# THE LIBERTY-SPEECH FRAMEWORK: RESOLVING THE TENSION BETWEEN FOREIGN AFFAIRS POWER AND FIRST AMENDMENT FREEDOMS

*Christiaan Highsmith*[*]

INTRODUCTION ..... 745
I. THE "SOLE ORGAN" APPROACH TO FOREIGN AFFAIRS POWER ..... 749
A. *The* Curtiss-Wright *Framework* ..... 750
B. *The Logan Act* ..... 751
C. *Criticizing the "Sole Organ" Tradition* ..... 754
II. THE RIGHT TO TRAVEL ABROAD: DEVELOPING THE LIBERTY-SPEECH BALANCING FRAMEWORK ..... 756
A. *The Fifth Amendment Right to Travel* ..... 757
B. *Travel as Information-Gathering* ..... 758
C. *An Alternative Framework: Justice Douglas's* Zemel *Dissent* ..... 759
D. *A Return to* Curtiss-Wright *Executive Deference* ..... 761
E. *Speech and Travel* – Clancy*'s New Framework* ..... 764
F. *Analyzing* Clancy ..... 766
III. THE LIBERTY-SPEECH FRAMEWORK ..... 767
IV. APPLYING THE FRAMEWORK: MILITARY RESTRICTIONS ON REPORTING ..... 769
A. *Models of War Reporting* ..... 771
B. *Legal Challenges to Press Restrictions During War: Applying the Liberty-Speech Balancing Framework* ..... 774
CONCLUSION ..... 779

## INTRODUCTION

During the Persian Gulf War of 1991, the United States military implemented its most controlling press policy in history.[1] Reporters covering the war were organized into "pools," which the military declared were the only permitted method of covering the war.[2] Military personnel determined where the pools could go, retained the right to censor reporting, and escorted reporters at all times.[3] Only one-tenth of the journalists who applied for a place in the "pools" reached the front lines, and journalists who attempted to

[*] J.D. Candidate, Boston University, 2008. Many thanks to Professor Pnina Lahav for guidance in developing this Note, to Alex Mocanu for his editorial feedback, and to my good friend and colleague Ben Strawn for his excellent assistance.

[1] THE MEDIA AND THE WAR ON TERRORISM 11 (Stephen Hess & Marvin Kalb eds., 2003)

[2] David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 54 (2005).

[3] *Id.*

cover the front lines without a military escort risked being detained by the U.S. military.[4] Most Americans learned about developments in the war from military officers who delivered information through televised briefings.[5] Enraged by the restrictive pooling system, a coalition of media organizations sued the Department of Defense, alleging the system violated a First Amendment right to gather news.[6] The court dismissed the claim in *Nation Magazine v. United States Department of Defense*, but the constitutional issue remained unresolved because the Defense Department lifted its reporting regulations in the late stages of the war, thus mooting the question.[7]

Ten years later, during the 2001 invasion of Afghanistan and the 2003 invasion of Iraq, the military employed a new system of regulating the media more suited to a war in which the enemy also targeted reporters. Under the "embed" system, journalists lived and traveled with U.S. troops, reporting while "on the ground" and under military protection.[8] In exchange for access to the front lines and for living among American soldiers, reporters agreed to a "security review" of their work to ensure that they did not publish sensitive information, including specific geographic locations, troop numbers, and enemy effectiveness.[9] While the embed system addressed many of the concerns presented by the Gulf War pooling system, it created a set of its own problems. First, embedded reporters are likely to have a pro-military bias because they rely on their unit for protection and camaraderie.[10] Second, in *Flynt v. Rumsfeld*, the D.C. Circuit allowed the military to control access to information by refusing to grant reporters' applications to embed, and by subjecting reporting to a "security review."[11] In *Flynt v. Rumsfeld*, the court of appeals for the District of Columbia ruled that the military may reject a reporter's application to embed with the military. Thus, by regulating which reporters gain access to the front lines, and by subjecting those reporters to "security review," the military is able to control the flow of information from the front lines back to the U.S. population.

---

[4] *Id.* at 54.

[5] *See* THE MEDIA AND THE WAR ON TERRORISM, *supra* note 1, at 11.

[6] Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1561 (S.D.N.Y. 1991).

[7] *Id.* at 1562.

[8] *See* Directive No. 5122.5 (U.S. Dep't of Def. Sept. 27, 2000), http://131.84.1.34/whs/directives/corres/pdf/512205p.pdf.

[9] Elana J. Zeide, Note, *In Bed with the Military: First Amendment Implications of Embedded Journalism*, 80 N.Y.U. L. REV. 1309, 1315-16 (2005) (arguing that embedded journalism is the best approach to furthering First Amendment values).

[10] *See* CHRIS AYERS, WAR REPORTING FOR COWARDS 13 (2005) (admitting that embedded reporters such as the author were not impartial); *see also* THE MEDIA AND THE WAR ON TERRORISM, *supra* note 1, at 170 (according to *New York Times* correspondent Michael Gordon and *Washington Post* reporter Carol Morello, the military's embed program did not yield much valuable reporting during the early part of the Afghanistan war).

[11] Flynt v. Rumsfeld, 355 F.3d 697, 702-03 (D.C. Cir. 2004) (holding that there is no First Amendment right for the press to go into battle with the military).

Despite the importance of war reporting, legal challenges to military restrictions on wartime press coverage are rare.[12] Moreover, few authors have written about challenges to military regulations on war reporting, and those who have done so apply the legal framework from domestic free speech law.[13] The two war reporting cases mentioned above reflect a unique tension between First Amendment freedoms and the executive branch's pursuit of foreign policy goals. Indeed, there appears to be a different constitutional standard for First Amendment protections in the domestic arena than in the foreign affairs arena.[14] Courts do not apply the familiar, strict scrutiny approach to First Amendment challenges when the Executive's foreign affairs powers are at issue.[15] Instead, courts use the less restrictive approach developed in *United States v. Curtiss-Wright Export Corp*.[16] *Curtiss-Wright* and its progeny are far more deferential to government actions pursuant to the foreign affairs power. Even when those actions impinge First Amendment rights, "the conduct of foreign relations . . . [is] so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[17] The doctrine in *Curtiss-Wright* has been developed and extended over the years to cases involving the First Amendment and the Fifth Amendment right to travel abroad. The First Amendment and the right to travel abroad are closely interconnected because the right to travel may be exercised for purposes related to free speech, free expression, and free association.

Wartime reporting implicates both the right to travel and First Amendment freedoms because it requires that reporters have the right to travel for the purpose of gathering information. Instead of fully addressing the First Amendment and right to travel implications of military restrictions on war reporting, courts have dismissed legal challenges to these restrictions without sufficiently protecting the right to travel abroad for the purpose of gathering information and reporting back to the American population. Indeed, the Court

[12] *See, e.g.*, Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1561 (S.D.N.Y. 1991); *Flynt*, 355 F.3d at 697.

[13] *See generally* Anderson, *supra* note 2; Zeide, *supra* note 9.

[14] *See* Brad R. Roth, *The First Amendment in the Foreign Affairs Realm: "Domesticating" the Restrictions on Citizen Participation*, 2 TEMP. POL. & CIV. RTS. L. REV. 255, 257 (1993); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 697-704 (2002).

[15] *Compare* Haig v. Agee, 453 U.S. 280, 292 (1981) (stating that the Executive's exercise of the foreign affairs power is "'largely immune from judicial inquiry or interference'" (quoting Harisiades v. Shaughnessy, 342 U.S. 580 (1952)), *with* NAACP v. Button, 371 U.S. 415, 439 (1963) (outlining the strict scrutiny standard for government infringement of First Amendment rights).

[16] 299 U.S. 304 (1936).

[17] *Agee*, 453 U.S. at 292 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952) (holding that deporting a resident alien for prior membership in the Communist Party, when such membership was lawful and unregulated, did not violate the First Amendment)).

has declared that the "right to speak and publish does not carry with it the unrestrained right to gather information."[18]

Instead, courts should adopt the alternative approach developed in the Warren Court's travel cases. Combining Justice Douglas's dissent in *Zemel* and Justice Brennan's dissent in *Agee*[19] provides a standard that protects both the First and Fifth Amendment components of the right to travel for the purpose of information gathering.[20] This approach would require courts evaluating government regulations touching combined Fifth Amendment "liberty" interests and related First Amendment rights – such as the right to international travel – to ensure the regulations are narrowly drawn to meet the precise evil addressed by the government action.[21] This framework would also require courts to balance the importance of the speech element against the government's foreign affairs interest, because the Fifth Amendment right to travel is interrelated with free speech and expression.[22] Thus, courts should apply heightened scrutiny to government restrictions on the interconnected Fifth and First Amendment right to travel abroad for the purpose of gathering information. This alternative approach would better protect the right to free speech in the foreign affairs context, and in particular during war time, when it is essential that journalists report accurate and unbiased information from the front to the general public.

The Note proceeds in four parts. Part I outlines the foreign affairs justification for restricting First Amendment freedoms. This Part analyzes the broad framework of plenary Executive foreign affairs power laid out in *United States v. Curtiss-Wright Export Co.*,[23] and the development and application of the Logan Act.[24] Part I concludes by critiquing the traditional, "sole organ" approach. Part II considers the Supreme Court's evolving jurisprudence on travel restrictions, culminating with a recent case evaluating a plaintiff's claimed right to travel to Iraq to serve as a human shield.[25] Part III presents an

[18] Zemel v. Rusk, 381 U.S. 1, 17 (1965).

[19] Haig v. Agee, 453 U.S. 280, 313-20 (1981) (Brennan, J., dissenting); *Zemel*, 381 U.S. at 23-26 (Douglas, J., dissenting).

[20] *See Agee*, 453 at 320 n.10 (Brennan, J., dissenting); *Zemel*, 381 U.S. at 23-24 (1965) (Douglas, J., dissenting); Aptheker v. Sec'y of State, 378 U.S. 500, 517 (1964); Kent v. Dulles, 357 U.S. 116, 126 (1958).

[21] *See infra* notes 119-27 and accompanying text.

[22] *See Agee*, 453 U.S. at 320 n.10; *cf. Zemel*, 381 U.S. at 23-26.

[23] 299 U.S. 304 (1936).

[24] Logan Act, 18 U.S.C. § 953 (2000). The Logan Act is an extant, eighteenth-century law prohibiting private citizens from unauthorized communication with foreign governments. *Id.*

[25] *See generally Zemel*, 381 U.S. 1; Kent v. Dulles, 357 U.S. 116, 129 (1958) (holding that the Secretary of State could not deny a passport on the basis that the applicant was a former Communist Party member because passport regulations promulgated by the Secretary of State must be expressly authorized by Congress); Clancy v. Office of Foreign Asset Control, No. 05-C-580, 2007 WL 1051767, at *1 (E.D. Wis. 2007).

alternative framework for resolving clashes between First Amendment freedoms and the government's foreign affairs power, which I call the liberty-speech balancing framework. This framework is drawn from the Warren Court's treatment of cases involving travel restrictions,[26] principally Justice Douglas's dissent in *Zemel v. Rusk*,[27] and Justice Brennan's dissent in *Haig v. Agee*,[28] which both emphasized the importance of the Fifth Amendment right to travel and the closely related freedoms protected by the First Amendment.

Part IV applies the liberty-speech balancing framework to evaluate First Amendment challenges to the military's war reporting regulations. This Part briefly discusses the history of military restrictions on war reporting, and then evaluates legal challenges to the military's pooling regulations during the Persian Gulf War and the "embed" system in place during the invasions of Afghanistan and Iraq. The Note concludes with a critical assessment of the military's ability to exert explicit and implicit pressure on reporters, which ultimately influences the quality and type of information disseminated to the American public. Therefore, under the framework proposed in Part III, the military must not be given the traditional judicial deference afforded to exercise of the foreign affairs power. War reporting triggers especially important First Amendment freedoms, freedoms that should be protected by the framework outlined in Part III rather than denigrated by the traditional deference afforded to the exercise of foreign affairs power.

## I. THE "SOLE ORGAN" APPROACH TO FOREIGN AFFAIRS POWER

To determine the executive branch's authority to restrict First Amendment protections under its foreign affairs power, it is necessary to establish the nature and extent of the foreign affairs power. In *United States v. Curtiss-Wright Export Corp.*,[29] the Supreme Court laid the foundation for the President's broad, plenary foreign affairs power.[30] This foundation comports with the Federalist Party's passage of the Logan Act,[31] which constrained free speech rights and helped solidify presidential primacy over foreign affairs. Together, *Curtiss-Wright* and the Logan Act stand for the "sole organ" principle – that the United States must speak with one voice in foreign affairs, usually the voice of the Executive Branch.[32] The "sole organ" principle set the stage for the Supreme Court's later decisions, discussed in Part II, holding that

[26] *See generally Kent*, 357 U.S. 116; *Zemel*, 381 U.S. 1; United States v. Robel, 389 U.S. 258 (1967); *see also* Haig v. Agee, 453 U.S. 280 (1981); *Clancy*, 2007 WL 1051767.

[27] *Zemel*, 381 U.S. at 24-26 (Douglas, J., dissenting).

[28] *Agee*, 453 U.S. at 313-20 (Brennan, J., dissenting).

[29] 299 U.S. 304 (1936).

[30] *Id.* at 319-20.

[31] 18 U.S.C. § 953 (2000).

[32] *Curtiss-Wright*, 299 U.S. at 319-20.

the executive branch may prohibit U.S. citizens from traveling abroad without violating either the Due Process Clause or the First Amendment.[33]

### A. *The* Curtiss-Wright *Framework*

The canonical *United States v. Curtiss-Wright Export Corp.* decision provided the framework for future Supreme Court jurisprudence by declaring the Executive's expansive authority in foreign affairs.[34] The opinion proceeds by first declaring that the government's foreign affairs power comes from outside the confines of the Constitution.[35] Second, it emphasizes the overwhelming importance of the government's foreign affairs power.[36] Third, the opinion states that the President speaks as a "sole organ" for the nation in foreign affairs.[37] Together, these declarations empower the President to prevent those outside the executive branch from speaking in the foreign affairs arena.

*Curtiss-Wright* upheld congressional legislation delegating President Roosevelt the power to prohibit arms sales to countries in South America.[38] Roosevelt immediately exercised his new power by making such sales illegal and by prosecuting violators.[39] Writing for the majority, Justice Sutherland first reasoned that the broad authority had both historical and practical justifications. While the Constitution expressly limits the federal government's power over domestic affairs, the government's foreign affairs power is derived from a source outside the Constitution – the British crown.[40] In separating from Great Britain, the foreign affairs power passed from the British crown to the federal government.[41] This separation and transfer of power occurred before the Constitution existed, and thus granted a power independent of the Constitution.[42] Second, Justice Sutherland emphasized the "important, complicated, delicate and manifold problems" inherent in foreign affairs.[43] Last, Justice Sutherland then took a third significant step. He held that the foreign affairs power should rest with the executive branch instead of

[33] Zemel v. Rusk, 381 U.S. 1, 15 (1965).

[34] *Curtiss-Wright*, 299 U.S. at 319-20; *see also* John Marshall, "Sole Organ" Speech, 10 ANNALS OF CONG. 613 (1800), *reprinted in* 18 U.S. (5 Wheat.) app. at 26-29 (1820) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.").

[35] *Curtiss-Wright*, 299 U.S. at 316.

[36] *Id.* at 319.

[37] *Id.* at 319-20.

[38] *Curtiss-Wright*, 299 U.S. at 312-13.

[39] *Id.*

[40] *Id.* at 316.

[41] *Id.*

[42] *Id.* at 316-17.

[43] *Id.* at 319.

Congress.[44] Justice Sutherland based this conclusion on John Marshall's "Sole Organ" speech[45] and on Article II of the Constitution, which grants the President sole power to negotiate treaties.[46]

B. *The Logan Act*

Although it was passed more than a century before *Curtiss-Wright*, the Logan Act also embodies the "sole organ" principle of foreign affairs. The Act does so in two limited areas – free speech and international travel – by prohibiting private citizens from unauthorized communication with foreign governments.[47] Originally passed by the Federalist Congress in 1799, the law exists today substantially in its original form.[48] The Logan Act subjects any

[44] *Id.*

[45] *Id.* (citing John Marshall, "Sole Organ" Speech, 10 ANNALS OF CONG. 613 (1800)).

[46] *Id.*; *see also* U.S. CONST. art. II, § 2.

[47] 18 U.S.C. § 953 (2000).

[48] In its present form, the Logan Act reads as follows:

> Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both.
>
> This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

*Id.*

When originally enacted, the Logan Act read:

> If any person, being a citizen of the United States, whether he be actually resident or abiding within the United States, or in any foreign country, shall, without the permission or authority of the government of the United States, directly or indirectly, commence, or carry on, any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States; or if any person, being a citizen of, or resident within the United State, and not duly authorized, shall counsel, advise, aid or assist in any such correspondence, with intent, as aforesaid, he or they shall be deemed guilty of a high misdemeanor, and on conviction before any court of the United States having jurisdiction therof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term not less than six months, nor exceeding three years: Provided always, that nothing in this act contained shall be construed to abridge the right of individual citizens of the United States to apply, by themselves, or their lawful agents, to any foreign government, or the agents thereof, for the redress of any injuries in relation to person or property which such individuals may have sustained from such government, or any of its agents, citizens or subjects.

Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT'L L. 268, 268 n.1 (1966).

American citizen to up to three years' imprisonment and a $5000 fine if that person, without authority, communicates with a foreign government intending to either influence that government with respect to a controversy of the United States or to defeat foreign affairs activities of the United States.[49] Since its passage, however, the Logan Act has been the basis for only one indictment and has never been used in trial.[50] Nonetheless, the act is significant because it manifests the tension between executive foreign affairs power and First Amendment freedoms.

The historical underpinnings of the Logan Act date to 1795. That year, the U.S. government signed the Jay Treaty with Great Britain, alienating France, a former U.S. ally.[51] As diplomatic tensions increased, President John Adams dispatched a delegation led by John Marshall to France to settle the dispute.[52] The trip, however, ended in a scandal known as the XYZ Affair, as French agents attempted to extort money and an apology from the American delegation.[53] American Federalists responded by criticizing France and the opposition Republican Party, which was viewed as sympathetic to the revolutionary French government.[54]

A private American citizen, friend of Thomas Jefferson, and Philadelphia Quaker, Dr. George Logan, sought to diffuse the situation by traveling privately to France in 1798 to meet with the French government.[55] Logan identified himself as a private citizen and stated that he did not intend to explain the official American government position to French officials.[56] Instead, Logan explained the anti-French sentiment in America and suggested ways France might improve the bilateral relationship.[57] Soon after the meeting, France eased its hard line towards the United States by lifting its trade embargo and releasing American sailors in French jails.[58]

In the aftermath of the XYZ Affair, however, there was significant anti-French sentiment in the United States. When Dr. Logan returned from France, congressmen on both sides of the aisle attempted to use his trip and his alleged ties to the French government to strengthen their parties's political power.[59] Seeking to portray a hard-line toward France, the Federalists who controlled Congress condemned Dr. Logan's private diplomacy, arguing that his endeavor

[49] Vagts, *supra* note 48, at 268.

[50] *Id.*

[51] Kevin M. Kearney, Comment, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285, 289-90 (1987).

[52] *Id.*

[53] *Id.*

[54] *Id.* at 290.

[55] *Id.* at 292-93.

[56] *Id.* at 293.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 294.

undermined President Adams's ability to execute foreign relations with France. The Federalist Congress subsequently passed the Logan Act as a way to condemn Dr. Logan and his alleged ties with politically unpopular France.[60]

Over its history, the Logan Act has been used as a political tool to threaten citizens engaged in private diplomacy and to solidify the President's foreign affairs power.[61] The Act's sole indictment came in 1803, when the U.S. Attorney for Kentucky indicted a farmer for writing a newspaper article advocating for a separate western American nation allied with France.[62] In a separate incident that same year, five American lawyers provided a legal opinion to the Spanish government that ran contrary to the opinions of the American government.[63] A Senate committee investigating the case concluded that the lawyers had violated the Logan Act, but no prosecution followed.[64] During World War I and in the years shortly following it, American citizens, such as Henry Ford, and politicians such as Presidential candidate Warren G. Harding, engaged in foreign affairs-related activities.[65] Congress briefly considered employing the Logan Act to prevent their interference, but again took no substantive action.[66] During the Vietnam War some considered invoking the Logan Act against Martin Luther King, Jr. for his communications seeking a resolution with North Vietnam.[67]

Although no one has gone to prison for violating the Logan Act, the Act remains important, standing for the notion that the President's foreign affairs power outweighs First Amendment freedoms. Additionally, the Logan Act is a political tool enabling administrations to criticize and undermine private citizen activity in foreign affairs by calling such action illegal. However, private citizen involvement in foreign affairs arguably has been beneficial in many situations. In the mid-1980s, Jesse Jackson met with Syrian officials to help release an American fighter pilot held captive by Syria.[68] A former American Ambassador to the Soviet Union secured the agreement of Soviet

[60] *Id.* at 294-96. Meanwhile, Republicans criticized the bill as an unnecessary extension of political power and a publicity stunt designed to increase popular support for the Federalist Party. *Id.* at 297.

[61] Vagts, *supra* note 48, at 270-81 (discussing how the Logan Act has been used as a powerful "weapon against the opposition and as a threat against those out of power").

[62] *Id.* at 271.

[63] *Id.* at 271-72.

[64] *Id.*

[65] *Id.* at 274-75.

[66] *See id.*

[67] *Id.* at 280 n.67.

[68] Hedrick Smith, *Administration and Jackson's Trip: Limits of Citizen Diplomacy Tested*, N.Y. TIMES, July 7, 1984, § 1, at 8. While the Reagan Administration supported Jackson's efforts to free the pilot, it opposed Jackson's private diplomacy later in the year when Jackson met with Fidel Castro of Cuba and leaders of the Sandinista government in Nicaragua to discuss relations between the countries. *Id.*

officials to increase cooperation with the United States.[69] Moreover, an American lawyer represented Nicaragua in a suit against the United States in part to compel Congress to take a more active role in U.S. foreign policy toward Latin America.[70] As is evidenced by the lack of prosecutions under the Act, executive branch reaction to private diplomacy has depended on the public's view of the private citizen involved and whether the effort would be beneficial to the presidential administration.[71]

### C. *Criticizing the "Sole Organ" Tradition*

The "sole organ" principle – embodied in *Curtiss-Wright* and the Logan Act – stands for the proposition that the President must be the country's one voice in foreign affairs and that courts should be deferential when adjudicating government actions involving the foreign affairs power. Critics, however, have questioned both *Curtiss-Wright* and the Logan Act, and some have suggested overturning *Curtiss-Wright* and rescinding the Logan Act.

Despite the frequent citations to *Curtiss-Wright*,[72] the opinion has been roundly criticized.[73] First, the decision has suffered criticism for its historical inaccuracies, prompting one scholar to state: "If good history is a requisite to good constitutional law, then *Curtiss-Wright* ought to be relegated to history."[74] Second, the decision has been criticized for its assumption that the foreign-affairs power of the British Crown passed unchanged to the government of the United States.[75] Clearly the source and breadth of power in

---

[69] *Id.*

[70] *See* Stuart Taylor Jr., *World Court To Hear the Nicaraguan Case Today*, N.Y. TIMES, April 25, 1984, at A4.

[71] *See id.*, stating:

> Other officials suggested that the President's different treatment of Mr. Jackson's trip to Central America and his visit to Syria in January reflected not only the political calculation that Mr. Jackson and the Democrats were now politically vulnerable but also that the diplomatic impact of his two missions was radically different. In January he had helped the Administration out of a predicament, but more recently he compounded its problems.

[72] *See, e.g.*, Haig v. Agee, 453 U.S. 280, 307-08 (1981); Zemel v. Rusk, 381 U.S. 1, 17 (1965); Clancy v. Office of Foreign Assets Control, 2007 WL 1051767, at *15 (E.D. Wis. Mar. 31, 2007).

[73] *See* Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, 83 YALE L.J. 1, 32 (1973) (stating that the history on which *Curtiss-Wright* rests is "'shockingly inaccurate'"). In addition, more recent scholarship argues that *Curtiss-Wright* departed from the prevailing view of allocation of power over foreign affairs existing prior to the 1936 decision. Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1091-92 (1999); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 8 (1999).

[74] Lofgren, *supra* note 73, at 32.

[75] Kearney, *supra* note 51, at 309-10.

the British monarchy differed from that in the American republic.[76] Government power in the United States derives from the Constitution and its democratic ratification. Thus, Justice Sutherland, the author of the *Curtiss-Wright* majority opinion, appears to have ignored both history and constitutional theory in elucidating his broad view of executive foreign-affairs power.[77] Justice Sutherland's one concession to restraints on executive power in the foreign affairs arena – that executive power is subject to constitutional constraint[78] – was so broad and obvious as to be nearly meaningless.[79] Thus, subsequent courts citing *Curtiss-Wright* have been deferential to the exercise of government power in the foreign affairs arena.[80] In the First Amendment context, courts have relied on *Curtiss-Wright* in granting the government additional leeway in dealing with international affairs matters involving freedom of speech and in restricting First Amendment rights more than in the domestic context.[81]

The Logan Act also stands as an important symbol of executive power and judicial deference to exercise of the foreign affairs power. As written, the statute appears to embody the notion that government foreign affairs power outweighs the importance of some First Amendment freedoms, namely, the right of an individual to express his view on American foreign policy to a foreign government.[82] Professor Detlev Vagts has argued that serious national security considerations, such as protecting military secrets, justify restraints on speech, but that preventing "embarrassment" in foreign affairs most likely does

[76] *Id.* at 310.

[77] *Id.*

[78] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) ("[L]ike every other governmental power, [foreign affairs power] must be exercised in subordination to the applicable provisions of the Constitution.").

[79] Kearney, *supra* note 51, at 321.

[80] *See, e.g.*, Haig v. Agee, 453 U.S. 280, 307-08 (1981); Zemel v. Rusk, 381 U.S. 1, 17 (1965); Clancy v. Office of Foreign Assets Control, 2007 WL 1051767, at *15 (E.D. Wis. Mar. 31, 2007). However, in a few situations this was not the case. After *Curtiss-Wright*, the Court began to weaken *Curtiss-Wright*'s holding, as it struck down legislation authorizing the federal government to deny a citizen's constitutional right to a trial by jury in the foreign affairs context. *See* Reid v. Covert, 354 U.S. 1, 5-6 (1957) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source."). Nor can Congress use the foreign affairs power to pass a statute permitting denaturalization of a lawfully naturalized citizen without his or her voluntary renunciation of American citizenship. Afroyim v. Rusk, 387 U.S. 253, 267 (1967) (holding that Congress cannot pass a statute revoking citizenship when a naturalized citizen votes in another country's election); Schneider v. Rusk, 377 U.S. 163, 167, 169 (1964) (holding that Congress cannot revoke citizenship when a naturalized citizens leaves the U.S. and lives in his or her homeland for three years or more).

[81] *See* Spiro, *supra* note 14, at 697-702.

[82] *See* 18 U.S.C. § 953 (2000).

not.[83] While the Logan Act may cover some actions that severely implicate national security, it is so broad and vague that it covers more than justifiable government interests.[84] Thus, the Logan Act may be unconstitutional for failing to clearly inform citizens of what constitutes improper conduct under the Act as well as for limiting free speech.

## II. THE RIGHT TO TRAVEL ABROAD: DEVELOPING THE LIBERTY-SPEECH BALANCING FRAMEWORK

Subsequent to the Logan Act, both Congress and the executive branch sought to further restrict Americans' right to travel abroad. The Warren Court addressed a line of cases involving statutes and executive orders restricting international travel that provides a body of law tying the First Amendment to the right to travel abroad. Initially, the Court grounded the right to travel in Fifth Amendment "liberty," which cannot be deprived without due process of law.[85] Later, the Supreme Court tied the right to travel to the First Amendment and sought to protect First Amendment freedoms when ruling on international travel restrictions.[86] In tying the right to travel to the First Amendment, the Warren Court departed from *Curtiss-Wright*'s deferential approach to resolving the foreign affairs power-fundamental freedoms tension.[87] By the early 1980s, however, the Burger Court marked a turning point in *Haig v. Agee*,[88] and returned to *Curtiss-Wright*-style deference to executive branch foreign affairs power.[89] Excessive deference continues to inhibit proper protection of the First and Fifth Amendment-based right to travel.[90] While one federal district court has taken the novel approach of analyzing a mixed foreign travel and free speech case under a domestic free speech standard, that court invoked *Curtiss-Wright* deference in resolving the tension between First Amendment freedoms and the foreign affairs power in favor of the Executive.[91] Thus, the district court upheld executive branch regulations prohibiting travel to Iraq in order to protest American foreign policy toward Iraq.[92] Despite the often unfavorable results, an analytical framework emerges from these cases that, as will be shown in Parts III and IV, is useful for

[83] Vagts, *supra* note 49, at 298-99.

[84] *Id.* at 299-300.

[85] *See* Kent v. Dulles, 357 U.S. 116, 125-27 (1958).

[86] *See generally* Zemel v. Rusk, 318 U.S. 1 (1965); Aptheker v. Sec'y of State, 378 U.S. 500 (1964); *Kent*, 357 U.S. 116.

[87] *See generally* United States v. Robel, 389 U.S. 258 (1967).

[88] 453 U.S. 280, 306-09 (1981).

[89] *See infra* Part II.D.

[90] *See infra* Part II.E.

[91] *See infra* Part II.E.

[92] Clancy v. Office of Foreign Asset Control, No. 05-C-580, 2007 WL 1051767, at *16 (E.D. Wis. Mar. 31, 2007).

resolving the tension between First Amendment freedoms and the government's exercise of its foreign affairs power.[93]

### A. *The Fifth Amendment Right to Travel*

The Supreme Court first recognized a Fifth Amendment right to international travel in *Kent v. Dulles*.[94] The Secretary of State had promulgated regulations – based on Congressionally delegated authority under the Passport Act of 1926 – denying passports to Communists or persons suspected of going abroad to further Communist causes[95] and allowing the Passport Division to require a non-Communist affidavit from the passport applicant.[96] Writing for the majority, Justice Douglas recognized a citizen's right to international travel as a part of his or her Fifth Amendment "liberty," in part because it impacts beliefs, associations, and the transmission of ideas.[97] Accordingly, Justice Douglas wrote that the Court would narrowly construe powers delegated by Congress to the Executive Branch that "curtail or dilute" the right to travel.[98]

The Court next addressed the extent to which Congress authorized the Secretary of State to curtail the right to travel.[99] Under the Passport Act of 1926, Congress delegated to the Secretary of State the discretion to withhold passports from U.S. citizens in two discrete situations: (1) where a citizen does not owe allegiance to the U.S., and (2) where a citizen is engaging in illegal activity.[100] Because the regulations did not fall into one of the two categories, the Court held that Congress had not delegated the Secretary power to withhold a passport based on political affiliation.[101] Ultimately, *Kent* invalidated the regulations without deciding the extent of the right to travel

[93] Scholars have conceded that the framework for analyzing First Amendment cases involving foreign affairs lacks both clarity and structure. *See* Vagts, *supra* note 49, at 294. Moreover, there is a relative dearth of case law evaluating free speech in the foreign affairs realm, further highlighting the need for a new approach to evaluating First Amendment freedoms in the foreign affairs context. *See* Anderson, *supra* note 2, at 64.

[94] 357 U.S. 116 (1958).

[95] *Id*. at 117-18 n.1 (providing the regulatory text).

[96] *Id.* at 117 n.2 (providing the regulatory text that allowed the Passport Division to require a non-Communist affidavit with a passport application).

[97] *Id.* at 126-27 (citing CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 195-96 (1956)).

[98] *Id.* at 129.

[99] *Id.* at 127.

[100] *Id*. (discussing the Passport Act, § 212, 32 Stat. 386 (1902) (current version at 22 U.S.C. § 212 (2000))).

[101] *Id.* at 129. The Court admitted that more restrictive passport regulations applied during World Wars I and II. *Id.* at 128. However, the Court refused to equate the statutory construction problem in *Kent v. Dulles* with such a situation under the war power because *Kent* was not decided during war time and because Congress and the Executive had not acted together to curtail citizens' right to travel. *Id.*

abroad. Nonetheless, the Court struck down a rule restricting freedom of movement because a citizen refused to be subjected to inquiry into his beliefs and associations."[102]

Six years later, in *Aptheker v. Secretary of State*,[103] the Court reached the constitutional issue left untouched by *Kent*: the extent to which a statute could restrict a citizen's right to travel. In *Aptheker*, the petitioner challenged Section 6 of the Subversive Activities Control Act of 1950, which made it a crime for any member of a Communist organization to attempt to use or obtain a passport.[104] The statute applied regardless of whether one knew or believed he was associated with a Communist organization, and regardless of the member's degree of activity in the organization or purpose for traveling.[105] The Court declared that the "freedom of travel is a constitutional liberty closely related to rights of free speech and association" and therefore applied a test used in free speech cases.[106]

Thus, the Court implied that because of the close relationship between First Amendment freedoms and the right to travel, restrictions on the right to travel abroad should be subject to a similar constitutional analysis as restrictions on domestic free speech rights.[107] In *Aptheker*, this meant that an individual's constitutional liberties – even a Communist's constitutional liberties – outweighed the government's interest in safeguarding national security.[108]

### B. *Travel as Information-Gathering*

In *Zemel v. Rusk*,[109] the Court restricted the scope of the right to travel abroad by differentiating the right to travel for the purpose of gathering information from First Amendment freedoms. Following the Communist revolution in Cuba, Secretary of State Dean Rusk promulgated regulations pursuant to the Passport Act prohibiting most American citizens from traveling to Cuba.[110] Seeking to travel to Cuba, Zemel challenged the regulations as violating his Fifth Amendment right to travel and his First Amendment right to free speech and association. In particular, Zemel argued that his trip to Cuba was protected by the First Amendment because he sought to gather first-hand information about the impact of American foreign policy toward Cuba.[111]

Chief Justice Warren's majority opinion first held that under the Passport Act of 1926 Congress validly delegated power to the executive branch for the

[102] *Id.* at 130.
[103] 378 U.S. 500 (1964).
[104] *Id.* at 501-02.
[105] *Id.* at 510-11.
[106] *Id.* at 517.
[107] *Id.*
[108] *Id.* at 514.
[109] 381 U.S. 1 (1965).
[110] *Id.* at 9-12.
[111] *Id.* at 16.

purpose of restricting travel to Cuba.[112] After completing the administrative law analysis, the Court addressed Zemel's constitutional challenges. The Court reiterated the Fifth Amendment right to travel abroad, including an individual's liberty interest in international travel for the purpose of first-hand information-gathering. Furthermore, the Court agreed that travel restrictions impeded information gathering.[113] But, the Court differentiated information-gathering under the Fifth Amendment from the right to free speech, concluding that the First Amendment "right to speak and publish does not carry with it the unrestrained right to gather information."[114]

After differentiating the Fifth Amendment and First Amendment components of the right to travel, the Court ruled that the prohibition on travel to Cuba did not violate the First Amendment because it did not restrict the right to travel based on beliefs and associations.[115] To resolve the Fifth Amendment challenge, the Court employed a balancing test, and weighed the petitioner's liberty interest in traveling abroad against the government's interest in constraining that liberty. It recognized Cuba was a Communist country seeking to export Communist revolution to the rest of Latin America,[116] its record of imprisoning U.S. citizens without charges,[117] and that the President had a statutory duty to secure the release of American citizens unjustly deprived of liberty by a foreign government, which might involve the U.S. in a dangerous international incident.[118] Based on this analysis, the Court ruled that the government's interest in restraining citizens' right to travel to Cuba outweighed their liberty interest; therefore, the restrictions were constitutional.

### C. *An Alternative Framework: Justice Douglas's* Zemel *Dissent*

Dissenting in *Zemel v. Rusk*, Justice Douglas emphasized the interrelationship between the right to travel and free speech, and elucidated a constitutional framework protecting the free flow of information.[119] Under Justice Douglas's framework, legislation restricting rights related to First Amendment freedoms, such as the Fifth Amendment right to travel abroad,

[112] *Id.* at 9-12 (analyzing legislative history, amendments to the Passport Act of 1926, and Executive actions between passage of the original Act and subsequent amendments, and concluding that Congress intended to delegate this power to the executive branch).

[113] *Id.* at 16.

[114] *Id.* at 17.

[115] *Id.* at 13 (citing Kent v. Dulles, 357 U.S. 116, 127 (1958)).

[116] *Id.* at 14.

[117] *Id.* at 15.

[118] *Id.* at 15 & n.16 (citing 22 U.S.C. § 1732 (1958 ed.) for the proposition that the President is obligated to attempt to secure the release of wrongfully imprisoned American citizens).

[119] *Id.* at 24 (Douglas, J., dissenting).

"must be 'narrowly drawn' to meet a precise evil."[120] Unlike the majority, he refused to divorce the right to travel abroad from the foundational rights of citizens under the First Amendment.[121] Justice Douglas reasoned that the right to know, converse, and consult with others abroad gives "gives meaning and substance to freedom of expression and freedom of the press."[122] Consequently, he criticized the Court for not striking the provisions for "too broadly and indiscriminately" restricting the right to travel, which it had done the year before in *Aptheker*.[123] While peacetime travel restrictions promulgated by the executive branch could be upheld, they had to be supported by congressional authorization based on an explicit and compelling national interest.[124]

Thus, Justice Douglas proposed a test in which the right to travel enjoys heightened judicial scrutiny because it is tied up with free speech. Travel, he said, is "more than speech: it is speech brigaded with conduct."[125] Conduct may be regulated in order to protect society, but only if it does not unduly infringe free speech. Under Justice Douglas's conception, allowing United States citizens to travel to Cuba during peacetime to exchange ideas and gather information presented an insufficient threat to national security to justify restricting the right to travel.[126]

The Court later used Justice Douglas's framework in *United States v. Robel*[127] to resolve a clear conflict between a federal statute enacted pursuant to the government's war power and an individual's First Amendment right to associate with the Communist Party.[128] In *Robel*, the petitioner Communist Party member challenged a statute prohibiting Communist Party members from working in a "national defense" job. To resolve the statute's conflict with the First Amendment right to free association, the Court required the government to establish the constitutional validity of the means chosen to achieve the statute's national security goal. In particular, the Court required

[120] *Id.* at 25 (quoting Cantwell v. Connecticut, 310 U.S. 296, 307 (1940)). Justice Douglas further noted that government regulation, even with a legitimate and substantial purpose, could not be pursued by means that broadly stifle fundamental personal liberties when the goal could be achieved through more narrow means. *Id.* at 26 n.*.

[121] *Id.* at 23-24.

[122] *Id.* at 24 (citing Kent v. Dulles, 357 U.S. 116 (1958)). Douglas's dissent thus appears to have corrected the Court's failure to address the fact that it would be difficult, in 1965, to publish one's views about the impact of American foreign policy on Cuba without traveling there.

[123] *Id.* at 25.

[124] *Id.* at 25-26.

[125] *Id.* at 26.

[126] *Id.* (stating that "the right to travel is at the periphery of the First Amendment" and that the majority has incorrectly allowed the government to infringe on that right merely because of some political objective).

[127] 389 U.S. 258 (1967).

[128] *Id.* at 268 & n.20.

the government to show that the statute was narrowly drawn so as to avoid infringing the petitioner's First Amendment rights.[129] The Court struck down the regulation because it violated the individual's right to free speech and association.[130] Interestingly, the Court specifically declined to use a balancing test to weigh the government's national security interest against the individual's First Amendment rights. Instead, the Court recognized both interests as substantial, explaining that the Court's role was not to prioritize one over the other, but to analyze whether Congress's adopted means were constitutional.[131]

### D. *A Return to* Curtiss-Wright *Executive Deference*

Together, the travel cases and *Robel* established a two-step framework for resolving the tension between First Amendment freedoms and travel restrictions on the one hand, and the government's foreign policy power on the other. Under the framework, the Court first examined the foreign policy legislation or regulation for facial restrictions on expression or association.[132] If the legislation restricted travel and information-gathering without directly impinging First Amendment freedoms – as was the case in *Zemel* – the Court upheld the legislation provided the restrictions constituted an exercise of the Executive's weighty foreign affairs power.[133] If, on the other hand, the foreign policy-based restrictions directly impinged First Amendment freedoms – as was the case in *Aptheker* and *Robel* – the Court mitigated the conflict by demanding that such restrictions be narrowly drawn.[134] Although the Court recognized the importance of individual rights vis-à-vis the government's foreign affairs power, it refused to go as far as Justice Douglas's *Zemel* dissent, which protected the right to travel under a hybrid liberty-speech, heightened scrutiny standard.[135] Under Justice Douglas's approach, the right to travel enjoyed heightened scrutiny, requiring that restrictions on the right to travel be narrowly drawn to meet a precise evil.[136]

In 1981, however, the more conservative Burger Court replaced the framework with *Curtiss-Wright*-style judicial analysis in *Haig v. Agee*, emphasizing Executive power over foreign affairs. *Agee* upheld executive branch regulations that allowed the Secretary of State to revoke the passport of a former CIA agent seeking to travel internationally and expose the identity

---

[129] *Id.*

[130] *Id.* at 264 (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)) ("'[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.'").

[131] *Id.* at 268 n.20.

[132] *See* Aptheker v. Sec'y of State, 378 U.S. 500, 514 (1964).

[133] *See supra* Part II.B.

[134] *See supra* notes 103-08, 127-31, and accompanying text.

[135] *See supra* notes 125-26 and accompanying text.

[136] Zemel v. Rusk, 381 U.S. 1, 17 (1965) (Douglas, J., dissenting).

and location of covert CIA agents around the world.[137] The Court split its analysis into two parts. First, it held that the policy announced in the regulation used to revoke Agee's passport was "'sufficiently substantial and consistent' to compel the conclusion that Congress has approved it."[138] Citing *Curtiss-Wright* and John Marshall's "Sole Organ" speech, the Court declared that no government interest is more compelling than its national security interest, which Congress broadly delegates to the Executive.[139] Thus, the Court ruled that Congress's broad delegation of foreign affairs power to the executive branch under the Passport Act authorized the Secretary of State's broad restrictions on the right to travel abroad.[140]

Second, the Court held that the regulations did not infringe on constitutionally protected freedoms.[141] With respect to Agee's First Amendment claim, the Court held that First Amendment protection did not extend to Agee's disclosures because they had the declared purpose of revealing the location and identity of secret CIA agents.[142] The Court also dismissed Agee's Fifth Amendment claim that his right to travel was a protected "liberty" interest. In its ruling, the Court distinguished between the "freedom" to travel abroad and the "right" to travel within the United States.[143] The "freedom to travel abroad," the Court concluded, "is subordinate to national security and foreign policy considerations."[144] Therefore, the government's national security interest easily outweighed the individual's right to travel abroad, and the Court upheld the government regulation.

In his dissent, Justice Brennan roundly criticized the majority's analysis as a significant and mistaken deviation from the framework established in the right to travel cases. Justice Brennan first argued that the majority had delegated too broadly to the Executive lawmaking power over international travel.[145] Instead, the Court should have narrowly construed the delegation of the foreign affairs power to the President because restricting an individual's ability to

---

[137] Haig v. Agee, 453 U.S. 280, 280-81 (1981).

[138] *Id.* at 306 (quoting *Zemel*, 381 U.S at 12).

[139] *Id.* at 291, 307 (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-20 (1936)).

[140] *Agee*, 453 U.S. at 291 (citing the Passport Act, 22 U.S.C. § 211a (2000)). The Passport Act, states in pertinent part:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular officers of the United States . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

22 U.S.C. § 211a.

[141] *Id.* at 306.

[142] *Id.* at 308-09.

[143] *Id.* at 306.

[144] *Id.*

[145] *Id.* at 319 (Brennan, J., dissenting).

travel abroad "touches an area fraught with important constitutional rights."[146] Justice Brennan also addressed the constitutional issues presented in the case. He argued that the Court should have recognized that the travel restriction impinged the First Amendment because it chilled Agee's right to speak. Because of the speech element, Justice Brennan argued that the Court should have weighed the government's interest in the travel restriction against Agee's right to speak.[147]

While the Court's outcome in *Agee* is undoubtedly correct, Justice Brennan's arguments are convincing. The majority ignored precedent protecting First Amendment freedoms and reiterated the *Curtiss-Wright* conception of foreign affairs power trumping individual rights. Thus, it dismissed all First Amendment protection because some of Agee's statements would harm national security.[148] Justice Douglas's framework in *Zemel* would have protected First Amendment freedoms while reaching the same result. Under the Douglas approach, the Court would have considered the First Amendment freedoms implicated in *Agee* and ensured that the restrictions at issue were narrowly drawn to meet the precise evil. And under Justice Brennan's continuation of the Douglas approach, the Court should have then balanced the speech element of the restrictions against the government's national security/foreign affairs interest.

Although prohibiting Agee from international travel was a narrowly drawn government action necessary to meet the precise evil of him disclosing specific national security secrets, the Court did not engage in that analysis. Nor did the Court balance the free speech implications of the regulations against the government's interest in national security. Instead, the Court simply stated that the foreign affairs power provided a blanket justification for denying the existence of First Amendment rights in this situation. By giving the President plenary power over foreign affairs, *Agee* poses problems for a democratic republic. James Madison highlighted the danger of plenary presidential power over foreign affairs in his arguments with Alexander Hamilton.[149] One of the great dangers to a free government, Madison argued, is the existence of an executive branch that both enacts and executes laws.[150] In foreign affairs, it would seem the President has the power to do both.

---

[146] *Id.* at 318.

[147] *Id.* at 320 n.10.

[148] *Id.* at 279-80 (majority opinion).

[149] LETTERS OF HELVIDIUS, NO. I, *reprinted in* 6 THE WRITINGS OF JAMES MADISON 138-75 (Gaillard Hunt ed., 1906). *But see* PACIFICUS, NO. I, *reprinted in* 4 THE WORKS OF ALEXANDER HAMILTON 76-85 (Henry Cabot Lodge ed., 1904) (arguing that the text of the Constitution provides the President with broad powers, especially in times of war).

[150] LETTERS OF HELVIDIUS, NO. I, *supra* note 149, at 138-75.

E. *Speech and Travel* – Clancy*'s New Framework*

In *Clancy v. Office of Foreign Asset Control*,[151] the Eastern District of Wisconsin chose a novel middle ground to resolve a new case involving the right to travel. Instead of applying the Warren Court framework or *Haig v. Agee* deference to the Executive, the *Clancy* court applied the domestic free speech standard in *United States v. O'Brien*,[152] thus recognizing the interconnectedness of the Fifth Amendment right to travel and free speech. The *Clancy* court upheld an $8,000 fine imposed by the Treasury Department's Office of Foreign Asset Control ("OFAC") on petitioner Clancy for his travel to Iraq in the weeks before the March 2003 invasion of Iraq.[153] According to the OFAC, Clancy's trip violated the OFAC's Iraqi Sanctions Regulations[154] (the "Regulations") prohibiting travel and provision of services to Iraq.[155] Clancy had traveled to Iraq in the weeks before the U.S. invasion to serve as a human shield for potential bombing targets.[156] Clancy appealed the OFAC fine and argued that his trip to Iraq was protected by the First Amendment because it "'communicated the specific message that Mr. Clancy supports peace, and . . . that innocent Iraqi civilians should not be harmed either by a U.S. military strike or by the Iraqi regime.'"[157] In other words, Clancy claimed that his trip to Iraq was protected by the First Amendment because the trip "communicated his beliefs about the situation in Iraq."[158]

The *Clancy* court acknowledged that the Regulations had an incidental effect on free speech and applied the domestic free speech law – the intermediate scrutiny, four-factor balancing test established in *United States v. O'Brien*[159] for situations where both speech and nonspeech elements are combined in the same course of conduct.[160] The court acknowledged that Clancy had engaged in a form of protest, albeit a unique one, and that the Regulations incidentally burdened his First Amendment rights to express his views on U.S. foreign policy.[161] Thus, the court applied *O'Brien*'s four-factors test, which upholds a government regulation if: (1) it is within the government's constitutional power; (2) it furthers an important or substantial government interest; (3) the government interest is unrelated to suppressing

[151] No. 05-C-580, 2007 WL 1051767 (E.D. Wis. Mar. 31, 2007).

[152] 391 U.S. 367 (1968).

[153] *Clancy*, 2007 WL 1051767, at *20.

[154] Iraqi Sanctions Regulations, 31 C.F.R. pt. 575 (2007).

[155] *Clancy*, 2007 WL 1051767, at *6.

[156] *Id.*

[157] *Id.* at *14.

[158] *Id.*

[159] 391 U.S. 367, 376-77 (1968).

[160] *Clancy*, 2007 WL 1051767, at *14.

[161] *Id.* ("While the First Amendment claim is tenuous, the regulatory scheme may be viewed as having the incidental effect of burdening speech . . . .").

free speech; and (4) the incidental restriction on First Amendment freedom is no greater than is essential to the furtherance of that interest.[162]

In regards to the first prong, the *Clancy* court found that the OFAC regulations fell within the authority of the executive branch.[163] Indeed, they were promulgated by the executive branch at the height of its foreign policy authority pursuant to two Executive Orders by President George H. W. Bush and authorizing legislation from Congress.[164] The Executive Orders declared the threat posed by Iraq's invasion of Kuwait a "national emergency" and imposed sanctions on Iraq to protect national security.[165] The OFAC then promulgated Regulations prohibiting both the exportation of services to Iraq from the United States and travel by a U.S. citizen to Iraq. Therefore, the court concluded that the Regulations satisfied the first prong of *O'Brien*.

The court quickly dismissed *O'Brien*'s second prong because the government had a strong interest in security and foreign policy and economic sanctions against Iraq may have furthered those interests.[166] The court instead focused on the third and fourth prongs of the test. Under the third prong, the court must determine whether the governmental interest is related to suppressing an individual's freedom of expression. This appears to present a relatively low bar for government regulations. The *Clancy* court concluded that the government's interest in imposing economic sanctions on Iraq to alleviate Iraq's threat to American national security following its invasion of Kuwait was "clearly unrelated to the suppression of free expression."[167] In other words, the purpose of the Regulations was not to restrict the flow of

[162] *O'Brien*, 391 U.S. at 377.

[163] *Clancy*, 2007 WL 1051767, at *17.

[164] Three pieces of congressional legislation empowered President Bush to regulate or prohibit economic relations or communications between Iraq and its nationals and the U.S. and its nationals: the United Nations Participation Act, 22 U.S.C. § 287c (2000) (authorizing the President, pursuant to measures adopted by the United Nations Security Council, to regulate or prohibit economic relations and other means of communication between any foreign country or its nationals and the United States or those subject to its jurisdiction), the International Emergency Economic Powers Act, 50 U.S.C. § 1701(a) (2000) (granting the President power to deal with any unusual and extraordinary threat to national security from outside the United States if the President declares a national emergency), and the Iraq Sanctions Act of 1990, 50 U.S.C. § 1701 Note (2000) (repealed 2003). The Iraq Sanctions Act of 1990 declared support for the President's Iraq sanctions regime and ensured that the executive branch was operating at the height of its foreign policy authority when issuing the Iraqi Sanctions Regulations. *See* 50 U.S.C. § 1701 Note (2000).

[165] Exec. Order No. 12,722, 3 C.F.R. 294 (1990), *reprinted in* 50 U.S.C. § 1701 (2000) (declaring a national emergency to deal with the threat from Iraq, and prohibiting imports and exports and travel to or from Iraq); Exec. Order No. 12,724, 3 C.F.R. 297 (1990), *reprinted in* 50 U.S.C. § 1701 (2000) (prohibiting imports from and exports to Iraq and prohibiting transactions and travel involving Iraq).

[166] *See* Haig v. Agee, 453 U.S. 280, 307 (1981).

[167] *Clancy*, 2007 WL 1051767, at *15.

information or ideas, but to restrict the flow of dollars to a dangerous nation. The restriction of expression was merely incidental to the general purpose of the Regulations.[168]

Under the fourth prong, the Regulations' incidental restrictions on speech may be no greater than is essential to the furtherance of the government's interest.[169] Here the court concluded that the restriction on Clancy's ability to demonstrate his opposition to U.S. foreign policy was no greater than was essential to further the government's "weighty" interest in national security and foreign policy.[170] The court justified its holding on the fourth prong by arguing that exceptions to the Regulations allowed travel to Iraq for three purposes: (1) to help a U.S. citizen or permanent resident depart Iraq or Kuwait, (2) to conduct the official business of the U.S. government, and (3) to conduct journalistic activity, although only by a person regularly employed in such capacity by a newsgathering organization.[171] Thus, the Regulations specifically prohibited Clancy's form of political expression and any form of on-the-ground fact-finding, newsgathering, or protest for anyone other than a professional journalist.

### F. *Analyzing* Clancy

Such restrictions on First Amendment expression seem overbroad, especially in light of the interests highlighted by Justice Douglas in his dissent from *Zemel v. Rusk*[172] and by Justice Brennan in his dissent from *Haig v. Agee*.[173] Clearly there is an argument that if Clancy had been wrongly imprisoned in Iraq, the United States would have had to intervene, and thus be drawn into an international incident. But this is a risk with journalists as well as private citizens. Moreover, the right to travel and gather information is tied up with First Amendment freedoms. The proper form of judicial analysis under Justice Douglas's model is to subject the restriction on travel to heightened scrutiny because travel is connected to free speech. Doing so would ensure that the government regulation is narrowly drawn to avoid conflict with First Amendment freedoms. Under Justice Douglas's narrowly drawn requirement, there is an argument that these Regulations prohibit more conduct than is essential to the government's interest in national security and foreign policy. After testing the regulation to determine whether it is narrowly drawn, under Justice Brennan's approach in *Agee* the court should balance the regulations' free speech infringement against the government's interest in national security furthered by the regulations. This dual approach would require the Court to fully access the importance of the interconnected rights to

---

[168] *Id.* (quoting Teague v. Reg'l Comm'r of Customs, 404 F.2d 441, 445 (2d Cir. 1968)).

[169] *Id.* at *16.

[170] *Id.*

[171] 31 C.F.R. § 575.207 (2007).

[172] Zemel v. Rusk, 381 U.S. 1, 23-26 (1965) (Douglas, J., dissenting).

[173] Haig v. Agee, 453 U.S. 280, 313-20 (1981) (Brennan, J., dissenting).

free speech, free expression, free association, and international travel. Under this combined analysis from the *Zemel* and *Agee* dissents, the Regulations could be overturned because they infringe upon peripheral First Amendment rights.

Rather than utilizing a Douglas-Brennan approach, *Clancy* analyzed incidental restrictions on speech posed by the Iraqi Sanctions Regulations under the *O'Brien* test,[174] bringing First Amendment rights in the foreign affairs realm more in line with domestic free speech. Although it used a domestic free speech framework, the court's holding still appears to have been influenced by a reluctance to invoke the First Amendment against executive branch foreign policy decisions. At the beginning of the opinion, the court emphasized that the President has broad authority to effectuate foreign policy using economic tools.[175] Later, in evaluating Clancy's free speech claim, the court stated that *Curtiss-Wright* empowered the executive branch to promulgate the Regulations.[176] Finally, the court juxtaposed the "incidental restriction on alleged First Amendment freedoms" with the President's "weighty" foreign relations interest.[177] This *Curtiss-Wright*-style deference to executive power was *Clancy*'s major shortcoming. The approach presented by Justices Douglas and Brennan would have better recognized individual rights associated with travel and speech, and weighed them against the government's interest in restricting such rights for national security purposes.

## III. THE LIBERTY-SPEECH FRAMEWORK

The *Haig v. Agee* framework provides the Executive with broad power to restrict international travel, even though the right to travel abroad is a protected "liberty" interest under the Fifth Amendment and is closely related to free speech and association under the First Amendment.[178] Courts separate international information gathering and the right to travel from the rights to free speech and association.[179] Therefore, when confronted with the government's asserted national security interest the Court will usually uphold regulations that infringe on the right to travel abroad for the purpose of gathering information.[180]

When government regulations directly infringe First Amendment freedoms, however, courts examine the constitutional validity of the government regulation and determine whether the legislation is drawn narrowly to avoid

[174] *Clancy*, 2007 WL 1051767, at *14-16.

[175] *Id.* at *3 ("In matters of foreign policy, the President . . . is authorized to make broad use of economic powers.").

[176] *Id.* at *15.

[177] *Id.* at *16.

[178] *See Agee*, 453 U.S. at 306-07.

[179] *See* Zemel v. Rusk, 381 U.S. 1, 16-17 (1965). *But see Clancy*, 2007 WL 1051767, at *14.

[180] *See supra* notes 112-14, 163-74 and accompanying text.

conflict with First Amendment freedoms.[181] Faced with travel restrictions that directly infringed free speech, the *Clancy* court employed a domestic First Amendment framework in the foreign affairs realm. Despite applying a more favorable framework, *Clancy*'s exhibition of *Curtiss-Wright*-style deference prevented the decision from sufficiently protecting both the right to travel and First Amendment freedoms.[182]

Both *Agee* and *Clancy* demonstrate the deferential, "sole organ" approach to foreign affairs embodied in *Curtiss-Wright* and the Logan Act. This emphasis on Executive power over the First Amendment maintains the prohibition on private citizen diplomacy,[183] which remains illegal under the two-centuries-old Logan Act, and supports the notion that the President has plenary power over foreign affairs. Moreover, the "sole organ" approach considers only direct conflict between central First Amendment rights, such as association and belief,[184] and ignores the importance of information-gathering and other peripheral First Amendment rights. Ultimately, courts should reject this outdated approach and adopt a framework that recognizes the importance of international information-gathering.

Justice Douglas's dissent in *Zemel* and Justice Brennan's dissent in *Agee*[185] – together, what I call the liberty-speech balancing framework – provide a standard that protects both the First and Fifth Amendment components of the right to travel for the purpose of information gathering.[186] The liberty-speech balancing framework would require courts evaluating government regulations touching combined Fifth Amendment "liberty" interests and related First Amendment rights – such as the right to international travel – to ensure the regulations are narrowly drawn to meet the precise evil addressed by the government action.[187] The framework would also require courts to balance the importance of the speech element against the government's foreign affairs

[181] United States v. Robel, 389 U.S. 258, 261, 267-68 & n.20; *Zemel*, 381 U.S. at 13; Lamont v. Postmaster General, 381 U.S. 301, 305 (1965) (holding that the federal government cannot create regulations prohibiting Communist Party mailings unless citizens specifically request such mailings). *Lamont* is an example of subordinating the foreign affairs power to First Amendment freedoms. Justice Brennan's concurrence in *Lamont* provides a helpful framework for evaluating government regulations that restrict First Amendment freedoms by determining if: (1) the government has a "compelling interest" in the regulation, and (2) the interest is within the government's constitutional power to regulate. *Id.* at 308-09 (Brennan, J., concurring).

[182] *Clancy*, 2007 WL 1051767, at *15.

[183] *See supra* notes 68-71 and accompanying text.

[184] *See supra* notes 112-14 and accompanying text.

[185] Haig v. Agee, 453 U.S. 280, 313-20 (1981) (Brennan, J., dissenting); *Zemel*, 381 U.S. at 23-26 (Douglas, J., dissenting).

[186] *See Agee*, 453 at 320 n.10 (Brennan, J., dissenting); *Zemel*, 381 U.S. at 23-24 (1965) (Douglas, J., dissenting); Aptheker v. Sec'y of State, 378 U.S. 500, 517 (1964); Kent v. Dulles, 357 U.S. 116, 126 (1958).

[187] *See supra* notes 119-26 and accompanying text.

interest.[188] As shown by Justice Douglas's dissent in *Zemel* and the majority opinion in *Aptheker*, Fifth Amendment "liberty" interests such as the right to travel abroad deserve heightened judicial scrutiny because they are interrelated with First Amendment freedoms.[189] Indeed, the Fifth Amendment right to travel is drawn from the right "to know, to converse with others, to consult with them, and to observe social, physical, political, and other phenomena abroad."[190] The ability to engage in this information gathering "gives meaning and substance to freedom of expression and freedom of the press."[191] Thus, courts should apply heightened scrutiny to government restrictions on the interconnected Fifth and First Amendment right to travel abroad for the purpose of gathering information.

## IV. APPLYING THE FRAMEWORK: MILITARY RESTRICTIONS ON REPORTING

Restrictions on the right to travel provide a useful analogy for examining the constitutionality of military restrictions that prohibit or severely restrict press corps access to overt military operations. Military restrictions on war reporting present a unique and evolving manifestation of the tension between expansive government foreign affairs power and First Amendment freedoms. The President, as Commander-in-Chief of the armed forces, has the constitutional responsibility to protect national security.[192] The press, on the other hand, has a constitutionally protected responsibility to inform the public about the actions of the armed forces, where those actions are taking place, and how the government is conducting them.[193] This tension between the press and members of the executive branch has resulted in accusations and mistrust.[194] War correspondents accuse the military of lying to the American people in order to cover up embarrassing military actions and policy failures, while the executive branch and military accuse the press of portraying the military in a negative light, which can undermine military success in the field.[195]

Case law addressing military restrictions on war reporting is sparse, and has given wide deference to the Executive and military in restricting war

---

[188] *See Agee*, 453 U.S. at 320 n.10 (Brennan, J., dissenting); *cf. Zemel*, 381 U.S. at 26 (Douglas, J., dissenting).

[189] *Zemel*, 381 U.S. at 23-24 (Douglas, J., dissenting) (citing *Kent*, 357 U.S. at 126); *cf. Aptheker*, 378 U.S. at 517.

[190] *Zemel*, 381 U.S. at 23-24 (Douglas, J., dissenting) (citing *Kent*, 357 U.S. at 126).

[191] *Id.* at 24.

[192] U.S. CONST. art. II, § 1, cl. 1.

[193] U.S. CONST. amend. I.

[194] *See* THE MEDIA AND THE WAR ON TERRORISM, *supra* note 1, at 11 (relating how Vietnam War correspondent Stanley Karnow accused the military of lying in order to avoid embarrassment, and that former CIA Director R. James Woolsey believed the press was not objective about the CIA and what it has done).

[195] *See id.*

reporting.[196] Legal scholars have noted the shortage of case law[197] and its state of flux and inconsistency,[198] and have sought to fill in the gaps.[199] Some have theorized that the First Amendment's Press Clause should be read to allow the press greater access in its coverage of war.[200] Others have argued that the embed program is the best current method of facilitating the flow of information in war time, and should be modified only slightly to enhance its protection of First Amendment rights.[201] Moreover, as others have indicated, courts treat free speech standards in the domestic context differently than free speech in the foreign affairs context.[202] It is beyond the scope of this Note to analyze the embed system within the entire framework of First Amendment jurisprudence. Instead, this Note attempts a new approach: it examines the embed program through the Supreme Court's international travel cases. Like those cases, embed reporting constitutes mixed fact-gathering and free expression; thus, this Note will use the liberty-speech balancing test framework to analyze the tension between the government's foreign policy interest in

[196] Those cases which do address the issue are Flynt v. Rumsfeld, 180 F. Supp. 2d 174, 175 (D.D.C. 2002), *rev'd*, 355 F.3d 697, 706 (D.C. Cir. 2004); and Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991).

[197] *See* Anderson, *supra* note 2, at 50, 64 (stating that the Supreme Court has only once ruled on the press's ability to report on a war and that the circuit courts of appeals have ruled only twice on the issue).

[198] *See* Vagts, *supra* note 48, at 293.

[199] *See, e.g.*, Anderson, *supra* note 2, at 51-52 (arguing that the Press Clause of the First Amendment should authorize greater press freedom to cover American military operations); David A. Freznick, *The First Amendment on the Battlefield: A Constitutional Analysis of Press Access to Military Operations in Grenada, Panama and the Persian Gulf*, 23 PAC. L.J. 315, 326-29 (1992) (discussing the press coverage restrictions during the Persian Gulf War); William E. Lee, *"Security Review" and the First Amendment*, 25 HARV. J.L. & PUB. POL'Y 743, 754, 761-62 (2002) (declaring security review unconstitutional); Michael D. Steger, *Slicing the Gordian Knot: A Proposal to Reform Military Regulation of Media Coverage of Combat Operations*, 28 U.S.F. L. REV. 957, 965-67 (1994) (observing that the unrestricted press access to the Vietnam conflict pitted the government against the press in trying to influence public opinion about the war); Phillip Taylor & Lucy Dalglish, *How the U.S. Government Has Undermined Journalists' Ability To Cover the War on Terrorism*, 20 COMM. LAW 22, 24 (2002) (tracing the development of press access to war zones from World War II through the Persian Gulf War); William A. Wilcox, Jr., *Media Coverage of Military Operations: OPLAW Meets the First Amendment*, 1995 ARMY LAW. 42, 45-49 (describing the history of restrictions on press access during wartime); Brian William DelVecchio, Comment, *Press Access to American Military Operations and the First Amendment: The Constitutionality of Imposing Restrictions*, 31 TULSA L.J. 227, 232-35 (1995) (discussing the military's press restrictions during the invasion of Grenada); Zeide, *supra* note 9, at 1339 (arguing that embedded journalism is the best approach to furthering First Amendment values).

[200] *See* Anderson, *supra* note 2, at 51-52.

[201] *See* Zeide, *supra* note 9, at 1339.

[202] *See* Roth, *supra* note 14, at 257; Spiro, *supra* note 14, at 697-702.

press restrictions and the public's right to information about its government's war effort.[203]

### A. *Models of War Reporting*

During the Vietnam War reporters were given "virtually unlimited access" to cover military operations.[204] The only restrictions on reporting were guidelines limiting dissemination of specific kinds of combat information which would jeopardize national security.[205] Consequently, the American public learned from a variety of perspectives what was happening on the ground in Vietnam. Ultimately, public opinion turned against the war.[206]

Military planners believed their press strategy in Vietnam was a failure, and that the media was to blame for turning the tide of public opinion against the war.[207] Consequently, the press was excluded from covering the initial invasion of Grenada in 1983.[208] Eventually, reporters were admitted into Grenada, but the U.S. government took them to a specific location that appeared to have been selected in order to demonstrate Soviet involvement in Grenada, thus hiding the effects of the U.S. military invasion.[209] During the invasion of Panama six years later, the military selected a small group of journalists to join a pool that military officers took to view combat operations on the ground.[210] The officers, however, took the group to locations away from the fighting, and independent journalists were detained at an Air Force base and prevented from covering the fighting.[211]

Following the openness of reporting in Vietnam and the exclusion of reporters from the front lines in Grenada and Panama, the military developed two additional models of war reporting – the "pooling" program of the Persian Gulf War and the embed program of the Afghanistan and Iraq wars. During

---

[203] *See* Haig v. Agee, 453 U.S. 280, 320 n.10 (1981) (Brennan, J., dissenting); Zemel v. Rusk, 381 U.S. 1, 23-24 (1965) (Douglas, J., dissenting); Aptheker v. Sec'y of State, 378 U.S. 500, 517 (1964); Kent v. Dulles, 357 U.S. 116, 126 (1958).

[204] Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1563 (S.D.N.Y. 1991).

[205] *Id.*

[206] *See* THE MEDIA AND THE WAR ON TERRORISM, *supra* note 1, at 110 (stating that William Hammond concluded that the media's assessment of the war was ultimately correct); *see also* WILLIAM M. HAMMOND, PUBLIC AFFAIRS: THE MILITARY AND THE MEDIA, 1962-1968, 388-89 (1988).

[207] HAMMOND, *supra* note 206, at 387 (stating that as the war progressed the military "tended to increasingly blame the press for the credibility problems they experienced, accusing television news in particular of turning the American public against the war"). The military's assessment may have been incorrect, however; Hammond concludes that casualties, and not war reporting, alienated the American public during the Vietnam War. *Id.*

[208] *See* Anderson, *supra* note 2, at 53.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 53-54.

the Persian Gulf War of 1991, the military implemented its most controlling press policy in history.[212] Reporters were organized into "pools," which the military declared was the only permitted method of covering the war.[213] Military personnel determined where the pools could go, retained the right to censor reporting, and escorted reporters at all times.[214] Of the journalists who applied for these "pools," only one tenth reached the front lines, and journalists who attempted to cover the front lines without a military escort risked detainment by the U.S. military.[215] Military officers delivered information regarding the war through televised briefings.[216] The outraged media mounted a legal challenge against the Defense Department's reporting regulations, [217] sent a letter of protest to Secretary of Defense Dick Cheney,[218] and created a commission to review military control of the media.[219]

Following the war, the outcry among the press corps was immense.[220] Consequently, the military revised its strategy for dealing with the press in the Afghanistan and Iraq wars of 2001 and 2003. The ensuing "embed" program was developed by the Office of the Assistant Secretary of Defense for Public Affairs ("OASDPA"), which set forth the specific policies and procedures in Directive 5122.5.[221] Embedded journalists traveled and lived with U.S. troops, reporting from a ground-level perspective while under the protection of the military.[222] In exchange, embedded journalists agreed to ground rules, which, due to security concerns, specified categories of content that could not be published. Embedded journalists were permitted to report approximate numbers of friendly forces, general mission results, generic descriptions of military missions, and, provided they gave their consent, service members' names.[223] Embedded journalists could not, on the other hand, print information about specific geographic locations, troop numbers, equipment, future military operations, levels of security, intelligence gathering, or enemy effectiveness.[224]

---

[212] THE MEDIA AND THE WAR ON TERRORISM, *supra* note 1, at 11.

[213] Anderson, *supra* note 2, at 54.

[214] *Id.*

[215] *Id.*

[216] THE MEDIA AND THE WAR ON TERRORISM, *supra* note 1, at 11.

[217] Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1562 (S.D.N.Y. 1991); *see also* Flynt v. Weinberger, 762 F.2d 134, 135 (D.C. Cir. 1985).

[218] Jason DeParle, *Keeping the News in Step: Are the Pentagon's Gulf War Rules Here To Stay?*, N.Y. TIMES, May 6, 1991, at A9.

[219] Anderson, *supra* note 2, at 55.

[220] *Id.*

[221] Directive No. 5122.5 (U.S. Dep't of Def. Sept. 27, 2000), http://131.84.1.34/whs/directives/corres/pdf/512205p.pdf.

[222] *See* Zeide, *supra* note 9, at 1313.

[223] *Id.* at 1315.

[224] *Id.* at 1315-16.

Moreover, military commanders exercised discretion about what kinds of "sensitive" information to release to embedded reporters.[225] Before military commanders released such information, embedded reporters were required to agree to "security review," which allowed military personnel to review a reporter's coverage before it was sent out.[226] And while "security review" is theoretically voluntary, a reporter who does not adhere to a military commander's recommendations can be removed at the commander's discretion.[227] Thus, during the Iraq war in March 2003, more than 600 reporters from all over the world reported on the war while embedded with coalition forces.[228]

Criticism of the embed system can be grouped into two categories. The first criticism is that, through the embed program, the military can control the flow of information by refusing to grant reporters' applications to embed and by reviewing journalists' reports. Given that reporters were targeted by enemy fighters in Afghanistan, Iraq, and elsewhere, all but the most resolute reporters relied on the military for protection.[229] Nonetheless, it is estimated that 2100 non-embedded journalists covered the invasion of Iraq.[230] However, many of those reporters received hostile treatment from military personnel and were denied access to military sights, interviews with soldiers, and assistance in emergency situations.[231] Whether embedded or not, all reporters were banned from publishing identifying features of enemy casualties or combatants, thus suppressing the appearance of American brutality, impersonalizing enemy forces, and hiding images of massive destruction.[232] Without these images, military operations appear far less harsh than they are in reality. If such images were exposed to the public, the public might be less apt to support the war.[233]

The second criticism is that reporting emanating from embedded reporters reflects a strong pro-military bias, for reporters rely on their units for protection and camaraderie.[234] For psychological, professional, and economic

[225] *Id.* at 1316.

[226] *Id.*

[227] *Id.* at 1317.

[228] THE MEDIA AND THE WAR ON TERRORISM, *supra* note 1, at 11.

[229] *See, e.g.*, Sabrina Tavernise, *For Freelancer Held Hostage, Caution Fell Short: Reporters in Iraq Face Rising Peril*, INT'L HERALD TRIB., Jan. 24, 2006, at 2; David Ignatius, *The Dangers of Covering This New War: Targeting the Press*, INT'L HERALD TRIB., Apr. 6, 2002, at 6.

[230] *See* Zeide, *supra* note 9, at 1318.

[231] *Id.* at 1319.

[232] *See id.* at 1320.

[233] *Id.*

[234] *See, e.g.*, CHRIS AYERS, WAR REPORTING FOR COWARDS 13 (2005) (admitting that embedded reporters such as the author were not impartial); THE MEDIA AND THE WAR ON TERRORISM, *supra* note 1, at 170 (according to *New York Times* correspondent Michael

reasons, embedded reporters are likely to adopt an implicit or explicit bias toward their unit.[235] Economically, embedded reporters desperately need access to military information.[236] From a professional standpoint, embedded reporters are in a tight-knit environment where they must maintain strong relationships with their combination protectors, hosts, and sources.[237] Psychologically, embedded journalists are in a position of vulnerability and their reliance on their military units for safety creates feelings of attachment and loyalty.[238]

Consequently, reporters might refrain from publishing anything that would alienate or offend the soldiers around them.[239] Victoria Clarke, Assistant Secretary of Defense for Public Affairs, implied that this bias exists as she stated the rationale for embedding reporters: "It is in my interest for the American people to get as much appropriate news and information about this war as possible. If we keep them informed, if we keep them educated, they will stay with us."[240] In a democracy the objective is not for the government to determine what is "appropriate" information. Nor is the ultimate objective for the public to give uncritical support for the war. First Amendment freedoms are enshrined in the Constitution so that the American public can decide the efficacy of a war. This is crucially important, for as commentators and scholars have said, the media paints a different view of war than the military.[241] As implied by both criticisms, a possible consequence of the embed system is that the scope of reporting is limited, and with a narrower view of military conflicts, the American public is less able to critically assess U.S. foreign policy.

### B. *Legal Challenges to Press Restrictions During War: Applying the Liberty-Speech Balancing Framework*

As commentators have noted, there is a relative dearth of case law evaluating the media's right to cover U.S. military operations abroad.[242] Nonetheless, in two relatively recent cases the federal courts ruled against reporters seeking access to the battlefield during wartime. In both instances the court emphasized the importance of executive and military power and

Gordon and *Washington Post* reporter Carol Morello, the military's embed program did not yield much valuable reporting during the early part of the Afghanistan war).

[235] Zeide, *supra* note 9, at 1320-22.

[236] *Id.* at 1320.

[237] *Id.* at 1321.

[238] *Id.*

[239] *Id.*

[240] THE MEDIA AND THE WAR ON TERRORISM, *supra* note 1, at 13.

[241] HAMMOND, *supra* note 206, at 388 ("It is undeniable, however, that press reports were still often more accurate than the public statements of the administration in portraying the situation in Vietnam.").

[242] Anderson, *supra* note 2, at 64.

deemphasized the reporters' interests in reporting the news, gathering information, and traveling.[243] By upholding press restrictions – arguably a form of restrictions on information-gathering and travel abroad – courts also have permitted the government to limit the public's access to information during wartime. The liberty-speech balancing framework, however, would require courts to address the restrictiveness of such regulations on important individual freedoms and societal interests and actively weigh the government's interests in the restrictions against the reporter's right to travel for the purpose of gathering information.

During the Gulf War several media outlets mounted a legal challenge to the Defense Department's reporting regulations, decided in *Nation Magazine v. United States Department of Defense*. The plaintiff publishers in *Nation Magazine* claimed that the "press has a First Amendment right to unlimited access to a foreign arena in which American military forces are engaged."[244] In particular, they argued that the Gulf War "pooling" regulations, which limited access to the battlefield to a specific number of media representatives and subjected them to certain reporting restrictions, infringed upon the right to gather news under the First Amendment."[245] The court, however, avoided deciding the issue, which would have determined whether limitations on the number of journalists granted access to the battlefield would be reasonable in the next overseas military operation. The Defense Department lifted its reporting regulations in the late stages of the war, allowing the court to dismiss the case for mootness and avoid resolving the constitutional question.[246]

While the court in *Nation Magazine* declined to issue either injunctive or declaratory relief, it did elucidate several important First Amendment guidelines for determining whether the press has a right to gather and report news involving U.S. military operations. First, the court noted that once a forum, such as a battlefield, is opened to public observation, the government may not limit access to others who might express less favorable views on the situation.[247] Second, the court emphasized that information-gathering by the press is subject to reasonable restrictions on time, place, and manner.[248] Therefore, when reviewing Defense Department regulations, courts should examine whether such regulations: (1) are justified, without reference to the

[243] Flynt v. Rumsfeld, 355 F.3d 697, 702-03 (D.C. Cir. 2004); Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1574-75 (S.D.N.Y. 1991).

[244] *Nation Magazine*, 762 F. Supp. at 1561.

[245] *Id.* The plaintiffs distinguished their argument by stating that they were primarily challenging access restrictions and not the Defense Department regulations which limit, for national security reasons, information that pool members could publish. *Id.*

[246] *Id.* at 1562. The court declined to dismiss on standing and political question grounds. *Id.*

[247] *Id.* at 1573 (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).

[248] *Id.* at 1574.

content of the regulated speech; (2) serve a significant government interest; and (3) allow for alternative channels to communicate information.[249]

Under the liberty-speech balancing framework, the legal guidelines provided in *Nation Magazine* are unsatisfactory because they might permit the Court to uphold military restrictions that prohibit reporters' observations from the front lines, as did the guidelines from Panama, Grenada, and the Gulf War.[250] Clearly, the military and executive branch can promulgate press regulations in war time for national security reasons, but under the liberty-speech framework a complete prohibition on reporting from the front lines of a major military conflict such as the Gulf War would not withstand judicial scrutiny. The liberty-speech balancing framework forces courts to weigh competing interests while focusing on individual rights, especially the Fifth Amendment right to travel accompanied by the related First Amendment right to gather information.[251] First, this approach requires the military's wartime press regulations to be narrowly drawn to avoid conflicts with First Amendment freedoms.[252] Second, the press restrictions would have to be balanced against the government's interest in national security, i.e., its war effort.[253] This balancing test would take into account the individual liberty and speech interests inherent in information-gathering, which are supported by the Fifth Amendment's right to travel and the related First Amendment right of free speech.

In a more recent war reporting case, *Flynt v. Rumsfeld*,[254] the Court of Appeals for the District of Columbia addressed the tension between the military's embed program for war reporting in Afghanistan and the First Amendment.[255] The court upheld the embed program, reasoning that because freedom of speech does not create a per se right of access to the government, the press has no right to go into battle with the military.[256] Instead, the court observed that the embed program does not prohibit the media from generally covering the war, and speculated that plaintiff Larry Flynt's reporters could have traveled to Afghanistan on their own to the cover the war without violating Defense Department regulations governing its embed program.[257] Because of this alternative, the court of appeals ruled that there was no impermissible restriction on free speech – so long as the military allowed

[249] *Id.* (citing Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981)).

[250] *See supra* Part IV.A.

[251] *See supra* notes 186-91 and accompanying text.

[252] *See* United States v. Robel, 389 U.S. 258, 268 & n.20 (1967); Zemel v. Rusk, 381 U.S. 1, 23-24 (1965) (Douglas, J., dissenting).

[253] *See* Haig v. Agee, 453 U.S. 280, 313-20 (1981) (Brennan, J., dissenting).

[254] Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004).

[255] *Id.* at 703.

[256] *Id.* at 703-05.

[257] *Id.* at 702.

alternative channels to communicate information, it could reject reporters' applications to embed with reporters on the front lines.[258] Thus, the embed program for the Afghanistan War did not impermissibly allow the military to control information by refusing reporters' requests to embed with military units.[259]

*Flynt*'s focus on the legitimacy of the government's press regulations appears to have ignored both the realities of war reporting in a location such as Afghanistan and the reporter's constitutional interest in information-gathering and travel. Without the embed system, a reporter was likely to receive hostile treatment from military personnel, be denied access to military interviews, and go without assistance in emergency situations in hostile territory in the midst of a war.[260] In practice, embedded reporting might have been the only way to cover ground operations in Afghanistan in the early stages of the war. Indeed, early on, ground operations against the Taliban and Al-Qaeda were conducted by small numbers of elite soldiers in special forces units.[261] This made it difficult for reporters to gain access to the front lines without embedding with U.S. forces, for the location of special forces was usually secret, and operations were conducted on a limited scale in remote parts of Afghanistan. The government emphasized secrecy, and provided only limited media access to special forces units on the basis that giving away any information about its soldiers would jeopardize its sensitive military tactics and safety.[262] Thus, the *Flynt* court's rationale for upholding the government's denial of a reporter's application to embed is undercut by the reality of war reporting in Afghanistan.

While *Flynt* focused on the absence or presence of an alternative channel of communication, the liberty-speech framework would have examined the press regulations in light of the Fifth Amendment right to travel and the related right to gather information. The liberty-speech balancing framework emphasizes the importance of individual rights by recognizing that the right to travel in order to gather information is protected by both the Fifth and First Amendments.[263] Preliminarily, a court applying the liberty-speech balancing test would examine whether the press regulations were narrowly drawn to meet the precise government interest sought to be protected by the regulations. And if the regulations satisfied that prong, the court would balance the individual reporter's interest in gathering information to report on the U.S. war effort against the government's interest in regulating the dangers presented by

[258] *Id.* at 705-06.

[259] *Id.* at 706.

[260] *See* Zeide, *supra* note 9, at 1320.

[261] Ivo H. Daalder & James M. Lindsay, *Ground War Will Be Risky, But Necessary*, NEWSDAY, Oct. 21, 2001, at B6.

[262] THE MEDIA AND THE WAR ON TERRORISM, *supra* note 1, at 86, 91 (declaring that embedding with Army Rangers "is out of the question" because of the sensitivity and secrecy of their operations).

[263] *See supra* notes 185-91 and accompanying text.

embedded reporters. As part of this balancing test, the court would be required to weigh the full societal importance of the Fifth and related First Amendment rights to travel and gather information.[264] Under this test, a court could of course decide to either uphold or strike the regulations, but that court would be forced to take account of wide-ranging travel, information-gathering, and speech interests, something both *Flynt* and *Nation Magazine* failed to do.

In terms of the first prong, if the government interest is preventing reporters from disclosing sensitive military secrets or jeopardizing the success of effective military operations, it would seem that press regulations denying some reporters access to the front lines during the early stages of the invasion of Afghanistan were narrowly drawn. Thus, the court would move to the second step of the analysis. If, however, the press regulations were found to be overly broad, perhaps because the reporter could have been embedded without jeopardizing the success of the mission or military secrets, the court would invalidate the regulations without moving to the balancing test.

Assuming that the government satisfied the first prong, the next step under the liberty-speech framework would be to balance the reporter's interest in the right to gather information against the government's interest in preventing reporters from disclosing sensitive military secrets or jeopardizing the success of effective military operations. Here the court would consider the relationship between the reporter's Fifth Amendment right to travel in order to gather information and the associated First Amendment right to free speech. While the court would not be required to recognize a right to embed with soldiers on the front lines, it would nonetheless weigh the importance of information-gathering in terms of societal values related to the ready supply of information[265] and the fundamental importance of an informed citizenry.[266] Indeed, the Supreme Court prohibits rules that limit information to the public regarding the functioning of government,[267] and has indicated that the citizenry has at least some "minimal right" to news from a reporter with "access to view and report about an . . . overt combat operation."[268] Accordingly, whereas the government's national security-foreign affairs power appeared to trump other considerations in *Flynt*, a court using the liberty-speech balancing framework would shift away from traditional deference to executive power over foreign

[264] *See* Zemel v. Rusk, 381 U.S 1, 24 (1965) (Douglas, J., dissenting).

[265] *Id.* at 24-25.

[266] Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980)); *cf.* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (indicating the importance of public access to criminal trials).

[267] *Nation Magazine*, 762 F. Supp. at 1572 ("'[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.'" (quoting First Nat'l Bank v. Belloti, 435 U.S. 765, 783 (1978))).

[268] *Id.*

affairs and consider important values embodied in the right to travel, information-gathering, and free speech.

## CONCLUSION

The judiciary has traditionally given the government – usually the Executive – broad leeway in resolving the tension between First Amendment freedoms and the foreign affairs power. In some instances, such as the Logan Act, this deference seems to unconstitutionally abridge free speech. More importantly, it hurts the operation of our democracy by impeding the education of citizens who have the responsibility to evaluate the foreign policy decisions of their politically elected leaders. Therefore, this Note proposes a new framework for dealing with the foreign affairs-First Amendment tension. The liberty-speech balancing framework more fully considers an individual's First Amendment rights. Thus, if the Executive seeks to prohibit travel to a certain country or to prohibit private citizen diplomacy, it must consider whether exercise of that right comes from a constitutionally valid power and whether doing so will impinge elements of free speech or expression. This framework allows reasonable restrictions on free speech, but requires that the Executive narrowly draw its actions to minimize conflict with First Amendment freedoms. Rather than giving the military the unbridled ability to restrict reporting in war time, this framework recognizes the importance of allowing access to the battlefield for reporters, whether they are inside or outside the embedding system.