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### Recommended Citation

Leon Hurwitz, *Judicial Control over Passport Policy*, 20 Clev. St. L. Rev. 271 (1971)  
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## Judicial Control Over Passport Policy

Leon Hurwitz\*

TO WRITE THAT FOREIGN POLICY is controlled by entities other than the President and State Department is misleading for, by virtue of its constitutional position, the Executive branch cannot be "controlled" in the formulation and execution of foreign policy. But this is not to say that those not able to control do not influence: Congress, public opinion, and foreign governments influence but do not control. This paper is concerned with the judiciary's role in influencing both the procedure and substance of one particular aspect of foreign policy, namely, the passport policy of the State Department. That a decision regarding passports is a foreign policy decision has long been advanced by the President and Secretary of State. It is generally accepted that the issuance and regulation of passports is an integral part of the general conduct of American foreign relations.

The President and Secretary of State usually exercise unlimited discretion in the conduct of foreign affairs and the courts will not interfere, for example, with the President's refusal to grant diplomatic recognition nor will they comment on the use of American troops abroad. If passports dealt solely with foreign policy, moreover, the Passport Bureau would be free to dispense with due process of law in its decision-making. The 1946 Federal Administrative Procedure Act specifically exempts foreign affairs from the requirements of due process.<sup>1</sup> But passport decisions have been open to judicial interpretation because basic constitutional issues are presented when the Secretary of State limits the right to travel by arbitrary procedures. The courts have not permitted the State Department to restrict constitutional guarantees under the guise of "national interest" or "foreign policy."

The purpose of this paper, then, is to examine the process by which the courts have removed effective authority from the Secretary of State to conduct this aspect of foreign policy—not because passports do not deal with foreign affairs but, rather, because even the conduct of American foreign relations is subject to constitutional requirements.<sup>2</sup>

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<sup>1</sup> Fed. Admin. Procedure Act, 5 U.S.C. § 1004 (1946).

<sup>2</sup> This paper is concerned only with the question of U.S. citizens leaving the country; and the welcome they may receive elsewhere is not relevant. The term "passport" refers to the normal passport issued to the ordinary traveler and not to the various types of special passports issued to the military or diplomatic corps.

## International Travel, Passports, and Foreign Policy

The United States Constitution is silent on the right to travel beyond the borders and as far as such travel is concerned, nothing was done prior to 1918 to restrain citizens from leaving the country. This excludes the 1799 Logan Act which has never been applied and is largely a dead-letter provision because it is unenforceable.<sup>3</sup> The freedom to travel was a dominant theme in United States policy prior to World War I: the War of 1812 and the War with the Barbary States were due, in part, to unwelcomed restrictions placed upon American traders; Japan was "opened up" in the name of freedom of access; China was subjected to "spheres of influence" for everyone had the right to travel and trade in China; and millions of immigrants were permitted entry into this country.

It was not until 1918 that this unlimited right of American citizens to travel abroad was restricted—a passport became a legal prerequisite. This restriction was lifted in 1921. With the advent of World War II, limitations were once again placed upon travel. International travel was thus closely tied to passports because possession of the document was now required by law before such travel could take place.

Passports are not a new phenomenon. They have existed since biblical times, but their nature has changed since their first use. The term "passport" was, at its inception, applied to a document given to an enemy alien or to a departing foreign ambassador which permitted the bearer to pass freely through the lines of the issuing power (a safe-conduct pass).<sup>4</sup> Passports were slowly transformed, however, into a type of "letter of recommendation" issued by a government, or by various officials of a government, to selected private individuals for use abroad.<sup>5</sup> The current usage is that a passport is a document issued only by a specific official of a Government (usually the Secretary of State/Foreign Minister or Interior Minister) only to its citizens or nationals in order to identify the bearer when he is in foreign countries.<sup>6</sup> It is

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<sup>3</sup> The Logan Act, forbidding private citizens from negotiating with a foreign government, was directed at a member of the Senate who had persuaded Tallyrand to lift the Napoleonic embargo against the U.S. and who also hoped to persuade the British to stop the conduct which ultimately led to the War of 1812. See Wyzanski, Jr., "Freedom to Travel," *Atlantic Monthly*, Oct. 4, 1952, at 67. The Act reads: "Any citizen of the United States, wherever he may be, who, without authority from the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government . . . with intent to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than \$5000 or imprisoned not more than three years, or both." 18 U.S.C. § 953, 62 Stat. 744.

<sup>4</sup> Jaffe, "The Right to Travel: The Passport Problem," *Foreign Affairs*, Oct., 1956 at 17.

<sup>5</sup> Reginald Parker, "The Right to Go Abroad: To Have and to Hold a Passport," 40 *Va. L. R.* 853 (1954).

<sup>6</sup> Jaffe, *supra* n. 4 at 17.

also a request to foreign governments to allow the bearer to pass without delay or hindrance and in case of need to give all lawful aid and protection.

The United States Supreme Court defined the nature of a passport in 1835 as:

... a document which, from its nature and object is addressed to foreign powers; purporting only to be a request that the bearer of it may pass safely and freely; and it is to be considered rather in the character of a political document, by which the bearer is recognized in foreign countries as an American citizen, and which, by usage and the law of nations, is received as evidence of the fact.<sup>7</sup>

The old idea of a passport, that it was a privilege granted only to those in the good graces of the Government, was not harmful to liberty because the document was not required for one to leave the country. Between 1918 and 1921, and from 1942 to the present, the possession of a passport is no longer a nicety but is a legal requirement.<sup>8</sup> Through a long process beginning in 1902, authority was granted, through Congressional Acts and Presidential Proclamations, to the Secretary of State to issue passports (or to refuse to issue passports) in his capacity of chief officer for the conduct of American foreign policy.<sup>9</sup>

It was believed that since the Department of State was concerned with foreign policy and that since international travel was a function of that policy, the Department should have authority over passports in order to regulate travel. President Eisenhower clearly emphasized this view in 1958:

Since the earliest days of our Republic, the Secretary of State has had the authority to issue or deny passports. Historically this authority stems from the Secretary's basic responsibilities as the

<sup>7</sup> *Urtetiqui v. d'Arcy*, 34 U.S. (9 Pet.) 692, 699 9 L. ed 690, 698 (1835). "It is a mere ex-parte certificate; and if founded upon any evidence produced . . . establishing the fact of citizenship, that evidence . . . ought to be produced . . . as higher and better evidence of the fact." *Id.* The State Department, however, believed the passport was evidence of citizenship and lack of the document would prevent the citizen from receiving the benefits of U.S. protection while abroad. The Department comments: "Possession of the passport indicates the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad. The right to receive the protection of the Government is correlative with the obligation to give undivided allegiance to the U.S. A person whose activities, either at home or abroad, promote the interests of a foreign country . . . should not be the bearer of an American passport." "Department Policy on Issuance of Passports," U.S. Dept. of State, Bulletin, June 9, 1952 at 919. I would add, however, that the right to U.S. protection derives from the fact of citizenship and not from the possession of a passport.

<sup>8</sup> There are several exceptions to this requirement, however. A passport is not required if one's destination is within the Western Hemisphere. But the document is necessary for countries outside the Hemisphere.

<sup>9</sup> For the relevant passport laws and regulations, see the following: Foreign Relations and Intercourse, 22 U.S.C. 212 (1902); 22 U.S.C. 213 (1917); 22 U.S.C. 211 (a) (1926). War and National Defense, 50 U.S.C. 785 (1954); Immigration and Nationality Act, 8 U.S.C. 1185 (1952); Exec. Order No. 7856, 22 C.F.R. 51.75, 51.77 (1938); Presidential Proclamation No. 3004, 18 F.R. 489 (1953).

principal officer of the President concerned with the conduct of foreign regulations. . . . the Secretary should have clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United States.<sup>10</sup>

Armed with this authority to regulate passports, the Department's Passport Division began to deny passport applications in a most arbitrary and capricious manner on grounds that the affected persons' activities would not be in the "best interests" of the U.S. The passport of Beverly Hepburn was not renewed for allegedly engaging in the internal political affairs of Guatemala. A Department spokesman said that to renew the passport would not have been in the national interest.<sup>11</sup> Miss Hepburn was not afforded the opportunity of a hearing nor was she allowed to appeal the decision, for private citizens cannot contest foreign policy decisions.

Paul Robeson's passport was revoked because ". . . any trip that Robeson would make would not be in the interest of the United States." The *New York Times* reported that Robeson's activities in left-wing movements and his outspoken criticism of this country's international posture had much to do with the revocation of his passport.<sup>12</sup> One of the most tenuous arguments offered for revocation was put forth by the Justice Department in a brief filed before the District of Columbia District Court in behalf of the Secretary of State. The Government argued that ". . . if Robeson spoke abroad against colonialism he would be a meddler in matters within the exclusive jurisdiction of the Secretary of State."<sup>13</sup>

Passport applications were denied for no apparent reason. Disclosure of the reasons it was thought, would prejudice the conduct of U.S. foreign relations. John Foster Dulles consistently maintained that passport denials could be effected *in camera* under the guise of foreign policy. Dulles comments:

I have reached this conclusion denial of passport on the basis of confidential information contained in the files of the Department of State, the disclosure of which might prejudice the conduct of U. S. foreign relations . . . and because the issuance of a passport would be contrary to the national interest.<sup>14</sup>

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<sup>10</sup> Dwight D. Eisenhower, "Administration Recommends New Passport Legislation," cited in U.S. Dept. of State Bulletin, Aug. 11, 1958 at 250.

<sup>11</sup> N. Y. Times, Sept. 7, 1953 at 8.

<sup>12</sup> N. Y. Times, Aug. 4, 1950 at 1.

<sup>13</sup> Brief for Appellee, p. 20. *Robeson v. Acheson*, 198 F. 2d 985 (D.C. Cir., 1952).

<sup>14</sup> John Foster Dulles, "Appendix to Opinion of the Court Decision and Findings of the Secretary of State in the Case of Weldon Bruce Dayton," *Dayton v. Dulles*, 357 U.S. 144, 153, 2 L. ed 2d 1221, 78 S. Ct. 1127 (1958).

Other passports were denied because the applicant wished to travel to areas where the U.S. did not maintain the usual diplomatic civilities. The State Department refused to issue passports because the prospective traveler could not be afforded protection for it was believed that protection of citizens was in accord with the "best interests" of the nation. Robert F. Cartwright, former Administrator of the Bureau of Security and Consular Affairs within the Department of State, comments to this effect:

Generally speaking, the United States will not validate passports for travel to countries with which we do not have diplomatic relations. Americans traveling to such countries cannot be extended the usual protection offered American citizens and property abroad by our embassies and consulates abroad.<sup>15</sup>

It appeared that the Department was slowly evolving a standard that a citizen could not travel to any country if he could not be afforded diplomatic protection. But this standard was not applied fairly or consistently and, consequently, there was no standard. A passport was revoked not because of the non-presence of an ambassador, but, rather, because the Ambassador did not like the prospective visitor, did not wish to protect him, or did not want him in "his" country.

The passport of a Mr. Clark, former Chief Justice of the United States High Commission's Court of Appeals in West Germany, was invalidated for travel to Berlin because he had made some remarks protesting the arrest of American citizens by German authorities. It was reported that the then United States Ambassador to the German Federal Republic, Dr. James B. Conant, had strongly objected to Judge Clark's visit and did not want him granted re-entry privileges.<sup>16</sup>

Judge Clark comments on this bizarre affair:

It is preposterous to say that Dr. Conant can exercise some sort of censorship on persons whom he wishes or does not wish to come to the country to which he is accredited. This has never been held to be the function of an Ambassador.<sup>17</sup>

The arbitrary and capricious action described above was pursued on grounds that a passport decision was a foreign policy decision and, therefore, the Department had absolute power and discretion to take such action. The Department's conception of the role passports had in the conduct of foreign relations bears citing at length for it illustrates the rationale underlying the total process of passport and travel regulation:

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<sup>15</sup> Hearing before the Subcomm. on Constitutional Rights of the Committee on the Judiciary, 85th Congress, 1st Sess. pt. 1, at 101 (1957).

<sup>16</sup> N. Y. Times, July 9, 1955, at 31.

<sup>17</sup> *Id.*

The Secretary's authority both to deny or restrict passports stems from his basic Constitutional powers in the conduct of foreign relations . . . [he] may deny passports [because] . . . the applicant's travel . . . is inimical to U.S. foreign policy or detrimental to the orderly conduct of U.S. foreign relations . . . . I believe we have a responsibility to see to it that individual Americans are not allowed capriciously to disturb the delicate international situation by breaking restrictions which have been imposed for sound foreign policy reasons.<sup>18</sup>

It is true that if the Department's authority to make decisions were based clearly and solely on foreign policy issues, the courts would not substitute their judgment for that of the Secretary and the Department would then be free to dispense with both procedural and substantive due process. But such decisions limiting international travel are not solely "foreign policy" for they affect basic constitutional rights. The courts, therefore, have maintained close scrutiny over the Department's actions in order to insure that administrative discretion did not eliminate procedural or substantive justice.

### Judicial Control Over Foreign Policy

The above remarks demonstrated that the Secretary of State believed it was incumbent upon him to determine, in his sole judgment and discretion, whether the travel of a particular citizen was in accord with the best interests of the nation. The Secretary also believed that he was the sole determinator of the country's "best interests." Although the Secretary has pleaded that the act of travel regulation is within his sole domain, the courts seem more impressed with the citizen's rights than with foreign policy requirements.

The right to travel has been re-affirmed several times against various restrictions placed upon it. In 1900, Chief Justice Fuller in *Williams v. Fears*,<sup>19</sup> stated:

The liberty, of which the deprivation without due process of law is forbidden, means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his facilities; where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be

<sup>18</sup> Roderic L. O'Connor, "The State Department Defends," *Saturday Review*, Jan. 11, 1958 at 11, 12. Mr. O'Connor continues: "When the Secretary issues a passport restricted for travel to certain areas, he is, in our view, making a determination that it is contrary to the foreign policy objectives of the U.S. to have American citizens traveling within those areas . . . if this authority is used on grounds which are clearly based on foreign policy the courts will not substitute their judgment for that of the Secretary. . . . The Secretary of State's power to withdraw or withhold a citizen's passport is not designed to be a punishment. It is designed as an instrument of foreign policy."

<sup>19</sup> *Williams v. Fears*, 179 U.S. 270, 274; 45 L. ed 186, 188, 21 S. Ct. 128 (1900).

proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned. . . .

More recently, in 1964, the Supreme Court re-affirmed this right to travel. Mr. Justice Douglas, in a concurring opinion in *Aptheker v. Secretary of State*,<sup>20</sup> stated:

The right to move freely from state to state is a privilege and immunity of national citizenship.<sup>20a</sup> None can be barred from exercising it, though anyone who uses it as an occasion to commit a crime can of course be punished. But the right remains sacrosanct, only illegal conduct being punishable.

Absent war, I see no way to keep a citizen from travel within or without the country unless there is cause to detain him.

Through a long legal process, the Courts have intervened in the Department's decision-making process regarding restraint of travel. The passport of a Miss Bauer was cancelled for the sole reason that her activities would be contrary to the best interests of the U. S. No opportunity was afforded Miss Bauer to appeal the "foreign policy" decision. A Federal District Court reversed this action.<sup>21</sup> Even though the Court recognized that the conduct of foreign affairs is a political matter within the discretion of the Executive, it was held that such conduct must not be in conflict with any constitutional provisions. The District Court states in *Bauer v. Acheson*:

This Court is not willing to subscribe to the view that the executive power includes any absolute discretion which may encroach on

<sup>20</sup> *Aptheker v. Secretary of State*, 378 U.S. 500; 12 L. ed 2d, 992; 84 S. Ct. 1959 (1964). The Department of State has listed various criteria it has employed as "cause" to restrict travel: (1) fugitives from justice and persons under court restraining orders; (2) persons repatriated at government expense, repayment not being made; (3) persons likely to become public charges; (4) criminals with long records and recent offenses; (5) participants in political affairs abroad whose activities were deemed harmful to good relations and persons whose previous conduct abroad has been such as to bring discredit on the U.S. and cause difficulty for other Americans; (6) fraudulent applications; (7) persons determined to be mentally ill; (8) minor children whose travel is objected to by one or both parents; and (9) persons whose activities abroad would violate the laws of the U.S. These categories are based on answers given by the Department of State to the Senate Foreign Relations Committee, *Hearings Before the Senate Foreign Relations Committee on Department of State Passport Policies*, 85th Congress, 1st Session, at 38, 39 (1957) as cited by the Report of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, *Freedom to Travel* at 45-46 (New York: Dodd, Mead and Co., 1958).

This Report has given its approval to criteria (1), (2), (6), (7), and (8) above as grounds upon which to deny a passport. For (3) the Report believes that the State Department has no authority to determine the financial status of an applicant except relating to (2). As to (4), it is difficult to determine exactly what is a "long record" and what constitutes a "recent" offense. Besides, as the Report states, a criminal is as free to travel as any other citizen once he has been punished (it is immaterial if foreign countries refuse entry). The Report does not agree with (5) as a cause to deny passports and neither do the courts. The last criterion, (9), should not be employed because the policing of criminal activities, within or outside the U.S., should not be administered by the Department of State.

<sup>20a</sup> *Edwards v. California*, 314 U.S. 160 (1941).

<sup>21</sup> *Bauer v. Acheson*, 106 F. Supp. 445 (D.C. Cir. 1952).



the individual's constitutional rights, or that the Congress has power to confer such absolute discretion. We hold that like other curtailments of personal liberty for the public good, the regulation of passports must be administered, not arbitrarily or capriciously, but fairly, applying the law equally to all citizens without discrimination, and with due process adopted to the exigencies of the situation.<sup>22</sup>

The lack of any procedure by which the affected applicant could appeal the decision of the Department voided the *Bauer* determination. The State Department, consequently, established a Board of Passport Appeals.<sup>23</sup> But notwithstanding the creation of this Board of Appeals, the individual applicant continued to have little effective redress for the State Department maintained that they could not violate the confidential character of the passport files by making them public. The Department based this insistence of non-exposure on the grounds that the conduct of foreign relations would be jeopardized if the reasons for their action were to be publicized.<sup>24</sup> The Courts, however, refused to sanction the denial of passports based on confidential information in the possession of the Secretary and which was kept out of the reach of the applicant—this was held to be unconstitutional as a denial of due process.<sup>25</sup>

The State Department also maintained that it was contrary to the national interests if Communists were allowed to travel abroad and engage in activities which would advance the Communist cause. A Communist was, for the State Department, any individual who belonged to one of the subversive organizations on the Attorney General's List. The Court ruled that this List was designed for screening government employees and could not be used to determine who could or could not go abroad.<sup>26</sup>

A new method of determining who were Communists was thus needed by the Department. They discovered a relatively simple procedure: anyone who refused to sign an affidavit denying membership in the Communist Party was *ipso facto* a Communist and could not obtain a passport. The Secretary refused to issue a passport to Rockwell Kent because he would not sign such an affidavit. Mr. Kent stated that

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<sup>22</sup> *Id.*

<sup>23</sup> Rules of the Board of Passport Appeals, 22 C.F.R. 51.151-51.170, 9 Jan., 1954, 19 F.R. 161.

<sup>24</sup> The Department comments: "The very nature of foreign negotiations requires caution and secrecy, and the premature revelation of the President's acts, or his motives, may ruin in an hour the results of laborious diplomacy. . . . [C]ourts ought not risk the exposure of reasons for passport cancellation when such exposure will inevitably in some cases put in jeopardy delicate foreign relations." Defendant's Memorandum, at 2, 3, *Foreman v. Dulles*, Civil No. 4924-54, (D.D.C., 1955).

<sup>25</sup> *Clark v. Dulles*, 129 F. Supp. 950 (D.D.C. 1955); *Kamen v. Dulles*, Civil No. 1121-55, (D.D.C. 1955); *Nathan v. Dulles*, 129 F. Supp. 951 (D.D.C. 1955).

<sup>26</sup> *Shachtman v. Dulles*, 225 F. 2d 938 (D.C. Cir. 1955).

"I am not a Communist and I have never been a Communist, but I'll be damned if I will sign one of those things."<sup>27</sup> Mr. Kent instituted action against the Secretary of State. The Supreme Court held that Paragraph 215 of the Immigration and Nationality Act of 1952 and Paragraph 1 of the Act of Congress of 3 July, 1926 did not authorize the Secretary of State to withhold a passport for non-compliance with the signing of an affidavit.<sup>28</sup>

The above cases assumed that the Secretary had broad discretion to deny passports but the courts did not subscribe to the view that this discretion was absolute and thus they provided the applicant with various procedural safeguards. Due process of law would mean very little if the Secretary could deny a passport application on any substantive grounds he thought sufficient. That is to say, if the Courts could not intervene with substantive issues, it would mean the Secretary could continue to refuse applications for practically any reason as long as he observed due process. There were two main substantive issues concerned in the denial of passports: (1) a Communist could not travel anywhere and (2) no one, including Communists, could go to certain countries.

The refusal to grant passports to Communists was based on the view that international travel by Communists would threaten the national security of the United States. Pursuant to the Internal Security Act of 1950, the Secretary of State adopted the policy of refusing to issue passports to those Americans (Communists) who were allegedly working against the national interest. This view is illustrated by the 1959 remarks of John Hanes, the Administrator of the Department's Bureau of Security and Consular Affairs, when he stated that the possession of a United States passport

... clothes them [the Communists] abroad with all the dignity and protection that our government affords. And yet their dedicated purpose in life is to destroy our Government and our freedom.<sup>29</sup>

This practice of withholding passports from Communists did not reach the Supreme Court until 1964. In *Aptheker v. Secretary of State*,<sup>30</sup> the substantive issue of whether the Department could refuse passports to members of communist organizations was under review. The Supreme Court held that such practice was unconstitutional because it discriminately restricted the right to travel, thereby abridging the liberty

<sup>27</sup> N. Y. Times, July 9, 1955, at 31.

<sup>28</sup> *Kent et Briehl v. Dulles*, 357 U.S. 116, 129 2 L. ed 2d 1204, 78 S. Ct. 1113 (1958). The Court did not rule on the question whether it was constitutional to withhold a passport from a Communist: it was immaterial at that point whether the applicant was, or was not, a Communist.

<sup>29</sup> U. S. Dept. of State, Bulletin, May 18, 1959 at 724.

<sup>30</sup> *Aptheker v. Secretary of State*, 387 U.S. 500, 12 L. ed 2d 992, 84 S. Ct. 1959 (1964).

guaranteed by the 1st, 5th and 14th Amendments. Mr. Justice Goldberg delivered the opinion of the Court:

Since freedom of association is itself guaranteed by the 1st Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that a citizen's right to travel could be fully exercised if the individual would first yield up his membership in a given association.<sup>31</sup>

Mr. Justice Black, in a concurring opinion, stated:

Under the due process clauses of the 5th and 14th Amendments, neither the Secretary of State nor any other government agent can deny people in the United States their liberty to do anything else except in accordance with the Federal Constitution and valid laws made pursuant to it.

The entire Subversive Activities Control Act is unconstitutional as (1) a bill of attainder, (2) restricting liberty without the benefit of a trial according to due process, which requires a jury trial after indictment, and (3) denying the freedom of speech, press, and association.<sup>32</sup>

The *Aptheker* decision effectively eliminated the Department's power to withhold passports from Communists. Henceforth, one's political persuasion could not be employed to justify the Department's refusal to grant passports.

The Department's powers and prerogatives in this "foreign policy" area were slowly being eroded by the Courts. The Department found itself obligated to issue passports to practically every applicant. The *Aptheker* case did not however touch upon the second substantive issue, namely, the long-term practice of the Department of banning all travel to certain areas, regardless of one's political beliefs. This question came to the Supreme Court in 1965 and 1967.

The Department of State denied the request of Louis Zemel to validate his passport for travel to Cuba as a tourist. Zemel instituted a suit in a District Court against the Secretary of State arguing that the section of the Immigration and Nationality Act relating to travel control of citizens during a national emergency and the section of the Passport Act authorizing the Secretary of State to issue passports under rules prescribed by the President were unconstitutional. He also claimed that the Secretary's regulations restricting travel to Cuba (and other countries) were invalid.<sup>33</sup>

The three judge District Court, in a 2-1 decision, ruled against Zemel. The Court held that the Secretary of State is not authorized to withhold passports of citizens because of their beliefs or associations. Such a standard could not be employed to restrain the citizen's right

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Zemel v. Rusk*, 228 F. Supp. 65 (D.C. Conn., 1964).

of free movement and that the Government does not have the power to restrain travel of citizens with those politics it disagrees.<sup>34</sup> But, the Court continued, the Government does have the power to forbid the travel of *all* citizens to particular geographic areas because of war or national emergency. Judge Blumenfield comments:

This is a regulation that . . . designates certain parts of the world forbidden to all American travelers. This can hardly be regarded as arbitrary or capricious by this plaintiff.

Congress has provided that the Executive should take all necessary steps short of an act or war to protect the rights and liberties of American citizens on foreign soil (22 U.S.C.A. 1732).

Certainly it is consistent with an overall policy that he should exercise that authority granted by law, to prevent incidents occurring in those countries where normal diplomatic relations are non-existent.<sup>35</sup>

The United States Supreme Court affirmed the lower court's decision on direct appeal.<sup>36</sup> In a 6-3 decision, the Court held: (1) the Passport Act of 1926 contains a grant of authority to the Executive to impose area restrictions on the right to travel and thus to refuse to validate the passports of United States citizens for travel to Cuba, (2) the Secretary's refusal violated neither due process nor the First Amendment's guarantee of free speech, and (3) the Passport Act contains sufficiently definite standards for the formulation of travel controls by the Executive. Mr. Chief Justice Warren delivered the opinion of the Court:

In this case . . . the Secretary has refused to validate appellant's passport, not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.

. . . the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited . . . 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.<sup>37</sup>

The Supreme Court thus declared in *Zemel v. Rusk* that the Secretary of State has the authority, emanating from his position as the chief

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<sup>34</sup> *Supra* n. 30.

<sup>35</sup> *Id.*

<sup>36</sup> *Zemel v. Rusk*, 381 U.S. 1, 14 L. ed. 2d 179, 85 S. Ct. 1271 (1965), *reh. den.* 382 U.S. 873.

<sup>37</sup> *Id.* Justice Black dissented on the grounds that the Passport Act violated the provision in Article 1 of the Constitution granting all legislative power to Congress. Justice Douglas, joined by Justice Goldberg, dissented with the view that restrictions on the right to travel in times of peace should be particularized that a First Amendment right is not precluded unless some clear countervailing national interest stands in the way of its assertion.

officer concerned with the conduct of U.S. foreign relations, to declare certain countries off limits to all citizens and that otherwise valid passports need not be specifically endorsed for travel to such countries. But recent events have redefined *Zemel v. Rusk*. It appears that the *Zemel* case established *only* the principle that the Secretary does not have to endorse an otherwise valid passport for certain countries and *Zemel* did not touch upon the question whether a U.S. citizen could or could not go to the banned areas or be prosecuted if he did visit the proscribed countries.

The Secretary is not required to endorse a passport for travel, let us say, to Cuba. But the passport has to be issued and validated for travel to other countries not on the proscribed list. Since most foreign countries require a valid and endorsed passport before granting entry visas, the area travel ban was relatively successful—one could not go to Cuba without a passport specifically endorsed for Cuba. But, what are the consequences if one or all of the proscribed countries do not require an endorsed passport before entry will be permitted and the traveler visits such country in a round-about manner, that is, he does not leave the United States directly for that country nor does he return directly? The traveler has thus conformed to the legal requirement of not leaving or entering the U.S. without a valid passport. But, is he liable for prosecution (up to 5 years imprisonment and/or a fine of \$5000) under the regulations issued by the Secretary of State for having traveled in these areas?<sup>38</sup> These latter questions came to the Court in 1967.

In 1962, Mrs. Helen Travis entered Cuba without a passport specifically endorsed for that country. She did, however, have possession of an otherwise valid passport. She did not leave the U.S. directly for Cuba nor did she return directly. Mrs. Travis was convicted of traveling to Cuba without a valid passport in violation of section 1185(b) of the 1952 Immigration and Nationality Act. The conviction was affirmed by the Court of Appeals and the decision was then appealed to the Supreme Court.<sup>39</sup> Messrs. Lee, Levi, and Laub were indicted in a District Court in 1966 for conspiring to violate the 1952 Immigration and Nationality Act—arranging travel to Cuba for persons whose passports were not endorsed for Cuba. The District Court dismissed the indictment and the U.S. appealed the decision to the Supreme Court.<sup>40</sup>

A unanimous Court reversed Travis' conviction and affirmed Lee, Levi, and Laub's dismissal on grounds that the statute under question was not violated since area restrictions are not criminally enforceable upon an otherwise valid passport. That is to say, one can be prose-

<sup>38</sup> Immigration and Nationality Act, *supra* n. 9.

<sup>39</sup> *Travis v. U.S.*, 385 U.S. 491, 17 L. ed. 2d 536, 87 S. Ct. 583 (1967).

<sup>40</sup> *U.S. v. Laub*, 385 U.S. 475, 17 L. ed. 2d 526, 87 S. Ct. 574 (1967).

cuted for leaving or entering the U.S. without a valid passport but since the people who went to Cuba *did* have a valid passport when leaving and returning to the United States, no crime was committed. Mr. Justice Fortas gave the opinion of the Court:

In view of this overwhelming evidence that Section 215(b) does not authorize area restrictions, we agree with the District Court that the indictment herein does not allege a crime. If there is a gap in the law, the right and the duty, if any, to fill it do not devolve upon the courts. The area travel restriction, requiring special validation of passports for travel to Cuba, was a valid civil regulation under the 1926 Act (*Zemel v. Rusk*). But it was not and was not intended or represented to be an exercise of authority under Section 215(b), which provides the basis of the criminal charge in this case.<sup>41</sup>

In other words, the Department of State does not have the authority to enforce criminal sanctions not specifically provided for by Congressional action against a violation of valid area restrictions. The Secretary of State cannot issue and enforce criminal prohibitions. The Court concluded that the affected people were charged with the conspiracy to violate, and the violation of, a nonexistent criminal prohibition.<sup>42</sup>

The State Department would now be required to seek Congressional passage of the necessary statutes to make it a criminal offense to travel to those areas banned by the Secretary. It is a meaningless provision to ban certain areas if the prospective traveler could still visit them, assuming, of course, he leaves and enters the U.S. with a valid passport. Congress has been most hesitant in the past to give the Secretary this authority and the present Congress is likewise unprepared to make the actual travel in certain countries a crime. It appears that even with the continuation of certain countries on the proscribed list, the Department of State has no real effective control over what is still maintained is a foreign policy decision—United States citizens can travel in any country which grants them entry without legitimate retribution being made against them by the Department.

Faced with Congressional hesitation and judicial opposition, the State Department in March, 1968, announced that it would no longer continue its policy of punishing those people who violated the area travel ban. Apart from the *Travis* and *Lee, Levi, Laub* cases,<sup>43</sup> punish-

<sup>41</sup> *Supra* n. 36 at 533-534.

<sup>42</sup> Justice Fortas also wrote that it appeared that the Government's actions were arbitrary for "although Department's records show that approximately 600 persons have violated area travel restrictions since the enactment of § 215(b) of the Immigration and Nationality Act, *supra* n. 9, the present prosecutions are the only attempts to convict persons for alleged area transgressions." This "active misleading" by the Government was for Fortas another reason to dismiss the cases. *Id.*

<sup>43</sup> *Supra*, n. 38, 39.

ment usually took the form of passport revocations and denial of renewal. The Department also modified its ban by stating that certain classes of people would now be able to receive endorsed passports for these countries (China, Cuba, North Korea, and North Vietnam). People such as journalists, doctors, educators, etc. would now receive an almost automatic endorsement of their passports. One could see that this trend toward complete absence of travel restrictions was being continued although the ordinary citizen still could not receive an endorsement.

The March 1968 announcement was not endorsed by the Republican Party. Although by no means having a monopoly on restricting travel under the guise of foreign policy, the Republican Party has traditionally taken a dim view of the individual citizen's standing before "foreign policy" passport decisions and one of the planks of the Party's 1968 Platform dealt specifically with these matters. It appears instructive to cite the Republican's pre-election stand:

The Republican Party abhors the activities of those who have violated passport regulations contrary to the best interests of our nation and also the present policy of re-issuing passports to such violators. We pledge to tighten passport administration so as to ban such violators from passport privileges.<sup>44</sup>

It appears that the Administration is girding up once again for more controversy and travel restrictions and not criminal prosecutions, for only Congress can declare travel in certain areas a criminal act. This would force the individual applicant into a long and costly procedure to regain his passport but this assumes, and perhaps the assumption is erroneous, that the courts will follow *stare decisis*, that is, that passports have to be granted except in narrowly defined cases (fraudulent applications, fugitives from justice).

The travel ban continued to be in effect although, as stated above, certain classifications of citizens now receive favored treatment. One is unable to comment upon future events but the current position is that the Department of State has had its authority effectively eroded from this area of foreign policy by the courts—not because passports and travel do not deal with foreign policy but, rather, because when dealing with a constitutional liberty, the Department of State, even when acting from foreign policy considerations, has to be subservient to the Federal Constitution.

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<sup>44</sup> Cited from Congressional Quarterly Almanac, 90th Congress, 2nd Series, Vol. 24 (Washington, D.C.: Congressional Quarterly Service, 1968), at 993. The regulations the Republicans refer to are the regulations issued by the Secretary, not those provided for by Congress.

## Conclusion

One of the first conclusions to be drawn is that the Department of State utterly disregarded the notion of due process of law in carrying out a function claimed to be solely within its power. Passports were denied or cancelled without notice, without opportunity to be heard, without the chance to confront witnesses, without the benefit of counsel, and, for a time, without opportunity to appeal the decision or see the information upon which the decision was based. The courts would not allow such practices to continue and finally convinced the State Department that, even in foreign policy, the Department must adhere to constitutional guarantees.

The courts also refused to sanction the usurpation of power by the State Department not granted to it by either the Constitution or Congress. The State Department attempted to determine who was or was not a Communist, to punish future violators of U.S. law, to punish violators of foreign law, to determine the financial status of citizens; and to determine the "best interests" of the United States. None of these activities belong to the Department of State and the courts prohibited the Department from pursuing them.

Progress has also been made in substantive questions: basic constitutional rights were being limited when the Department refused to issue passports to alleged Communists and other persons with whose politics it did not agree. The courts, probably believing that those people who actually work for the violent overthrow of the Government, wish to remain in the country to perform their duties, forced the Department to issue passports to all political persuasions. The area travel ban has been whittled down and so circumscribed that it is no longer an effective tool on which to base foreign policy decisions. The Secretary may wish to place the Bahamas on the restricted list but as long as the citizen departs and leaves from the United States with a valid passport and is welcome elsewhere, the travel ban cannot be employed to control the external relations of the United States.

In conclusion, then, it appears valid to state that the courts have indeed removed this specific area from the conduct of foreign relations. Travel restrictions can no longer be used as a tool of foreign policy although it still remains to be seen whether the current Republican Administration intends to reassert its claim that foreign policy, and thereby passports and international travel, ought to be wholly within the discretion of the Department of State.