

# THE RIGHT TO TRAVEL AND NATIONAL SECURITY

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We have temporized too long with the passport practices of the State Department. Iron curtains have no place in a free world.<sup>1</sup>

The right to travel has been deeply enmeshed in the Anglo-American tradition. In the relatively small country of England this need was particularly obvious, and there can be little doubt that both England and the United States owe a great deal of their commercial and intellectual growth to the freedom of international mobility.<sup>2</sup>

## I. HISTORICAL BACKGROUND

Articulating a reaction against royal abuse, clause 41 of the Magna Carta guaranteed to instrument merchants "safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water."<sup>3</sup> Clause 42 extended corresponding rights to the remainder of society. It permitted the individual "to leave our Kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy. . . ." Subsequent re-issues dropped clause 42 and thus the only explicit guarantee related to the merchants in clause 41. The concern for the right of locomotion, however, was present in early England. Professor Jaffe noted this when he wrote the following:

When it is remembered that many of the "civil liberties" as we know them today—the "freedoms" of speech, worship and assembly—are not mentioned in Magna Carta, it is curious that it contains a chapter on freedom of travel.<sup>4</sup>

The writ, *ne exeat regno*, became the king's restrictive weaponry in this area, but by the sixteenth century it was in a state of gradual decline and eventually came to be applied only to absconding debtors.<sup>5</sup>

The values envisaged in freedom of movement were inscribed in American tradition from the very beginnings of independence. Article IV of the Articles of Confederation stated that "the people of each state shall have free ingress and egress to and from any other states. . . ." This right was later upheld by the Supreme Court in a

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1. *Briehl v. Dulles*, 248 F.2d 561, 596 (D.C. Cir. 1957) (dissent).

2. A detailed history is contained in Note, Passports and Freedom of Travel: The Conflict of a Right and a Privilege, 41 *Geo. L.J.* 63 (1952).

3. This paper is concerned primarily with the right to leave a country, and not to enter. Thus the snarls of immigration are avoided or at least dealt with only indirectly.

4. Jaffe, *The Right to Travel: The Passport Problem*, 35 *Foreign Affairs* 17, 19 (1956).

5. Note, *supra* note 2.

number of decisions.<sup>6</sup> Some writers have stated that the travel between states is an entirely different question from that of travel beyond our frontiers,<sup>7</sup> but the viewpoint of the district court for the District of Columbia seems to be a better one. It wrote as follows:

While the Supreme Court was there [in the above mentioned decisions] considering freedom to move from state to state within the United States, it is difficult to see where, in principle, freedom to travel outside the United States is any less an attribute of personal liberty. Especially is this true today, when modern transportation has made all the world easily accessible and when the executive and legislative departments of our government have encouraged a welding together of nations and free intercourse of citizens with those of other friendly countries.<sup>8</sup>

The Constitution makes no mention of the right to travel. Since there was no discussion of this matter in the debates of the constitutional convention, it has been maintained that such liberty was viewed as an "unchallenged right,"<sup>9</sup> and something that was assumed rather than rejected.<sup>10</sup> The almost complete absence of regulation in this area until 1856 indicates that this proposition has merit. Those who argue that the courts may not approach this question as a "right" because the Constitution does not speak of it specifically are in for many constitutional surprises. Indeed, Professor Black, in his excellent work, *The People and the Court*, has recently pointed out that all provisions of the Constitution are "neither self-enforcing nor self-construing."<sup>11</sup>

6. *Edwards v. California*, 314 U.S. 160 (1941); *Williams v. Fears*, 179 U.S. 270 (1900); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

7. Note, *Passport Control in the National Interest and Freedom to Travel*, 33 *Temp. L.Q.* 332 (1960).

8. *Bauer v. Acheson*, 106 F. Supp. 445, 451 (D.D.C. 1952).

9. *Freedom To Travel*, Report of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, at 5 (1958) [hereinafter cited as *Freedom To Travel*].

10. Professor Jaffe writes that "it has that powerful yet ambiguous confirmation which comes from a custom which is taken for granted and upon which so many of the 'rights' and 'freedoms' of Englishmen rest." Jaffe, *supra* note 4 at 20.

11. Black, *The People and the Court* 140 (1960). Language itself can hardly ever be completely self-construing. Whenever an implicit right is found in a document a great hue and cry will go up and many will argue that the Pandora's box has been opened. See the following conversation in *Passport Legislation Hearing before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess.* 49 (1959):

Senator Lausche. I am asking this because of your ability as a lawyer: the right to travel is not guaranteed in any specific language in the Constitution. Now, on what theory was the deduction made that the right to travel is a constitutional right?

Senator Javits. Well, I think that . . . either you agree or disagree with their fundamental construction of the Constitution. Liberty of movement,

Passports were recognized as early as 1803 when American consuls were forbidden by statute to issue them to non-citizens.<sup>12</sup> Historically, a passport has been considered to be a document whereby a citizen could conveniently identify himself to foreign officials so as to have the courtesies to which he is entitled as a citizen.

During the War of 1812 passports became a requirement for travel into enemy territory.<sup>13</sup> In 1835 the Supreme Court wrote that "there is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect."<sup>14</sup> With the passage of time, however, a great deal of confusion arose because of the practice of governors, mayors and notaries public (in addition to the federal authority) of issuing passports. It was to deal with this problem and to reduce the possibility of fraud that Congress centralized the issuance of passports in 1856 with the following act:

That the Secretary of State shall be authorized to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue or verify any such passport. . . .<sup>15</sup>

Violation in issuing passports was forbidden by penalty.

In 1866 a substantive amendment disqualified non-citizens.<sup>16</sup> The Revised Statutes of 1875 changed the statute so as to read, "The

which is what they, in essence, decided, is one of the fundamental and inherent rights of any citizen under the Constitution. . . .

Senator Lausche. We would be justified, in a measure, to believe that there are other rights, not specifically enumerated in the Constitution, that would fall into the same category as the right to travel.

12. Act of Feb. 28, 1803, ch. 9, § 8, 2 Stat. 205. As to the original nature of the passport, see *Freedom To Travel* at 18-19, wherein the following is written:

The word "passport" is based on two French words, *passer*, to pass, and *port*, a port or harbor. Originally, the passport concept involved governmental permission to enter or leave a port or harbor, and it was gradually extended to include generally permission of egress and of passage. Thus, it is not surprising to find that passports were first issued to foreigners as permits to travel into and through the issuing nation; and in international law passports came to be recognized as letters of protection or of safe conduct issued by the host country.

13. Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 199.

14. *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835).

15. Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 60. By Act of June 14, 1902, ch. 1088, 32 Stat. 386, the law was amended to disqualify persons not owing allegiance to the United States. This amendment was meant to cover citizens of Puerto Rico, Hawaii and the Philippines.

16. Act of May 30, 1866, ch. 102, 14 Stat. 54.

Secretary of State may grant and issue passports." This replaced the previous provision which provided that, "The Secretary of State shall be authorized to grant and issue passports." This remains as the basic enabling statute for the Secretary of State, and, although the language is "may" rather than "shall," the effect would appear to be the same.<sup>17</sup>

In 1918 Congress enacted a statute which would operate during time of war.<sup>18</sup> The act prohibited departure from or entry to the United States during wartime or upon a presidential finding of necessity by proclamation.<sup>19</sup> The statute became operative through a proclamation by President Wilson in 1918.<sup>20</sup> When the war was officially declared at an end by statute, the passport requirement was terminated.<sup>21</sup>

The authority conferred on the President by statute was exercised in 1938 by Franklin D. Roosevelt through an Executive Order.<sup>22</sup> This order designated only one general category with regard to passport eligibility—citizens of the United States. The order also enunciated formal requirements for passport application, evidence for citizenship and authorization for the Secretary of State to use discretion in the issuance of passports and to make regulations. On the same day as the President's order, the Secretary did issue implementing regulations of a procedural nature.<sup>23</sup> Subsequently, on June 21, 1941, the 1918 act was amended to become operative in time of war or proclamation of national emergency.<sup>24</sup> In the same year a presidential proclamation made this amendment operative,<sup>25</sup> and it remained so until 1952.<sup>26</sup> The Immigration and Nationality Act of 1952 repealed the 1918 act, but retained similar provisions requiring passports for foreign travel "when the United States is at war or during the existence of any national emergency proclaimed by the President. . . ."<sup>27</sup> President Truman issued such a proclamation in 1953,

17. See Judge Bazelon's dissent in *Briehl v. Dulles*, 248 F.2d 561, 582 n.16 (D.C. Cir. 1957).

18. Act of May 22, 1918, ch. 81, § 2, 40 Stat. 559.

19. The penalty for violation was a maximum of twenty years imprisonment, or a fine of \$10,000 or both.

20. Proclamation No. 1473, 1918 Foreign Relations 809 (Supp. 2).

21. Act of March 3, 1921, ch. 136, 41 Stat. 1359.

22. Executive Order No. 7856, 3 Fed. Reg. 799 (1938).

23. Departmental Order 749, 22 C.F.R. §§ 51.101-134 (1938).

24. Act of June 21, 1941, ch. 210, 55 Stat. 252. The penalty for violation was reduced to a maximum of \$5,000 fine, or five years imprisonment or both.

25. Proclamation No. 2523, 6 Fed. Reg. 5821 (1941).

26. Between 1945 and 1951 travel was "relatively free" except in areas under military control. See *Freedom To Travel* at 9.

27. 66 Stat. 190, 279 (1952), 8 U.S.C. § 1185 (1952).

thus making the statute operative.<sup>28</sup> Both proclamation and statute remain in effect today, and as a result the passport is a requirement for travel outside the Western Hemisphere.

In 1952 the Secretary of State issued regulations imposing substantive passport qualifications which excluded Communist supporters.<sup>29</sup> The main previous substantive disqualification, existing in peacetime, and where a passport was a necessity to travel, was that of citizenship. Much controversy has surrounded these regulations, and they will be returned to shortly.

The Internal Security Act of 1950<sup>30</sup> also deals with the passport problem. Section 6 makes it a crime for a member of a Communist organization to apply for or use a passport. It should be noted that there is some variance between this statute's provision and the Secretary of State's regulations. The former does not indulge in the arduous task of defining those who are going abroad to aid the Communist movement or those who follow a certain "line." State Department regulations would appear to go beyond the Internal Security Act and attempt to deal not only with Communist Party members, but also with those individuals who are subject to Party "discipline."<sup>31</sup>

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28. Proclamation No. 3004, 18 Fed. Reg. 489 (1953).

29. Departmental Order 749, 22 C.F.R. § 51.135 (1952), states:

*Limitations on issuance of passports to persons supporting Communist movement.* In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement.

30. 64 Stat. 993 (1950), 50 U.S.C. § 785 (1953).

31. Boudin, *The Constitutional Right to Travel*, 56 Colum. L. Rev. 47, 63 (1956).

Area restrictions involve another question where travel has been restricted by the Secretary of State.<sup>32</sup> Prohibitions have usually been imposed where hostilities were in progress, but there have been exceptions. A contemporary and glaring exception is that of Communist China.<sup>33</sup> Passports were valid for all countries for a number of years prior to World War I; subsequent to peace, restrictions were relaxed as to all of the Central Powers except Germany, Austria and Russia. Soon thereafter passports were valid everywhere. When Mussolini invaded Ethiopia in 1935, travel to that country was eliminated, except for recognized representatives of American newspapers, press associations, magazines, motion-picture companies and well-known independent writers. The same exceptions applied to a restraint on travel to Spain at the outset of the Civil War in 1936. More restrictions ensued as World War II grew near, and with the United States' entry, travel was limited to the Western Hemisphere (except for accredited war correspondents). On December 3, 1945, passports became valid for travel anywhere except occupied enemy territory. This restriction was gradually withdrawn.

The State Department, on May 1, 1952, announced a new policy. Passports were to be stamped as not valid for Russia, China and Eastern European countries, but at the same time travel was not forbidden to these countries. In 1955 Czechoslovakia, Hungary, Poland, Rumania and Russia were opened to travel, but visits to Albania, Bulgaria and those portions of China, Korea and Viet Nam under Communist control were forbidden. This policy evoked the real beginning of the contemporary discussion of area restrictions.

## II. RIGHT OR PRIVILEGE?

The individual's quest for a passport depends very much on how society will characterize it. If his petition is accorded the status of privilege, he may find his path strewn with impediments. It then becomes quite difficult to speak of violation of either procedural or substantive due process. But if his petition can be viewed as a right, the state assumes the burden of proof when it seeks to deprive the individual of this right. The Eisenhower administration's attitude is reflected in the following exchange between Congressman Bentley and the Administrator of Security and Consular Affairs:

Mr. Bentley. . . . Do you regard the possession of a passport as a privilege or right?

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32. Freedom To Travel at 14-18.

33. The most recent of such restrictions deals with Cuba. See N.Y. Times, Jan. 17, 1961, p. 1, col. 4.

Mr. Hanes. I regard the possession of a passport as a privilege.<sup>34</sup>

The considerable dissent from that opinion stems from the sight of all-pervading governmental control in an area where the citizen must always beseech the state for permission. The need for strict legal protection may be especially present when, as here, the Government restricts human movement because of the possible injury to national security or foreign affairs. Indeed, Mr. Justice Jackson has written that,

the most scrupulous observance of due process, including the right to know a charge, to be confronted by the accuser, to cross-examine informers and to produce evidence in one's behalf, is especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed.<sup>35</sup>

Certainly when the Government involves itself in the business of dispensing gratuities it has an obligation to be fair to the public. This is especially true where the Government makes it unlawful to proceed without such a gratuity—which is the case with passports. Parenthetically, it might be noted that the courts have often given legal protection to what they have persisted in calling a "privilege."<sup>36</sup> Professor Davis finds three ideas, and a fourth method, upon which the courts have relied in recognizing an interest for the petitioner: (1) that constitutional principles of substantive and procedural fairness apply even when a privilege is at stake and even when the privilege itself is not directly entitled to legal protection; (2) that privileges as well as rights are entitled to legal protection; (3) that when a privilege is combined with another interest the combination may be a right and accordingly entitled to legal protection; and (4) a practice of illogically providing legal protection to a privilege without mentioning that it is a privilege.

One need not attempt such reasoning in the passport area, however, for "the theory of privilege or lack of right . . . became unreal as the nature of a passport changed. The passport came to be usually indispensable to foreign travel."<sup>37</sup> In any event the matter seems to be fairly well settled by the federal judiciary.

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34. Hearings on H.R. 9069 Before the House Committee on Foreign Affairs, 86th Cong., 1st Sess. 32 (1959), providing standards for the issuance of passports and other purposes.

35. *Shaughnessy v. Mezei*, 345 U.S. 206, 225 (1953) (dissenting opinion).

36. Davis, *The Requirements of a Trial-Type Hearing*, 70 *Harv. L. Rev.* 193, 225 (1956).

37. *Id.* at 260. See also *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 *Yale L.J.* 171, 189 (1952), wherein the following is written:

The Circuit Court of Appeals for the District of Columbia recognized the substantive right to travel in *Schachtman v. Dulles*.<sup>38</sup> Judge Fahy probably went beyond the position of many right-to-travel advocates when he spoke of it as a "natural right." Noting the illegality of travel without a passport and the impossibility of entering certain countries without a passport,<sup>39</sup> he wrote the following:

The denial of a passport accordingly causes a deprivation of liberty that a citizen otherwise would have. *The right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under law.* A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provision of the Fifth Amendment that "No person shall be . . . deprived of . . . liberty . . . without due process of law."<sup>40</sup>

Remaining doubts as to judicial recognition of this right were obliterated in 1958 by the Supreme Court's landmark decision in *Kent v. Dulles*.<sup>41</sup> Mr. Justice Douglas, writing for the majority, took a look at the history of travel in this country and stated that "the 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."<sup>42</sup> He relied on Professor Chafee's writings on the history of freedom to travel<sup>43</sup> and the social benefits to be derived therefrom, as he said,

Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for

In like cases involving use of the mails, courts realized that an activity which was long considered a privilege may be given increased judicial protection because of its greater importance under changed conditions. Similarly new conditions have given greatly increased importance to passports.

38. 225 F.2d 938 (D.C. Cir. 1955); see Note, 41 Cornell L.Q. 282 (1956); Comment, The Passport Puzzle, 23 U. Chi. L. Rev. 260 (1956); Comment, Authority of the Secretary of State to Deny Passports, 106 U. Pa. L. Rev. 454 (1958).

39. Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review, 61 Yale L.J. 171 (1952).

40. *Schachtman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955). (Emphasis added.)

41. 357 U.S. 116 (1958); see The Supreme Court 1957 Term, 72 Harv. L. Rev. 77, 172 (1958); 57 Mich. L. Rev. 119 (1958).

42. *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

43. Chafee, Three Human Rights in the Constitution of 1787, 171-81 (1956). A similar attitude may be found in The Saturday Review, Jan. 11, 1958, What's Wrong with U.S. Passport Policy?, p. 10; see also, Welch, A Citizen Criticizes, id. at 10; Commager, A Nation of Travelers, id. at 24.



livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.<sup>44</sup>

Although the Court avoided discussing the limitations that might be imposed upon the right to travel, it has made clear that this freedom is an "important aspect" of liberty.

A subsidiary question centers about a discussion of the constitutional provision to be exercised in the protection of this right. Justice Douglas, in the *Kent* case, relied upon the fifth amendment, but some writers look to the first amendment, and it has been argued that the source of the right depends upon the purpose of a trip.

The right travel could be treated as a facet of free expression and communication under the First Amendment, the threat of passport denial for political reasons being treated as a prior restraint on free speech. Such an analysis, while more difficult to reach than the Fifth Amendment approach actually adopted, would make possible use of the "clear and present danger" rule as an overriding limitation. Under the analysis chosen there are no established guideposts since the Fifth Amendment merely requires that due process be accorded. This problem will undoubtedly cause the Court some vexation in the future.<sup>45</sup>

Congressman Lindsay has maintained that the right to travel should find its source primarily in the first amendment.<sup>46</sup> He reasons that,

speech is communication, and communication this modern day is impossible without locomotion. Speech is meaningless unless thought of in the context of the physical and social aspects of human existence. The social aspect suggests that speech is not effectively exercised when a man talks to himself—speech implies communication. The physical aspect renders communication impossible under some circumstances—or possible only through certain means. The social aspect may in turn attach connotations to the physically possible means, rendering all but one appropriate. The Supreme Court has repeatedly recognized the interaction of these aspects in its interpretation of free speech and has held that denial of the appropriate means of communication may abridge free speech.<sup>47</sup>

44. *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

45. 57 Mich. L. Rev. 119, 120-21 (1958).

46. See Passport Legislation Hearing Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess. 121 (1959), which contains the following:

Senator Lausche. . . . On what provisions of the Constitution do you primarily rely in proving that the right to travel is a constitutional right?

Mr. Lindsay. The first amendment.

Senator Lausche. That is the right of freedom of speech?

Mr. Lindsay. Correct.

47. Communication from Congressman Lindsay to the author, Nov. 2, 1960. In this regard see *Thornhill v. Alabama*, 310 U.S. 88 (1940), wherein the Supreme Court characterized the picketing of a certain area as free speech.

The American Civil Liberties Union has taken much the same position. They view this freedom as an integral element of the first amendment.<sup>48</sup> Denial of this right is thus analogous to the stifling of beliefs, the thwarting of associations and the obstruction of the press.<sup>49</sup> This is a viewpoint which this writer thinks has plausibility, especially when travel is meant to produce information. These values are inherent in the first amendment.

Despite the rights that inure to the citizen attempting to travel, it has been argued that the judicial inquiry into this matter should be a narrow one. This practice might well make the individual's protection more apparent than real. If we allow this right to be "narrowly construed . . . [it can] afford no real protection."<sup>50</sup> Why, then, should the judicial inquiry be restricted? The Secretary of State has argued that the passport problem is part of the Government's conduct of foreign affairs and the power to be exercised in this realm is exclusively vested in the executive. But this implicit power has been recognized only with regard to negotiations with foreign governments.<sup>51</sup> This authority has not

involved a situation where the Executive action was specifically directed at restraining the freedom of a particular individual. Nor, in any of those cases, were there charges that unconstitutional considerations affected the Executive determination or that procedural due process had been denied. The validity of restrictions on the freedom of movement of particular individuals, both substantively and procedurally, is precisely the sort of matter that is the peculiar domain of the courts.<sup>52</sup>

### III. PASSPORT DENIAL LITIGATION

Since the subject of this paper lies within the peculiar domain of the courts, it is important to discover judicial experience in this area.<sup>53</sup> This is a *sine qua non* for any discussion of improvements and alterations.

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48. Hearings on S. 2770, 3998, 4110, 25.4137 Before the Senate Committee on Foreign Relations, 85th Cong., 2d Sess. 128 (1958).

49. The ACLU finds, alternatively, the freedom to travel in the ninth and tenth amendments. The ninth amendment says that the enumeration of certain rights in the Constitution shall not be construed to deny or disparage others retained by the people. The tenth amendment says that powers not delegated to the United States by the Constitution or prohibited by it to the states, are reserved to the states or to the people. See Hearings, *supra* note 48.

50. Black, *The People and the Court* 99 (1960).

51. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

52. Note, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 *Yale L.J.* 171, 187 (1952); see Judge Bazelon's dissent in *Briehl v. Dulles*, 248 F.2d 561 (D.C. Cir. 1957), for the citations of foreign affairs cases.

53. The cases are compiled in the Hearings Before the Subcommittee on Constitutional Rights of the Senate, 85th Cong., 1st Sess., pt. 2, at v (1957).

The first of a series of cases in the passport field was *Bauer v. Acheson*.<sup>54</sup> This was an action against the Secretary of State for a declaratory judgment, for review under the Administrative Procedural Act,<sup>55</sup> and for an injunction against denial of the plaintiff's right to a passport. It arose from a revocation by the State Department of plaintiff's passport without notice or hearing. The only reason given for revocation was the Secretary's opinion that "her activities are contrary to the best interests of the United States." Plaintiff contended, among other things, that the revocation and refusal to renew her passport without hearing or notification was violative of the fifth amendment's due process clause. The Secretary answered that the issuance and revocation of passports were within the "absolute discretion" of the executive branch because of: (1) its inherent power in foreign affairs, and (2) the passport statute.

Conceding the passport problem to be within the conduct of foreign affairs and thus according "wide discretion," the district court nevertheless recognized the existence of constitutional limitations on the activities of political departments. The court, viewing travel as a personal liberty, stated that passports were not to be administered arbitrarily or capriciously. The opinion made no suggestion that the Secretary was without power to act in this realm. The court simply wrote that "since the Act in question is susceptible of an interpretation which would permit due process, it follows that it is not in violation of the Fifth Amendment."<sup>56</sup> The Secretary was directed to either renew petitioner's passport or grant her a hearing.

Subsequently the petitioner dropped the case, but shortly after the decision the State Department issued regulations which established the Board of Passport Appeals and devised criteria for passport denials. Not only did the rules disqualify those who would "advance" or "support" the Communist movement,<sup>57</sup> but they also denied certain information to the applicant upon which the Board might base its ruling and denied confrontation of adverse witnesses.<sup>58</sup>

In *Dulles v. Nathan*,<sup>59</sup> Judge Edgerton considered the case of Otto Nathan, economics professor and executor of Albert Einstein's will. Proceedings began on December 24, 1952 when Nathan applied for a passport. His application remained pending for nearly twenty

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54. 106 F. Supp. 445 (D.D.C. 1952).

55. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1952); Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1952), as amended, 28 U.S.C. § 2201 (Supp. iv, 1957).

56. *Bauer v. Acheson*, 106 F. Supp. 445, 452 (D.D.C. 1952).

57. 22 C.F.R. § 51.135 (1952).

58. 22 C.F.R. §§ 51.163, 51.170 (1954).

59. 225 F.2d 29 (D.C. Cir. 1955).

months until finally he sought a declaratory judgment and injunction to direct the Secretary to issue his passport. The district court directed the Secretary to give plaintiff a prompt and appropriate hearing.<sup>60</sup> Because of noncompliance with this order the Secretary was subsequently directed to issue a passport to the plaintiff. This petition was an appeal by the Secretary.

The circuit court held that Nathan was entitled to a "quasi-judicial" hearing because he had never been accorded an evidentiary hearing and had not been confronted with evidence. The court ordered an almost immediate hearing with report and recommendation to be based on the record. The State Department dropped the case and issued the passport.

*Boudin v. Dulles*<sup>61</sup> was a case that also involved procedural due process. The Secretary of State had refused to issue a passport to petitioner on the basis of "evidence," some of which was contained in confidential reports. Petitioner sued in district court for a judgment that he, as an American citizen, was entitled to a passport, and that the passport regulations were invalid. He also sought an order for the issuance of his passport. The district court held that Boudin's right to a quasi-judicial hearing must include the right to confront adverse testimony and to cross-examine so as to rebut or explain. Confidential information was characterized as a hindrance to judicial review. The case was remanded to the Passport Office.<sup>62</sup>

Both the Secretary and Boudin appealed this decision. The Secretary subsequently submitted an affidavit to the circuit court which stated that Boudin's associations and activities led to the conclusion that he was a supporter of the Communist movement. The circuit court, however, dismissed this affidavit from consideration because it failed to state that Communist direction was exercised over him, therefore failing to state a conclusion or finding under the regulations. The court returned this matter to the Secretary with directions for reconsideration. If the Secretary should continue to deny Boudin's passport, he was to advise Boudin, in writing, with or without additional hearing, of the findings made and relate them to

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60. *Nathan v. Dulles*, 129 F. Supp. 951, 952 (D.D.C. 1955):

The record in the case and stipulations of counsel leave the facts fairly clear and from them I can reach only one conclusion which is that the plaintiff did not have a hearing which the law contemplates and guarantees. I do not suggest the form or the manner in which such a hearing should be held but there should be one. It does not satisfy me to argue that the plaintiff has not exhausted his administrative remedies since I think as a matter of practical fact he had none.

Accord, *Clark v. Dulles*, 129 F. Supp. 956 (D.D.C. 1955).

61. 235 F.2d 532 (D.C. Cir. 1956).

62. *Boudin v. Dulles*, 136 F. Supp. 218 (D.D.C. 1955).

the sections of the regulations relied on. The court also said the following:

We do not reach in the present posture of the case the contention made by Boudin that the Secretary cannot rely on confidential information in reaching his decision. But since that question may arise at a subsequent stage, we think the Secretary should—if he refuses a passport to Boudin after the further consideration we have ordered—state whether his findings are based on the evidence openly produced, or (in whole or in material part) on secret information not disclosed to the applicant. If the latter, the Secretary should explain with such particularity as in his judgment the circumstances permit the nature of the reasons why such information may not be disclosed. . . . This will facilitate the task of the courts in dealing with the question of the propriety of the Secretary's use of confidential information—a question which, we repeat, we do not now reach.<sup>63</sup>

Subsequently, the State Department issued a passport to Boudin. It thereby rendered this case moot and postponed the day of judgment on confidential information.

*Schachtman v. Dulles*<sup>64</sup> raised an issue of substantive due process. Here Max Schachtman, chairman of the Independent Socialist League, was denied a passport because that organization was listed by the Attorney General as a subversive group. Schachtman had previously testified that his organization was in opposition to revolutionary violence and was committed to the democratic process. Nevertheless, the State Department declined to issue a passport to him on the grounds that it would not be in the best interests of the United States. Schachtman did not seek to compel the Secretary to issue a passport. He only asked that the grounds for rejection be declared insufficient.

The circuit court upheld this petition (reversing the district court) and held that the Secretary's denial was arbitrary. A passport was then issued to Schachtman. It would be difficult to conceive of a more clear cut case supporting the proposition that travel bans have been a weapon exercised against "Americans whose views on domestic and foreign policy do not accord with those of the State Department."<sup>65</sup>

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63. *Boudin v. Dulles*, 235 F.2d 532, 535-36 (D.C. Cir. 1956).

64. 225 F.2d 938 (D.C. Cir. 1955); see also, *Kraus v. Dulles*, 235 F.2d 840 (D.C. Cir. 1956). Here the Secretary of State disqualified petitioner on the basis of a means test. Since this policy did not seem to be applied to the great majority of other applicants, the circuit court set aside the Secretary's ruling because of a failure to establish a reasonable classification, thus making his action arbitrary. The court commented that application of a means test would raise serious constitutional questions. See Judge Prettyman's dissent.

65. *Boudin*, *The Constitutional Right to Travel*, 56 Colum. L. Rev. 47 (1956); see also, *Boudin*, *The Right to Travel*, *The Nation*, July 30, 1955, p. 95; *Parker*,

*Kent v. Dulles*<sup>66</sup> was the first of the passport cases to reach the Supreme Court. This case incorporated two appeals from the circuit court into one. Rockwell Kent, an artist, was informed by the director of passports that issuance of a passport to him was precluded by the regulations because it was alleged: (1) that he was a Communist, and (2) that he had a consistent and prolonged adherence to the Communist Party line. Kent was advised of his right to an informal hearing, but he was told that whether or not the hearing was requested, it would be necessary for him to submit an affidavit as to whether he was then or ever had been a Communist. Kent did not ask for a hearing, but rather for a new passport application, listing several European countries he desired to visit. When advised that a hearing was still available, his attorney replied that Kent took the position that the affidavit requirement was unlawful, and for that reason and as a matter of conscience he could not support such a procedure. Nevertheless, an informal hearing was held at which the principal evidence against him was his book, *It's Me O Lord*. Kent conceded that the evidence was accurate and refused to submit a sworn statement dealing with Communist front affiliations. Because of a subsequent passport denial based upon his non-compliance, Kent sued in district court for a declaratory judgment and an injunction. The district court viewed the Secretary's regulations as reasonable and the circuit court affirmed.

Another case with a similar fact situation involved Dr. Walter Briehl, a psychiatrist who sought a passport in order to attend conferences in Geneva and Istanbul. He also refused to give an affidavit about Communist Party membership. Briehl asked for a hearing and was given one. He contended that: (1) political affiliations were irrelevant to a passport; (2) every American has the right to travel regardless of politics; and (3) the burden rested upon State Department shoulders to demonstrate that he had engaged in illegal activity. The Department refused to issue a passport to Briehl.

Briehl filed a civil action in district court.<sup>67</sup> He sought a judgment which would declare, among other things, that he was entitled to a passport, and that the passport regulations were invalid. The district court denied the relief sought, and the circuit court affirmed. Judge Prettyman, speaking for the majority, wrote: "The Communist organization and program have long since passed beyond the area

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The Right to Go Abroad: To Have and to Hold a Passport, 40 Va. L. Rev. 853 (1954).

66. 248 F.2d 600 (D.C. Cir. 1957). For another passport case decided by the circuit court at that time, see *Stewart v. Dulles*, 248 F.2d 602 (D.C. Cir. 1957).

67. *Briehl v. Dulles*, 248 F.2d 561 (D.C. Cir. 1957).

of mere politics and political opinion."<sup>68</sup> He took judicial notice of Congressional and Presidential declarations on this topic and stated that the court would not be "naive," and that the courts should not interfere in executive foreign affairs, "save in a narrow and limited class of extraordinary circumstances."<sup>69</sup> In summation, he viewed the regulations as reasonable and recognized the State Department's duty to prevent incidents abroad which might provoke hostility, stating, "And so the problem in the case is once more the familiar problem of balancing private right against public requirement. Our conclusion is reached by such a balancing."<sup>70</sup>

Judge Bazelon dissented, with Judges Edgerton and Fahy concurring in his dissent. He perceived the Secretary's substantive regulations to be invalid because: (1) the President did not delegate such discretion; and (2) the President did not have such discretion himself. Judge Bazelon noted that the authority conferred upon the President had been understood to be procedural—with the exception of the substantive requirement of citizenship.<sup>71</sup> In rejecting the Secretary's urging to recognize implicit discretion in the statute, Judge Bazelon added that to do so would raise grave constitutional doubts. He left no doubt that he would be particularly vigilant when he wrote, "the word 'Communist' is not an incantation subverting at a stroke our Constitution and all our cherished liberties."<sup>72</sup>

While the dissent did recognize that the Secretary's power to curtail travel might extend beyond its present limits, it saw no implication in the express language of the statute which justified the regulations at issue.

In a five to four decision, the Supreme Court accepted Judge

68. *Id.* at 565.

69. *Id.* at 568.

70. *Id.* at 573. This balancing act, which is invariably applied in a manner hostile to the individual's rights, is stated by Mr. Justice Frankfurter in *Dennis v. United States*, 341 U.S. 494, 539-40 (1951), as follows:

Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

71. For passport problems involving American citizenship, see *Perkins v. Elg*, 307 U.S. 325 (1939); *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692 (1835); *Louie Hoy Gay v. Dulles*, 248 F.2d 421 (9th Cir. 1957); *Dulles v. Tam Suey Jin*, 237 F.2d 500 (9th Cir. 1956); *Dulles v. Quan Yoke Fong*, 237 F.2d 496 (9th Cir. 1956); *Yip Mie Jork v. Dulles*, 237 F.2d 383 (9th Cir. 1956); *Yung Jin Teung v. Dulles*, 229 F.2d 244 (2d Cir. 1956); *Chin Chuck Ming v. Dulles*, 225 F.2d 849 (9th Cir. 1955); *Hitaka Suda v. Dulles*, 224 F.2d 908 (9th Cir. 1955); *Jew May Lune v. Dulles*, 226 F.2d 796 (9th Cir. 1955); *Ng Kwock Gee v. Dulles*, 221 F.2d 942 (9th Cir. 1955); *Miller v. Sinjen*, 289 Fed. 388 (8th Cir. 1923).

72. *Briehl v. Dulles*, 248 F.2d 561, 584 (D.C. Cir. 1957).

Bazelon's reasoning and held that Congress had not delegated the discretion claimed by the Secretary of State.<sup>73</sup> Justice Douglas, writing the majority opinion, spoke for Chief Justice Warren, Justices Black, Brennan and Frankfurter.<sup>74</sup> He scanned passport history and found, generally, two previously existing reasons for denial: (1) lack of citizenship; and (2) violation of U.S. laws:

We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.<sup>75</sup>

Declaring war powers to be a different matter, the Court said that power delegated to regulate liberty must be carefully scrutinized,<sup>76</sup> stressing the fact that beliefs, associations and ideological matters were involved in the right to travel. In avoiding constitutional questions, the Court said in conclusion:

To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.<sup>77</sup>

Justice Clark, joined by Justices Burton, Harlan and Whitaker dissented. Their view of legislative intent was in sharp contrast with that of the majority.<sup>78</sup> Although they also claimed to avoid the

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73. *Kent v. Dulles*, 357 U.S. 116 (1958). Previously the Supreme Court had denied certiorari where a citizen refused to sign a similar affidavit. See *Robeson v. Dulles*, 235 F.2d 810 (D.C. Cir. 1956), cert. denied, 352 U.S. 895 (1956). Here suit was dismissed because petitioner had not exhausted his administrative remedies—including the execution of such an affidavit.

74. It is doubtful that the Court avoided constitutional issues and used this approach so as to have Mr. Justice Frankfurter's vote. Judge Bazelon used the delegation theory when such considerations were not present.

75. *Kent v. Dulles*, 357 U.S. 116, 128 (1958).

76. The failure-to-delegate approach is relatively unusual. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). But a constitutional issue will always be avoided if possible. See *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955).

77. *Kent v. Dulles*, 357 U.S. 116, 130 (1958); accord, *Dayton v. Dulles*, 357 U.S. 144 (1958).

78. Although a conclusion acceptable to the dissent may be drawn from the 1918 legislative history, nevertheless "legislative history of the 1926 statute gives no indication as to whether Congress intended to confer power on the Secretary



constitutionality of the Secretary's regulations, they stated that, realistically speaking, we were not at peace and thus emergency measures to deal with a conspiracy might well be appropriate to a national security program.

*Communist Party of the United States v. Subversive Activities Control Board*<sup>79</sup> has recently upheld the validity of the Internal Security Act as applied to the Communist Party. The constitutionality of a blanket prohibition against the Communist Party is extremely doubtful when one considers the Court's attitude as exhibited in *Kent*. Previous decisions indicate that the Court will insist on more restrictive criteria—perhaps a differentiation between "active" Party members and mere ideologists.<sup>80</sup> At this time, it appears as if the State Department is acting on a case to case basis. Proposals for enforcing the Court's decision are now being considered.<sup>81</sup>

Recent cases involving passport procedures arise from the State Department restrictions on travel in "those portions of China, Korea and Viet Nam under Communist control."<sup>82</sup>

*Worthy v. Herter*<sup>83</sup> is the first of a trilogy of cases dealing with individuals who seek to travel to Communist China. In this case, William Worthy, a duly accredited newspaperman, applied in 1957 for his passport. The passport contained restrictions against travel in Hungary and portions of China, Korea and Viet Nam under Communist control. Worthy declined to commit himself to obedience of these restrictions and consequently renewal was refused. The background for this refusal consisted of Worthy's previous travel in Communist China and Hungary in the teeth of the same restrictions. Judge Prettyman, speaking for the circuit court, was quick to point out that this case in "no wise" resembled the Supreme Court's decision in *Kent v. Dulles*:

In the case at bar no beliefs, associations, or personal characteristics are involved. Nor is this a case in which the Secretary has proposed a restriction upon a passport for reasons of internal security, i.e., protection against internal subversion. The factors here are political and military conditions in certain areas of the earth.<sup>84</sup>

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to prescribe substantive eligibility requirements for a passport or whether it merely intended to confer power to establish appropriate procedures for the issuances of passports." Authority of the Secretary of State to Deny Passports, 106 U. Pa. L. Rev. 454, 460 (1958).

79. 367 U.S. 1 (1961).

80. *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957); see also Note, 75 Harv. L. Rev. 83, 111 (1961).

81. N.Y. Times, Dec. 5, 1961, p. 17.

82. See Gelhorn, *American Rights* 148-49 (1960).

83. 270 F.2d 905 (D.C. Cir. 1959).

84. *Id.* at 907.

The court recognized that a constitutional right to travel was at issue along with the freedom of the press.<sup>85</sup> However, these rights, like all others, are not absolute. The court reasoned, "Liberty is achieved by rules, which correlate every man's actions to every other man's rights and thus, by mutual restrictions one upon the other, achieve a result of relative freedom."<sup>86</sup>

Judge Prettyman said that he found no restrictions upon Worthy's thinking and writing. He noted the Secretary's claim that restricted areas were "trouble spots" where American citizens might be placed in danger and where American foreign policy might be impeded. For the judiciary to interfere would be usurpative. He viewed the Secretary's action as within the Executive power to conduct foreign affairs, reasoning as follows:

If the Secretary has any discretion it seems to us it must include a discretion to prevent trouble when he reasonably foresees trouble. Without a preventive discretion, he has no discretion of any realistic content.<sup>87</sup>

*Frank v. Herter*<sup>88</sup> and *Porter v. Herter*<sup>89</sup> involved travel in Communist China. The circuit court dealt with them similarly. The only wrinkle in those cases is the different occupations that were urged as reasons to travel—scholar and Congressman. All three cases have been denied certiorari by the Supreme Court.<sup>90</sup> However, a denial of certiorari "is not a precedent for like action in a similar case . . .,"<sup>91</sup> and this issue may well crop up again soon. It deserves some scrutiny.

Judge Prettyman says that the question of travel to restricted areas in "no wise" resembles *Kent v. Dulles*. But is this really true? The Supreme Court in *Kent* said that historically in peacetime the Secretary had only exercised substantive power with regard to citizenship and offenders of United States laws. Travel restrictions in peacetime, like denials of passports for political beliefs, are of recent origin. The passport statute does not confer authority upon the Secretary to abridge the constitutional right to travel. Not only do these cases resemble *Kent* very much, but they are also conceptually difficult to distinguish. Why should we now impute to Congress an

85. There is the additional question of equal protection caused by the Secretary's imprimatur being placed upon the travel rights of some newspapermen. See Brief for Petitioner, pp. 21-25, *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959).

86. *Worthy v. Herter*, 270 F.2d 905, 908 (D.C. Cir. 1959).

87. *Id.* at 912.

88. 269 F.2d 245 (D.C. Cir. 1959).

89. 278 F.2d 280 (D.C. Cir. 1960).

90. *Worthy v. Herter*, 361 U.S. 918 (1959); *Frank v. Herter*, 361 U.S. 918 (1959); *Porter v. Herter*, 361 U.S. 918 (1959).

91. Stern and Gressman, *Supreme Court Practice* 149-50 (2d ed. 1954).

intention to suddenly abridge this right with new-found substantive regulations?

Of course the cases are different in one sense—and admittedly it is a major sense. The Executive here, in the conduct of foreign affairs, is presumably dealing in the area of negotiations with foreign governments. This is the factor which makes the foreign affairs argument more plausible than in *Kent*. In this area travel might more arguably be subject to “reasonable regulation”<sup>92</sup> to avoid impairment of this Executive function.

There is only one *caveat* to the above-stated Executive claim. It is the lack of *explicit authority* in the Constitution empowering the Executive to act in this manner. Inherent Executive power has been accepted warily by the judiciary, even when argued for on the basis of military hostilities.<sup>93</sup> The Supreme Court, in *Kent*, said that any new regulation of the liberty to travel should come from Congress.<sup>94</sup> It is very possible that action to the contrary “flies in the face of the Constitutional tradition accepted by . . . [the] Court. . . .”<sup>95</sup>

### III. LEGISLATIVE PROPOSALS

A number of legislative proposals on the passport problem were placed before the Senate Foreign Relations Committee in the 86th Congress,<sup>96</sup> but “no action was taken on this subject by the Committee because of the wide divergence of opinion.”<sup>97</sup> This problem is one which will undoubtedly occupy a good deal of the committee's time in the eighty-seventh Congress.<sup>98</sup> Congress should enact legislation in the passport area because of: (1) the desirability of definite procedural standards in preference to previously existing State Department fiat; (2) the doubt which now surrounds the validity of Executive action in the promulgation of area restrictions; and (3) the sub-

92. See Comment, *The Passport Puzzle*, 23 U. Chi. L. Rev. 260, 289 (1956).

93. See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

94. *Kent v. Dulles*, 357 U.S. 116, 129 (1958). The Eisenhower Administration cast doubt on their belief in this power when they asked for legislation in accord with the *Worthy* decision. Senator Fulbright believes that there is doubt about this authority. See *Passport Legislation Hearing Before the Senate Committee on Foreign Relations*, 86th Cong., 1st Sess. 17 (1959).

95. See Brief for Petitioner, p. 12, *Porter v. Herter*, 361 U.S. 918 (1959). The proposed bill stated that “it is not clear at present whether the Department actually has such power under existing law.” *Passport Legislation Hearing Before the Senate Committee on Foreign Relations*, 86th Cong., 1st Sess. 17 (1959).

96. For a comparison of the bills see *Passport Legislation Hearing Before the Senate Committee on Foreign Relations*, 86th Cong., 1st Sess. 29-33 (1959).

97. Communication from Senator Fulbright to the author, Dec. 13, 1960.

98. Communication from Senator Fulbright to Secretary of State Herter, Sept. 20, 1960.

stantive vacuum created by the Supreme Court's decision in *Kent*. It is appropriate that this task be undertaken by Congress, for, as Judge Bazelon has said:

The broad power to curtail the movements of citizens of the United States, to the extent that our Government possesses it, *is vested in Congress, not in the President*. . . . Whether our internal security requires the drastic measure of restricting travel and, if so, to what extent and by what criteria and procedures is for Congress to decide. If and when Congress acts, there will presumably be hearings, reports and debates which may serve to limit what Congress elects to do and may help to interpret what it does. The constitutionality of any such measure will, of course, depend on its provisions and the circumstances in which it is enacted.<sup>99</sup>

All nations, irrespective of strength, must impose security measures in the basic interest of self-preservation. Our laws must not give comfort to those who commit crimes and to those who are *actively* engaged in a dedicated struggle to overthrow the government. Internal security is a competing interest in a free society.

It is true that we are, at present, involved in the "cold war" with the Communist bloc—a struggle that may prove to be lengthy and exhausting. But just how germane is this struggle (a struggle that exists in peaceful coexistence) to the problems of internal security and passport procedures? It becomes important for the American citizen to ask what passport procedures have to do with internal security. If the nation has a goodly number of hard core conspirators, it would seem that they would not find a passport to be an item of necessity. Surely they could make a fruitful use of other methods of communication such as the mails, cables and telephones. And might they not find embassies and consulates located in this country convenient to their plotting? Furthermore, under existing law, a conspirator who felt dire need to confront his fellow conspirators face to face beyond United States limits could do so. A passport is not required for travel in the Western Hemisphere—and travel to Iron Curtain countries may often be arranged from other countries in this hemisphere.<sup>100</sup>

The whole question requires at least a brief discussion of internal security itself in this country at present. The ability of the most dedicated opponents of our government to effectuate physical harm here is extremely doubtful. The United States is an advanced industrial society in the midst of a fair amount of stabilizing opulence. It is in an era where appeals to a violent Communism not only fall upon deaf ears, but are a simple anachronism. Congress would do

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99. *Briehl v. Dulles*, 248 F.2d 561, 596 (D. C. Cir. 1957). (Emphasis added.)

100. *Freedom To Travel* at 43.

better to legislate a bill containing wisdom in its respect for freedom—a concept which finds its essential roots in a concern for the benefit of society—and constitutional authenticity in its recognition of a right specifically enunciated by the Supreme Court.

In considering passport legislation Congress ought to be mindful of one other factor. If there is a grave threat to our internal security, and if there is a nexus between this and the issuance of passports, it would seem that the effects of unbridled conspiracy would now be at their height. *Kent* has obliged the State Department to stop refusing passports to Communist supporters. Indeed the State Department has announced that it has been reluctantly issuing passports to hard core Communists<sup>101</sup>—and this is a situation that has been in existence now for almost three years!

It would be interesting to know of those catastrophes envisaged by advocates of restrictive legislation and critics of the Supreme Court. Those predicted efforts appear to have remained embryonic for three years. Thoughtful Americans must be puzzled by this clouded area of unanswered questions. Perhaps they are stating inquiries similar to that posed by Senator Morse:

The President of the United States sent a special message to Congress asking for restrictive passport legislation immediately following the Supreme Court passport decisions. These frightening words came from the President: "Each day and week that passes without it [restrictive passport legislation] exposes us to great danger!"

It is high time that the Government witnesses give us their views on this subject. We are entitled to know what the "great danger" is, *if it actually exists*.<sup>102</sup>

#### IV. PROPOSED LEGISLATION

Six passport bills were introduced in the Senate in the 86th Congress.<sup>103</sup> Three of these will here be considered. The bills to be discussed were sponsored by Senators Humphrey,<sup>104</sup> Fulbright,<sup>105</sup> and Wiley<sup>106</sup>

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101. Brief, *supra* note 89 at 34.

102. O'Conner, Need for Legislation Authorizing Denial of Passports to Communist Supporters, 39 Dep't State Bull. 880 (1958). (Emphasis added.)

103. The bills not discussed were introduced in 86th Cong., 1st Sess. by Senator Javits (S. 1973), Senator Eastland (S. 1303) before the Internal Security Subcommittee of the Judiciary Committee, Senator Mundt (S. 2095) before the Government Operations Committee.

104. S. 806 86th Cong., 1st Sess. (1959) [hereinafter cited as the Humphrey bill].

105. S. 2287, 86th Cong., 1st Sess. (1959) [hereinafter cited as the Fulbright bill].

106. S. 2315, 86th Cong., 1st Sess. (1959) [hereinafter cited as the Wiley bill]. A restrictive bill sponsored by Rep. Selden of Alabama, H.R. 9069, 86th Cong., 1st Sess. (1959), passed the House on Sept. 8, 1959. No further action was taken.

respectively. Only the Fulbright bill is a comprehensive treatment of passport problems. These three bills were selected for analysis because they represent what might be viewed as three basic positions in this controversy. Also to be considered in this discussion of proposals is the excellent book, *Freedom to Travel*, a work of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, and some recommendations presented by the American Civil Liberties Union.

#### A. Prompt Notice

The Department of State has indicated that the average period of time in 1957 between passport application and tentative disapproval was seventy-two days.<sup>107</sup> Since there are no statutory safeguards in this area, it is important that some be effected by new legislation. Delayed travel, like justice, may often result in complete frustration for the restrained individual. Dr. Otto Nathan has testified that it took two and one-half years of waiting before he was issued his passport.<sup>108</sup> While admittedly the State Department has advanced from a Star Chamber era,<sup>109</sup> it is proper that statutory obligations be thrust upon it.

The Wiley bill recommends a ninety day waiting period. However, the Humphrey and Fulbright bills state that the limit should be thirty days. The Special Committee's<sup>110</sup> recommendations also contain a thirty day provision. In the light of the frequent need to travel promptly, it would seem that the latter recommendations should be accepted by the Foreign Relations Committee.

The Special Committee thinks that the applicant should be informed of reasons for denial so as to permit the possibility of "early and economical" resolution of the problem. The Fulbright bill contains similar objectives in its attempt to command specificity in notice and to convey to the applicant an awareness of his rights, and it would also require a written statement containing specific reasons for denial. In addition, the State Department would furnish detailed information upon which the stated reasons of denial were based, and an identification of the sources of the information. Also included would be detailed information concerning a petitioner's right to administrative judicial review. The Humphrey bill is silent on this point, and the Wiley bill would allow the statement of reasons to be as specific as the dictates of national security permit.

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107. *Freedom To Travel* at 75.

108. *Freedom To Travel* at 77.

109. Hennings, *The Right to Travel*, *Coronet* p. 133 (Dec. 1957).

110. *Freedom To Travel* at 35-90.

Legislation should be along the lines drawn by the Committee and Senator Fulbright.

*B. Necessity for Hearing*

Although there is no statutory requirement for a hearing, nevertheless, regulations of the Secretary of State establish such a procedure.<sup>111</sup> Furthermore, a hearing procedure has received judicial recognition in *Nathan* and *Bauer*.

The Special Committee has proposed that an individual denied his passport be entitled to "a trial type hearing on the issues of fact relative to denial of his passport."<sup>112</sup> They believe that the hearing body is properly located within the Department of State. This is because procedural regulations already provide the adequate safeguards for which an independent body might be created. The Special Committee recommends that the Office of the Legal Adviser have representation on the Board because of the legal nature of the passport appeal. He would act independently as a member, as would the other members. The Committee recommends that a counsel for the State Department be appointed by the Secretary of State. His role must be separate from that of the Board.<sup>113</sup> The applicant would have the right to counsel.<sup>114</sup>

The Fulbright bill is in substantial agreement with the Committee. The provision for hearing would be thirty days, and would not be extended to citizenship and area control cases.

Senator Humphrey would have a trial-type hearing as envisaged in the Administrative Procedure Act.<sup>115</sup> This suggestion the Special Committee considers inappropriate. This act places the burden of proof upon the proponent of a rule or order. It calls for a sanction to be imposed "upon consideration of the whole records, . . ." or that portion which may be cited by any party as "reliable, probative and substantial evidence."<sup>116</sup>

The Wiley bill is similar to that of Senator Fulbright except that the length of time allowed before a hearing must start is ninety days. The Committee's proposals seem satisfactory, and they should be enacted into law with Senator Fulbright's thirty day time period.

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111. 22 C.F.R. §§ 51.151-170 (1958).

112. Freedom To Travel at 76.

113. Compare 22 C.F.R. § 51.153 (1958), with Freedom To Travel at 77.

114. Present regulations of the Board provide for appearance by or with an attorney. 22 C.F.R. §§ 51.160-161 (1958); see also *Powell v. Alabama*, 287 U.S. 45 (1932).

115. 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1952).

116. *Ibid.*

### *C. Confrontation*

The sixth amendment specifically guarantees the right to confront witnesses in criminal cases. There are good reasons behind the right to face one's accusers, for as Mr. Justice Douglas has said, the faceless confidants,

may be psychopaths or venal people, like Titus Oates who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.<sup>117</sup>

The Fulbright bill would require full disclosure of evidence and the complete right of cross-examination. It would appear that the Humphrey bill is in agreement. Its reliance on the Administrative Procedure Act is tempered with the exclusion of that Act's provisions for withholding information detrimental to the national security.

Senator Wiley would withhold information, sources of information and investigative methods where their disclosure would have a substantially adverse effect upon national security or foreign relations. A "fair" resumé would be given to the applicant.

The Committee split four to four on this question. Two of the members who balked at full confrontation present an interesting alternative.<sup>118</sup> They make an exception to this principle in the "extremely narrow and rare" situation. Where an applicant has had access to government information of a highly classified nature, he may be denied complete discovery and confrontation where such denial is based on the charge that the applicant would disclose such information abroad. The head of the appropriate investigative agency certifies that discovery and confrontation would reveal intelligence sources and techniques which would be detrimental to the national security. Regular governmental classification would not be controlling, and the nature of the information would be re-examined by the agency. These members of the committee stress that casual informants should not be protected. They also emphasize the high position of trust accorded those with highly classified information and the attendant obligations of that trust.

Although the requirements of the sixth amendment are only applicable to criminal cases, the Ninth Circuit has held that merchant seamen in administrative proceedings cannot be barred from pursuing their occupation on the ground of subversion unless they have the

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117. *Peters v. Hobby*, 349 U.S. 331, 351 (1955) (concurring opinion).

118. *Freedom To Travel* at 84-86. The opinion is presented by Mr. Fifield Workum and Mr. Adrian S. Fischer.



right to full discovery.<sup>119</sup> Due process has also been held to be applicable to state employees in denial of employment cases.<sup>120</sup> In legislating in the area of travel, Congress ought to be mindful that they are dealing with a right guaranteed by the Constitution. The recommendations of Senators Fulbright and Humphrey are in accord with the liberal procedures that are appropriate to this problem. Such legislation might possibly include the above stated exception—but Congress should proceed cautiously in carving out exceptions. Chief Justice Warren, speaking of a situation where a constitutional right was not at issue, said the following:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, . . . prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.<sup>121</sup>

One further admonition to those who would seek to surround this right with restrictions is implicit in the following statement by Mr. Justice Frankfurter:

We can take judicial notice of the fact that in conspicuous instances, not negligible in number, such "confidential information" has turned out to be either baseless or false. There is no reason to believe that only these conspicuous instances illustrate the hazards inherent in taking action affecting the lives of fellow men on the basis of such information. The probabilities are to the contrary.<sup>122</sup>

#### *D. Transcript of Hearings*

In keeping with the right of full discovery, a complete record of all testimony should be kept with copies available to the applicant, the Secretary and the reviewing court if necessary. Both the Committee and the Fulbright bills contain this provision.

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119. *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955); but see *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam* by an equally divided Court, 341 U.S. 918 (1951).

120. *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

121. *Green v. McElroy*, 360 U.S. 474, 496 (1959).

122. *Jay v. Boyd*, 351 U.S. 345, 373 (1956) (dissenting opinion).

### *E. Privacy of Hearings*

The Committee has suggested that hearings should be private in order to alleviate possible social and economic prejudice. This provision could be waived by the applicant if he desired a public hearing. The Fulbright bill is similar.

### *F. Appeal from Administrative Hearing*

The Committee has recommended that upon a favorable ruling by the Board, a passport should be issued immediately. If the Board denies the application, the Committee thinks that proposed findings and facts should be submitted to the Secretary. If the Secretary denied the passport, he would be required to issue his findings to the applicant with specific reasons for rejection.

The Fulbright bill specifically incorporates the idea of ultimate review by the Secretary. Senator Wiley would have the Board make recommendations to the Secretary. Enactment of the Committee's proposals would be desirable.

### *G. Judicial Review*

At present, there is no specific provision providing for judicial review; but such review has been obtainable in the United States district courts in the District of Columbia. The standards of the reviewing court are uncertain.

The Wiley bill provides that the district court in the District of Columbia may determine whether or not the Secretary has complied with the passport act and regulations. If this could be supported by substantial evidence on the entire record, the Secretary would be upheld. There is one *caveat*. A court would not be able to review a passport denial based on information not in the open record or of a confidential nature.

Enactment of the Humphrey bill would leave the existing state of the law unchanged. Senator Fulbright has proposed that review be sought in either the District of Columbia or in the district court of the applicant's residence. The judiciary would determine whether or not the Secretary had complied with the procedural and substantive portions of the bill and regulations. The court would not sustain denial of a passport unless the Secretary's findings were supported by substantial evidence *on the entire record*.

Congress might take a long, hard look at possibilities for forum shopping here, but a provision in accord with the spirit of the Fulbright proposal should be enacted into law.

It should be pointed out to those who would deprecate the importance of rigid compliance with the above mentioned rules that:

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.<sup>123</sup>

#### *H. Substantive Grounds for Denial of Passports*

The Committee believes that neither membership nor support of any organization, short of violation of the Smith Act, should serve as criteria for travel restraints. A more definable danger to the security of the United States should be contemplated. The Committee stated that:

Travel of an individual should be restrained only upon a clear showing of real danger to the nation which would follow from the travel abroad of the particular applicant. The generalized taint which properly attaches to the Communist Party as an organization should not be carried over to restrain the travel of an individual without evidence which specifically links the individual to dangerous activity abroad.<sup>124</sup>

The Committee rejects the idea that qualification to travel should be related to anything so vague as advancing the "Communist movement." The Committee recognizes that this is a matter which is susceptible to a variety of answers and thus difficult to administer. They wrote the following:

Indeed, it is a rare administrator who would on his own initiative resolve any doubt in favor of the applicant. The inevitable tendency is to deal with rumor as fact, association as membership, and advocacy as incitement. This discretionary power, in short, is foreign to American standards of fairness and justice.<sup>125</sup>

It is the Committee's opinion that it would be more consistent with our principles of freedom to allow freedom of travel to those suspected of "leftist beliefs and associations." It is the Committee's judgment that less harm will be done by the travel of those who are severely critical of our government than would be done if many could claim to be prisoners within our borders.

What then should the standards be for national security? The Committee believes in restraints upon the following categories: (1) individuals transmitting United States secrets; (2) individuals who would incite hostilities which might involve the United States and thus endanger our national security; and (3) individuals who would

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123. Mr. Justice Douglas, concurring in *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951).

124. *Freedom To Travel* at 42-43.

125. *Id.* at 43-44. See also *United States v. Lattimore*, 215 F.2d 847 (1954), *aff'd* 232 F.2d 334 (1955).

incite attacks by force upon the United States. They would give the State Department authority to predict such action as a court predicts an anticipatory nuisance through injunction. But the Committee emphasizes that predictions should be concerned with *action and not speech*.

The Committee would also restrain the following people: (1) fugitives from justice and persons under court restraining orders; (2) persons repatriated at government expense, repayment not having been made; (3) persons determined to be mentally ill by competent authority; and (4) minors whose travel is objected to by one or both parents. The Committee would not extend prohibitions to: (1) persons likely to become public charges; or (2) habitual criminals who have served their punishment.

Senator Fulbright would follow the criteria that the Committee enunciated. Realizing that such criteria present a real problem of investigatory channels, Senator Fulbright has, unlike the Committee, discussed the role that membership in a political party will play. He wrote that,

it would certainly be relevant to the national security criteria . . . to inquire whether the applicant is, or within the past few years has been, a member of the Communist Party. . . . But it would not permit the Department to inquire into party affiliations in the 1930's and 1940's, since in those days the nature of the Communist threat was unknown to many loyal, law-abiding Americans and since under the bill a passport may be denied only if its issuance could create the likelihood of imminent danger to national security. Nor would section 202 sanction inquiry into the activities of applicants relating to so-called "left-wing" or "front" organizations unless it can be shown that such an organization is engaged in activities relating to the criteria. . . . My bill focuses on conduct that presents clear and present danger to the security of the United States and in no way attempts to curb expression of unpopular beliefs or association with unpopular groups. . . . I want to stress that the fact that section 202 permits inquiry into current Communist membership does not mean that a passport could be denied under section 203 (b) solely because of such membership.<sup>126</sup>

The Fulbright bill would also deny passports to: (1) individuals charged with criminal felony violations or free on bail; (2) individuals convicted within five years of violating area control regulations and who fail to post \$5,000 bond to guarantee future compliance; and (3) persons repatriated at government expense, repayment not having been made.

The Humphrey bill states that passports will not be issued to people

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126. Hearings Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess. 14 (1959).

charged with or under sentence for a felony. During periods of declared war the President would be empowered to deny a passport for any reason.

The Wiley bill would keep the existing regulations. During the remainder of the present national emergency, a passport could be denied where there were substantial grounds for a belief that the applicant knowingly engaged in activities to further the international Communist movement. Petitioner would have the burden of proof in proceeding before the Secretary of State. This provision's restrictiveness is undesirable in our free society today and stands convicted of vagueness. Furthermore, its constitutionality is doubtful in view of the Court's concern for freedom of belief in *Kent*.

The recommendations of the Committee and Senator Fulbright are tempting. Their concern for action rather than beliefs, and Senator Fulbright's limited inquiry into Communist membership seem to be consistent with the Supreme Court's opinion in *Yates v. United States*:

The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court. . . .<sup>127</sup>

The Fulbright bill proves especially alluring when one realizes that the excellent procedural regulations in this bill would assure a minimum of deviation from the *Yates* principle—as would the right to judicial review.<sup>128</sup> The bill provides a nexus between belief and action which is rather clear. Nevertheless the inquiries provided for seem to be unnecessary. The danger caused by people who would put their beliefs into action, once abroad, appears to be negligible in view of events since the *Kent* decision. As of now there have been no violent physical attacks upon the government which can be traced to the passport policy. Implicit in the Fulbright criteria is the happening of events within a short period of time. It would be difficult for the State Department to make long range predictions, and indeed, such speculation would be inconsistent with the stated criteria. The past three years have indicated that there is a dearth of conspirators who would cause violence immediately. In view of this, can we consider the Fulbright inquiry to be justifiable?

The Humphrey provision on this subject seems to be the most desirable law under present day conditions. Unless specific dire consequences can be exhibited, it would be best to keep beliefs and associations inviolate from all possible encroachments and adminis-

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127. 354 U.S. 298, 318 (1957).

128. For a statement in support of this bill, see communication from Professor Bickel to Senator Fulbright, July 8, 1959, in Passport Legislation Hearing Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess. 160-61 (1959).

trative discretion. The actual commission of a crime would be a better standard here. The State Department should, of course, co-operate with police authorities and would deny a passport in such situations. But mere abstract intent to commit a crime is not a crime. If such intent is accompanied by actual preparations, then the applicant can be indicted for conspiracy.<sup>129</sup> It should be noted that the Fulbright bill would repeal the Internal Security Act's passport provision. The Humphrey bill leaves this legislation intact.<sup>130</sup> That act's standards of Communist Party membership are inferior to the standards of both the Fulbright and Humphrey bills. Congressional action should then repeal Section Six of the Internal Security Act. This writer's other recommendation in this area would include all other categories suggested by the Committee and Senator Fulbright which are not inconsistent with the Humphrey bill. A restraint imposed upon defendants in a civil action involving a substantial amount seems reasonable. This has been advocated by the American Civil Liberties Union.

### *I. Area Restrictions*

It seems clear that the President could constitutionally prohibit travel in certain areas *pursuant to Congressional legislation*. (This situation does *not* exist today.) Congress ought to proceed with caution here, because as the Committee has said:

The great difficulty with area restrictions is that they are self-defeating in too many instances. It becomes a close question, too often, whether the *real* penalty is imposed upon the foreign government which is the target of the area prohibition or upon the people of this country, both those who choose to stay at home and those who desire to travel abroad. Those who remain at home through choice are denied information from their fellow citizens and local news sources about the proscribed country, and those who wish to travel, but are denied passports to their areas of choice, are prevented from directly informing themselves and the associates.<sup>131</sup>

The Committee thinks that *carte blanche* authority for the Secretary of State is necessary. The following are illustrations of instances

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129. See statement of Patrick Murphey Malin, Executive Director of the American Civil Liberties Union, in Passport Legislation Hearing Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess. 131-32 (1959).

130. Statement by Senator Humphrey, Jan. 27, 1959, contained in press release of same date.

131. Freedom To Travel at 42-43. If exceptions are to be made for certain reporters, the problem of eligibility becomes ticklish. There is also the problem of whether the breadth of exceptions "should be considered a form of concession to that country, or whether it should be considered a matter of our own interest for the benefit of Americans and other people of the world." *Id.* at 55. See Barrett, *Diplomacy, Press and China*, *The Sat. Rev.*, March 9, 1957, p. 22.

where they view the Secretary as justified in exercising this power: (1) as a deterrent to aggression—restraint on travel in a particular country would be similar to an economic embargo; (2) when hostilities are threatened or in force, and the United States desires to bring pressure to subdue them or avoid involvement; and (3) where a country is wrongfully holding United States citizens in prison. With regard to the detention of United States citizens, the Committee urges that normal diplomatic practices be exhausted “prior to the imposition of area restraints.” The Committee thinks that the Secretary should be obliged to set forth a statement with reasons for such an imposition. Provision would also be made for exceptions, and for a hearing for individuals who are subject to area restraints when other applicants are not subject to them.

The Committee rightfully rejects the idea of a “no protection” passport. It points out that no right inures to the citizen against his country. The right is a matter of international law, and thus a nation *could* make a claim on behalf of its subject.<sup>132</sup> A waiver would not affect this subject, for as Judge Bazelon wrote, “the American who becomes embroiled with foreign authorities can only request the aid of his Government; he cannot compel it.”<sup>133</sup>

The Committee also thinks that dangers in foreign countries would be multiplied by such a waiver. This, however, is extremely doubtful in the cold war situation today because such hostile action against individuals would not be in the interests of Communist propaganda. Indeed, the Security Officer of the State Department gave an indication of the Eisenhower Administration’s views on this problem when he said the following of Congressman Porter’s petition to travel:

I am using Mr. Porter as an example, since he has put himself forward as an example; if he traveled to Red China—incidentally, I am quite certain that the Communist Chinese would make very certain that nothing happened to him, because it would be to their propaganda advantage to see that nothing did. . . .<sup>134</sup>

Senator Fulbright’s provision on area restrictions seems to be in accord with those advocated by the Committee. As previously mentioned, he would make the use of a passport in restricted areas a crime—a provision that does not today exist.<sup>135</sup> This is a reform also proposed by the Committee.

132. 1 Oppenheim, *International Law* § 319 (8th ed. Lauterpacht 1955).

133. *Briehl v. Dulles*, 248 F.2d 561, 588 (D.C. Cir. 1957).

134. Brief for Petitioner, p. 23, *Porter v. Herter*, 361 U.S. 918 (1959).

135. *Trading With the Enemy Act*, 40 Stat. 411 (1917), as amended, 50 U.S.C. §§ 1-40 (1952), does not seem to have ever contemplated the regulation of travel passports.

The Fulbright bill would permit the Presidential travel ban to last for one year rather than for an indefinite period. The Humphrey bill would give the President the power to stay travel anywhere during war, and to designate combat areas where the United States is engaged in military hostilities, but war has not been declared. No other travel bans could be imposed, but the President could inform the public and Congress of certain areas where this nation could not protect its citizens. The Wiley bill is silent on this subject.

President Kennedy has indicated that a substantial revision of the China policy may soon be in order. He favors "a more liberal policy of granting passports to journalists" to visit Communist China, and in a speech on June 14, 1960, he stated that we must work to improve our communications with mainland China, and that if these contacts prove fruitful, "further cultural and economic contact could be tried."<sup>136</sup> Thus, it is not beyond the realm of possibility that a substantial portion of the problem with regard to travel in China may be rendered moot shortly. On the other hand, it might be reasonable to assume continuing problems in this specific area.<sup>137</sup> Perhaps this whole question will be controversial for some time to come, if not in China, then in other Communist controlled nations. It is, therefore, important to articulate a demarcation line for Presidential discretion which is as sharp as possible.

The provisions of the Humphrey bill dealing with war and combat area restrictions are absolutely necessary to the orderly conduct of Executive affairs. The "no protection" passport idea should be discarded in accordance with the reasons stated by the Committee. The President should have some discretion beyond the Humphrey bill which would allow him to close off areas where imminent hostilities, in his opinion, might involve this country; or where a clear pattern of violence against American citizens endangers the conduct of foreign affairs. He should set forth his findings in the most detailed manner possible. This requirement should, however, be consistent with the requirements of national security imposed by this imminent danger. The time limit should be from six months to a year. If the President should wish to prohibit travel in a country that he wishes to punish for a wrong such as aggression or the imprisonment of American citizens, he should be required to go to Congress for specific authorization. If this procedure is followed, Executive whim

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136. Communication from Senator Kennedy to the author, Oct. 11, 1960.

137. Communist China appears to be hostile to overtures by the Kennedy administration thus far. See N.Y. Times, March 9, 1961, p. 1, col. 1, wherein the following is written: "It was reported by diplomatic sources that in a talk with the United States Ambassador in Warsaw yesterday the envoy from Peiping refused to negotiate an exchange of news correspondents. . . ."



with regard to the morals and decency of a certain country may be kept to a minimum. A quarantine would be subject to examination through debates and hearings, and a greater rule of reason might prevail.

#### *J. General Requirement to Hold a Passport*

Senator Wiley would leave existing law unchanged. Senator Fulbright would continue the passport requirement, subject to general exceptions made by the President, into periods of "normalcy." His bill also closes loopholes with respect to the requirement of passports for United States citizens living in other countries in the Western Hemisphere. An individual going from Mexico to Europe without a passport would be in violation of the law. The right to travel in other countries in the Western Hemisphere would continue. The President would be directed to use, to the extent possible, his power to make general exceptions to the prohibition of travel without a passport so that citizens may soon travel without passports to countries outside the Western Hemisphere.

The Humphrey bill repeals existing law and sanctions travelling abroad without a passport. A passport would still be important to citizens, however, since most countries require it as a condition of entry,<sup>138</sup> and since it is ready proof of United States citizenship.

#### CONCLUSION

President Kennedy, in advocating a liberal version of the right to travel, has indicated that he will support legislation along the lines of the Fulbright and Humphrey bills.<sup>139</sup> This is in accord with the spirit of the Universal Declaration of Human Rights to which the United States is a signatory, and which states, "everyone has the right to leave any country, including his own. . . ."<sup>140</sup>

The liberties guaranteed in the Bill of Rights are, of course, in continual competition with the dictates of national security. But we must always remember that these broad prohibitions may only recede in the face of the gravest immediate dangers. The Founding Fathers knew full well the many risks involved in placing their faith in the individual. In doing so, they rejected a philosophy which would assume the stooping posture of fear. It is in this tradition that the Supreme Court acted in *Kent v. Dulles*. It is to be hoped that Congress will follow suit and simultaneously stake out a positive policy encouraging human understanding in a world that is severely troubled.

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138. A survey is reported in *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Reviews*, 61 *Yale L.J.* 171, n.3 (1952).

139. Communication from Senator Kennedy to the author, Oct. 11, 1960.

140. Universal Declaration of Human Rights, Art. 13(2), 19 *Dep't State Bull.* 753 (1948).