16 June 1976

MEMORANDUM FOR: Chairman, Security Committee, USIB

SUBJECT : Security Policy Concerning Travel and Assignment of Personnel with Access to Compartmented Information

REFERENCES : (a) Security Committee Memorandum, dtd 17 February 1976, same subject
(b) Security Committee Memorandum, dtd 29 April 1976, same subject

1. This is a formal response to your referenced memoranda concerning private foreign travel of personnel with access to sensitive compartmented information. In general, it reflects our earlier oral opinion rendered during informal discussions with you.

2. You stated that the USIB Security Committee currently is reviewing its instructions in this area, and is considering various alternative approaches. Specifically, you requested the opinion of this Office as to the legality of:

a. restricting a current employee's private travel to a high risk area.

b. ...former employee's private travel to a high risk area.

You drew our attention to the "Indoctrination Oath" used by the National Security Agency" which requires that a new employee "understand that certain limitations may be placed on foreign travel in or through Communist or Communist-dominated areas."

3. There is no reason why intelligence agencies may not formulate policies with respect to the private foreign travel of their employees to "denied" foreign areas, or why such policies may not be articulated in administrative regulations. In cases where employees have sensitive clearances and access to sensitive classified intelligence, it is understandable that there would be apprehensions as to the potential for compromise of the information these individuals possess or are likely to possess. It is questionable, however, in light of the constitutionally protected rights of U.S. citizens to travel abroad as they wish, whether such regulations may go further than merely express policy and prohibit, explicitly or by implication, private foreign travel to certain countries, particularly with respect to former employees. Moreover, such regulations would be illusory, since they would likely be legally or practically unenforceable.

4. Restrictions on private foreign travel must take into consideration the constitutional rights of U.S. citizens to travel abroad where they wish. The Supreme Court has held that the right to travel is part of the "liberty" of which a person cannot be deprived without due process of law under the Fifth Amendment of the Constitution, Kent v. Dulles, 357 U.S. 116 (1958) and Aptheker v. Secretary of State, 378 U.S. 500 (1964). As such, it is clearly not absolute; it does not mean that under no circumstances can it be inhibited. The requirements of due process are a function not only of the governmental restrictions imposed, but also the extent of necessity for such restrictions. In Worthy v. Herter, 270 F.2d 905 (D.C. Cir. 1959), cert. denied 361 U.S. 918, the court held that the Secretary of State had the authority to withhold a citizen's passport as a means of enforcing area restrictions on two grounds: The inherent foreign affairs power of the executive and statutory authority based on §215(b) of the Immigration and Nationality Act of 1952. In 1965, in Zemel v. Rusk, 381 U.S. 1, the Supreme Court held that §211(a) of the Passport Act of 1926, which authorized the Secretary to determine area restrictions and to restrict the validity of U.S. passports for travel in these countries, was constitutional, and that the Secretary of State has the authority to refuse to validate the passports of United States citizens for travel to Cuba. While acknowledging that freedom of travel was "liberty" protected by the Fifth Amendment, the majority argued that considerations of foreign policy justified some restrictions on that freedom, and that restrictions involved in the case were supported by the weightiest considerations of national security. The Court stated, at pp. 14-18:

> In Kent v. Dulles, supra, 357 U.S. at 125, ..., we held that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." See also Aptheker v. Secretary of State, supra, 378 U.S. at 505-506, ... However, the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.
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> The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction. Cuba is the only area in the Western Hemisphere controlled by a Communist government. It is, moreover, the judgement of the State Department that a major goal of the Castro regime is to export its Communist revolution to the rest of Latin America. The United States and other members of the Organization of American States have determined that travel between Cuba and the other countries of the Western Hemisphere is an important element in the spreading of subversion, and many have therefore undertaken measures to discourage such travel. It also cannot be forgotten that in the early days of the Castro regime, United States

citizens were arrested and imprisoned without charges. We think, particularly in view of the President's statutory obligation to "use such means, not amounting to acts of war, as he may think necessary and proper" to secure the release of an American citizen unjustly deprived of his liberty by a foreign government, that the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.

* * * *

That the restriction which is challenged in this case is supported by the weightiest considerations of national security is perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant's complaint by less than two months.

* * * *

This does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice. However, the 1926 Act contains no such grant. We have held, Kent v. Dulles, supra, and reaffirm today, that the 1926 Act must take its content from history: It authorizes only those passport refusals and restrictions "which it could fairly be argued were adopted by Congress in light of prior administrative practice." Kent v. Dulles, supra, 357 U.S. at 128, 2 L. Ed. 2d at 1211. So limited, the Act does not constitute an invalid delegation.

Two years later the significance of the Zemel case was sharply undercut. Criminal proceedings were brought under §215(b) of the Immigration and Nationality Act of 1952 against several citizens who traveled to Cuba in violation of the area restrictions. The Supreme Court unanimously held in United States v. Laub, that violation of area restrictions had not been made a criminal offense by Congress, and therefore the defendants could not be convicted. Finally, in Lynd v. Rusk, 389 F. 2d 940 (D.C. Cir. 1967), the court stated that the Secretary has authority to decline to issue a passport when the citizen's sole purpose is to journey to a restricted area, but that the Secretary does not have authority to withhold a passport when the applicant seeks to travel to a non-restricted area, even though he plans also to visit a restricted zone. The Secretary's statutory authority in the latter instance is limited to taking reasonable steps to assure that any travel into or within a restricted area is done without a passport; in achieving that objective the Secretary may require a passport holder to leave his passport with a responsible depository approved by the Secretary, before undertaking travel to a restricted country.

5. In summary the courts in effect have told the Secretary of State that Congress has given him the power to designate restricted areas, but that Congress failed to provide any effective means of enforcing these restrictions.

6. These cases, while not directly in point with respect to the restrictions you are considering, are indicative of the potential reception which attempts to enforce restrictions would face in court. It is clear that it would be difficult to prevent an employee, present or former, for national security reasons, from engaging in private foreign travel to denied areas by means of passport denial. Moreover, the intelligence community would be in an even more precarious position in attempting to justify other enforcement measures under the authority of the National Security Act and other laws which are much less specific with respect to travel abroad than the passport statutes. In this context, we must keep in mind that statutes limiting the right to travel are to be strictly construed, Kent v. Dulles.

7. In any event, enforcement of restrictions on the private foreign travel of current employees would seem much more justifiable than on the private foreign travel of former employees. With respect to current employees, administrative remedies technically are available for enforcement purposes. Given the Director's statutory responsibility to protect intelligence sources and methods and classified information, under the National Security Act of 1947, particular NSCID's and DCID's, and other law, it is arguable that an intelligence agency in creating public office or providing for public employment, may attach thereto such reasonable conditions relating to the national security as it chooses, and one who accepts such office or employment is bound by such conditions. And, of course, in the case of CIA, the DCI may ultimately employ the sanction of employment termination. Under the National Security Act (§102(c)), and notwithstanding the provisions of any other law, he "may in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interest of the United States...." This right has been construed as the "plenary power to discharge an employee at will . . . for any reason, or no reason at all," Kochan v. Dulles, Civ. Act. No. 2728-58, May 20, 1959 (unpublished). See also Torpats v. Dulles, Civ. Act. No. 1111:61, July 27, 1961 and George S. Rhodes v. U.S., 156 Ct. Cl. 31 (1962).

8. With respect to the private foreign travel of former employees, legal enforcement measures are more limited or unavailable altogether. In this context, the administrative enforcement measures applicable to present employees are not available, and the situation is analogous to that of private citizens or contractor personnel (see para 10 below).

9. I discussed this subject with Knute Malmborg, Assistant Legal Advisor for Management Affairs at State. The Department currently has regulations which provide that (1) a passport may be refused in cases where the Secretary of State determines that a national's activities abroad are causing or are likely to cause serious damage to the national security or foreign policy of the United States, and (2) that passports cease to be valid for areas to which travel is restricted in the national interest, on determination of the Secretary, because such travel would seriously impair the conduct of U.S. foreign affairs, see 22 CFR §51.70(b)(4) and §51.72. He felt that attempting to enforce such regulations with respect to employees with access to sensitive intelligence on the basis of national security or foreign relations interests would be extremely difficult to justify in court. He suggested that perhaps the more prudent policy would be to require, in the case of employees, the reporting of any intended foreign travel and the use of persuasion if such travel were adverse to the interests of the Agency.

10. This strategy is precisely the current posture of CIA. CIA regulations provide essentially that employees contemplating private foreign travel, either direct or incidental to official travel, must report such contemplated travel and receive Agency permission. Specifically, a CIA employee planning to undertake private foreign travel into, over or through risk-of-capture areas (as listed in the Appendix to this memorandum) is required to submit a request, and obtain the prior approval of the Director of Security. The Office of Security coordinates such requests with the operating divisions responsible for the area of proposed travel and thereafter the Director may disapprove such a request upon the determination that the proposed travel is in conflict with the best interests of the Agency,

25X1 [redacted]

and contract personnel must also seek prior approval of the Director of Security for contemplated foreign travel into, over or through the USSR or any Communist-controlled country, but the regulations acknowledge that the U.S. Government cannot legally prevent foreign travel of contractors or contract personnel and must rely on persuasion and cooperation with the individual involved, [redacted] The 25X1
regulations require reporting when an employee and/or dependent travel is con-
25X1 templated to the PRC [redacted] and when close relatives of an employee plan
private foreign travel to denied areas [redacted] Other provisions establish 25X1
standards of employee conduct when private foreign travel is undertaken, [redacted] 25X1
25X1 [redacted]

11. I discussed the Agency's experiences under these regulations with STAT [redacted] of OS/EAB, and learned about the practical problems in preventing undesirable travel. He advised that OS was concerned with the private foreign travel to denied areas of employees who have sensitive clearances and who have access to sensitive information. Most of these employees are warned about the possible consequences of such travel, but OS has generally stopped short of refusing permission to travel abroad. More and more employees are insisting on such a right and many are willing to forego Agency employment if it comes to that. If such personnel cannot be persuaded to abandon their foreign travel, it is not likely that stringent prohibition regulations would make any difference.

12. It is difficult to determine what purpose contractual provisions of the nature of those in the NSA Oath would fulfill other than to bring to the attention of personnel an agency's interests in the area of private foreign travel to denied areas, and to record such notice. Provisions of this nature could hardly serve to cure any constitutional or practical infirmities in any proposed enforcement procedures. In passing, we note that, in the NSA Oath, obligations undertaken by the oath-giver are that he understand NSA's interests in restricting certain private foreign travel and that he consult with the Director of Security about his own travel plans. To the extent this provision implies a promise not to engage in private foreign travel on which NSA places limitations, the Oath may very well reflect legal authorities unique to those of the armed forces in relation to military personnel. Such authorities, of course, would not be available to non-military agencies.

13. As far as I could determine, there are no provisions in Agency secrecy agreements with respect to private foreign travel, except in the case of contractor personnel. Pursuant to regulations ([redacted] the following statement is placed in contracts signed by such individuals: 25X1

> I understand that travel into, over, through the U.S.S.R. or any Communist-controlled countries may constitute a security hazard. I, therefore, agree to request approval in advance from the Security Headquarters of the sponsoring activity for all such travel.

As previously mentioned, however, this regulation acknowledges that the private foreign travel of contractor personnel cannot be legally restricted. There is no statement concerning private travel abroad in documents signed by personnel when

they enter on duty. Apparently, there are no contractual restrictions which relate to the private foreign travel of employees after termination of their employment by the Agency, although such employees are asked to report any such contemplated travel undertaken within one year after leaving the job. Departing employees are asked to provide details on any contemplated foreign travel at security debriefings.

25X1

Assistant General Counsel
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APPENDIX

25X1 Risk-of-Capture Areas [redacted]

Include, but are not limited to:

(1) U.S.S.R.

(2) People's Democratic Republic of Korea (North Korea)

(3) People's Republic of China (China)

(4) Tibet

(5) Outer Mongolia

(6) Estonia

(7) Latvia

(8) Lithuania

(9) Poland

(10) Czechoslovakia

(11) German Democratic Republic (East Germany)

(12) Hungary

(13) Rumania

(14) Bulgaria

(15) Albania

(16) North Vietnam

(17) Demilitarized Zone of Korea

(18) Soviet Sector of Berlin

(19) Yugoslavia

(20) Macao

(21) Certain parts of South Vietnam, Laos, and Cambodia

(22) Quemoy and Matsu Islands

(23) Cuba