



## BOOK REVIEW

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# *Mrs. Shipley's Ghost: The Right to Travel and Terrorist Watchlists*

By Jeffrey Kahn. Ann Arbor, MI: University of Michigan Press, 2013. 360 pages.

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The 1948 Universal Declaration of Human Rights affirmed in Article 13 that “[e]veryone has the right to leave any country, including his own, and to return to his country.” In response to the Soviet Union’s and China’s prohibitive controls over the travel of their citizens, Article 13 recognized the right of individual citizens to take trips to other countries willing to receive them, knowing that they may return home at the end of their foreign stays.

Neither the Declaration nor its offspring, the 1966 Covenant on Civil and Political Rights, which expands on freedom of movement, sought to enlarge the rights of peoples to migrate at will, or to undermine the sovereignty of national borders and visa systems. But the importance of individual travel as a fundamental civil liberty has grown exponentially as globalization beckons individuals to travel for work and family purposes. Now counterterrorism, with its growing reliance on a watchlist of travelers who may be prohibited from flying or other activities, has highlighted the need to understand the legal framework buttressing this civil liberty.

The largely unpublicized, post-9/11 watchlist-based limitation on the right of US citizens to travel is the subject of Jeffrey Kahn’s book, *Mrs. Shipley’s Ghost: The Right to Travel and Terrorist Watchlists*. His purpose is to spotlight the expansion of a debilitating impingement on individual lives and to vindicate the right of Americans to exercise freedom of travel and especially, to be able to return to the United States after traveling abroad. Toward that end, Kahn, a professor of law at Southern Methodist University and a specialist on human rights, has woven an elegant and authoritative four-part book.

The first section, “Fact,” describes the problem as it has manifested itself since 9/11 in the form of startled US citizen travelers being halted at their foreign departure points and prohibited from flying home to the United States. Next, “Law” examines freedom of movement and the Constitution as well as a brief history of the passport. Then, “Policy” recounts the history of prohibitions on US citizen travel, reaching into the Cold War past to sketch a vivid portrait of the redoubtable Mrs. Shipley who exercised near absolute control over

US passport issuance from 1928 to 1955. Finally, “Principle” invokes the provisions of the Constitution that Kahn suggests can help courts and policymakers to exorcise Mrs. Shipley’s ghost from travel law and practice.

According to the FBI, which runs the Terrorist Screening Center (TSC), the location of a consolidated, all-source watchlist available to government agencies, there are over 20,000 names on TSC’s No-Fly list. The Transportation Security Administration’s (TSA’s) Secure Flight program filters ticketed passengers against the list (often long before they arrive at the airport) and then issues orders to the airlines about whom to deny a boarding pass. Approximately 500 no-fly list names belong to US citizens (the number varies and has been higher), and 21,000 presumably to resident aliens. The public has no way of knowing how many of these individuals have been blocked from returning home to the United States. Occasionally a media story surfaces, such as in October 2013 when the *NY Daily News* reported that a Queens man, Samir Suljovic, 26, was blocked from returning from Vienna, Austria. Kahn tells several troubling stories of former military veterans and others suddenly barred without explanation from coming home. Most of them have been Muslims, and not accused of terrorism.

The eponymous Mrs. Shipley stands at the heart of the book, as the historical antecedent to sweeping executive branch control over an individual’s right to travel. As director of the Passport Division of the US Department of State during the Cold War, she denied passports to individuals whose travel she determined was not “in the interests of the United States,” a vague and expansive category into which American luminaries such as Paul Robeson, Linus Pauling, and

Arthur Miller fell. As the courts closed in on Mrs. Shipley’s effectively unreviewable discretion, the State Department granted previously-denied passports to forestall legal defeat. Finally the Supreme Court issued its first opinion on the right to international travel in 1958, declaring such travel an element of the liberty protected by the Fifth Amendment.

A signal contribution of Kahn’s book is his thorough examination and critique of the constitutional basis for an individual’s liberty to travel. Rather than travel primarily implicating the Fifth Amendment’s guarantee of due process, Kahn argues that the right to travel internationally is simply and profoundly an attribute of citizenship. A citizen in a democracy, unlike a subject of a monarchy or a dictatorship, by definition travels at will, on self-determined terms, for self-defined purposes, without being subject to approval by or interference from the sovereign. This being so, Kahn asserts, the Citizenship Clause of the Fourteenth Amendment requires that US courts strictly scrutinize watchlist-based actions that prohibit travel. Citizens need not obtain the sovereign’s consent to travel as long as the traveler’s actions are not “treasonous, immediately dangerous, or contrary to some lawful obligation made to the state.” The No-Fly List, Kahn maintains, fails strict scrutiny because it is not the least restrictive means of protecting civil aviation or national security.

Readers may not all accept Kahn’s argument that a retrospective look at travel restrictions imposed during the Cold War provides a wholly apt perspective on travel prohibitions imposed in the context of preclusive counterterrorism. Regardless, Kahn makes a strong case for how US constitutional law may move toward accommodating both fundamental liberty of travel and our civil and human security.

Kahn's analysis is speculative, but a court in California has begun to pry open the doors of the TSC that houses the national security watchlist. In January 2014 this court rendered a groundbreaking decision requiring rectification of what it found to be an unwarranted prohibition on an individual's international travel. Kahn testified as an expert at that trial, and his prescient book is a call to justice that stands as an essential guide to liberty of travel that will challenge courts and national policy for some time to come.