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# Restrictions on the Right to Travel

Joseph L. Rauh, Jr. and Daniel H. Pollitt

*{The authors critically examine the authority assumed by the State Department to impose individual restrictions on foreign travel because of a person's political beliefs and to impose general restrictions on travel to designated countries for diplomatic and political reasons. They argue that such general travel restrictions are contrary to democratic and diplomatic traditions, and are unconstitutional and devoid of Congressional support.—Ed.}*

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>

Following World War II<sup>2</sup> the United States embarked upon a two-pronged project restricting the right to travel abroad. One prong was aimed at individuals whose political persuasions were deemed suspect by the State Department. The other prong denied travel facilities, whatever the political persuasion of the applicant, to designated areas of the earth.

## INDIVIDUAL CONTROL

In the decade or so ending in 1958, leftists,<sup>3</sup> rightists,<sup>4</sup> and even those in the center<sup>5</sup> were denied passports when their travel was not deemed to be "in the best interests of the United States." This program, aimed

at individuals, received a series of body-checks in the lower federal courts<sup>6</sup> and a death blow from the Supreme Court in *Kent v. Dulles*.<sup>7</sup>

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Rockwell Kent, the artist, was denied a passport when he refused to tell the Passport Di-

vision whether or not he had ever been a Communist. The Supreme Court, however, anxious to avoid constitutional problems, read the exist-

1. Judge Henry W. Edgerton, dissenting opinion in *Briehl v. Dulles*, 248 F.2d 561, 596 (D.C. Cir. 1957).

2. "It was not until World War II, with the exception of Communist Russia, Nazi Germany and Mussolini's Italy, that the right to leave one's country was substantially controlled and limited." Doman, *Do Citizens Have the Right to Travel?*, 43 A.B.A.J. 307 (1957).

3. E.g., Howard Fast, Paul Robeson, Corliss Lamont. See Note, *Passport Refusals for Political Reasons*, 61 YALE L.J. 171 (1952).

ing passport laws as not authorizing denial of passports on the basis of beliefs, associations, or ideological matters,<sup>8</sup> and said:

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. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. . . . 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 a 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>9</sup>

The *Kent* decision was announced on June 16, 1958. On July 7, President Eisenhower sent a message to Congress requesting passport legislation authorizing the Secretary of State to "deny passports where their possession would seriously impair the conduct of the foreign relations of the United States or would be inimical to the security of the United States."<sup>10</sup> On July 8, Secretary of State Dulles sent a proposed bill to Congress, and in his letter of transmittal pointed out that "the Supreme Court has ruled that the Government is without statutory authority to deny passports to supporters of the International Communist Movement. Enactment of the proposed draft bill would supply the authority now lacking."<sup>11</sup> In a related move, Senator Eastland, Chairman of the Senate Committee on Internal Security, called witnesses to testify on "Communist use and abuse of passports."<sup>12</sup> The lead-off witness, Ro-

4. The passport of Charles E. Davis was invalidated upon conviction in a Swiss court of having spied on United States diplomatic personnel on behalf of Senator McCarthy. *N. Y. Times*, Oct. 18, 1951, p. 20, col. 5.

5. Judge William Clark, formerly of the United States Court of Appeals for the Third Circuit, was denied a passport for travel to Germany. See *Clark v. Dulles*, 129 F. Supp. 950 (D.D.C. 1955).

6. Procedurally, the lower courts held that a passport cannot be denied or revoked without a hearing, *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952), of a quasi-judicial nature, *Nathan v. Dulles*, 225 F.2d 29 (D.C. Cir. 1955), with the decision based on evidence openly produced or good reason advanced for reliance on "confidential" information. *Boudin v. Dulles*, 235 F.2d 532 (D.C. Cir. 1956). Substantively, the courts held passports could not be denied for "arbitrary or capricious" reasons and set aside denials based on the chairmanship of a "Trotskyite" organization on the Attorney General's List of Subversive Organizations, *Shachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955), and based on the selective application of a "means test" to a passport applicant going abroad to gain international backing for his case before the United Nations Commission on Human Rights. *Kraus v. Dulles*, 235 F.2d 840 (D.C. Cir. 1956).

7. 357 U.S. 116 (1958).

8. "The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Id.* at 128.

9. *Id.* at 125-26.

10. *N.Y. Times*, July 8, 1958, p. 54, col. 2.

11. *N.Y. Times*, July 9, 1958, p. 10, col. 2.

12. *Ibid.*

bert D. Johnson, chief of the Passport Office's legal division, told the Senate Internal Security Subcommittee that "even if an espionage agent walked in and asked for a passport, we'd have to issue it."<sup>13</sup>

The opposition then began to make itself felt. The *New York Times* editorialized that

The terms of the bill would permit, at least to some degree, a restoration of what we have repeatedly denounced as the 'political means test' that the State Department has insisted on applying to Americans desiring to travel abroad. We are convinced that neither the good name nor the security of the United States would thereby be aided. In fact, if this bill passes, quite the reverse will be true.<sup>14</sup>

The *Wall Street Journal*, in an editorial headed "Mr. Robeson Takes a Trip," made these remarks:

Paul Robeson is a man with whose opinions about this country we completely disagree. But can a radical baritone's voice drown out Mr. Dulles? Can his views threaten NATO, or nullify all the billions of dollars we've spent on foreign aid to make friends and influence other nations? If so, we have built a foreign policy that is insecure indeed; and we might be the better off for knowing about it.

If the Government is empowered to deny Paul Robeson and others like him a passport because they are disgruntled or critical of our system, what is to stop the Government from broadening that power to include those who disapprove not of the whole system but only of part of it? Is the next step to label critics of, say foreign aid as too "dangerous" to let abroad and to deny them passports also?

So far as Robeson, the individual, is concerned, it wouldn't matter very much to us if he found life elsewhere so enchanting he decided never to come back here. But so far as all of us are concerned, it should matter very much that even Robeson and his kind shall have the right to go.<sup>15</sup>

The *Washington Post* pointed out that the proposed bill "would countenance the odious practice of denying passports on the basis of whispered accusations by faceless informers" and commented:

What are the "overriding requirements of our national security" which President Eisenhower sees to justify so grave a foreclosure of due process of law? Is it that Communist sympathizers might serve as couriers for the Communist cause? The diplomatic pouches are available for this purpose anyway. Is it that they might say things abroad critical of or embarrassing to the United States? They can do this whenever they please at home, and Mr. Dulles would hardly suggest abridging the First Amendment to prevent them. Admittedly there is an element of risk entailed in the freedom to travel as there is an element of risk in all freedom. But there is an infinitely greater element of risk in con-

13. N.Y. Times, July 10, 1958, p. 25, col. 3. Apparently Mr. Johnson overlooked the Supreme Court's language that passports can be denied for "criminal or unlawful conduct." See note 8 *supra*.

14. July 9, 1958, p. 26, col. 2.

15. July 14, 1958, p. 8, col. 1.

16. July 10, 1958, p. 20, col. 2.

ferring on any Government official arbitrary power to suppress freedom.<sup>16</sup>

The *New York Post* said that the President's message gives the impression that "unless dangerous characters can be kept at home, the cause of freedom will suffer irreparably." This, editorialized the *Post*, "is poppycock."

Freedom's cause suffers less from mobile American eccentrics proclaiming political folly from time to time abroad than it does from immobile racists at home. If every Communist in the land were to travel freely for the next year, they could not create the damage to the U.S. done in Little Rock in a few short weeks.<sup>17</sup>

Senator Theodore F. Greene, chairman of the Senate Foreign Relations Committee, introduced the administration passport bill, and the Foreign Relations Committee held hearings. At these hearings, testimony on behalf of the Americans for Democratic Action pointed out that the damage done to American prestige by the restrictions on basic liberties has far outweighed any possible damage that might have been done by those whose passports were delayed or denied.

"Take just a few examples," the testimony continued:

A world-renowned scientist, Linus Pauling, was refused a passport; it was finally granted only after he had won a Nobel prize. How, one would ask, does our Nation sustain its standing as the land of the free in the face of the jibe "Get a Nobel prize and win a passport"?

An internationally famous actor and singer, Paul Robeson, who sought to fulfill a commitment to play Othello in England, was denied a passport because he might make speeches there favorable to Russia and unfavorable to our own country. But no speech that Paul Robeson could have made in England . . . could have sullied our national stature one quarter as much as did this denial of the liberties of an American citizen. . . .

A great American playwright, Arthur Miller, was denied a passport in 1954 when he sought to appear at the opening of one of his most famous plays in Brussels. This withholding of Miller's passport resulted in statements and articles in many parts of the world extremely critical of an America so frightened that it could not trust a distinguished son to appear in a foreign land for the opening of a distinguished artistic work. . . .

One could multiply such examples — the executor of Einstein's estate, a distinguished judge, and so forth; . . . — but little would be gained by so doing.

The picture of an America frightened by the travel of Communists, the picture of an America unwilling to let fellow travelers attend international conferences, the picture of an America unwilling to allow its disaffected citizens to speak that disaffection in distant parts — is far more harmful to our international standing and thus to our national security than any injury a passport holder could possibly inflict upon the cause of democracy.<sup>18</sup>

17. July 10, 1958, (Magazine), p. 5, col. 1.

18. Testimony of Joseph L. Rauh, Jr. in *Hearings on Passport Legislation before the Senate Committee on Foreign Relations*, 85th Cong., 2d Sess. p. 61, 62-63 (1958).

Many witnesses at the hearing reflected the view that passport controls over the individual had weakened rather than enhanced our national strength. The vague security considerations offered in support of renewed passport controls were easily refuted. Secret documents and information could as easily be sent out of the country in diplomatic pouches or through countries accessible without passports as they could be carried by passport holders. Further, if the Government believed that a person was carrying illegally-obtained information, the last thing it would do would be to tip him off by denying him a passport; it would either arrest and prosecute the courier or watch him for counter-espionage purposes.

The Senate Foreign Relations Committee quietly "pigeon-holed" the proposed legislation. Thus ended the decade of individual passport controls. The "political means test" is no longer operative in our passport procedures.

#### AREA CONTROL

The other prong of the State Department program which restricts the right to travel — an across-the-board denial of passports for travel to designated countries or areas — continues unabated. In the October, 1959 Term the Supreme Court denied certiorari in cases affirming a denial of passports for travel in China to a foreign correspondent,<sup>19</sup> to a scholar and author invited by China to lecture on Walt Whitman at the University of Peking,<sup>20</sup> and to a member of the United States Congress anxious to gain first hand impressions on the possibility of "foreign commerce" with China.<sup>21</sup> The denial of passports to these three applicants was not based on any concern over their safety while in China.<sup>22</sup> The motivating factor in area control is the "political interest" of the State Department.

#### *The State Department Asserts an Inherent Power to Control Travel as an Instrument of Foreign Relations*

Absent a shooting war or a grave national emergency, there was no "area control" of American travel from 1776 until 1949 when we witnessed its first use for "political reasons." Since its inception, it has been

19. *Worthy v. Herter*, 361 U.S. 918 (1959).

20. *Frank v. Herter*, 361 U.S. 918 (1959).

21. *Porter v. Herter*, 361 U.S. 918 (1959).

22. Worthy, the newspaper correspondent, had spent some time in China with no harmful physical consequences. The State Department admitted in Congressional testimony that no harm would befall Congressman Porter if permitted to go to China. The fact that Averill Harriman, Vincent Sheehan, Fulton Lewis, and other prominent Americans have received State Department permission to visit China indicates that there is no real concern over the individual traveler's safety.

used with increasing frequency. Testimony by spokesmen for the Passport Office of the Department of State revealed that:<sup>23</sup>

The ban against travel to Hungary on December 21, 1949, was a foreign policy measure directed against Hungary to induce the release of Robert Vogeler. . . .<sup>24</sup>

The ban against travel to Czechoslovakia imposed on June 12, 1951, was a measure directed against Czechoslovakia to induce the release of an American journalist named Oatis.<sup>25</sup>

The next travel ban for political reasons was a general restriction against travel to all Iron Curtain countries announced on May 1, 1952, "to stop Communist propaganda groups from going to the Soviet Union."<sup>26</sup> It apparently was not imposed soon enough for State Department purposes, however, as Secretary Acheson a few months later denounced the attendance of Americans at the so-called Peiping Peace Conference and announced an investigation to determine "whether they have violated the instruction which is on the passport."<sup>27</sup>

On October 31, 1955, the State Department removed the travel ban to Czechoslovakia, Hungary, Poland, Rumania, and the Union of Soviet Socialist Republics, but not to China.<sup>28</sup> The State Department explained in a press release that:

The United States welcomes the free exchange of information between different countries irrespective of political and social differences. But the Chinese Communist regime has created a special impediment. It adopted the practice of taking American citizens into captivity and holding them in effect as political hostages.<sup>29</sup>

Secretary Dulles elaborated on this point at a press conference. He explained that the Chinese Communists "want to have certain American correspondents come to Communist China and will hold Americans in jail until we allow them to come. . . . That kind of blackmail I don't propose to satisfy."<sup>30</sup>

23. *Hearings on the Right To Travel Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. pt. 2, (1957) [hereinafter cited as *The Right To Travel*].

24. *Ibid.*

25. *Ibid.*

26. *Ibid.*

27. *Id.* at 205.

28. *Id.* at 191.

29. *Id.* at 207.

30. *Id.* at 99. For this statement Secretary Dulles was "blasted" by the National Commander-in-Chief of the Veterans of Foreign Wars who said in a press release that the offer of Red China "to release American prisoners if we will allow reporters to go into Red China. . . . is the finest offer we have ever had from Peiping, in fact, if it would mean the release of those prisoners, I would like to offer a citation to all of those newsmen who are willing to risk their life by going into Red China." *Id.* at 116.

Subsequently the State Department relaxed the ban on American travel to Red China by permitting designated types of news-gathering agencies to send representatives there. This

An additional political reason for continuing the Communist China travel ban was assigned on March 5, 1957. Secretary Dulles stated that China felt the need of "respectability" and therefore was trying to re-establish cultural intercourse with the neighboring countries. Re-establishment of such intercourse would present a danger to these neighboring countries, and the United States should not set a bad example by trade and cultural relations with China.<sup>31</sup> This is the particularized "political" reason given Congressman Porter for denying him passport facilities: "[A]s a Member of Congress your visit would be interpreted throughout Asia as well as by the Communist Chinese as a basic change in policy."<sup>32</sup>

*The Power Asserted by the State Department Runs Counter to the Democratic Evolution of the Right to Travel Found Elsewhere in the Free World*

The modern system of compulsory passports developed in the 16th and 17th centuries by the more or less benevolent tyrant to prevent his subjects from "becoming infected with foreign and new, and hence presumably dangerous, ideas."<sup>33</sup> In addition, passports were employed to control the internal movements of special classes of persons. Thus, in the German states special passports were required for citizens capable of military service (Militar-pass), for persons proceeding from territories infected by epidemics (Pestpass), and for Jews traveling through the country (Judenpass).<sup>34</sup>

The French Revolution brought about a more widespread application and a stricter organization of the compulsory passport system. Within France, the first years of the revolution witnessed the abolition of the passport system.<sup>35</sup> Within a short time, however, the re-establishment of a severe passport system was thought to be necessitated by the re-

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modified policy, however, was doomed to fail as China refused to issue entrance "visas" except on a basis of reciprocity. The United States asserted two reasons for denying admission to Chinese newsmen: because their passports "would have to be issued by a regime that we do not recognize as a government," and because our immigration laws do not permit advance agreement for the admission of aliens into the United States. "Iron Curtain Made in USA — The Facts About United States-China Travel," Speech by Congressman Charles O. Porter, 105 CONG. REC. 17634 (1959).

31. 36 DEP'T STATE BULL. 488 (1957).

32. *Porter v. Herter*, 278 F.2d 280 (D.C. Cir. 1960) (joint app. p. 11).

33. Parker, *The Right To Go Abroad: To Have and To Hold A Passport*, 40 VA. L. REV. 853 (1954).

34. Sharp, *Passports and the Right to Travel: A Study of Administrative Control of the Citizen*, in *The Right To Travel* 165-66, quoting from Reale's article on passports in 12 ENCYC. SOC. SCI. 14 (1935).

35. Peucher wrote in 1791 that the passport is a police "disorder" depriving man of the first, the most well-founded of his rights, that of breathing the air which pleases him without asking the permission of one who can refuse it. In the same year, the Declaration of the Rights of Man guaranteed the right to wander at will. Jaffe, *The Right To Travel: The Passport Problem*, 35 FOREIGN AFFAIRS 17, 19 (1956).



quirements of national defense.<sup>36</sup> The compulsory passport system was shortly thereafter introduced in all other European states except England, Sweden, and Norway, to prevent the spread of French revolutionary ideas.<sup>37</sup> However, during the 19th century, liberal doctrine prevailed more and more so that by 1914 the passport system was abolished in all European countries except Russia, Turkey, and parts of the Austrian empire. In these countries a rigid internal passport system complemented the external passport system for the purpose of defending the autocratic governments of those countries from the spread of democratic ideas.<sup>38</sup>

During the days of the post World War I Austrian Republic there was an attempt to restore passport control, but the attempt was rebuffed. In 1925 a group of Austrian railroad employees accepted an invitation of the Soviet railroad workers' union to visit Russia. They applied for passports, but the Federal Chancellery denied the application with a finding that the journey was intended "for the purposes of a propaganda that appears to endanger the public tranquility and order and eventually the safety of this state." The passport applicants then appealed to the Constitutional Court, which, in an opinion written by Hans Kelsen, held that the then constitutionally guaranteed freedom of movement guaranteed the right to make the proposed journey.<sup>39</sup>

In the interval between the two world wars some of the totalitarian states again adopted a compulsory passport system. In Mussolini's Italy, passport applications were carefully scrutinized and granted only to loyal adherents of the government, and the same practice prevailed in Franco's Spain. The demand that its subjects act at all times in the interest of the state "may be said to be the ultimate criterion of totalitarianism. Hence, under that form of rule the government has a right to expect that its subjects abroad will always act 'in the best interest' of their state, and consequently it is privileged to deny the right to go abroad to those not likely to be true agents for the totalitarian state."<sup>40</sup>

With the end of World War II, however, the free countries sought to preserve the right of free movement for all times. The drafters of the new constitutions generally included a provision on the matter of mobility. This is true throughout the nations with continental back-

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36. Sharp, *op. cit. supra* note 34, at 166. The passport system continued in France for many years to prevent the would-be artisan emigrant from taking with him the secrets of French industry. *Ibid.*

37. *Ibid.*

38. *Ibid.*

39. 5 SAMMLUNG DES ERKENNTNISSE DE VERFASSUNGSGERICHTSHOFES 137, 138-41, quoted in Parker, *The Right to go Abroad: To Have and to Hold a Passport*, 40 VA. L. REV. 863-64 (1954).

40. *Id.* at 855-56.

grounds<sup>41</sup> and in the newer states of the Near and Far East such as Korea, Japan, and the like.<sup>42</sup> Moreover, the right of free travel was inserted in the international documents setting forth basic democratic rights. The American Declaration of the Rights and Duties of Man, adopted at the Ninth International Conference of American States, held in Bogota in 1948, provides in article 8: "Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will."<sup>43</sup> Similarly, Article 13 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948, reads as follows:

- (1) Everyone has the right to freedom of movement and residence within the borders of each state.
- (2) Everyone has the right to leave any country, including his own, and to return to his country.<sup>44</sup>

The above expressions are not tokens of hope; in most of the free nations of the world they are practiced as living expressions of faith in the democratic ideal. A noted scholar of international law was able to report in 1954 that "nowhere in Western Europe, as far as I can determine, have passport matters been regarded as having anything to do with 'foreign affairs.' Passports, like automobile licenses, are obtained from local police authorities upon payment of a fee and after checking the applicant's criminal record, if any."<sup>45</sup>

*The Power Asserted by the State Department Runs Counter to the Historical Evolution of Democratic Ideals in Anglo-American Jurisprudence Given Staunch Support by Previous Secretaries of State*

The freedom of an American citizen to go anywhere in the world long has been a touchstone of our democratic precepts. This right to freedom of movement goes back to the fields of Runnymede when in 1215 the Magna Charta provided that "it shall be lawful in the future for anyone . . . to leave our kingdom and to return . . . except for a short period in time of war."<sup>46</sup> With few exceptions during periods of re-

41. See GERMAN CONST., art II, § 1 (1949); III PEASLEE, CONSTITUTIONS OF NATIONS, 602 (1950).

42. Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6, 13 n.27 (1955).

43. *Id.* at 12 n.24.

44. *Ibid.*

45. Parker, *The Right to go Abroad: To Have and to Hold a Passport*, 40 VA. L. REV. 864-65 (1954).

46. Clause 42 of the Magna Carta of 1215. One noted commentator suggests that the purpose of this clause was to overrule the earlier assize of Clarendon (1166) which had forbidden clergymen to leave England without the King's license. Jaffe, *The Right To Travel*, 35 FOREIGN AFFAIRS 17, 19 (1956).

ligious crises,<sup>47</sup> the right of Englishmen to travel abroad was assumed and, since 1606, guaranteed by statute.<sup>48</sup> By the 18th century, Blackstone could say: "At present everybody has, or at least assumes, the liberty of going abroad when he pleases."<sup>49</sup>

The English settlers brought with them to this country the concept that free people have a right to free travel. Indeed, the action of the English Crown banning travel into the then western areas of this country was one of the "long train of abuses" set forth in the Declaration of Independence.<sup>50</sup>

With independence won, our forefathers guaranteed the right to travel in the Articles of Confederation. Article IV states in part: "[T]he people of each State shall have free ingress and regress to and from any other State . . . ." The fact that no specific mention is made of the right in the Constitution has usually been interpreted by writers in this field to mean that it was regarded as unchallenged, basic, and essential.<sup>51</sup> This was the view of a long line of notable Secretaries of State.

Though it was not until 1919 that passports were required as a condition of travel, the Secretaries of State were chary in denying passport applications.<sup>52</sup> Generally, passports were denied to bona fide competent

47. In the time of Elizabeth, statutes forbade departure to attend any visitation, congregation, or assembly for religion; and under James I, it was forbidden to send children to Catholic schools abroad. *Id.* at 20.

48. 4 Jac. 1, c. I/XXII repealed all authority "concerning the restraint of passage of his Majesty's subjects out of this realm." This was aimed not only at the statutes of Elizabeth and James I, but also at the occasional political use of the writ *Ne Exeat Regno*. In America the writ was never used for political purposes, only "in cases of equitable debts and claims." 3 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 509 (14th ed. Lyon, 1918).

49. BLACKSTONE, COMMENTARIES \*134, 265.

50. The grievance against the King states: "He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands."

51. Jaffe, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFFAIRS 17 (1956).

52. Immorality, or even violation of foreign laws, was no blanket reason for denial of a passport. In 1900 Secretary Hay directed the United States legation at Peking to issue passports to two American prostitutes in Port Arthur with the statement that "their acts, if wrongful, were matters to be dealt with under the law of the place of sojourn." 3 MOORE, DIGEST OF INTERNATIONAL LAW § 512 (1906). Similarly, in 1930, the Vice-Consul at Santo Domingo was directed to issue passports to prostitutes. The Department took the view that "a passport should be based on citizenship; and that generally speaking an applicant's conduct and character do not enter into the case." 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 268 (1940). However, in 1907 the Department refused to issue a passport to the American editor of an Egyptian newspaper who "had been engaging in blackmail activities against a number of important public officials." The Department pointed out, however, that the editor "remained entitled to protection in the enjoyment of all rights which inure to him from the mere fact of American citizenship." *Id.* at 500. And in 1932 the Department rejected the proposal of a district attorney that passports be refused persons leaving the United States with the intention of abandoning their families. The Department said it had "for many years taken the position that the conduct or deportment of an applicant for a passport should not, as a rule, be considered a justification for the refusal to issue such a document. It feels that the issue of an American passport should, so far as practicable, be conditioned solely upon the applicant's submitting to it appropriate documentary evidence that he is an American citizen." *Ibid.*

American citizens only if they were fugitives from justice, under court order, or going abroad for the purpose of violating laws of this country.<sup>53</sup> Peacetime blanket proscription of travel is a contemporary concept without precedent in the annals of the Department of State.

Prior to the outbreak of World War I in 1914, American passports were valid for all countries. They continued to be valid for all countries during the period of United States neutrality. Indeed, our official position was that American citizens had the right to travel anywhere, even on the merchant ships of belligerent nations.<sup>54</sup>

In 1915, three years before Congress required a passport as a condition of travel, famine conditions broke out in Belgium, and the Secretary of State ruled that passports should not be issued for use in that country except in cases of reasonable necessity.<sup>55</sup> Subsequently, it was found that (1) the presence of Americans in belligerent nations led to disagreeable complications, and that (2) Germany was making efforts to obtain American passports for their spies. Therefore, rules were made requiring each applicant for a passport to state the countries which he expected to visit as well as the objects of his visits thereto, and passports were made out accordingly. Some time later, the Department issued a rule that passports should not be issued for travel to belligerent countries unless the applicants showed that it was necessary for them to visit such countries, and still later, this rule was made applicable to neutral countries adjacent to belligerent countries.<sup>56</sup> It was not until America's entry into the war, however, that possession of passports was made a condition of travel.

With the signing of the armistice on November 11, 1918, American travel to Germany and Austria was again permitted, although the war did not end officially until March 3, 1921, two and a half years later. Secretary Lansing telegraphed all missions in Europe in 1919 that the Department was not issuing passports for Germany but it was "interposing no objection to the entry into Germany of Americans" who should be informed that "they go upon their own risk." Assistant Secretary Adee elaborated in a subsequent document that the travelers should "be advised

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53. Secretary Seward in 1861 disallowed the issuance of passports to "insurrectionary agents" sent to Europe "on errands hostile and injurious to the peace of the country and dangerous to the Union." 3 MOORE, DIGEST OF INTERNATIONAL LAW § 512 (1906). Similarly, Secretary Bayard in 1886 enjoined the issuance of passports to Mormon emissaries. "Inasmuch as polygamy is a statutory crime, proselytism with intent that the emigrants should live here in open violation of our laws would seem to be sufficient warrant for refusing a passport." *Ibid.*

54. *Geographic Limitations on Validity of Passports During Past 40 Years*, a report prepared by Ashley J. Nicholas, Chief, Passport Legal Division, for the Senate Subcommittee on Constitutional Rights, *The Right To Travel* 190.

55. *Id.* at 190, 345.

56. *Id.* at 349.

to obtain certificates of identity for their use while in such countries . . . good for the period for which the applicants' passports are valid."<sup>57</sup>

In 1921 the problem of "area control" arose when Poland and Rumania requested this country to deny passports for travel to their countries except in cases of persons going there on commercial business or for reasons of "meritorious urgency." The Department Solicitor questioned the authority of the Secretary to deny passports for such travel without "special authorization of the President"<sup>58</sup> and commented that "American citizens desiring to visit Poland and the other countries concerned are obliged to have their passports visaed by consular officers thereof, and such officers may, in their discretion, refuse to grant visas. The question naturally arises, whether the burden of preventing Americans from going to Poland does not under present circumstances properly rest upon consular officers of Poland, rather than upon this Department."<sup>59</sup> At the same time, the question arose in the Department as to whether passports should be issued to top ranking Communists intending to visit Russia. All these matters temporarily were put to rest by a 1922 memorandum by the Second Assistant Secretary of State which recited tersely that Secretary Hughes "desires that American passports should be granted without regard to the locality."<sup>60</sup>

The problem of whether passports should be issued for travel to designated portions of the world (Russia) to designated Americans (top ranking American Communists) continued to plague the Department of State. In 1924 Secretary Hughes granted a passport to M. J. Olgin.<sup>61</sup> In 1928 Secretary Kellogg denied a passport to Lovett Fort-Whiteman and Bertram D. Wolfe.<sup>62</sup> However, in 1931 Secretary Stimson granted a passport to a top Communist leader with the following statement:

The ultimate defense of this country against the machinations of the Communist conspirators in Russia and their agents here depends in chief measure upon the faith of an overwhelming majority of the inhabitants of this country in the principles of freedom and equality of rights and that their government adequately represents those principles.<sup>63</sup>

57. *Id.* at 189.

58. *Id.* at 345.

59. *Id.* at 349.

60. *Id.* at 344.

61. *Id.* at 335.

62. *Id.* at 333. Secretary Kellogg's reasons for denial are similar to those of Secretary Bayard's 1886 denial of passports to Mormon emissaries. See note 52 *supra*. Secretary Kellogg said that when there came to his attention the passport application of "an individual who is clearly engaged, in an important capacity, in furthering organized interference in our internal affairs carried on under the direction and control of the present regime in Russia, I do not propose through the granting of a passport to facilitate his activities and thereby to countenance, not to say foster, such interference." *Id.* at 333.

63. *Id.* at 334.

Following the precedent set by Secretaries Hughes and Stimson, Secretary Hull in 1933 issued a passport to William Z. Foster, one of the most prominent Communist leaders.<sup>64</sup> At no time when the above recited incidents arose was the possession of a passport necessary for American travel abroad.

During the 1930's shooting wars broke out in Ethiopia, in Spain, and in China, and the Department of State limited the use of passport facilities in those areas. The ban on travel was not absolute, however, as in Ethiopia it was limited only to "ordinary travel" and numerous exceptions were made to the ban on travel to Spain and China.<sup>65</sup> It might further be noted that the possession of passports was not then necessary for travel to those areas and that the only sanction authorized against American citizens traveling there without passports was that "the protection of the United States may be withdrawn."<sup>66</sup> At no time during this period did either President Roosevelt or Secretary Hull assert "inherent" authority to ban American travel to the areas of belligerency.

Upon the outbreak of World War II in September of 1939, the State Department issued regulations requiring all applicants for passport facilities to demonstrate the imperativeness of their proposed trip.<sup>67</sup> The State Department had no statutory authority to prevent foreign travel, and again, the only sanction authorized against an American leaving the country without a passport was that "the protection of the United States may be withheld from him while he is abroad."<sup>68</sup>

The Act of June 21, 1941, as augmented by Presidential Proclamation 2523 of November 14, 1941, made it illegal to depart or enter the country without a passport. From that date until the end of the shooting war, travel to areas outside of the Western Hemisphere was restricted to that necessary in the war effort.<sup>69</sup> By December 3, 1945, passports were again valid for travel in all countries except enemy territory occupied by American, British, and French forces.<sup>70</sup> Thereafter, beginning in 1949, travel control was utilized for the first time in American history as an instrument of our foreign policy.

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64. *Id.* at 325.

65. *Id.* at 190.

66. Exec. Order No. 7856, 3 Fed. Reg. 65 (1938) ¶ 125. In 1938, during the period when passports were stamped not valid for travel to China, John Foster Dulles, then a private citizen, traveled to China for the purpose of persuading the Chinese Government to make peace with Japan. Statement of the Emergency Civil Liberties Committee to the Committee on Foreign Relations, Passport Legislation 154.

67. *The Right To Travel* 191.

68. Departmental Order No. 811, issued by Cordell Hull on September 4, 1939. *Id.* at 196.

69. *Id.* at 191.

70. *Ibid.*

*The Power Asserted by the State Department is Devoid of  
Congressional Support*

Some twenty-seven or more passport statutes have been enacted since 1790, and the common purpose of these statutes has been to facilitate, not impede, travel by United States citizens. Indeed, the initial passport statute sought this objective by providing punishment for violation of any safe conduct or passport issued by the United States.<sup>71</sup> Subsequent statutes simplified the procedure of applying for passports, or reduced the fees involved.<sup>72</sup> The basic passport statute, that of August 18, 1856,<sup>73</sup> took from governors, mayors, and even notary publics the power they were then exercising to issue passports and lodged it exclusively in the Secretary of State. Attorney General Black explained the beneficent purpose of the statute in these words: "The impositions practiced upon the illiterate and unwary by the fabrication of worthless passports, led to the passage of the law which is now under consideration."<sup>74</sup>

Only in times of war or national emergency has Congress authorized blanket travel curbs on American citizens, and then only into and from the United States.<sup>75</sup> Congress has never authorized the Secretary of State to preclude travel by American citizens to foreign areas to implement foreign policy.<sup>76</sup> This denial of authority is not inadvertent. Following the Supreme Court's decision in *Kent v. Dulles*,<sup>77</sup> President Eisenhower asked Congress for authority to impose area restrictions on American travel. The President's Special Message to Congress of July 7, 1958, said: "The secretary should have clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with

71. Act of April 30, 1790, 1 Stat. 118, described in Sharp, *Passports and the Right To Travel: A Study of Administrative Control of the Citizen*, in *The Right To Travel* 158.

72. Act of March 1, 1855, 10 Stat. 624; Act of April 30, 1878, 20 Stat. 40.

73. 11 Stat. 52, 22 U.S.C. § 211a (1958).

74. 9 OPS. ATT'Y GEN. 350 (1859) quoted in a State Department intra-office memorandum in *The Right To Travel* 346.

75. Just prior to the termination of the War of 1812 Congress made it illegal for a citizen to "cross the frontier" without a passport first obtained from the Secretary of State. Act of Jan. 30, 1815, 3 Stat. 199-200. The Act of May 22, 1918, 40 Stat. 559, made it illegal for a citizen to leave or enter the United States "unless he bears a valid passport" and this World War I statute was amended in 1941 to meet the emergency of World War II. 55 Stat. 252 (1941). The Act of April 14, 1952, 66 Stat. 57, makes it illegal to enter or depart the United States without a passport during the existence of a presidentially declared emergency. Sections 2 and 6 of the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. §§ 781, 785 (1958), provide that it shall be unlawful, when a Communist organization is registered under the act, for any member to apply for or use a passport. The conditions precedent of this latter statute have not yet materialized.

76. In 1834 Congress required aliens, but not citizens, to obtain passports from the War Department before entering Indian country. Act of June 30, 1834, 4 Stat. 730.

77. 357 U.S. 116 (1958).

our foreign policy objectives or be inimical to the security of the United States."<sup>78</sup> Congress has thus far failed to grant the requested authority.<sup>79</sup>

*The Area Control Ban Is Applied on a Discriminatory and Arbitrary Basis, and Thereby Permits the Emasculation of the Supreme Court's Kent Decision*

None of the reasons assertedly justifying an area travel ban — non-recognition, inability to afford physical protection, desire to avoid affording a cloak of respectability — have application to those denied passports without also having application to those granted passports. But some are kept at home, and others are given passports for "compelling reasons," that is, reasons that the Passport Office likes.

The 1952 Department of State press release which announced the Iron Curtain travel ban also stated that this "in no way forbids American travel to those areas."<sup>80</sup> State Department spokesmen told the Senate Subcommittee on Constitutional Rights that "the entire release leaves to the Department the determination as to whether travel may be authorized."<sup>81</sup> Robert F. Cartwright<sup>82</sup> testified that "geographical restrictions which are applied by the Department in certain instances . . . apply to everyone without exception. There is no category of person to whom they do not apply. However, the Department has made numerous exceptions . . . where the facts of the matter in the Department's judgment put the case in the national interest that they should go."<sup>83</sup> The exercise of this discretionary power permits the grant of exit visas to those friendly

78. 104 CONG. REC. 1932-33 (1958).

79. The House passed H.R. 9069, 86th Cong., 1st Sess. (1959), which would give the President power to impose area control (1) when the United States is at war, (2) where actual hostilities are in progress, and (3) when the President finds the national interest at stake either because of inability to provide protection or because the travel would "seriously impair the foreign relations of the United States." The proposed bill requires that the presidentially imposed limitations "must be determined and declared annually, together with detailed reasons for such action." House Report to accompany H.R. 9069, p. 4. State Department spokesmen assured the Senate Committee on Foreign Relations that the imposition of geographical limitations would be subject to judicial review, that "there would be no intention to bar judicial review." *Passport Legislation, Hearings before the Senate Committee on Foreign Relations*, 85th Cong., 2d Sess. p. 54 (1958). Three Senate bills introduced in the 85th Congress failed of enactment. Senate Bill 2770 required a presidential finding and a presidential report to the Committee on Foreign Relations concerning the need for area travel restrictions. Senate Bill 3998 required the Secretary of State to make the determination that area travel must be curtailed and to "publish such determination." Senate Bill 4137 authorized the President to impose area control and required the Secretary of State to "inform the Congress of this determination and the reasons therefor."

80. *The Right To Travel* 201.

81. *Id.* at 130.

82. Mr. Cartwright was Acting Director, Bureau of Security and Consular Affairs, Department of State.

83. *The Right To Travel* 73. Senator O'Mahoney immediately commented that this asserted power to pick and choose who should go abroad and who should stay home is a power denied Congress by the first amendment. *Ibid.*



to the Administration's policy and program and the denial of exit visas to critics, thereby undermining the democratic process which requires the informed and knowledgeable presentation of all points of view.

The prospects here suggested are not fanciful but borne out by past conduct. The State Department refused Judge William Clark a passport unless he agreed to refrain from public comment that might be "inimical" to United States interests.<sup>84</sup> The American Jewish Congress testified before the United States Senate Committee on Foreign Relations that the 1956 ban on travel to Egypt, Israel, Jordan, and Syria did not stop all travel to that area, merely travel by religious Jews "as a form of economic sanction or pressure upon Israel sorely in need of the springtime Passover and Easter tourist traffic."<sup>85</sup>

The Supreme Court in *Kent* held that the Secretary of State was not authorized to deny passports because of beliefs, associations, or ideological matters. Yet the authority asserted — to impose area bans with exceptions — permits this very thing in those areas of the world where the Secretary deems American travel inimical to United States interests. Again it should be pointed out that these prospects are not fanciful but borne out by the record. State Department spokesmen admitted to a "blacklist" of 20 million cards and were asked, "what changes in policies and procedures has the Department put into effect as a result of the recent Supreme Court passport decision?" The reply to this question was that if a passport applicant "falls under the Communist part of the regulations, we must go ahead as though that information did not exist" but that "if he fell under some other portions of the regulations we would process him as we have in the past."<sup>86</sup>

*The Power Asserted by the State Department Infringes upon  
First Amendment Freedoms and Is Contrary to the Separation  
of Powers Doctrine*

The asserted power to ban travel to designated areas of the earth takes from the citizen the "right of breathing the air which pleases him without asking the permission of one who can refuse it."<sup>87</sup> But freedom of movement has a larger social value.

Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. . . . Finally, travel abroad enables American

84. *Clark v. Dulles*, 129 F. Supp. 950 (D.D.C. 1955).

85. *Passport Legislation, Hearings Before the Senate Committee on Foreign Relations*, 85th Cong., 2d Sess. p. 143 (1958). Clarence Duffy was denied a passport when he applied for permission to visit "Italy and Israel," but was granted one when he reapplied for permission to visit "Rome and the Holy Land." *Id.* at 162.

86. *Id.* at 41.

87. See note 35 *supra*.

citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. . . . In many different ways direct contact with other countries contributes to sounder decisions at home.<sup>88</sup>

The selective policy of the State Department in its application of its "area ban" aggravates, rather than minimizes, the first amendment abridgement. It is bad enough when information on conditions in foreign countries must be based on government hand-outs; it is worse when the Secretary of State sets himself up "as an international assignment editor for the American press and broadcasting networks."<sup>89</sup> William Worthy, Jr., a correspondent for the *New York Post*, must stay out of China. Fulton Lewis, Jr., a commentator for the Mutual Broadcasting Co., is permitted to go. The citizen's viewpoints are thus formulated on the basis of a state-determined presentation.

When the State Department bans some newsmen from traveling to designated portions of the earth, thereby deciding who should be permitted to report and interpret news, such asserted power constitutes government regulation of the press. When the State Department denies a Congressman a passport to visit China, such asserted power results in an abridgement of the separation of powers doctrine.

Congress has long played an important role in our foreign relations, even in those foreign affairs areas where the Constitution is most explicit concerning the exclusive power of the President — the treaty-making power and the power to recognize foreign governments.<sup>90</sup> The congressional challenge to Executive authority to recognize foreign governments came early in our history. During the early 1800's the President sought to avoid trouble with Spain by ignoring the revolting Spanish American colonies. The House, however, championed the cause of the rising states, and on March 24, 1818, Henry Clay sponsored a move in the House of Representatives to appropriate a salary for a minister to the new republic of the United Province of the Rio de la Plata. This move, though initially defeated, forced the President to recognize the new governments.<sup>91</sup>

Current illustrations of the power exercised by the House of Representatives in the area of foreign relations are legion. The United States

88. CHAFFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 195-96 (1956), quoted in *Kent v. Dulles*, 357 U.S. 116, 126-27 (1957).

89. The charge was made by former Governor Averill Harriman. *N.Y. Times*, May 19, 1959, p. 4, col. 3.

90. "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, . . ." U.S. CONST. art. II, § 2. "[H]e shall receive Ambassadors and other public Ministers." U.S. CONST. art. II, § 3.

91. Goebel, *Congress and Foreign Relations Before 1900*, *Annals*, Sept. 1953, p. 31.

is a member of the United Nations by virtue of the United Nations Participation Act, based not on the treaty-making power but on the national legislative power.<sup>92</sup> The North Atlantic Treaty had to be implemented by military support which means that "the House of Representatives was, and is, actively concerned with the whole North Atlantic Treaty structure."<sup>93</sup> Congress used its fiscal primacy to control and direct foreign policy in connection with the State Department Appropriations Bill for 1954. Amendments were proposed which would cut off United States contributions to the United Nations in the event of the admission of Communist China to membership in that organization. These amendments were withdrawn only after the President assured congressional leaders that he would oppose vigorously any attempt to admit Communist China to the United Nations.<sup>94</sup>

The province of regulating foreign affairs is not confined to Congressmen serving on the Foreign Relations Committee.

Acts concerning tariffs and duties, the entry and status of aliens, quotas on imported commodities, claims involving other countries, representatives of the armed services attached to our embassies abroad, the property of alien enemies, ships and shipping, the secrecy of inventions in the field of national security, copyright, and other subjects were reported out by such 'other committees' during the second session of the Eighty-second Congress. At least fifty public laws enacted in that session in the field of foreign relations were reported out of committees other than Foreign Relations and Foreign Affairs.

Serving on those other committees were three-quarters of the membership . . . .<sup>95</sup>

The entire membership of the Congress participates in the formulation of foreign policy. To be effective, it requires information and intelligence. But, "if the Congress is to do an effective job under our system of checks and balances, it must not be completely dependent upon the executive branch in gathering its facts and figures."<sup>96</sup> One source of independent information is travel. It was Secretary Herter who, as a member of the House, led one of the first postwar congressional groups abroad to study conditions firsthand to better evaluate the need for Marshall Plan legislation. Members of this Herter group came from diverse committees of the House of Representatives.<sup>97</sup> The value of for-

92. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 270 (3d ed., 1948).

93. Richards, *The House of Representatives in Foreign Affairs*, Annals, Sept. 1953, p. 67.

94. Nobelman, *Financial Aspects of Congressional Participation in Foreign Relations*, Annals, Sept. 1953, p. 163.

95. Cardozo, *Committees Touching Foreign Relations Indirectly*, Annals, Sept. 1953, pp. 84-85. "Even the committees on the District of Columbia find international considerations urged upon them in dealing with problems such as segregation . . ." Griffith, *The Place of Congress in Foreign Relations*, Annals, Sept. 1953, p. 12.

96. H. Alexander Smith, *Information and Intelligence for Congress*, Annals, Sept. 1953, p. 119.

97. Carnahan, *Congressional Travel Abroad and Reports*, Annals, Sept. 1953, pp. 122-23.

eign travel as an adjunct to their congressional function is increasingly recognized by Congressmen. Following the adjournment of the Eighty-second Congress, for example, 204 legislators made foreign study trips, thirty at their own expense.<sup>98</sup>

The State Department denial to Congressman Porter of the right to obtain reliable and first-hand information concerning China, the most populous nation in the world — a nation whose activities, intentions, and purposes have critical bearing upon numerous legislative measures regularly pending before the Congress — intruded upon the Separation of Powers Doctrine, and hamstrung the ability of Congress to play its historic role in the formulation of our foreign affairs.

### CONCLUSION

The government of the United States has protested the refusal of totalitarian governments to allow their citizens freely to travel abroad as a denial of fundamental human rights. In 1951 President Truman wrote to Nikolai M. Shvernik, President of the Soviet Presidium, as follows:

The unhappy results of the last few years demonstrates that formal diplomatic negotiations among nations will be largely barren while barriers exist to the friendly exchange of ideas among peoples. . . . We shall never be able to remove suspicion and fear as potential causes for war until communication is permitted to flow, free and open, across international boundaries.<sup>99</sup>

Free citizens cannot properly be regarded as pawns of a free country's foreign policy. Free travel best serves the interests of a democratic nation.

98. *Id.* at 120.

99. N.Y. Times, July 8, 1951, p. 5, col. 1.