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TO: Mike Helfer

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SUBJECT: The Alien's Right To Interstate Travel?

I. In Shapiro v. Thompson, 394 U.S. 618 (1968), the Supreme Court declared that citizens of the United States possessed a fundamental right to travel among the several states. Id. at 629-31. This right, the Court concluded, is so basic that Congressional legislation, which abridged that right for welfare applicants within the District of Columbia, offended the Due Process Clause of the Fifth Amendment. Id. at 641-42. See also Kent v. Dulles, 357 U.S. 117, 125 (1958). Absent a compelling interest, thus, Shapiro clearly renders unconstitutional both state and federal laws infringing upon the citizens right of interstate travel. The precise issue posed, thus, is whether Congress may burden an alien's right to travel to areas which, although not states, enjcy a special relationship to the United States akin to commonwealth status.

No court has yet ruled that aliens have a constitutional right to travel among the several states.

While this issue was raised in Graham v. Richardson, 403 U.S. 365 (1971), the Court resolved the case on independent grounds. With respect to the assertion that aliens possessed the same fundamental right to travel enjoyed by citizens, the court merely stated that:

> [T]he Court has never decided whether the right [to interstate travel] applies specifically to aliens, and it is unnecessary to reach that question here. Id. at 375.

And later:

> Moreover, this Court has made it clear that, whatever may be the scope of the constitutional right of interstate travel, aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under non-discriminatory laws.' Takahashi, 334 U.S. at 420. Id. at 377-78.

The right of aliens to unencumbered passage among the several states, referred to above, is based upon federal laws guaranteeing that right and the exclusive authority of Congress to regulate immigration. The Court did not consider the right of aliens to assert "an equality of legal privileges" in the absence of Congressional authorization, or in express conflict with Congressionally enacted laws, in Takahashi. The above language, thus, merely affirms Takahashi without

extending it.

The Supreme Court has specifically addressed itself to the issue of an alien's right of travel in a scattered series of other cases. In Truax v. Raich, 239 U.S. 33 (1915), for instance, the Court stated that an alien admitted to the United States under Federal law possessed "the privilege of entering and abiding in the United States, and hence of entering and abiding in any State of the Union." Id. at 39. This statement, however, was expressly based upon a decision that Federal law provided aliens with this right. (Gegrow v. Uhl, 239 U.S. 3 (1915)).

In Edwards v. California, 314 U.S. 160 (1941), Mr. Justice Jackson (concurring) argued that citizens must possess a constitutional right to travel arising from the privileges and immunities clause because of the aliens right of travel recognized in Truax. He declared in this regard "[w]hy we should hesitate to hold that federal citizenship implies rights to enter and abide in any state of the Union at least equal to those possessed by aliens passes my understanding." Id. at 184.

II. A. Because no case has considered the right of aliens to travel apart from statutory considerations, it is essential to determine the roots of the current constitutional protections afforded citizens in seeking to travel within and without the United States. At least four distinct rationales have been employed by the Supreme Court in support of right of travel. The one element common to all, however, is the concept that the right is inextricably bound to the status of national citizenship.

In Twining v. New Jersey, 211 U.S. 78 (1908), the Court declared that the right of travel was founded upon the privileges and immunities clause and arises from "the nature and essential character of the National Government." Id. at 97. In Edwards v. California, 314 U.S. 160 (1941), Justice Douglas (concurring) declared that, "[t]he right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference." [Citing Twining]. Id. at 178. See also Colgate v. Harvey, 296 U.S. 404, 429 (1935).

B. Other decisions rested the right to travel upon the commerce clause. Edwards v. California, 314 U.S. 160 (1941); Colgate v. Harvey, 296 U.S. 404 (1935) (Stone dissenting); Bowman v. Chicago & Northwestern R.R., 125 U.S. 464 (1888). These decisions held that state laws impairing this right violated the constitutional provisions vesting exclusive authority to regulate interstate commerce within Congress. Because a right to travel based upon the commerce clause would allow Congress to formulate distinctions as long as they are reasonable, Shapiro and Graham implicitly reject this rationale. Clearly a citizen's right to travel cannot be abridged by Congress unless a compelling interest exists. A right to travel founded on the commerce clause could not so narrowly restrict Congressional authority.

C. A third theory bases the right to travel on the right of citizens to petition their government, right to sue in a federal court located in another state, and other miscellaneous provisions of the constitution. Gilbert v. Minnesota, 254 U.S. 325 (1925) (Brandeis dissenting); Crandall v. Nevada, 6 Wall. 35 (1867); Smith v. Turner, 48 U.S. 282 (1949) (Taney, dissenting). Whatever the merits of this particular theory, it clearly recognizes

the roots of the right of travel in citizenship. Justice Brandeis, for instance, described it as "a privilege and immunity of every citizen of the United States." Gilbert at 337. Justice Taney argued that it was rooted in the concept that, "[w]e are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption as freely as in own States." Id. at 492. (Cited as controlling in Crandall v. Nevada, 6 Wall. 35 (1867).

D. The modern concept of the right to travel is even more amorphous than its precedessors. In United States v. Guest, 383 U.S. 745 (1966), the Court declared that the right of travel is a fundamental right "that has been firmly established and repeatedly recognized." Id. at 758. Despite its fundamental nature, the Court acknowledged that there is no explicit mention of it in the Constitution. The Court stated in this regard, that, "[t]he reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." Id. at 758. In Shapiro, the Court

expressly declined to cite a particular source for this right within the Constitution. Shapiro, 394 U.S. at 630. Graham adopted the same practice. 403 U.S. at 375.

Whatever may be the specific constitutional source of the right of travel, the Court has not divorced the right from the status of citizenship. Thus, in Oregon v. Mitchell, 400 U.S. 112 (1970), Justice Stewart, concurring, upheld Congressional legislation eradicating some state residency requirements for voters because of the right of travel. This right, he stated, "is a privilege of United States citizenship." Id. at 285. In Griffin v. Breckinridge, 402 U.S. 88 (1970), the Court again upheld Congressional legislation designed to protect the right of travel. The Court refused to identify the particular provision of the Constitution preserving this right. Rather it stated merely that

> [T]he right to pass freely from State to State has been explicitly recognized as 'among the rights and privileges of National citizenship.' Twining v. New Jersey, supra, at 97. That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation. Id. at 106.

Finally, in Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707, Justice

Douglas (dissenting), reaffirmed his belief that that right of travel is rooted in the privileges and immunities clause. Because that clause applies only to citizens, this would restrict the sweep of the right to travel solely to citizens.

Earlier decisions coupling the right to travel and citizenship may be suspect because they may have been based on the theory that many rights possessed by citizens could be denied aliens. Recent Court decisions have vastly curtailed state and federal power to discriminate on the basis of alienage. Earlier formulations, thus, may be challenged on the grounds that they might have been influenced by a now discredited constitutional doctrine.

This same argument, however, cannot be raised to challenge the language employed in Oregon v. Mitchell by Justice Stewart, Griffin v. Breckinridge (decided one week before Graham in which the issue was squarely raised), and Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc. (Douglas, dissenting) (decided after Graham).

The continued reaffirmance of this fusion of the right of travel and citizenship, while admittedly dicta, suggests that a distinction may exist between aliens and

citizens in this regard. Certainly no decision expressly or impliedly rejects this distinction.

III. Even should the Court conclude that aliens do enjoy a constitutional right of travel, the serious consequences for the Marianas from unrestricted immigration may rise to the level that most elusive of constitutional categories - the compelling state interest. Certainly the effects on the Marianas would equal or exceed those used to defend the zoning ordinances challenged in Village of Belle Terre v. Boraas, 42 L.W. 4476 (1974). Yet the burden on travel posed by the ordinance was almost cavalierly dismissed by the majority opinion because the ordinance was not aimed at transients. Id. at 4477. By the same token, the regulations at issue in the Marianas would only deter those interested in accumulating residence time for citizenship. Presumably only those anticipating residence in the Marianas for a substantial period of time would feel deterred from travelling there - particularly in light of federal law allowing aliens to spend half their time outside the United States.

At this time, thus, it is my belief that Congress could enact the regulations sought without infringing upon the right to travel.

IV. The fact that the Marianas are not states is irrelevant for the purpose of the right to travel issue. Citizens of the United States have a fundamental right to travel without as well as within the United States. Kent v. Dulles, 357 U.S. 117 (1958). While the Govern- may may restrict it to some degree (Zemel v. Rusk, 381 U.S. 1 (1965), the close relationship between the United States and the Marianas would be unlikely to provide sufficient reasons for restricting travel to those Islands. Thus, if aliens do indeed have a constitutional right of travel and no compelling reason to restrict travel is found, the restriction of alien entry will be deemed unconstitutional regardless of the somewhat distinct status of the Marianas from the several states.