Amendment, which guarantees the right of assembly? Justice

William Douglas, in a dissenting opinion in *Zemel v. Rusk*, 381 U.S. 1 (1965), has answered in the negative:

> As I have said, the right to travel is at the periphery of the First Amendment, rather than at its core, largely because travel is, of course, more than speech: it is speech brigaded with conduct. "Conduct remains subject to regulation for the protection of society. * * * (But i)n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Restrictions on the right to travel in times of peace should be so particularized that a First Amendment right is not precluded unless some clear countervailing national interest stands in the way of its assertion.

6. ***Passports Post September 11, 2001.***

With the advent of profiling, screening devices, and evermore intrusive security measures at airports, does Dr. Walter Briehl's argument in *Kent v. Dulles*, that "every American has the right to travel regardless of politics," ring true after September 11th? What does the presence of these machines say about the health of our democracy? Related, how would you describe the state of the "right to travel" or "freedom of movement" today? See Heather E. Reser, Comment, *Airline Terrorism: The Effect of Tightened Security on the Right to Travel*, 63 J. AIR L. & COM. 819 (1998).

What limits, if any, should be imposed upon government requirements of citizens to demonstrate nationality? For example, would a passport containing a citizen's biometric information synch with constitutionally protected civil liberties? See generally Arnold Henson, *Constitutional Law: Right to Travel: Authority of Secretary of State to Deny Passports*, 57 MICH. L. REV. 119 (1958). *See also* James D. Barnett, *Passport Administration and the Courts*, 32 ORE. L. REV. 193 (1953); Leonard B. Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47 (1956); Reginald Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 VA. L. REV. 853 (1954).

7. ***Korematsu and War Measures.***

War measures are discussed in *Kent v. Dulles*, one of which was at the heart of one of the most discredited opinions ever rendered by the U.S. Supreme Court.

At the age of 23 Fred Korematsu, an American citizen of Japanese descent, was ordered to go to an internment camp west of the Rockies pursuant to Executive Order 2525, which President Franklin D. Roosevelt signed the day after the Japanese attack on Pearl Harbor in December 1941. The order authorized the federal government to apprehend and confine "alien enemies." The order resulted in the imprisonment of thousands of Americans, including Norman Mineta who would later serve as the Secretary of the Department of Transportation during the administrations of President Bill Clinton and George W. Bush. *See* Abigail Simon, *This Bush Cabinet*

Official Was Imprisoned in a Japanese Internment Camp. He Sees Troubling Parallels with Family Separations, TIME, June 21, 2018, https://time.com/5318725/family-separation-policy-japanese-internment-camp-norman-mineta/ ("After the attack on Pearl Harbor, Mineta was taken from his family by train, forced to say goodbye to his friends, his dog, and even his baseball bat when he was sent to an internment camp in Heart Mountain, Wyoming. He was only 10.")

In *Korematsu v. United States*, 323 U.S. 214 (1944), the court ruled 6–3 allowed Executive Order 2525 to stand as an exercise of the president's national security powers. After more than 70 years on the books, the U.S. Supreme Court officially rejected and overruled the *Korematsu v. United States* decision in *Trump v. Hawaii*, 138 S.Ct. 2392 (2018), a case in which the U.S. Supreme Court upheld President Donald Trump's ban on migration from certain mostly Muslim countries. *See generally* Philip Bump, *How a 1944 Decision on Japanese Internment Affected the Supreme Court's Travel Ban Case*, WASH. POST, June 26, 2018.

C. INTERNATIONAL APPLICATION

LEE V. CHINA AIRLINES, LTD.

669 F. Supp. 979 (C.D. Cal. 1987)

WILSON, DISTRICT JUDGE.

This case is one of several involving China Airlines Flight 006 (a Boeing 747) on February 19, 1985. The Lees were injured on that flight when the 747 made an unexpected and uncontrolled 31,000-foot descent off the coast of California.

The Lees are permanent residents of California. Mr. Lee is in the international garment manufacturing business, so he makes frequent trips to Asia. They purchased the tickets which allowed them to travel on Flight 006 in Hong Kong. These tickets were for round trip travel from Hong Kong to San Francisco. The date and flight number on the return portion of the ticket were left open.

International Transportation, Defined

Article 28 of the Warsaw Convention will not allow the Lees' case against China Airlines to be heard in the United States. The Lees argue that the Warsaw Convention does not apply in this case because their ill-fated flight did not depart from a country that is a party to the Convention. They are incorrect. The Convention applies to "international transportation." This term is defined in Article 1, Paragraph (2) of the Convention as:

> [A]ny transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or

> not there be a break in the transportation or a transshipment, are situated either in the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place in a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this Convention.

According to this language, the Convention will apply in two situations. First, it applies, if according to the contract of transportation (*e.g.*, a plane ticket), travel will be from one High Contracting Party to another. Second, if the contract of transportation provides for travel from a High Contracting Party, for stops abroad, and then for a return to that same High Contracting Party, then the Convention also applies. The ticket in this case provided for transportation from Hong Kong to Taipei to San Francisco to Hong Kong. Because the Convention only allows for one destination, the departure point and the destination of the Lees must officially be considered Hong Kong. Thus, the Convention will not apply here unless Hong Kong is a High Contracting Party. And, Hong Kong qualifies as a High Contracting Party to the Convention. The United Kingdom is a High Contracting party, and its adherence to the Convention covers Hong Kong.

Warsaw Convention: Constitutional?

The Lees argue that even if the court finds that Article 28 requires dismissal of China Airlines, the court should still not dismiss them because the Warsaw Convention is unconstitutional. The Lees make three different arguments on the constitutionality issue. First, they argue that the Convention constitutes a substantive due process violation because it impairs the allegedly fundamental right to international travel. Second, they argue that the Convention constitutes an equal protection violation because it treats passengers on the same airplane differently depending upon the content of their tickets. Finally, they argue, at the suggestion of the court, that the Convention is a procedural due process violation because it deprives them of the opportunity to have their tort claim heard in the United States. The court finds all three arguments to be without merit.

A. Substantive Due Process

The Lees argue that the Convention violates the Fifth Amendment because it impairs a fundamental right. They assert that they have a fundamental right to travel internationally and that the liability limitation of the Convention infringes upon this right. If such a right is impaired, then the court must examine the Convention with strict scrutiny to see if the Convention furthers a compelling governmental interest. The strict scrutiny analysis need not be reached, however,

because the court finds that while the right to travel interstate is fundamental, the right to international travel is not. Therefore, the court need only evaluate the Convention under a rational basis test, and under that test, the Convention passes muster.

International Travel as Fundamental Right?

In support of their argument that international travel is a fundamental right, the Lees cite *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301 (9th Cir.1982) ("International travel, like interstate travel, is a fundamental right."). This case, however, does not appear in accordance with prior Supreme Court authority. *See Califano v. Aznavorian*, 439 U.S. 170 (1978) ("[L]egislation which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel, such as durational residency requirements imposed by the States."). The Court added:

> [T]his court has often pointed out the crucial difference between the freedom to travel internationally and the right of interstate travel. The constitutional right of interstate travel is virtually unqualified. . . . by contrast, the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. As such, this "right" the Court has held, can be regulated within the bounds of due process.

Rational Basis Test for Limitations on International Travel

Aznavorian makes clear that limitations upon international travel are to be evaluated under a rational basis test. *Aznavorian* dealt with legislation that provided that a person could not receive SSI benefits during a month when that individual was out of the country. The Court upheld this legislation, saying that it only had an "incidental" effect on international travel. Given this incidental impact, the Court said that the limitation should be upheld unless it is "wholly irrational." This court turns, then, to an evaluation of the Lees' contention that the Convention impairs their right to travel and holds that the Convention has only an incidental impact on international travel and that this limitation is not wholly irrational.

The Convention was designed to establish uniformity in the law regarding international aviation. It recognizes that aviation links many countries with different languages, customs, and legal systems, and this goal is achieved somewhat through standard documentation, procedures for claims, and jurisdictional requirements. Because the Warsaw Convention helps to achieve the goal of uniformity in the law regarding international air travel, the court finds the treaty passes the rational basis test.

First, the court notes that the impact of the Convention upon international travel is *de minimus*. While the liability and jurisdictional limitations in the Convention may have a slight chilling effect upon some people considering a trip abroad, the Convention does not prevent anyone from taking such a journey. The court notes that the Convention does not prevent someone who is concerned about the liability limitation from obtaining additional insurance before embarking on a journey abroad. Whatever limitation there is, however, is justifiable. The Convention was designed to establish uniformity in the law regarding international aviation. It recognizes that aviation links many countries with different languages, customs, and legal systems, and this goal is achieved somewhat through standard documentation, procedures for claims, and jurisdictional requirements. Because the Warsaw Convention helps to achieve the goal of uniformity in the law regarding international air travel, the court finds the treaty passes the rational basis test.

B. Equal Protection

The Lees also suggest that Article 28 violates the equal protection clause of the Fifth Amendment because it makes distinctions among passengers on the same plane depending upon their tickets. They note that while the journeys of some passengers on a particular plane may be governed by the Convention, other journeys may not be so covered. Furthermore, even when the Convention applies to two passengers on the same plane, the Convention may allow one passenger to sue in the United States, but prohibit the other passenger from doing so. This differentiation among passengers, however, does not amount to an equal protection violation because no fundamental right is impaired by the distinction, and the distinction has a rational basis.

Treating similarly situated people differently is not always unconstitutional. Usually, making such distinctions is acceptable if a rational basis exists for the distinction.

Treating Similarly Situated People Differently: Constitutional?

Treating similarly situated people differently is not always unconstitutional. *See, e.g., Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955). Usually, making such distinctions is acceptable if a rational basis exists for the distinction. If, however, the classification created is suspect or impinges upon a fundamental right, then a court should apply strict scrutiny in reviewing the law creating the classification. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (suspect class); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (fundamental right). In this case, the court must apply a rational basis test. First, as set forth above, the Convention does not

impinge on any fundamental rights. Second, the classifications created are not suspect.

The court finds that the distinctions made between passengers on the same plane because of the provisions of the Convention are rational. The goal of the Convention is to bring uniformity to the law governing international air travel. This goal is fostered by the method set up by the Convention to determine whether it is applicable to a particular journey. The Convention dictates that applicability is determined by the place of departure and the place of destination as listed upon a passenger's ticket. This mechanism insures that the Convention will only apply to journeys with a clear nexus to High Contracting Parties, and it also ensures that passengers will have had some notice and an opportunity to choose whether they are willing to subject themselves to the dictates of the Convention. Thus, the Convention does create a rational system for bringing some uniformity to the law regarding international air travel in a world in which every nation has not agreed to abide by its terms. In light of this analysis, the court cannot say that distinctions created by the Convention among passengers on the same plane are irrational.

C. Procedural Due Process

Two-Step Due Process Analysis

The Lees argue that the jurisdictional limitation violates due process because it prevents American residents who were injured in or near the United States from bringing a tort action here. This argument also fails. When engaging in due process analysis, the court must first examine if a governmental action is infringing upon a life, liberty, or property interest. If the court finds that such an interest is affected, then the next question is what process is due. To determine what process is due, the court must go through a three-part analysis:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319 (1976). Assuming for the sake of argument, then, that the Lees have a property interest in their claim, the next question is what process is due.

Turning to the *Mathews v. Eldridge* test quoted above, the court finds that dismissal here would not be a due process violation. The Lees assert that if their

claim against China Airlines is dismissed, they will not be able to receive an adequate hearing of their claims abroad in either Taiwan or Hong Kong. The Lees have not shown, however, that having their claims heard abroad will create a substantial risk of "erroneous deprivation." They have come forward with almost no evidence regarding the nature of judicial proceedings in either Hong Kong or Taiwan. The Lees' only contention regarding the unfairness of potential proceedings in either Taiwan or Hong Kong is that it would be unfair to subject them to the uncertainty regarding what law will apply to this case in those countries. At least in this case, however, some of the usual mystery regarding what law a foreign forum will apply disappears.

The court surmises that the Warsaw Convention will figure prominently in the decision-making process over there since both Hong Kong and Taiwan adhere to it. The Ninth Circuit recently noted that "the cardinal purpose of the [Convention] is to ensure the existence of a uniform and universal system of recovery for losses incurred in the course of international air transportation." Because the plaintiffs have not met their burden of showing the proceedings abroad are likely to be erroneous, the court cannot act further on the Lees' due process contentions. In conclusion, then, the court disagrees with the Lees' contention that the Warsaw Convention is unconstitutional and dismisses their claims in accordance with the Convention's mandate.

EXERCISE 1-3. *LEE V. CHINA AIRLINES, LTD.*—DUE PROCESS IN INTERNATIONAL AIR TRAVEL

1. What is the departure point for the Lees? What is their destination? Why is this important from a legal perspective?
2. The plaintiffs assert three different arguments about the constitutionality of the Warsaw Convention. Identify each.
3. Explain how the court treats interstate travel and international travel differently as a matter of law.
4. Do the liability and jurisdictional limitations in the Warsaw Convention impermissibly impede the right to travel? Explain.
5. Does the result reached in *Lee v. China Airlines, Ltd.* afford the plaintiffs with due process of the law? Why or why not?

NOTES ON *LEE V. CHINA AIRLINES, LTD.*—LEGAL CONSTRAINTS IN INTERNATIONAL TRAVEL

The dispute in *Lee v. China Airlines, Ltd.*, *supra*, underscores an important legal peril uniquely related to the nature of air travel—different laws at the origin and destination of a flight potentially mean different rights (including the absence of rights) for litigants. Just as the Lees argued that application of an international treaty might impact their constitutional rights, passengers frequently litigate choice of law issues where the rights and remedies available to a plaintiff may be more favorable in one state over another. (*See*, *e.g.*, *Piper Aircraft v. Reyno*, Chapter 12, *infra*.) Some examples of international limitations of the right to air travel—for understandable and controversial reasons—follow.

1. ***Travel Limitations Based on Nationality.***

A German court ruled in 2016 that Kuwait Airways had the right to refuse to carry an Israeli passenger due to his nationality. A Frankfurt state court opined that the airline was merely respecting the laws of Kuwait, which does not recognize the state of Israel, and that the German court lacked authority to rule on Kuwaiti law. *See German Court Rules Kuwait Airline in Allowed to Ban Israelis*, REUTERS, Nov. 16, 2017, https://www.reuters.com/article/germany-court-kuwait-airways/german-court-rules-kuwait-airline-is-allowed-to-ban-israelis-idUSL1N1NM1NJ.

2. ***Protection for Nationals.***

The U.S. Department of State provides safety and security information for international travelers, including specific guidance for journalists, faith-based travel, and travelers identifying as LGBTI, woman, disabled, or older. *See* U.S. Dep't of State, *International Travel*, https://travel.state.gov/content/travel/en/international-travel.html.

Additionally, the U.S. State Department provides information about every country of the world to assist passengers assess for themselves the risk of travel. Each country information page contains a Travel Advisory, Alerts, and other important details specific to that country that could affect travelers. The Department of State further advises travelers to pay close attention to the entry and exit requirements, local laws and customs, health conditions, and other details to decide whether traveling to that country is right for them. Also provided is the address and phone number of the nearest U.S. embassy or consulate. *See* U.S. Dep't of State, *Country Information*, https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages.html.

Illustration 1-1. U.S. Department of State Travel Advisory: Iran

Iran
Islamic Republic of Iran

Travel Advisory
January 10, 2018

Iran - Level 4: Do Not Travel

Do not travel to Iran due to the risk of **arbitrary arrest and detention of U.S. citizens**.

There is a very high risk of arrest and detention of U.S. citizens in Iran, particularly U.S.-Iranian dual nationals.

Iranian authorities continue to unjustly detain and imprison U.S. citizens, including students, journalists, business travelers, and academics, on charges including espionage and posing a threat to national security. U.S.-Iranian dual nationals are particularly susceptible to arrest for these charges. Consular access to detained U.S. citizens is often denied.

The U.S. government does not have diplomatic or consular relations with Iran. The U.S. government is unable to provide emergency services to U.S. citizens in Iran. Switzerland serves as the protecting power for U.S. citizens in Iran, providing limited emergency services. The Iranian government routinely delays or denies Swiss officials access to detained U.S. citizens.

Due to risks to civil aviation operating within or in the vicinity of Iran, the Federal Aviation Administration (FAA) has issued a Notice to Airmen (NOTAM) and/or a Special Federal Aviation Regulation (SFAR). For more information U.S. citizens should consult the Federal Aviation Administration's Prohibitions, Restrictions and Notices.

Read the Safety and Security section on the Country Information page.

If you decide to travel to Iran:

- Visit our website for Travel to High-Risk Areas.
- Review your personal security plan.
- Enroll in the Smart Traveler Enrollment Program (STEP) to receive Alerts and make it easier to locate you in an emergency.
- Draft a will and designate appropriate insurance beneficiaries and/or power of attorney.
- Discuss a plan with loved ones regarding care/custody of children, pets, property, belongings, non-liquid assets (collections, artwork, etc.), funeral wishes, etc.
- Establish your own personal security plan in coordination with your employer or host organization, or consider consulting with a professional security organization.
- Follow the Department of State on Facebook and Twitter.
- U.S. citizens who travel abroad should always have a contingency plan for emergency situations. Review the Traveler's Checklist.

Source: https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Iran.html

3. ***Brexit.***

"Brexit"—the portmanteau for the British referendum on June 23, 2016 to withdraw the United Kingdom from the European Union—presented an enormous and unprecedented challenge to the concept of freedom of movement within an economic bloc.

Free movement of people had been one of the "four freedoms" guaranteed by membership in the EU and exercised under Article 21 of the Treaty of the Functioning of the European Union. Difficulties in negotiations about the terms by which the United Kingdom would leave and prospectively deal with the EU prompted the Director General and CEO of the International Air Transport Association ("IATA") to release a statement:

> The UK government's papers on the air transport implications of a "no deal" departure from the EU clearly exposes the extreme seriousness of what is at stake and underscores the huge amount of work that would be required to maintain vital air links. It is not just permission for flights to take off and land. Everything from pilots' licenses to security arrangements need to be agreed. Much of this could be secured through mutual recognition of existing standards. But formalizing this cannot happen overnight. And even when that is done, there will still be an administrative burden for the airlines and governments involved that will take time and significant resources. While we still hope for a comprehensive EU-UK deal, an assumption that "it will be all right on the night" is far too risky to accept. Every contingency should be prepared for, and we call upon both the EU and the UK to be far more transparent with the state of the discussions.

See generally Angela Dewan, *It's Official—A No-Deal Brexit will Make Traveling a Pain*, CNN, Sept. 13, 2018 ("Traveling between the UK and European Union will get a whole lot more complicated—and expensive—should Brexit talks end without a deal.")

4. ***Health and Public Welfare.***

"Planes provide the quickest way to get from one part of the world to another," an Associated Press article noted in 2005, adding, "for deadline contagious diseases as well as for people." In fact, in the spring of 2003, the respiratory virus SARS (also known as "bird flu") spread to five countries in 24 hours after first emerging in rural China. Airline and tourism industries lost billions of dollars "because people were afraid to travel and governments ordered flights canceled." *See Planes Could Spread Bird Flu Virus at Jet Speed*, NBC NEWS, Oct. 14, 2005, http://www.nbcnews.com/id/9687610/ns/health-infectious_diseases/t/planes-could-spread-bird-flu-virus-jet-speed/#.W4Qr6-hKg2w. Unsurprisingly, then, airlines routinely condition travel on

passenger health. For example, Finnair requires medical clearance in specific circumstances:

Illustration 1-2. Finnair Guidance on Medical Conditions

MEDICAL CONDITIONS

Most people with existing medical conditions are able to fly without difficulty. However, certain precautions sometimes need to be taken and in some cases we request medical clearance.

MEDA FORMS

If you have one of the illnesses or conditions below, you must notify us when you book your ticket, or at least 72 hours before your travel date. This will enable us to take appropriate precautionary measures. Please fill this preliminary information form. After submitting the form, you will receive your personal case number, e.g. 1- 456789078. This will allow you to update the information and insert attachments to the case. Sign in with your case number.

- recent myocardial infarction
- recent cerebral circulatory disorders
- recent injuries
- recent surgeries
- symptomatic coronary disease
- chronic obstructive pulmonary disease
- a need for oxygen therapy
- psychoses
- an infectious disease (tuberculosis, diphtheria)
- anaemia (Hb less than 75 g/l)
- chickenpox in the vesicle phase
- severe allergy

Source: https://www.finnair.com/no/gb/information-services/before-the-flight/special-services-health/medical-conditions.

BEYDOUN V. SESSIONS

871 F.3d 459 (6th Cir. 2017)

CLAY, CIRCUIT JUDGE.

Plaintiffs Nasser Beydoun and Maan Bazzi each separately sued various federal government officials challenging their placement on the federal government's "Selectee List," which designates them for enhanced screening at the airport. Asserting that their Fifth Amendment right to due process was violated, Plaintiffs sought declaratory and injunctive relief, with the ultimate aim of having their names removed from the government's enhanced screening list.

Plaintiff Nasser Beydoun is a United States citizen and resident of Dearborn, Michigan. According to his complaint, every time Beydoun attempts to board an airplane, he is subjected to "excessive delays, secondary screening, being singled out at check points, and being singled out for additional screening at the gate." As a result, Beydoun "has missed countless flights." He also claims that he has been humiliated and that his business ventures have suffered because he is subjected to extra security measures.

Plaintiff Maan Bazzi, who is also a United States citizen, similarly claims that he is only allowed to board flights after undergoing additional screening and experiencing excessive delays. For example, when Bazzi was flying from Brazil to Texas, he "was subjected to extra screening for approximately 10 minutes after receiving a boarding pass and was told to wait as [he] was going to be the last person boarded on the flight." After arriving in Texas, Bazzi underwent an additional hour of questioning and had his bags searched for explosives. Bazzi also had his passport "confiscated" for an hour at the Las Vegas airport and was taken for additional screening that lasted thirty minutes. At least once, Bazzi canceled one of his planned trips in order to avoid the "the stress and embarrassment of extra screening."

Selectee List

Based on their experiences going through airport security and boarding airplanes, Beydoun and Bazzi believe that they are on the Selectee List, which designates individuals for enhanced security screening due to the threat they may pose to "civil aviation or national security." *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–08–110, TERRORIST WATCHLIST SCREENING: OPPORTUNITIES EXIST TO ENHANCE MANAGEMENT OVERSIGHT, REDUCE VULNERABILITIES IN AGENCY SCREENING PROCESSES, AND EXPAND USE OF THE LIST 35 (2007). For example, individuals on the Selectee List "are to receive additional security screening prior to being permitted to board an aircraft, which may involve a physical inspection of the person and a hand-search of the passenger's luggage."

The Selectee List is a subset of the government's Terrorist Screening Database ("TSDB"). The TSDB "is developed and maintained by the Terrorist Screening Center ('TSC'), a multi-agency center that was created in 2003 and is administered by the Federal Bureau of Investigation ('FBI'), which in turn is part of the Department of Justice." *Mokdad v. Lynch*, 804 F.3d 807 (6th Cir. 2015). Officials from multiple agencies staff the TSC, including individuals from the FBI, the Department of Homeland Security ("DHS"), the Department of State, Customs and Border Protection, and the Transportation Security Administration ("TSA"). "TSC personnel decide whether to accept or reject the 'nomination' of a person by the FBI or the National Counterterrorism Center (NCTC) to the

TSDB" or the Selectee List. "TSC also decides whether to remove a name from the TSDB after it receives a redress request that has been submitted through" DHS's Traveler Redress Inquiry Program ("DHS TRIP").

According to their complaints, Beydoun and Bazzi have both attempted to use the procedure established by DHS TRIP to challenge their inclusion on the Selectee List. However, each time, the government failed to remove them from the list and has only sent them generalized responses to their inquiries. In addition, in both cases, the government has neither confirmed nor denied that Plaintiffs are on the Selectee List.

Plaintiffs contend that the district court erred in determining that their alleged inclusion on the Selectee List does not implicate a liberty interest protected by the Fifth Amendment. We address each issue in turn.

The Supreme Court has recognized that "[f]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Dunn v. Blumstein*, 405 U.S. 330 (1972); see also *Kent v. Dulles*, 357 U.S. 116 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment . . . Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." Indeed, "[t]he constitutional right of interstate travel is virtually unqualified." *Califano v. Aznavorian*, 439 U.S. 170 (1978). However, "the freedom to travel outside the United States must be distinguished from the right to travel within the United States." *Haig v. Agee*, 453 U.S. 280 (1981). Therefore, "the freedom to travel abroad . . . is subject to reasonable governmental regulation."

> *A fundamental right will only be implicated by government action that, at a minimum, "significantly interferes with the exercise of a fundamental right." Burdens that are incidental or negligible are "insufficient to implicate [the] denial of the right to travel.*

A fundamental right will only be implicated by government action that, at a minimum, "significantly interferes with the exercise of a fundamental right." Burdens that are incidental or negligible are "insufficient to implicate [the] denial of the right to travel." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007). At issue in these cases is whether Plaintiffs' alleged placement on the Selectee List has created more than an incidental burden on their right to travel. The district court found that the instances alleged by Plaintiffs do not rise

to such a level as to implicate a constitutional right, and therefore that Plaintiffs have failed to state a claim.

On appeal, Plaintiffs argue that the district court erred in considering the burden placed on Plaintiffs by their inclusion on the Selectee List as negligible or incidental. Beydoun alleged that he has missed "countless flights" after being subjected to lengthy secondary screenings. According to Beydoun, these delays had the effect of deterring him from flying and taking away his right to travel. However, Beydoun has not attempted to provide any information about when those delays occurred, how long the delays were, what type of enhanced screening he was subjected to, or indeed any information beyond general allegations that he has been prevented from traveling.

Bazzi's complaint provides a few more details. For example, Bazzi mentions several instances when he has been delayed or subjected to additional screening, with delays ranging from ten minutes to one hour in duration. Bazzi also points to the fact that, in his complaint, he specifically alleged that he had been deterred from flying on one occasion.

Inconveniences Are Not Constitutional Violations

The district court correctly held that Plaintiffs did not allege that any protected interest was violated by them being on the Selectee List. While Plaintiffs may have been inconvenienced by the extra security hurdles they endured in order to board an airplane, these burdens do not amount to a constitutional violation. Importantly, Plaintiffs have not actually been prevented from flying altogether or from traveling by means other than an airplane. Therefore, Plaintiffs' cases are distinguishable from those in which the plaintiffs claimed they could not fly at all because they were on the No Fly List.

The burdens alleged by Plaintiffs, to the extent they provided specific details about those incidents, can only be described as incidental or negligible and therefore do not implicate the right to travel. Plaintiffs point to no authority supporting their claim that a delay of ten minutes, thirty minutes, or even an hour at the airport violates their fundamental right to travel, and we are aware of none. Indeed, the Second Circuit rejected a claim that plaintiffs were impeded from exercising their right to travel when they were delayed for an entire day. When Plaintiffs' only allegations amount to delays that many individuals are likely to experience at the airport, it is hard to conclude that the fundamental right to travel has been implicated.

Finally, we are not convinced by Plaintiffs' contention that, because they were deterred from traveling, they have a constitutional claim. In support of their argument, Plaintiffs cite to *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898

(1986), in which a plurality of the Supreme Court remarked that "[a] state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." However, we have recognized that burdens that are incidental or negligible can "hardly be said to deter or penalize travel." *Pollack v. Duff*, 793 F.3d 34, 45 (D.C. Cir. 2015) (remarking that if a law's "effect upon [a plaintiff's] willingness to travel, i.e., to exercise her right to travel, is 'negligible[,]' [it] does not warrant scrutiny under the Constitution"); *Matsuo v. United States*, 586 F.3d 1180, 1183 (9th Cir. 2009) ("[N]ot everything that deters travel burdens the fundamental right to travel.").

Indeed, even if Plaintiffs were, in fact, deterred from flying after being delayed for an hour, we cannot conclude that this minor disturbance actually resulted in denying Plaintiffs the right to travel. *See Torraco v. Port Auth. of New York and New Jersey*, 615 F.3d 129, 141 (2d Cir. 2010) ("Assuming that the actions the defendants took did in fact deter these plaintiffs . . ., the most-inconvenienced plaintiff was delayed a little over one day. This was a minor restriction that did not result in a denial of the right to travel."). Therefore, the district court correctly concluded that Plaintiffs failed to state a claim that their right to travel was infringed upon by Defendants.

EXERCISE 1-4. *BEYDOUN V. SESSIONS*—THE "NO FLY LIST"

1. A number of important procedural issues present in *Beydoun v. Sessions*. To understand their application, define the following terms using a legal dictionary: (a) declaratory relief; and (b) injunctive relief.
2. What is the "No Fly List"?
3. What is the Terrorist Screening Database? How does it operate and by whom?
4. According to the court, what is the minimum type of government action necessary to implicate a fundamental right? Explain.
5. Are the plaintiffs' claims based on procedural or substantive due process, according to the court? What is the difference?

D. INTERSTATE AIR TRAVEL

GILMORE V. GONZALES

435 F.3d 1125 (9th Cir. 2006)

PAEZ, CIRCUIT JUDGE.

On July 4, 2002, John Gilmore ("Gilmore"), a California resident and United States citizen, attempted to fly from Oakland International Airport to Baltimore-Washington International Airport on a Southwest Airlines flight. Gilmore intended to travel to Washington, D.C. to "petition the government for redress of grievances and to associate with others for that purpose." He was not allowed to fly, however, because he refused to present identification to Southwest Airlines when asked to do so.

Identification Requirement

Gilmore approached the Southwest ticketing counter with paper tickets that he already had purchased. When a Southwest ticketing clerk asked to see his identification, Gilmore refused. Although the clerk informed Gilmore that identification was required, he refused again. Gilmore asked whether the requirement was a government or Southwest rule, and whether there was any way that he could board the plane without presenting his identification. The clerk was unsure, but posited that the rule was an "FAA security requirement." The clerk informed Gilmore that he could opt to be screened at the gate in lieu of presenting the requisite identification. The clerk then issued Gilmore a new boarding pass, which indicated that he was to be searched before boarding the airplane. At the gate, Gilmore again refused to show identification. In response to his question about the source of the identification rule, a Southwest employee stated that it was a government law. Gilmore then met with a Southwest customer service supervisor, who told him that the identification requirement was an airline policy. Gilmore left the airport, without being searched at the gate.

That same day, Gilmore went to San Francisco International Airport and attempted to buy a ticket for a United Airlines flight to Washington, D.C. While at the ticket counter, Gilmore saw a sign that read: "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." Gilmore again refused to present identification when asked by the ticketing agent. The agent told him that he had to show identification at the ticket counter, security checkpoint, and before boarding; and that there was no way to circumvent the identification policy.

Secondary Screening "Option"

A United Airlines Service Director told Gilmore that a United traveler without identification is subject to secondary screening, but did not disclose the source of the identification policy. United's Ground Security Chief reiterated the need for identification, but also did not cite the source of the policy. The Security Chief informed Gilmore that he could fly without presenting identification by undergoing a more intensive search, *i.e.* by being a "selectee." A "selectee" search includes walking through a magnetometer, being subjected to a handheld magnetometer scan, having a light body patdown, removing one's shoes, and having one's carry-on baggage searched by hand and a CAT-scan machine. Gilmore refused to allow his bag to be searched by hand and was therefore barred from flying.

The Security Chief told Gilmore that he did not know the law or government regulation that required airlines to enforce the identification policy. Another member of United's security force later told Gilmore that the policy was set out in government Security Directives, which he was not permitted to disclose. He also told Gilmore that the Security Directives were revised frequently, as often as weekly; were transmitted orally; and differed according to airport. The airline security personnel could not, according to the Government, disclose to Gilmore the Security Directive that imposed the identification policy because the Directive was classified as "sensitive security information" ("SSI"). Gilmore left the airport and has not flown since September 11, 2001 because he is unwilling to show identification or be subjected to the "selectee" screening process.

Gilmore filed a complaint against Southwest Airlines and the United State Attorney General, challenging the constitutionality of several security measures, which he collectively referred to as "the Scheme," including the identification policy, CAPPS and CAPPS II, and No-Fly and Selectee lists. Gilmore alleged that these government security policies and provisions violated his right to due process, right to travel, right to be free from unreasonable searches and seizures, right to freely associate, and right to petition the government for redress of grievances. Gilmore also alleged that "similar requirements have been placed on travelers who use government-regulated passenger trains, and that similar requirements are being instituted for interstate bus travel."

Gilmore also alleged that the identification policy violates his constitutional right to travel because he cannot travel by commercial airlines without presenting identification, which is an impermissible federal condition. We reject Gilmore's right to travel argument because the Constitution does not guarantee the right to travel by any particular form of transportation.

Identification Request

Fourth Amendment Implication?

Gilmore alleges that both options under the identification policy—presenting identification or undergoing a more intrusive search—are subject to Fourth Amendment limitations and violated his right to be free from unreasonable searches and seizures. Gilmore argues that the request for identification implicates the Fourth Amendment because "the government imposes a severe penalty on citizens who do not comply." Gilmore highlights the fact that he was once arrested at an airport for refusing to show identification and argues that the request for identification "[i]mposes the severe penalty of arrest." Gilmore further argues that the request for identification violates the Fourth Amendment because it constitutes "a warrantless general search for identification" that is unrelated to the goals of detecting weapons or explosives.

The request for identification, however, does not implicate the Fourth Amendment. "[A] request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." Rather, "[a]n individual is seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Similarly, an airline personnel's request for Gilmore's identification was not a seizure within the meaning of the Fourth Amendment.

Gilmore's experiences at the Oakland and San Francisco airports provide the best rebuttal to his argument that the requests for identification imposed a risk of arrest and were therefore seizures. Gilmore twice tried to board a plane without presenting identification, and twice left the airport when he was unsuccessful. He was not threatened with arrest or some other form of punishment; rather he simply was told that unless he complied with the policy, he would not be permitted to board the plane. There was no penalty for noncompliance.

Request to Search

Airport Searches Measured by Reasonableness

Gilmore argues that the selectee option is also unconstitutional because the degree of intrusion is unreasonable. We reject this argument because it is foreclosed by our decisions in *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) and *Torbet v. United Airlines, Inc.*, 298 F.3d 1087 (9th Cir. 2002). The identification policy's search option implicates the Fourth Amendment. *See Davis*, 482 F.2d at 895 (holding that the government's participation in airport search programs brings any search conducted pursuant to those programs within the reach of the Fourth Amendment). Airport screening searches, however, do not *per se* violate a traveler's Fourth Amendment rights, and therefore must be analyzed for reasonableness. As we explained in *Davis*:

> To meet the test of reasonableness, an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it. It follows that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft.

Gilmore was free to reject either option under the identification policy, and leave the airport. In fact, Gilmore did just that. United Airlines presented him with the "selectee" option, which included walking through a magnetometer screening device, being subjected to a handheld magnetometer scan, having a light body patdown, removing his shoes, and having his bags hand searched and put through a CAT-scan machine. Gilmore declined and instead left the airport.

Additionally, the search option "is no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives . . . [and] is confined in good faith to [prevent the carrying of weapons or explosives aboard aircrafts]; and . . . passengers may avoid the search by electing not to fly." Therefore, the search option was reasonable and did not violate Gilmore's Fourth Amendment rights.

Gilmore had a meaningful choice. He could have presented identification, submitted to a search, or left the airport. That he chose the latter does not detract from the fact that he could have boarded the airplane had he chosen one of the other two options.

Meaningful Choice, Options?

Gilmore also suggests that the identification policy did not present a meaningful choice, but rather a "Hobson's Choice," in violation of the unconstitutional conditions doctrine. We have held, as a matter of constitutional law, that an airline passenger has a choice regarding searches:

> [H]e may submit to a search of his person and immediate possessions as a condition to boarding; or he may turn around and leave. If he chooses to proceed, that choice, whether viewed as a relinquishment of an option to leave or an election to submit to the search, is essentially a "consent," granting the government a license to do what it would otherwise be barred from doing by the Fourth Amendment.

Gilmore had a meaningful choice. He could have presented identification, submitted to a search, or left the airport. That he chose the latter does not detract from the fact that he could have boarded the airplane had he chosen one of the other two options. Thus, we reject Gilmore's Fourth Amendment arguments.

Right to Associate and Right to Petition the Government

Finally, Gilmore argues that because the identification policy violates his right to travel, it follows that it also violates his right to petition the government and freely associate. These claims, as Gilmore argued in his appellate brief, are based on the notion that "[f]reedom to physically travel and the free exercise of First Amendment rights are inextricably intertwined." Here, this logic works to Gilmore's detriment. That is, even accepting Gilmore's assertion that there is a connection between the right to travel and First Amendment freedoms, his argument fails because, as we explained, his right to travel was not unreasonably impaired.

Gilmore argues that the identification requirement impinges his First Amendment right to associate anonymously. In support of this argument he relies principally on *Thomas v. Collins*, 323 U.S. 516 (1945), in which the Supreme Court concluded that a registration requirement for public speeches is "generally incompatible with an exercise of the rights of free speech and free assembly." Unlike the regulation in *Thomas*, the identification policy is not a direct restriction on public association; rather it is an airline security measure.

Further, Gilmore did not allege that he was exercising his right to freely associate in the airport, but rather that he was attempting to fly to Washington, D.C. so that he could exercise his right to associate there. The enforcement of the identification policy did not prevent him from associating anonymously in Washington, D.C. because he could have abided by the policy, or taken a different mode of transport. Although the policy did inconvenience Gilmore, this inconvenience did not rise to the level of a constitutional violation. In the end, Gilmore's free association claim fails because there was no direct and substantial action impairing this right.

Gilmore's right to petition claim similarly fails. Although Gilmore did not fly to Washington, D.C., where he planned to petition the government for redress of grievances, the identification policy did not prevent him from doing so. The identification policy is not a direct regulation of any First Amendment expressive activity, nor does it impermissibly inhibit such activity. Gilmore's claims that Defendants violated his rights to associate anonymously and petition the government are without merit.

EXERCISE 1-5. *GILMORE V. GONZALES*—"SELECTEES" AND AIRPORT SECURITY

1. What was the stated purpose of Gilmore's trip?
2. What is a "selectee" and what does the search of a selectee entail?
3. Does a refusal to present identification upon initial check-in implicate the Fourth Amendment protection against unreasonable government searches and seizures? Why or why not?
4. According to the court, what choices, if any, does a passenger have when asked to submit to a search of his person and immediate possession as a condition to boarding? Do you agree with this rationale? Explain.
5. Did the identification policy in this case violate Gilmore's constitutional rights?

HOUSTON V. FED. AVIATION ADMIN.

679 F.2d 1184 (5th Cir. 1982)

JOHN R. BROWN, CIRCUIT JUDGE.

This flight from Houston, Texas to our Nation's Capital takes us to both Dulles International and Washington National Airports. The Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, will serve as our flight plan, and the Supreme Court as air traffic control. In the course of our flight, our passengers—the City of Houston, American Airlines and the Federal Aviation Administration—will be informed of our conclusion that Department of Transportation ("DOT") regulations imposing a "perimeter rule" upon flights to and from Washington National Airport are valid and thus, as we disembark, we shall deny the petitions for review.

Destination: Washington—A Capitol City

Our Nation's Capital, Washington, D. C., attracts millions of visitors each year, be it for pleasure or for business. Nestled in the green hills of the Mid-Atlantic region, snug and smug along the banks of the beautiful Potomac River, this celebrated town of "Northern charm and Southern efficiency" offers visitors a potpourri of museums, art galleries, monuments, historic sites, parks, Panda bears, politicians, and a climate that is charitably described as ghastly. And for one group of travelers, Washington offers something else: our federal government, with its milch cow departments and regulatory agencies. For the business traveler, Washington is Mecca.

One If By Land, Two If By Sea, and Three If By Air

Yet the road to Mecca is not an easy one. The metropolitan Washington area supports three airports: Washington National ("National"), Dulles International ("Dulles")—both owned by the FAA, an arm of the DOT and Baltimore-Washington International ("BWI"). For those citizens living within 1,000 miles of Washington, nonstop air service to close-in National allows them to earn their wings, every day. Served directly by Metro, Washington's vintage 2001 subway network, National lies across the Potomac River from downtown Washington, a few minutes' ride from the seat of government and from most of its appendages as well.

If Washington is the city of cherry blossoms, National is a faded bloom. Constructed in the early 1940's to handle propeller planes, it now handles jet aircraft which disgorge up to 3,500 passengers/hour in peak periods, for a total of 17 million passengers per year. Those figures represent 67% of the air traffic in the metropolitan Washington area. National's 6,870-foot runway can handle Boeing 727's and similar jet aircraft but cannot accommodate the "jumbo" widebody jets that serve the coast-to-coast and international markets. To the west of the airport is Arlington County, Virginia, and to the south, the city of Alexandria, Virginia—both densely populated areas whose residents with increasing vehemence have protested the noise and congestion that National engenders.

You Can't Get There from Here

For those travelers who live beyond 1,000 miles from Washington, only a flying carpet can assure them nonstop service to National, since the DOT regulations we confront prohibit such flights. They may select from two alternatives: a non-nonstop flight to National, stopping or changing planes in a city less than 1,000 miles distant, or a direct flight to Dulles or Baltimore-Washington Airport.

Dulles, the other federal airport, is National's younger and substantially more glamorous sister. Completed in 1962, situated 26 miles west of downtown in the rolling green hills of Loudoun and Fairfax Counties in Virginia, Dulles boasts one of the most spectacular terminals in the world. Designed by the architect Eero Saarinen, the terminal possesses a roof that defies both gravity and common sense, modern facilities, comfortable mobile lounges that carry passengers from the terminal building out to an awaiting plane and thus eliminate much of the walking endemic to airports, and, what is central here, three 10,000-foot runways that can accommodate any and all airplanes currently constructed. The first airport in the

nation planned for jet aircraft, Dulles services the bulk of nonstop flights from Washington to the West Coast and abroad.

For all its attributes, however, Dulles suffers from one small problem: unpopularity. The 30-mile trip to Washington from Dulles doth a lengthy and expensive taxi ride make. Ground transportation to downtown by bus or limousine, while not as expensive, still takes approximately 45 minutes in light traffic. Rapid rail transport along the Dulles Access Road, a limited access parkway that services only the airport, is unlikely to begin in the near—or even distant—future. Thus travelers arriving in Washington generally prefer National, however crowded, however congested, however decrepit, to the spacious and graceful, but inconvenient, Dulles. Traffic figures confirm its loneliness. While Dulles can accommodate 1,800 passengers per hour, the total daily average passenger load is less than 7,000. And since the majority arrive or depart late in the afternoon, when the crowded West Coast flights are scheduled, the daily average figures are deceptive. As overcrowding plagues National, arousing the ire of its neighbors, during most of the day the younger sister pines away, unwanted.

The FAA, like any prudent entrepreneur, seeks to increase business and has resorted to the regulatory process to attempt to transfer "long-haul" flights to Dulles. The City of Houston and American complain. And on that note, we must fasten our seat belts, for our flight begins.

Pre-Flight Procedure

Perimeter Rule

American and Houston seek review of DOT regulations imposing a "perimeter rule" that prohibits air carriers from operating nonstop flights between National and any airport more than 1000 statute miles away. 46 Fed. Reg. 36068 (1981), 14 C.F.R § 159.60. The procedural background to this rule could fill several Boeing 747's. Lest we deter the reader, we will throttle back on unnecessary details.

Prior to the dawn of the jet age, the air carriers serving National agreed to a 650-mile perimeter rule on nonstop flights to and from National, with exceptions for seven cities between 650 and 1,000 miles away which enjoyed grandfathered nonstop service as of December 1, 1965. The agreement expired on January 1, 1967, but the carriers continued to adhere to its terms until May 1981, when three carriers—American, Pan American and Braniff—announced plans to fly nonstop to National from cities outside the perimeter.

Environmental Impact Statement ("EIS")

The perimeter rule did not rest upon operational or safety considerations—all parties concede that the Boeing 727's that land at National have a range well beyond 1000 miles. Rather, the FAA viewed the rule as a means of controlling the increasing traffic at National. The rule did not placate area residents, who found the noise from jet aircraft equally disturbing whether the flight originated within 1000 miles or on the Moon. The neighboring states of Maryland and Virginia, the District of Columbia, local planning organizations, and area Senators and Congressmen all urged the FAA to "do something" about National. In 1970, a coalition of citizen groups and individuals brought suit against the DOT, FAA and eleven major airlines to abate noise and air pollution at the airport. The U.S. Court of Appeals for the Fourth Circuit ordered the FAA to prepare an Environmental Impact Statement ("EIS") concerning its operation of its two airports.

Responding to the Fourth Circuit's flight instructions, the FAA on March 23, 1978 issued a Notice of Proposed Policy for the Metropolitan Washington Airports and a draft EIS. In discussing a wide range of policy options, from no change to various restrictions on growth, the proposal declared as its purpose "to rationalize the role and use of the two airports (National and Dulles) from an overall transportation viewpoint." The FAA solicited and received comments from the public, members of Congress, federal agencies, state, municipal and local agencies, public organizations, private companies, and interested individuals.

The comments fell into two categories. Local governments and residents argued that the concentration of service at National imposed an unnecessary burden on the airport's neighbors. The airlines and distant cities, on the other hand, argued that National's convenience outweighed the objections.

The FAA, after further public comment, modified its 1978 proposal and issued a supplementary draft EIS and a Notice of Proposed Rulemaking in January 1980. For the first time, FAA mentioned a flat 1000-mile rule as an alternative to the existing policy. Still more comments followed. The House Committee on Public Works and Transportation got into the act and held oversight hearings.

In response, FAA further refined its policy proposal. The final EIS appeared in August 1980. It contained five policy alternatives, essentially variations on a theme. None suggested abandonment of the perimeter rule.

Amended Policy

On August 15, 1980, then-Secretary of Transportation Goldschmidt unveiled an amended Metropolitan Washington Airport Policy. 45 Fed. Reg. 62398 (1980). The FAA issued several regulations to implement this policy, which abolished the

650-mile perimeter and its exceptions and replaced it with a flat 1,000-mile perimeter. In support of the new rule, FAA advanced three reasons:

(1) To assure the full utilization of Dulles;

(2) To preserve the short- and medium-haul nature of National; and

(3) To eliminate the inequity that the prior rule, with its exceptions for the grandfathered cities, created.

The new policy also set a ceiling of 17 million passengers per year at National, changed the distribution of slots between certificated air carriers and air taxis, imposed a strict curfew on departures and arrivals at night, removed the restriction on those widebody aircraft that can safely operate on National's short runway, called for a master plan governing physical redevelopment of National, and required Dulles to remain open 24 hours per day with unrestricted access.

We've Only Just Begun

These rules were to take effect on January 5, 1981. Just when it seemed that FAA had taken a giant step for traveling mankind, Congress stepped in and prohibited the FAA from reducing the number of air carrier slots until April 26, 1981. *See* Department of Transportation and Related Agencies Appropriations Act of 1981, Pub. L. 96–400, 94 Stat. 1681 (October 9, 1980). Since the rules formed a package, the FAA chose to defer the effective date of the remainder, including the perimeter rule, to the later date.

On February 27, 1981, the newly-appointed Secretary of Transportation, Drew Lewis, proposed to delay the effective date of the package until October 25, 1981, to enable him thoroughly to reconsider the matter. On July 8, 1981, he issued a new proposal and regulations which superseded the Goldschmidt policy and regulations. Although he made some changes, the Secretary approved the 1,000-mile perimeter restriction. The DOT promulgated new regulations on November 27, 1981, as part of a coherent operating policy for National and Dulles.

As if these rules were not enough, the Secretary, on May 8, 1981, ordered the FAA to promulgate a separate, interim perimeter regulation to maintain the existing 650-mile rule in the face of the decision of three airlines to inaugurate nonstop flights to National from Dallas and Houston, Texas. This interim rule, the Secretary declared, met the "emergency" situation created by the airlines' action. It took effect after only one week's comment period instead of the customary 45 or 60 days.

The Friendly Skies—Filled with Litigants

The City of Houston filed a petition for review (No. 80–2030) of the Goldschmidt perimeter rule on September 22, 1980. American sought review of both the perimeter and the Goldschmidt slot reallocation rules (No. 80–2251). The Air Transport Association of America and Eastern Airlines filed a petition for review of the slot redistribution rule in Unit B of this Court (now the U.S. Court of Appeals for the Eleventh Circuit). New York Air filed a petition for review of the slot reallocation rule in the D.C. Circuit (No. 81–4004).

The May 8, 1981 interim perimeter rule also spawned litigation. On May 20, 1981, Houston and American moved to enjoin issuance of the interim perimeter regulation. We denied their motions by order filed May 27, 1981. Houston then filed a petition for review of the interim perimeter rule (No. 81–4194), which we consolidated with the petitions seeking review of the final perimeter rule. Only the perimeter rules-interim and final-stand in the dock before us.

Scope of Review—

We're the Administrative Agency, Doing What We Do Best

Administrative Procedures Act and Agency Rulemaking

Before we reach cruising altitude, we need, as always, first to delineate the flight plan we must follow. Rulemaking by an administrative agency is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), which prohibits agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and prescribes proper methods of administrative action. Reviewing courts have taken a radar fix on this amorphous standard on many occasions, but invariably have encountered turbulence during the flight. In general, we review the agency's procedures to ensure reasoned decision-making, but we defer to its expertise in the final analysis. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), obliges us "to engage in a substantial inquiry." The agency's decision "is entitled to a presumption of regularity. But that presumption is not to shield (the agency's) action from a thorough, probing, in-depth review.

> *Rulemaking by an administrative agency is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), which prohibits agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and prescribes proper methods of administrative action.*

We must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although

this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." The record plays a pivotal role, for "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." Yet we "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation v. Arkansas-Best Freight*, 419 U.S. 281, 286 (1974). As we recently concluded,

> (W)e must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, but only so far and no further; and its decision need not be ideal or even, perhaps, correct so long as not "arbitrary" or "capricious" and so long as the agency gave at least minimal consideration to the relevant facts as contained in the record.

American Petroleum Institute v. EPA, 661 F.2d 340, 349 (5th Cir. 1981).

You Deserve National Attention?

Houston and American label as arbitrary and capricious the FAA's decision administratively to impose a perimeter rule on flights to and from National. We disagree. While the Courts of Appeals have on numerous occasions taken an administrative agency to task for its failure to follow correct procedures or to proffer an acceptable reason for its actions, we find that the FAA and DOT have acted reasonably and in good faith to solve a difficult problem. The agency carefully considered all the factors and arrived at a reasonable judgment. In no way do the rules before us constitute arbitrary and capricious agency action. The enormous record in this case bolsters the decision, and the arguments of Houston and American, although sincere and not without merit, do not convince us to the contrary.

Houston and American contend that no rational basis connects the FAA's goals—to protect Dulles and to preserve the short-haul status of National—to the means it has adopted. This argument ignores reality and, in the process, misreads the factual record. Having traveled through these two airports, we may take judicial notice of their problems of under- and over-use. The FAA's actions, while not the only way of treating these problems, fall well within the APA's radar scope for agency action.

A perimeter rule, Houston and American allege, will not protect Dulles. Moreover, there is no showing that Dulles needs protection. They are wrong on both counts. As counsel for the FAA pointed out at oral argument, one could shoot off a cannon in the Dulles terminal at midday without a chance in the world

of hitting anyone. Except for the hours from 4:00 to 8:00 p. m., when the complement of West Coast nonstop and international flights arrive and depart, Dulles is deserted. In those same hours, National is saturated with passengers. Dulles needs help, which the perimeter rule, by preventing the further concentration of flights at National, can provide.

We point out what Houston and American conveniently ignore, that Dulles since 1967 has depended upon a perimeter rule of some sort at National. Already empty for much of the day with a rule, Dulles might, if we invalidate the perimeter, cease to exist. Carriers would schedule nonstop flights from National to Denver, Dallas and Houston. The shift would leave Dulles with only the California and Seattle nonstops, which employ aircraft that cannot land on National's short runway, and the international trade. That small amount of traffic, contrary to petitioners' predictions, would not prove adequate to sustain the airport. Their zeal for overturning these regulations confirms the FAA's view that "as long as carriers are able to increase the number of passengers carried at National, they will continue to do so." 45 Fed. Reg. at 62399.

Houston and American suggest that since the FAA has imposed a ceiling on the number of flights per day at National, the lifting of the perimeter rule would allow the market to determine the level of service. Even if true, that redistribution would not necessarily serve the public interest. The airlines, having only so many slots at their disposal, would drop service to Podunk in place of the more profitable, longer-haul markets.

> As long as carriers are able to increase the number of passengers carried at National, they will continue to do so. It has been to their advantage to shift longer haul flights formerly scheduled at Dulles to National, at the expense of shorter haul markets traditionally served there.

Metropolitan Washington Airports Policy, *Final EIS*, August 1980, at 5. That course not only undercuts National's short-haul status, but it reduces the level and quality of service to smaller towns in our nation, which the FAA and CAB are sworn to uphold.

In the same breath, Houston and American retort that the FAA could always increase the number of slots to protect the commuter and short-haul flights. Yet that idea puts us back where we started. The FAA wants to decrease traffic at National, not increase it. For the same reasons that international traffic in New York centers at John F. Kennedy Airport, it makes sense to the FAA that one Washington airport handle the volume of nonstop traffic to the distant cities.

The Long and Short Haul of It

Next, Houston and American insist that National "has not been, is not and will not be" a short-haul airport. They correctly point out that National serves as many, if not more, of the long-haul cities as does Dulles, e.g., San Francisco, Los Angeles, Seattle, Portland, Las Vegas, Denver. See Official Airline Guide, North American Edition (June 1, 1982). Yet their argument ignores the very point at issue. Those flights must stop somewhere less than 1000 miles from National. No one has ever attempted completely to bar travelers from distant cities from flying to National Airport. Such an attempt might well give rise to a constitutional claim. Rather, the perimeter rule gives travelers a choice. Those who prefer nonstop service may use Dulles; those who do not mind a stopover in Chicago, Atlanta, St. Louis, Memphis, Pittsburgh, New Orleans, or Charlotte, may take a slightly lengthier trip and arrive at or depart from National. Whether they simply stop over or must change planes, the passengers who elect that alternative do leave from or arrive at National on a short-haul flight. The ultimate destination on the ticket cannot change that fact.

The rule comports with common sense. We propose the following example by way of illustration. A New Yorker with business in Washington will make the 53-minute flight in the morning, have a full day to transact his business, and still return home by evening. He carries with him nothing but a briefcase. By contrast, a business traveler from Houston who leaves at 7:00 a. m. does not arrive in the Washington area until 11:48 a.m. If he seeks to return home the same day, he has only the afternoon in which to complete his affairs. If, as seems more likely, he plans to stay overnight, he will carry baggage. Such luggage-laden travelers are precisely those who make National congested. They have less need of National's convenience to downtown than the one-day, arrive-and-return traveler whom we have described. The FAA's determination to reserve National for the short-haul passenger finds ample support in the practicalities of air travel.

A Modest Alternative

Houston generously proposes an alternative perimeter rule. Acting, apparently, on the theory that a perimeter rule is arbitrary, capricious, irrational, and unconstitutional if it excludes Houston but hunky-dory if not, Houston suggests that the FAA promulgate a 1,500-mile rule. That distance coincides with the approximate range of those jets currently serving National and, curiously enough, embraces Houston.

The FAA could have selected such a perimeter, just as it could have continued the status quo or closed National altogether, but it chose not to do so.

As it conceded, "The resultant policy is not likely to be acceptable to all factions, but it represents the (DOT's) views of the proper role and best use of these two airports in the public interest." Ours is not to reason why, ours is but to uphold the agency's decision if not arbitrary and capricious. Houston's suggestion finds even less support in logic or tradition than the FAA's rule. While the 1,000-mile rule at least possesses the virtue of continuity, the Houston proposal would bind National, a few years down the runway, to the traveling range of outdated aircraft. One might as well limit the perimeter to the range of the Wright Flyer.

The FAA has produced copious reasons for its choice. The various drafts of the EIS run several hundred pages, accompanied by exhibits and tables covering every possible alternative for National and Dulles. The EIS points to the problems that currently plague National-overcrowded parking lots and aircraft aprons, insufficient counterspace, traffic congestion, too little baggage claim area, harsh environmental effects on the airport's neighbors-and convincingly shows that, in the absence of a perimeter rule, National would absorb long-distance flights over and above its already overcrowded capacity, while Dulles would wither on the vine. The agency defends its choice of a 1,000-mile perimeter on the basis that it preserves the *status quo* but relieves the inequity that the 650-mile rule with its exceptions created.

As Justice Holmes once remarked,

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself, without regard to the necessity behind it, the line or point seems arbitrary. It might as well, or nearly as well, be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 41, 48 (1928) (Holmes, J., dissenting). The FAA's line is not "very wide of any reasonable mark." Our "thorough, probing, in-depth review," obliges us to uphold the FAA's decision.

Who's In Charge Here?

Even if it did not act arbitrarily and capriciously, the FAA, say American and Houston, lacked the statutory authority to impose a perimeter restriction. That argument fails to make it off the ground. The Federal Aviation Act and the FAA's

status as proprietor of National and Dulles provide independent support for its decision.

Curiously enough, the FAA has never grounded its decision on safety concerns. Rather, it asserts its rights as the proprietor of the two airports. Analogizing to the right of a store owner to run his business, FAA acted to manage, as best it could, the great and increasing volume of air traffic in the Washington area.

At the outset, we dispense with the claim that § 105 of the Federal Aviation Act, 49 U.S.C. § 1301 *et seq.*, bars the FAA from taking the actions it did. Section 105 of the Act, 49 U.S.C. § 1305, entitled Federal preemption, delineates the powers of airport proprietors. It reserves for the federal authorities control over "rates, routes or services of any (interstate) air carrier." Yet the statute also specifies that it deals with "the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport." The FAA does not fit within that definition. Nothing could be more certain than that the restrictions of § 1305 do not bind the FAA, an arm of the federal government which just happens to own two airports.

> *While it is true that Congress had reserved an extremely limited role for airport proprietors in our system of aviation management," the FAA is not the typical airport proprietor. To avoid interference with the preeminent authority of the federal government in the field of aviation, Congress, in § 1305, sought to prevent the proprietor of a rural airstrip from infringing upon the federal government's turf.*

While it is true that "Congress had reserved (an) extremely limited role . . . for airport proprietors in our system of aviation management," *British Airways Board v. Port Authority of New York and New Jersey*, 564 F.2d 1002, 1010 (2nd Cir. 1977), the FAA is not the typical airport proprietor. Why did Congress specify such a limited role? To avoid interference with the preeminent authority of the federal government in the field of aviation, Congress, in § 1305, sought to prevent the proprietor of a rural airstrip from infringing upon the federal government's turf. FAA obviously plays a different role. Houston and American claim, in effect, that the FAA may not take certain actions for fear of interfering with itself. The argument reduces to tautological gibberish.

Houston and American call attention to the FAA's actions in seeking an injunction against the John Wayne Airport ("JWA") in Orange County, California. JWA imposed a perimeter on flights from more than 500 miles away. The FAA

intervened, arguing that the airport exceeded its proprietary authority. The District Court agreed and granted the injunction. *Pacific Southwest Airlines v. County of Orange*, No. CV 81–3248 (C.D. Cal. Nov. 30, 1981).

The JWA affair does not undercut the FAA's actions. A local airport with no connection to nearby Los Angeles International or Ontario Airports, JWA could not blithely take such an action upon itself. Section 1305 removes control over routes, etc., from local airport proprietors. Petitioners again miss the key question, that is, whether the FAA is governed by the same rules as a local proprietor. The answer, obviously, is no.

Even if proprietary interest cannot legitimate its decision, the Federal Aviation Act grants the FAA the power to impose a perimeter. Section 1303 provides:

> In the exercise and performance of his powers and duties under this Act the (Secretary of Transportation) shall consider the following, among other things, as being in the public interest:
>
> (c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both.

Section 1348(a) of the Act states:

> The (Secretary) is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace.

In a similar vein, § 1353(a) declares:

> The (Secretary) is directed to make long range plans for and formulate policy with respect to the orderly development and use of the navigable airspace, and the orderly development and location of landing areas. . . .

To top it off, § 1354(a) provides:

> The (Secretary) is empowered to perform such acts, to conduct such investigations, to issue and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as he shall deem necessary to carry out the

> provisions of, and to exercise and perform his powers and duties under, this Act.

The terms of the Act clothe the FAA with authority to formulate policy for the efficient use of navigable airspace and landing areas. Without engaging in a word by word definition of those terms, we find these sections support the FAA's actions. Section 1354(a), finally, grants the Secretary the power to effectuate such policies.

We cannot, consistent with common sense, read these sections in any other way. The navigable airspace is of surprisingly little use if a plane cannot land or take off. To promote its "efficient utilization", the FAA must have the power to make rules and regulations governing not only the corridors of air traffic, but the use of airports as well. The perimeter rules help to accomplish that goal in the Washington area: by setting up an orderly plan for the development of National and Dulles, they aid in the efficient use of now-crowded airspace.

Houston and American refer us to provisions of the D.C. Code which govern such critical aspects of airport operation as the lost and found desk or water fountains. They cannot seriously contend that such powers, although important in their own way, constitute the outer limits of an airport proprietor's authority. The Federal Aviation Act is our handbook, and it ordains that the FAA may take whatever steps it considers necessary to carry out its statutory responsibilities.

Houston suggests that in the absence of statutory authority, the perimeter rule requires an "explicit grant of authority by Congress". We have already found that the Federal Aviation Act authorizes the rule. Even if the Act did not reach so far, however, Congress has stepped into the breach. In the Department of Transportation and Related Agencies Appropriations Act, *supra*, Congress froze the number of air carrier operations at National. The legislative record makes clear that Congress did not intend to hold up any of the other aspects of the Metropolitan Washington Airports Policy. Congressman Duncan, the Chairman of the House Committee, stated,

> In delaying the reduction of hourly slots, it was not our intention to disapprove or negate the overall Washington National Airport policy or to delay the balance of the plan. . . . It is not the intent of the conferees to interfere with whatever ultimate responsibility and authority the FAA may have for the orderly management of traffic at Washington National Airport. . . .

126 Cong. Rec. H 10049 (daily ed. Sept. 30, 1980) (statement of Rep. Duncan). The Senate Report on the bill confers that body's blessing as well. It states:

> The Committee is pleased to see the FAA adopt a final metropolitan Washington airports policy regarding the operations of Washington National and Dulles International Airports. The Committee has raised no objections to the proposed changes in operating procedures at Washington National. . . . The Committee expects prompt implementation of this policy through the issuance of appropriate Federal regulations.
>
> An obvious imbalance exists in the utilization of the three major airports serving the Baltimore-Washington metropolitan area. While on the one hand we have a gross underutilization of two large international airports, we find that on the other hand, National Airport absorbs approximately as much traffic as the other two combined. Although it is difficult to achieve a balance in addressing this problem, the Committee feels that the *FAA's recent announcement of a metropolitan Washington airports policy is a step in the right direction.*

S. Rep. No. 96–932, 96th Cong., 2d Sess. 27 (1980) (emphasis added).

Congress, whose members frequent the Washington area airports, knew of the FAA's actions in restricting service at National. These excerpts from the legislative record demonstrate that Congress in effect ratified that policy. "(A) consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has Congressional approval." *Kay v. FCC*, 443 F.2d 638, 646–47 (D.C. Cir. 1970). Thus, even if the FAA's action necessitated Congressional support, which it did not, Congress concurred in the agency's decision.

Authority, Authority, Who's Got the Authority?

In a last gasp objection, American and Houston protest that the CAB rather than the FAA bears the responsibility for economic regulation of aviation. Obviously they have not read the newspapers. For all intents and purposes, the CAB has folded its wings and gone into retirement. The Airline Deregulation Act of 1978 mandated a significant reduction in the governmental regulation of the airlines, and the CAB obediently has committed regulatory suicide. Surely someone must have the responsibility for National and Dulles airport. The CAB had it, but it has lost it. *See House Committee on Public Works & Transportation, Legislative History of the Airline Deregulation Act of 1978* (Comm. Print 1978). With the CAB off the radar scope, only the FAA-under the terms of the Federal Aviation Act-can assume such responsibility.

We find that the FAA, acting in its proprietary capacity as the owner/operator of National and Dulles, had express authority under the Federal Aviation Act to promulgate reasonable regulations concerning the efficient use of the navigable airspace. The perimeter rule falls within its grasp as a means of promoting such efficiency. Since we have held, *supra*, that the rule does not violate the APA, it follows that we must deny the petitions for review.

We find that the FAA, acting in its proprietary capacity as the owner/operator of National and Dulles, had express authority under the Federal Aviation Act to promulgate reasonable regulations concerning the efficient use of the navigable airspace. The perimeter rule falls within its grasp as a means of promoting such efficiency.

Have Perimeter Rule, Will Travel

Houston and American finally make the unlikely contention that the perimeter rule violates passengers' constitutional right to travel. While one could search forever for a clause explicitly conferring such a right and never discover one, the Supreme Court, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), did find such a guarantee. The Justices struck down a residency requirement for welfare recipients on the ground that it violated the constitutional right to travel freely from state to state.

> (T)he purpose of inhibiting migration by needy persons into the state is constitutionally impermissible. This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement.

Justice Brennan's opinion rested on the right of poor persons to migrate to another state in search of a better life. Residency requirements that might hinder such movement could not survive constitutional challenge. We have here no such claim. Neither Houston nor American suggests, nor could they, that the perimeter rule operates as a residency requirement to deny persons their constitutional right to travel. At most, their argument reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel. That notion, as any experienced traveler can attest, finds no support whatsoever in *Shapiro* or in the airlines' own schedules.

Final Approach

As we line up for our final approach, we glance back over the route we have taken. The FAA's perimeter rule for National Airport, we hold, rests on an adequate factual and statutory basis and does not violate the terms of the APA. We uphold the agency's actions and deny the petitions for review.

EXERCISE 1-6. *HOUSTON V. FED. AVIATION ADMIN.*—AIRPORT FLIGHT RESTRICTIONS

1. The *Houston v. Fed. Aviation Admin.* court described the FAA as "like any prudent entrepreneur, seek[ing] to increase business." Is the promotion of aviation commerce—in addition to safety—a part of the FAA's agency mission? *See* https://www.faa.gov/about/mission/. Should it be? Or, would that pose a conflict of interest? Explain.
2. Describe the "perimeter rule" created by the Department of Transportation in 1981, including a summary of its development. Also, discuss what powers does the FAA have under the Federal Aviation Act with respect to airport operations?
3. Explain how the Administrative Procedures Act ("APA") constrains agency action in legal proceedings, focusing on these elements:
    a. What type of agency action is prohibited under the APA?
    b. What is the standard by which a court reviews agency procedures?
    c. What presumptions do courts make under the APA with respect to agency decision-making?
    d. How much deference are federal agencies such as the DOT owed by courts?
4. What are the main arguments of the City of Houston and American Airlines with respect to the administrative imposition of a perimeter rule? Is the court persuaded by these positions? Explain.
5. Did the perimeter rule violate the constitutional right of airline passengers to travel? What did the court say? Explain your agreement or disagreement.

NOTES ON *HOUSTON V. FED. AVIATION ADMIN.*—LEGISLATIVE RESTRICTIONS ON AIR TRAVEL

1. ***Wright Amendment.***

The "perimeter rule" established in *Houston v. Fed. Aviation Admin.*—prohibiting airlines from operating nonstop flights between National Airport (now known as Reagan National Airport) in Washington, D.C.—is striking in that it impacted the right to travel not for operational or safety purposes but for traffic control. The Wright Amendment is another example of 1970s-era airport traffic diversion law, but for economic development purposes.

The 1979-law governed air traffic at Dallas Love Field. It restricted the number of non-stop flights airlines could fly from Love Field to destinations within Texas and neighboring states. It did so to encourage airlines flying in and out of Love Field to shift their operations to the then-new Dallas-Ft. Worth International Airport ("DFW"). Southwest Airlines refused to move to DFW or sign a related use agreement and litigation ensued to force Southwest from Love Field.

Southwest won. The Fifth Circuit Court of Appeals concluded that, "Southwest Airlines Co. has a federally declared right to the continued use of and access to Love Field, so long as Love Field remains open." *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 103 (5th Cir. 1977). *See also American Airlines v. Dep't of Transp.*, 202 F.3d 788 (5th Cir. 2000); *Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83 (Tx. Ct. App. 2000). The Wright Amendment was repealed in 2014, six years after an agreement among American Airlines, Southwest Airlines, and the Cities of Dallas and Ft. Worth to end the law.

Southwest Airlines founder (and lawyer) Herbert D. Kelleher—used the litigation to fuel the airline's narrative as the proverbial little guy in a veritable David-versus-Goliath battle for the right to fly. *See generally* KEVIN FREIBERG & JACKIE FRIEBERG, NUTS! SOUTHWEST AIRLINES' CRAZY RECIPE FOR BUSINESS AND PERSONAL SUCCESS 10 (Broadway Books 1996) ("The people of Southwest Airlines are crusaders with an egalitarian spirit who truly believe they are in the business of freedom."). That said, even Kelleher noted that, "[t]he Wright Amendment is a pain in the ass, but not every pain in the ass is a constitutional infringement." *See also* John Grantham, *A Free Bird Sings the Song of the Caged: Southwest Airlines' Fight to Repeal the Wright Amendment*, 72 J. AIR L. & COM. 429 (2007); Robert B. Gilbreath & Paul C. Watler, *Perimeter Rules, Proprietary Powers, and the Airline Deregulation Act: A Tale of Two Cities . . . and Two Airports*, 66 J. AIR L. & COM. 223 (2000).

2. ***Taxes and the Right to Travel.***

Taxes can be a significant burden on aviation interests and may potentially interfere with the fundamental right to travel to an unacceptable extent. For example, in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), the Supreme Court of the United States held that the Commerce Clause does not prohibit states or municipalities from charging commercial airlines a "head tax" on passengers boarding flights at airports within their jurisdiction, to defray the costs of airport construction and maintenance: "At least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users."

Congress enacted the Anti-Head Tax Act ("AHTA") to address a concern that the Evansville-Vanderburgh Airport Authority Dist. case would prompt a proliferation of local taxes burdensome to interstate air transportation. *See Aloha Airlines, Inc. v. Director of Taxation of Haw.*, 460 U.S. 1078 (1983) ("The head tax . . . cuts against the grain of the traditional American right to travel among the States."). *See also* S. Rep. No. 93–12, p. 4 (1973) (Congress intended AHTA to "ensure . . . that local 'head' taxes will not be permitted to inhibit the flow of interstate commerce."). *See, e.g., Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994) (evaluating the claim of seven commercial airlines that certain airport user fees charged to them were unreasonable and discriminatory in violation of the AHTA and the Commerce Clause). For further discussion of the taxation of aviation commerce see generally *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986) and *Massachusetts v. United States*, 435 U.S. 444 (1978).

For further discussion of taxes of aviation operations see generally Anthony Ryan, *How Airline Security Fees in a Post September 11, 2001 Environment are Spiraling Out of Control*, 29 TRANSP. L.J. 253 (2002); Carolyn P. Meade, Note, *Aviation Taxes: Can We Leave FAA Funding on Auto-Pilot?*, 20 VA. TAX. REV. 191 (2000).

Suggested Further Reading

Lindsay Ray Altmeyer, *Freedom to Fly: An Analysis of the Constitutional Right to Air Travel*, 80 J. AIR L. & COM. 719 (2015)

Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. INFO. TECH. & PRIVACY L. 639 (2014)

Kathryn E. Wilhelm, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U. L. Rev. 2461 (2010)

Gregory B. Hartch, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457 (1995)

Tracy Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on* the *Streets*, 75 CORNELL L. REV. 1258 (1990)

Note, *State Parochialism, and Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989)