

The Internationalization of Faculty

Academic Freedom: Looking

*Toward 2025**

William A. Kaplin
Professor of Law Emeritus
The Catholic University of America
Senior Fellow, Center for Excellence in
Higher Education Law and Policy
Stetson University College of Law

I. Overview

The continuing trend toward commercialization of higher education, and the continuing trend toward globalization, have spawned various new types of challenges for academic freedom. (On globalization, see International Association of Universities, *Internationalization of Higher Education: Global Trends, Regional Perspectives* (2010, available from iau@iau.net; Ben Widavski, *The Great Brain Race: How Global Universities Are Reshaping the World* (Princeton Univ Press, 2010).) These challenges, like their more traditional predecessors, may implicate both the professional (or customary) concepts and the legal concepts of academic

*This paper was prepared for the U.S./U.K. Higher Education Law and Policy Roundtable held at New College, University of Oxford, on August 29-Sept. 1, 2012, and was subsequently revised by the author. Parts I, III, IV, and V of this paper are adapted from William Kaplin and Barbara Lee, *The Law of Higher Education*, sec. 7.1.8 (5th ed., Jossey Bass, 2013); copyright © 2013 by John Wiley & Sons, Inc.; all rights reserved. Parts II and VI are copyright © 2013 by William A. Kaplin; all rights reserved.

freedom. Moreover, these challenges may implicate the institution's own interests in academic freedom (or institutional autonomy), as well as the separate and sometimes inconsistent academic freedom interests of faculty members and students. These challenges may also arise with respect to academic freedom in both public and private institutions, although academic freedom may receive considerably less protection in profit-making private institutions than in non-profit institutions. (For explication of these concepts and distinctions in U.S. law, see William Kaplin and Barbara Lee, *The Law of Higher Education*, secs. 7.1.3 - 7.1.7 (Jossey-Bass, 5th ed., 2013).)

There are, however, important differences between “international” and “domestic” academic freedom issues. Although international academic freedom issues may arise in a single country, as domestic issues do, the former will have implications for other countries as well. In these trans-border situations, for example, the central government, a state or regional government, an educational association, or a higher educational institution (HEI) in one country (say, Country A) may take action that limits the freedom of faculty members or students from other countries to teach, study, or do research in Country A. Conversely, the central government, a state or regional government, an educational association, or an HEI in one country may take action that limits the freedom of that country's faculty members or students to teach, study, or do research in other countries.

II. Paradigms and Examples

When considering the relationships between two countries, A and B, there are four types of restrictions on international academic freedom for faculty that may arise: (1) Governmental or private entities in Country A may limit the freedom of that country's faculty members to study,

teach, or research in Country B. (2) Governmental or private entities in Country A may limit the freedom of Country B's faculty members to study, teach, or research in Country A. (3) Governmental or private entities in Country B may limit the freedom of that country's faculty members to study, teach, or research in Country A. (4) Governmental or private entities in Country B may limit the freedom of Country A's faculty members to study, teach, or research in Country B.

Here are some examples drawn from real-life events. For each example, one might ask whether the situation presents an academic freedom problem and, if so, whose academic freedom is implicated; and whether international norms of academic freedom, were they to be agreed upon or strengthened, could help alleviate the conflict at issue.

- An HEI in Country A establishes a branch campus, or a new freestanding institution, in Country B. The academic freedom norms adhered to by the HEI in its home country provide substantially more protection for academic freedom than do the norms applicable to Country B's HEI's. The Country A HEI is considering whether it can maintain its core academic freedom values in Country B or, alternatively, whether it can or should work out some modification of the academic freedom norms it adheres to that takes account of the very different norms it will confront in Country B.
- An HEI in Country A establishes a cooperative arrangement with an HEI in Country B to undertake research projects and offer programs of study in both countries. The two HEI's adhere to substantially different academic freedom norms (or rules and regulations). They are considering which set of norms - - or what amalgam of norms - - will apply to this cooperative venture.

- An HEI in Country A establishes a branch campus or new institution in Country B. The HEI has strong core values of academic freedom and upholds them for its new branch campus or institution. As time passes, the HEI finds itself increasingly in competition with certain other HEI's in Country B. These competitor HEI's are market driven in their operations, do not grant tenure to faculty members or recognize principles of academic freedom, and therefore operate more efficiently and at lower cost. The Country A HEI is considering whether or how it can avoid the pressures to become more market driven and forego the strong protections it has provided for academic freedom.
- Country A often denies visas to academics from Country B and certain other countries who have been invited by Country A academics to speak or teach in Country A. The denials are usually based, explicitly or implicitly, on ideological grounds. The denials apparently violate academic freedom norms that are applicable to academics in Country A. They may or may not violate norms applicable in the countries from which the excluded academics come. Academics in Country A and other countries are considering how to safeguard academic freedom in these circumstances.
- Country A implements a policy of cross-border searches of travelers' computers and other electronic devices for storing and transmitting information. (For a U.S. example, see U.S. Immigration and Customs Enforcement, Dept. of Homeland Sec., ICE Directive No. 7-6.1, Border Searches of Electronic Documents and Media (Aug. 18, 2009), available at http://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf (last visited Sept. 11, 2013); U.S. Customs and Border Protection, Dept. of Homeland Sec., CPB Directive No. 3340-049, Border Search of Items Containing

Electronic Information (Aug. 20, 2009), available at

http://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf (last visited Sept.

11, 2013).) Country A's policy is applied to academics in Country A traveling to other countries as well as academics from Country B and other countries traveling to Country A. Academics in Country A and other countries are considering what academic freedom norms should apply to this situation and how academic freedom can be protected.

- An HEI in Country A, or a faculty association in Country A, boycotts an HEI in Country B because of political action or a political stand that the Country B HEI allegedly has taken in support of broad-based ethnic discrimination. Academics in Country A and in Country B are considering whose academic freedom is being violated by the boycott and whether or how this problem could be resolved or alleviated.

III. Addressing Emerging Issues

To address emerging issues that arise in international or trans-border contexts, such as those that are outlined in part II, one often cannot rely only on the professional and legal concepts of academic freedom that are operative in a single country. The professional and legal concepts applicable in other countries must often also be considered -- including concepts that are inhospitable to academic freedom as it is understood in progressive or democratic countries. See generally Andrew Ross, "Human Rights, Academic Freedom, and Offshore Academics," *Academe*, vol. 97, issue 1 (Jan.-Feb. 2011); Balarishnan Rajagopal, "Academic Freedom as a Human Right: An Internationalist Perspective," *Academe*, vol. 89, issue 3 (May/June 2003); Philip Altbach, "Academic Freedom: International Realities and Challenges," 41 *Higher Education* 205 (Kluwer Academic Publishers, 2001). The disputes that have arisen thus far in

this broader context suggest a need to consider the laws of the countries involved, international agreements, diplomatic relationships, the statements and recommendations of international governmental bodies and non-governmental working groups, the statements and practices of domestic and international academic (and academic labor) organizations, and the customs and practices of individual HEI's, in developing a more global perspective on academic freedom. Moreover, such disputes suggest a need to examine whether there are, or can be, *international norms* of academic freedom that supplement the more traditional national and institutional norms.

IV. Sources of International Norms of Academic Freedom

Thus far, the leading attempt by governments to develop international norms of academic freedom is the *Recommendation Concerning the Status of Higher Education Teaching Personnel*, promulgated by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and adopted November 11, 1997 (available at: http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html) For an earlier attempt, see the *Magna Charta Universitatum* , promulgated in 1988 by 430 European university rectors meeting in Bologna, available at www.aic.lv/bologna/Bologna/maindoc/magna_carta_univ_.pdf And for a third, more recent, example of a governmental statement of international norms, see the Council of Europe's *Recommendation CM/Rec(2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy*, available at <https://wcd.coe.int/ViewDoc.jsp?>

[id=1954741&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](#).

Private educational or academic labor associations have also devised statements of trans-border or international norms regarding academic freedom. One example of such a statement is “On Conditions of Employment at Overseas Campuses”

(www.aaup.org/aaup/comm/rep/a/overseas.htm), jointly adopted in 2009 by the American Association of University Professors and the Canadian Association of University Teachers, which expressly incorporates the UNESCO statement. In addition, university presidents and rectors may cooperate in developing statements of principles on academic freedom and institutional autonomy; see, for example, the Academic Freedom Statement of the first Global Colloquium of University Presidents, issued by the presidents’ colloquium in 2005 and initially signed by 16 presidents from the United States and seven foreign countries (see <http://chronicle.com/article/Leading-Presidents-Issue-St/25635/>). And academics, as well as other researchers and analysts, may develop model statements of academic freedom norms for consideration by policymakers; see, for example, Terence Karran, “Academic Freedom in Europe: Time for a Magna Charta?” 22 *Higher Education Policy* 163 (2009); J. Thorens, “Proposal for an International Declaration on Academic Freedom and University Autonomy,” in Guy Neave, ed., *The Universities’ Responsibility to Society: International Perspectives* (JAI Press, 2008), pp. 271-82 (International Association of Universities monograph). For a discussion of other statements, foundational principles, and supportive activities, see John Sexton, “Of Academic Freedom,” an address delivered March 15, 2006, and available at: http://www.nearinternational.org/documents/Of_Academic_Freedom.

V. The Role of Courts: A U.S. Example

Recent controversies implicating international academic freedom have often involved bans on travel for academic purposes. Three such controversies involving the United States are analyzed below as examples. As will be seen, these controversies involve U.S. academics seeking to leave the United States for teaching or research purposes, as well as foreign academics seeking to enter the United States for teaching or research purposes.¹ The resulting issues, under U.S. law, may arise under the U.S. Constitution's First Amendment freedom of speech, the Fifth and Fourteenth Amendment liberty interest in travel, or the procedural guarantees of the Fifth and Fourteenth Amendment due process clause, as well as under federal "supremacy" concepts, and may also implicate various federal statutes, regulations, and administrative law principles.

Faculty Senate of Florida International University v. Roberts, 574 F. Supp.2d 1331 (S.D. Fla. 2008), *affirmed in part and reversed in part*, *Faculty Senate of Florida International University v. Winn*, 616 F. 3d 1206 (11th Cir. 2010), concerns a ban imposed by the state of Florida on certain U.S. scholars seeking to travel abroad. The pertinent legislation is the Florida "Travel Act" (Fla. Stat. Ann. Secs. 1011.90(6) and 112.061(3)(e)) that, as described by the federal district court, "restricts state universities from spending both state and 'non-state' funds on activities related to travel to a 'terrorist state'," as designated by the U.S. Department of State. The plaintiffs claimed that this Act violated their academic freedom as researchers and teachers. They provided various examples, such as this one:

Professor Lisandro Perez is a professor in the Sociology and Anthropology Department at Florida International University ("FIU"), a state university in

¹ Similar controversies may also involve U.S. students seeking to study or do research in foreign countries, or foreign students seeking to study or do research in the U.S. Such student academic freedom issues may sometimes overlap with faculty academic freedom claims - - as, for instance, when a faculty member's assertion of a right to teach may also serve to protect students' right to learn, and students' assertions of a right to learn (or right to hear) may also serve also to protect faculty members' right to teach..

Miami, Florida, and the founder and director of the Cuban Research Institute (the “CRI”) at FIU, which fosters academic exchanges and collaborations with Cuba. Professor Perez is authorized by the United States to travel to Cuba in furtherance of his ongoing research relating to Cuba. Since its 1991 founding, the CRI has agreed with the FIU administration that it would not use state funds to pay for travel to and from Cuba, but rather it would raise funds from external sources to support its programs in Cuba. Funds from the foundations are received by FIU and placed into accounts and, while the CRI Director has the signature over the accounts, the FIU grants-administrator oversees all expenditures to make sure they are within the grant’s guidelines. Professor Perez asserts that it is “not currently possible for the CRI to receive private grant funds without having the funds administered by FIU.”

Professor Perez testified that for purposes of researching a book on the Cuban community in New York City in the 19th century, he had planned to go to Cuba in December 2006, but was unable to take the trip as a result of the Travel Act. Moreover, Professor Perez stated that he is unable to continue with the subject in the future as a result of his inability to travel to Cuba and also that his teaching has suffered because he cannot do first-hand research. Professor Perez also represented that he is evaluated on his research, teaching and service to the community, and represented that his evaluation on [these] criteria would be harmed due to the Act. Finally, Professor Perez testified that his community service consists of offering commentary on current events involving Cuba through essays published in newspapers, interviews on television, or speaking at local

events, and the inability to travel to Cuba affects these activities. [574 F. Supp.2d at 1339-40 (footnotes and transcript references omitted).]

The plaintiffs challenged the Travel Act on its face as a violation of their First Amendment freedom of speech. Working through the Travel Act's tortured legislative history, the court determined that "the Act only limits funding for activities related to, or involving, travel to a terrorist state." As narrowly construed, the court (with very little supportive analysis) held the Act to be constitutional on its face. In dicta, however, the court did warn that, had "the Act preclude[d] funding for a broad scope of activities, such as lectures, dissertations, etc., relating to the designated countries, the Act would likely be a content-based restriction [on speech] in violation of the First Amendment" (574 F. Supp.2d at 1354). Moreover, in another part of the opinion dealing with the Act's interference with the federal government's foreign affairs powers, the court invalidated the Act's application to "non-state" funds, and "nominal state" funds necessary for the administration of "non-state" funds, leaving the Act valid only in its application to state funding.

Although the plaintiffs had secured a partial victory for academic freedom, they nevertheless appealed, seeking complete invalidation of the statute on this same theory that the Act interfered with the federal government's foreign affairs powers. The plaintiffs actually lost ground, however, when the U.S. Court of Appeals reversed the judgment regarding the "non-state" funds and vacated the injunction barring enforcement of Florida's Travel Act as applied to such funds. The court, in a footnote, asserted that there is no meaningful difference between state-contributed funds and funds from outside grantors that are administered by the state, since both result in expense to Florida. Relying on the U.S. government's traditional grant of control to states over their spending for education, the court determined that concern for student and faculty

safety and the avoidance of entanglement with “foreign espionage” were legitimate considerations when determining how to allocate limited education resources. Additionally, the court found that invalidation of Florida’s Travel Act was not required because any conflict between federal law and the Act was “too indirect, minor, incidental, and peripheral to trigger” application of the U.S. Constitution’s Supremacy Clause (616 F.3d at 1208). The plaintiffs attempted to prove that a significant conflict did exist by offering evidence of a definitive U.S. government policy favoring academic freedom - - noting, for example, that general travel bans imposed by the federal government usually still allow for academic travel; and that Title VI of the Higher Education Act of 1965 emphasizes the importance of “American experts in and citizens knowledgeable about world regions, foreign languages, and international affairs, as well as upon a strong research base in these areas.” The court of appeals, however, found that there was nothing on record to show a “definite substantive foreign policy position . . . in favor of academic travel -- much less in favor of travel to countries that sponsor terrorism -- that could be undermined by Florida’s act.” The court further determined that, even if there were “some indistinct desire on the part of the Executive Branch or Congress to encourage generally academic travel,” the “traditional state interest” in managing the scope of and resource allocations for academic programs overcomes the conflict between federal policy and state law, “given the lack of the conflict’s clarity and severity.”

Another wrinkle in determining the validity of Florida’s Travel Act could unfold as a result of a 2011 U.S. Presidential Directive regarding U.S. relations with Cuba, as implemented by amendment of the Office of Foreign Assets Control (OFAC) regulations that govern the Cuba Trade Embargo (31 C.F.R. Part 515) and are authorized by the Trading with the Enemy Act (50 U.S.C. App. § 5(b)). The newly amended regulations could become the “definite substantive

foreign policy position . . . in favor of academic travel” that the U.S. Court of Appeals spoke of as requisite to invalidating the Travel Act. At the least, the Presidential Directive and the federal regulations may give more “clarity” to the conflict between U.S. policy and Florida’s law. The Directive aims to “facilitate educational exchanges” with Cuba, and the OFAC regulations serve to “allow for greater licensing of travel to Cuba for educational . . . activities.” While these purposes for the amended policy are part of the greater purpose of “reaching out to the Cuban people,” it seems feasible that a court could construe them as more than “some indistinct desire on the part of the Executive Branch . . . to generally encourage academic travel.” Then the question, in any litigation challenging Florida’s Travel Act or similar legislation that other states could pass, would be whether the Directive and amended regulations add sufficient weight to the U.S. policy supporting academic travel to create an actual conflict between state and federal law. If a court were to answer that question affirmatively, there then could be a second question: whether a ban on using non-state funds (or nominal state funds) would be invalid only as to Cuba and not as to other terrorist states.

In contrast to the *Faculty Senate of Florida International University* case, the case of *American Academy of Religion, et al. v. Chertoff*, 463 F. Supp.2d 400 (S.D.N.Y. 2006), and 2007 WL 4527504 (S.D.N.Y. 2007), illustrates a type of travel ban imposed by the U.S. government (rather than a state government) on a foreign scholar (rather than a domestic scholar). The scholar, Dr. Tariq Ramadan, had sought a nonimmigrant visa (a B visa) that would allow him to enter the United States to participate in various academic conferences as he had frequently done in the past. He had applied for the B visa shortly after the U.S. Department of Homeland Security (DHS) revoked an H-1B visa that he had sought in order to accept a faculty position at the University of Notre Dame.

When DHS delayed any action on the B visa application, three United States nonprofit organizations brought suit in a U.S. District Court, claiming that DHS was seeking to exclude Dr. Ramadan from the United States on the basis of his political views, in violation of the First Amendment. The plaintiffs asserted their own rights to hear (or receive information and ideas from) Ramadan. They sought a preliminary injunction allowing Ramadan to enter the United States temporarily to attend the organizations' annual conventions or, alternatively, to require DHS to promptly reach a final decision on Ramadan's pending B visa application. At the time the lawsuit was filed, and during its pendency, DHS had not "provided any explanation as to why it revoked Ramadan's H-1B visa in July 2004 or why it is unable to render a decision on Ramadan's pending B-visa application" (463 F. Supp.2d at 408).

In its opinion, the court relied on and built upon principles developed by the U.S. Supreme Court in *Kleindienst v. Mandel*, 408 U.S. 753, 762-66, 769-70 (1972). Based on these principles, the court affirmed that "the First Amendment rights of American citizens are implicated when the Government excludes an alien from the United States on the basis of his political views, even though the non-resident alien has no constitutionally or statutorily protected right to enter the United States to speak." On the other hand, Congress' power over immigration is of the highest order, and the Executive branch "has broad discretion over the admission and exclusion of aliens. . . ." Thus the "power of a court to override the Government's decision to exclude an alien is severely limited." The court in *American Academy of Religion* accommodated these contending principles in this helpful way:

[W]hile the Executive may exclude an alien for almost any reason, it cannot do so solely because the Executive disagrees with the content of the alien's speech and

therefore wants to prevent the alien from sharing this speech with a willing American audience.

* * * * *

Only where the Government is unable to provide a facially legitimate and bona fide reason for excluding the alien, thereby revealing that the true reason for exclusion was the content of the alien's speech, may a court remedy the constitutional infirmity by enjoining the Government from excluding the alien in contravention to the First Amendment. [463 F. Supp.2d at 415, citing *Mandel*, 480 U.S. at 769-70.]

In this litigation, the court noted, the Government had not provided "any explanation at all" for excluding Ramadan from the United States, or any explanation for the delay in ruling on his application (other than a few "totally inadequate," "bare assertions"), thus "making it impossible for the court to determine" whether, under the above guidelines, the Government had violated the plaintiffs' First Amendment rights. The court therefore entered a preliminary injunction ordering the Government "to issue a formal decision on Ramadan's pending nonimmigrant visa application" within ninety days.

A few days before expiration of the ninety-day deadline, the Government denied Ramadan's visa request. The stated reason was that "Professor Ramadan had contributed money to an organization which provided material support to Hamas, a terrorist group," in violation of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). The plaintiffs thereafter returned to court (2007 WL 45527504), claiming that the Government's reason was not "facially legitimate and bona fide," as the court had required (see above), and that the visa denial therefore infringed their First Amendment rights.

After methodically reviewing the statutory provision relied on by the Government, and considering the limited judicial review available for First Amendment claims asserted in visa cases, the district court rejected the plaintiffs' argument. The court concluded that the statute applied to Ramadan (even though the organization to which he contributed \$1,000 was not designated an organization supporting terrorism until a year after his last contribution), that the government had provided a reason based on the statute, and that the Government's reason for denying the visa "is unrelated to Professor Ramadan's speech."

The plaintiffs appealed, challenging the district court's acceptance of the Government's application of the Immigration and Nationality Act to Ramadan (*American Academy of Religion v. Napolitano*, 573 F.3d 115 (2d Cir. 2009)). One of the main issues the appellate court addressed was "what will render the government's reason [for visa denial] 'facially legitimate and bona fide[.]'" In particular the court considered the provision of the Act that made an alien ineligible for a visa if he has supplied "material support, including . . . funds . . . to a terrorist organization . . . or to any member of such an organization, *unless* the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization" (emphasis added). The court found that this provision implicitly required procedural protections allowing the alien "reasonable opportunity" to counter the Government's determination made pursuant to the provision. Since there was no showing that the Government had provided Ramadan this opportunity, the court could not ascertain whether the Government's reason for the visa denial was "facially legitimate and bona fide." The court therefore remanded this issue to the district court so that the Government could either show that the consular official had confronted Ramadan with the allegations about material support to a terrorist organization and afforded him the opportunity to

counter them, or conduct a new visa hearing in which Ramadan would have the opportunity to confront and counter these allegations.

About six months after the U.S. Court of Appeals decision, and before any decision by the district court on remand, the U.S. Secretary of State retracted the orders denying Ramadan's entry into the United States, using the discretionary authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act. (See Andrew Quinn, *Clinton Lifts U.S. Ban on Muslim Scholar*, Reuters (Jan. 20, 2010), <http://www.reuters.com/assets/print?aid=USTRE60J3YQ20100120>). For another, somewhat similar, case where the scholar at issue also eventually had the ban on his entry to the United States lifted by the U.S. Secretary of State, see *American Sociological Association, et al. v. Chertoff*, Civ. Act. No. 07-11796-GAO (D. Mass.) (the Adam Habib case).

The third travel case is *Emergency Coalition to Defend Educational Travel v. United States Department of the Treasury*, 545 F.3d 4 (D.C. Cir. 2008). This case, like *Faculty Senate of Florida International University*, involved governmental restrictions on academics seeking to leave the country for academic purposes; but unlike *Faculty Senate* (and like *American Academy of Religion*), the *Emergency Coalition* case involved U.S. government rather than state government restrictions. At issue were 2004 amendments to the Office of Foreign Assets Control (OFAC) regulations (see above) that govern the Cuba Trade Embargo (31 C.F.R. Part 515), and are authorized by the Trading with the Enemy Act (50 U.S.C. App. § 5(b)). In contrast to the 2011 amendments to the OFAC regulations, which loosened travel restriction and are discussed above in relation to the *Faculty Senate* case, the 2004 amendments had tightened the conditions under which American colleges and universities could obtain licenses to conduct study programs in Cuba. The program had to be at least 10 weeks' duration; only students from

the licensed institution could enroll, and not students from other institutions; and only permanent full-time faculty members of the licensed institution could teach in the program. The plaintiffs claimed that these restrictions violated faculty and student academic freedom. They argued, for example, that the first restriction ruled out all of the inter-session study programs that had been conducted prior to the amendments; that the second restriction banned “the prior practice of aggregating students from a variety of universities” into one university’s course and thus “made it economically infeasible for most universities to offer courses in Cuba;” and that the third restriction had “drastically reduced the pool of professors eligible to teach such courses.” These restrictions, the plaintiffs argued, affected “who may teach and what may be taught” (and presumably who may be admitted to study) without sufficient justification, and thus violated their academic freedom as protected under the First and Fifth Amendments.

In both the U.S. district court and the U.S. appellate court, however, the plaintiffs were tripped up by issues concerning the applicable standard of review for their claims. The court determined that “strict scrutiny” review of the plaintiffs’ First Amendment claims did not apply because the U.S. government had not interfered with the “content” of professors’ academic lectures” or “academic speech.” Rather, the government regulations at issue are “content neutral” because their purpose is to “curtail tourism” in Cuba and thus restrict the profits from tourism that Cuba relied on. The more lenient “intermediate scrutiny” test therefore applied – a test that the government was able to meet.

The plaintiffs fared no better with their Fifth Amendment claim – that the government regulation infringed upon their “right to travel” as a protected liberty interest under the Fifth Amendment due process clause. Although acknowledging that the U.S. Supreme Court, in *Kent v. Dulles*, 357 U.S. 116, 127 (1958), had “recognize[d] the right to international travel as part of a

liberty interest,” the court determined that “subsequent cases have distinguished [*Kent*]” and “disapproved of [its] broad protection of international travel.” Under these cases, U.S. government regulations of international travel are valid under the Fifth Amendment so long as they “apply equally to all citizens and [are] rooted in foreign policy concerns.” The 2004 amendments easily met this test, according to the court, especially since the U.S. Supreme Court had made it clear that “the federal judiciary was obliged to defer to the political branches” on questions concerning the importance of federal foreign policy objectives.

A concurring judge, Judge Edwards, issued a separate opinion specifically to address the academic freedom dimensions of the case – a matter given short shrift in the court’s opinion written by Judge Silberman. Judge Edwards, however, ultimately reached essentially the same conclusion as the majority – that “in this case, the First Amendment rights implicated by appellants’ claims are coterminous with any applicable rights to academic freedom,” and that in this case, under the First Amendment, only intermediate scrutiny applies. While Judge Edwards’ more nuanced opinion does hold out hope to faculty members that the First Amendment could sometimes provide meaningful protections in international academic freedom cases, he spoke only for himself. In response to Judge Edwards, Judge Silberman issued a second opinion, a concurring opinion for himself alone, in which he cast doubt on the existence of any First Amendment academic freedom right and argued that, even if there were such a right, it would belong only to institutions of higher education and not to their faculties or students. This reasoning apparently explains why Judge Silberman’s opinion for the court gave scant attention to the plaintiff’s academic freedom arguments.

Although the *Emergency Coalition* case still stands as good law on all points, the travel restrictions that the plaintiffs challenged were eliminated or revised by the 2011 amendments to

the OFAC regulations (76 Fed. Reg. 5072 (Jan. 28, 2011), 31 C.F.R. sec. 515.565). (The 2011 amendments are discussed above in relation to the *Faculty Senate of Florida International University* case.) The new regulations, for example, eliminate the old requirement that study programs at a Cuban institution be no shorter than 10 weeks; instead, the regulations mandate only that “the study in Cuba be accepted for credit toward the student’s degree.” Moreover, students are now permitted to participate in academic activities through *any* “sponsoring U.S. academic institution” rather than, as the old regulations prescribed, only through the “accredited U.S. academic institution at which the student is pursuing a degree”; and eligibility to conduct study programs in Cuba has been extended to include *all* faculty and staff (including adjunct and part-time staff) of a sponsoring U.S. academic institution, rather than, as the old regulations required, only “full-time permanent employee[s] of the institution.”

These amendments apparently resolve the issues the plaintiffs had raised regarding the old regulations in the *Emergency Coalition* case. The new amended regulations clearly provide greater support for trans-border or international academic freedom and may indicate an important shift in U.S. policy. Viewed as just one of several changes regarding relations with Cuba, however, the greater academic freedom protection may just be a side-effect of the overriding goal of increasing American contact with Cuba and the Cuban people. So although the plaintiffs in *Emergency Coalition* may now in effect have the relief they sought, the broader impact of this relief as related to international academic freedom remains to be seen.

Taken together, the three U. S. international travel cases provide little protection for international academic freedom. The court opinions evidence substantial deference to the U.S. government when it is exercising its foreign affairs powers, and the *Faculty Senate* case also evidences deference to state governments when they are exercising their spending powers

regarding education. And all the courts' opinions, except Judge Edwards' concurrence in *Emergency Coalition*, suggest a reluctance to probe into the academic freedom issues raised by the cases.

The cases do reveal three types of arguments, however, that may yield some judicial protection for international academic freedom in limited circumstances. First, the opinions in the *American Academy of Religion* case apparently accept the proposition that the U.S. may not exclude a foreign scholar from the country solely on the basis of his or her political beliefs. If plaintiffs could show that this had occurred, they then would have a First Amendment free speech argument for challenging the Government's action. The *Emergency Coalition* case also appears to support this type of argument, but it qualifies its reach by emphasizing that governmental travel restrictions that implicate free speech will usually be "content-neutral" restrictions and thus would not receive the "strict scrutiny" review that content-based restrictions (such as an exclusion based on political beliefs) would receive.

Second, the appellate court opinion in the *American Academy of Religion* case indicates that statutory visa requirements will sometimes require fact finding that, in turn, will require the government to provide minimal procedural due process protections. Such protections will apparently be implicit in the statutory provision requiring fact finding, or perhaps sometimes in the Fifth Amendment due process clause. Similarly, state law travel restrictions requiring fact finding may be subject to the procedural requirements of the Fourteenth Amendment.

Third, the district court opinion in the *Faculty Senate* case accepted an argument based on the "supremacy" of U.S. foreign affairs powers over state law. This type of argument (unlike the free speech argument) applies only to state law restrictions on international academic travel. The supremacy argument was qualified on appeal in *Faculty Senate*, however, when the court applied

a very strict guideline for determining when a state law actually conflicts with the federal foreign affairs powers.

While the three U.S. travel cases cover only a part of the much wider range of possible international academic freedom issues, and do not provide a sufficient basis for drawing any firm conclusions, it is nevertheless important to note the tentative conclusions that one might draw from these opinions and the tentative advice that one might find in them. In short, at this point in time, courts may not be the best source for international academic freedom protections. Rather, it appears that developments in U.S. foreign policy, and that of other countries as well, may be a better source for securing these protections, as suggested by the Presidential Directive and regulations on Cuba (above) and the U.S. State Department's intervention in the visa disputes involving foreign scholars (above). Other sources where protections for international academic freedom may be found or developed are international treaties, other bi-lateral and multi-lateral agreements between and among countries, agreements between HEI's in one country and government agencies in another country, and agreements between HEI's in one country and collaborating HEI's in other countries. In addition, as may also be seen regarding domestic academic freedom, it will be important to pay renewed attention to professional concepts (vs. legal concepts) of academic freedom as sources of protection, and thus to engage in the difficult and slow work of developing international professional understandings and norms of academic freedom that are attentive to the effects of the continuing commercialization and globalization of higher education.

VI. Further Research: Next Steps

Development of international norms of academic freedom is obviously a long-term and multi-faceted project with no clear pathway from beginning to end. From this perspective, the concluding section of this paper seeks only to suggest some next steps that may prove feasible and constructive in shedding more light on the project and moving it further along the uncertain pathway.

- 1 Further research is needed to identify additional documents – governmental and nongovernmental – that state principles of international (or trans-border) academic freedom or make recommendations concerning the same.
- 2 Content analysis is needed of the various documents cited in this paper or identified in step 1 above. Definitions of faculty academic freedom (as well as institutional autonomy) could be compared. Underlying concepts could be identified and compared. Areas of agreement and disagreement of principle could be charted. Vague generalities, as compared with specific statements, could be highlighted.
- 3 Further research is needed to identify scholars’ and policy-makers’ critiques of the academic freedom documents cited in this paper as well as critiques of other documents that may be identified under step 1 above.
- 4 Taking steps 2 and 3 to a higher level, research could be initiated on the difference between what governments and influential nongovernmental organizations say they do in their academic freedom statements and what they actually do in practice. (Data gathered in steps 5 and 6 below could yield useful evidence of what governments actually do in trans-border contexts.)
- 5 Further research on case law is needed to identify cases that implicate international academic freedom (see, for example, the international travel cases discussed in part V of this paper). Such research may yield further illustrative examples of international

- (or trans-border) academic freedom problems and may also uncover valuable insights into the judicial role in international academic freedom cases and into differences in the scope and prominence of the judicial role from one country to another.
- 6 Further information could be collected, and further analysis could be done, on the experiences of groups like the Scholars at Risk Network (SAR) and the Council for Assisting Refugee Academics (CARA) that assist at-risk academics in various countries. (For more on these organizations, see John Sexton, “Of Academic Freedom,” cited in part IV this paper.) The experiences of these organizations would likely yield insightful case studies on ways that academic freedom is threatened and on the trans-border implications of such problems, as well as instructive examples of clashes of cultures regarding academic freedom.
 - 7 Empirical studies could be done on why academic freedom is a core value for so many academics and higher education institutions throughout the world. Possible studies would be those of how academic freedom benefits a particular higher educational institution, or benefits higher education (generally) in a particular country, or benefits a particular country in areas beyond higher education as such. For instance, a study could focus on a particular agreement regarding academic freedom between institutions in two different countries, or between faculty organizations in two different countries, or between government agencies in two different countries, and consider how that agreement has benefitted (or not) the two entities involved.

