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PASSPORT REFUSALS FOR POLITICAL REASONS: CONSTITUTIONAL ISSUES AND JUDICIAL REVIEW

"Everyone has the right to leave any country, including his own, and to return to his country."

—Universal Declaration of
Human Rights, Article 13,
Paragraph 2.¹

FREEDOM to leave one's country temporarily for travel abroad is important to individual, national and international well-being. But today this right of exit depends, for the great majority of the world's people, on ability to secure passports.² An individual denied a passport may be unable either to leave his nation or to enter others.³

For United States citizens, passports became essential for travel only recently. Traditionally they were mere letters of introduction to other nations,

1. For the full text of the Declaration see 1948-9 YEARBOOK OF THE UNITED NATIONS 535 *et seq.* The Declaration does not legally obligate its signatories, but, in the words of its preamble, is meant as "a common standard of achievement for all peoples and all nations."

The United Nations is presently preparing an International Covenant on Human Rights, which will spell out the rights set forth in the Declaration and be legally binding on those nations signing it. Article 11 of the most recent draft of the Covenant approved by UNESCO reads: "Any person who is not subject to any lawful deprivation of liberty or to any outstanding obligations with regard to national service shall be free to leave any country including his own." U.N. ECON. AND SOC. COUNCIL, OFFICIAL RECORDS, 3d Year, 6th Sess., Supp. No. 1, p. 16 (1948). Article 8 of a revision of this draft proposed by the United Nations Commission on Human Rights reads: "Subject to any general law consistent with the rights recognized in this Covenant . . . everyone shall be free to leave any country including his own . . . [and] be free to enter the country of which he is a national." 24 DEP'T STATE BULL. 1008, 1009 (1951).

For discussions within the United Nations on this provision of the Covenant, see U.N. ECON. AND SOC. COUNCIL DOC. E/CN.4/353/Add. 2, p. 3 (1950) and U.N. ECON. AND SOC. COUNCIL DOC. E/CN.4/353/Add. 10, pp. 7-8 (1950).

2. One of the few recognitions of the dependence of the right of exit on a right of passport is Note, "Passport Denied": *State Department Practice and Due Process*, 3 STAN. L. REV. 312, 313-14 (1951).

3. Out of thirty-seven foreign countries replying to questionnaires, only ten allow their nationals to leave the country without a passport. These ten are Australia, Belgium, Great Britain, Burma, Canada, Cuba, Greece, Mexico, New Zealand and Norway. Only five countries do not require aliens attempting to enter to have passports—Argentina, Burma, Mexico, Venezuela and Yugoslavia. United States citizens can also enter Canada, Ecuador, Cuba and Haiti without passports. Communications to the YALE LAW JOURNAL from representatives of Argentina, Australia, Belgium, Brazil, Burma, Canada, Colombia, Cuba, Czechoslovakia, Denmark, Ecuador, Egypt, France, Great Britain, Greece, Guatemala, Haiti, Honduras, Iceland, India, Indonesia, Iraq, Iran, Israel, Italy, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Poland, Sweden, Syria, Turkey, Venezuela and Yugoslavia; all on file in Yale Law Library.

entitling the bearer to protection by American officials; one was free to leave without a passport.⁴ Moreover, very few foreign countries required visitors to have passports prior to World War I.⁵ Recently, however, all this has changed. So long as the National Emergency declared in 1941 continues, it is illegal for United States citizens to travel outside the Americas without a passport.⁶ And even when the United States once more allows its citizens to depart freely, they will find it almost impossible to enter another country without a passport.⁷

The power to issue passports is lodged by statute in the State Department and is administered by its Passport Division. The statute merely says that the Secretary of State "may" issue passports to United States citizens under rules and regulations set forth by the President.⁸ The word "may" has been construed by various executive officers, including the President, to mean a

4. See DEP'T STATE, *THE AMERICAN PASSPORT* 3 *et seq.* (1898).

5. Stuart, *Safeguarding the State Through Passport Control*, 12 DEP'T STATE BULL. 1066 (1945).

In 1897, only travel to Persia, Roumania, Russia and Serbia would have been impossible without a passport. Travel to Germany and the Dominican Republic would have been possible but not practical. DEP'T STATE, *PASSPORT REGULATIONS OF FOREIGN COUNTRIES* 5-9 (1897).

6. In 1918, Congress passed a law making it illegal for citizens to leave the country without a passport when the United States is at war, and the President shall find that public safety requires additional restrictions and prohibitions on departures and shall so declare. 40 STAT. 559 (1918), 22 U.S.C. §§ 223-6 (1946), as amended 55 STAT. 252 (1941), 22 U.S.C. § 223 (1946). The Presidential Proclamation implementing this enactment ordered that no passport should be issued unless the applicant had good reason for desiring to go abroad and his trip would not be "prejudicial to the interests of the United States." Presidential Proclamation No. 1473 (1918).

The Act of 1918 was amended in June of 1941 to make it applicable "during the existence of the national emergency proclaimed by the President on May 27, 1941. . . ." 55 STAT. 252 (1941), 22 U.S.C. § 223 (1946). Under this revised act President Roosevelt, in November of 1941, issued a proclamation forbidding departure from the country without a passport. Presidential Proclamation No. 2523, 6 FED. REG. 5821 (1941). The national emergency is still in existence, *Knauff v. Shaughnessy*, 338 U.S. 537, 546 (1950), and so, therefore, is the Proclamation. The regulations set forth by the State Department under the Proclamation allow passportless travel between the United States and countries in North, Central, and South America, and islands adjacent thereto; also between the United States and Hawaii, Puerto Rico and the Virgin Islands. 22 CODE FED. REGS. § 53.2 (1949).

7. See note 3 *supra*.

8. 44 STAT. 887 (1926), 22 U.S.C. § 211a (1946); 32 STAT. 386 (1902), 22 U.S.C. § 212 (1946). The statute does not use the word "citizens," but rather the phrase "persons . . . owing allegiance . . . to the United States." 32 STAT. 386 (1902), 22 U.S.C. § 212 (1946). Thus it could include residents of American possessions. See 22 CODE FED. REGS. §§ 51.26 and 51.71 (1949). Since citizens make up the overwhelming majority of the class of persons owing allegiance to the United States, the word "citizens" is used throughout this Comment, for simplicity's sake, to describe the class covered by the statute.

grant of absolute discretion,⁹ and at present the Secretary of State is empowered by executive order to deny passports, invalidate them, or restrict their use "in his discretion."¹⁰ Exercising an absolute discretion as to who shall and who shall not receive a passport, and as to the conditions under which any or all passports shall be used, the State Department is guardian of the right of exit.

In denying passports the State Department generally gives reasons such as lack of United States citizenship,¹¹ attempt to avoid legal sanctions,¹² or inability of the United States government to protect the applicant in the area where he intends to travel.¹³ Similarly, citizens resident abroad who have become notorious as drug traffickers, pimps, etc., are often denied passport renewals.¹⁴ But an increasing number of refusals are in effect unexplained. The applicant is simply informed that his "travel abroad at this time would be contrary to the best interests of the United States."¹⁵

Determination of the facts behind these "best interests" refusals is no simple matter. In the first place, the Passport Division generally makes no public announcement when it refuses a passport.¹⁶ Therefore, unless the individual

9. See 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 467-8 (1942) (hereinafter cited as HACKWORTH). An early assertion of the Secretary of State's discretionary authority will be found in 23 OPS. ATT'Y GEN. 511 (1901). See also Exec. Order No. 4382-A (1926); Exec. Order No. 4800 (1928).

10. "The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries." Exec. Order No. 7856, 22 CODE FED. REGS. § 51.75 (1949).

Thus, Corliss Lamont, see text, *infra* at notes 48-53, once had his passport limited to use in Great Britain, France, and Switzerland, a restriction which was later lifted. Communication from Corliss Lamont to YALE LAW JOURNAL, dated Nov. 8, 1951, on file in Yale Law Library. One who uses a passport in violation of conditions imposed on its issuance is liable to up to ten years imprisonment. 40 STAT. 227 (1917), 22 U.S.C. § 221 (1946), as amended 54 STAT. 80 (1940). The same penalty is provided for making false statements to obtain a passport, 40 STAT. 227 (1917), 22 U.S.C. § 220 (1946), as amended 54 STAT. 80 (1940); and passport applicants must inform the State Department where they intend to travel. Exec. Order No. 7856, 22 CODE FED. REGS. § 51.23(1) (1949). See also 22 U.S.C. § 52.9 (1949) (passports to include names of countries where applicant intends to travel).

11. 3 HACKWORTH at 498.

12. Communication to the YALE LAW JOURNAL from Adrian S. Fisher, Legal Adviser to the Department of State, dated Dec. 11, 1950, on file in Yale Law Library. See also 3 HACKWORTH at 504.

13. See 3 HACKWORTH at 530-2. See also Note, "Passport Denied": State Department Practice and Due Process, 3 STAN. L. REV. 312, 323 (1951).

14. See 3 HACKWORTH at 498-504. See also Communication from Adrian S. Fisher, *supra* note 12.

15. This phrase, or a similar one, appears in all the cases discussed in the text, *infra* at notes 21-57, except the *Davis* case. See also cases discussed in note 58, *infra*.

16. Of all the cases discussed in the text, *infra* at notes 21-57, and in note 58, *infra*, in only four did the announcement of the refusal come from the State Department.

makes some sort of public protest, even the fact of the refusal will remain buried. Secondly, much of what the investigator learns is "off the record." Since the applicant's most practical method of contesting a refusal is to get the State Department to change its stand,¹⁷ he will be reluctant to be quoted as authority for facts which might antagonize the officials in whose hands his trip abroad lies. Finally, whatever data the investigator turns up is likely to be one-sided, for State Department officials will not discuss individual refusals.

A few shreds of evidence suggest that the State Department has in the past considered political extremists persons unsuited to receive passports. In 1901, an Attorney General's Opinion, upholding the discretionary power of the State Department to refuse passports, mentioned anarchists as persons who might be ineligible to receive passports.¹⁸ An Assistant Secretary of State in 1921 referred to the applicant's membership in the IWW and his anarchist tendencies as making him unworthy of a passport.¹⁹ And a consular regulation of 1930 put "revolutionary radicals" in the same class.²⁰ The known facts about recent "best interests" refusals tend to confirm the hypothesis that the State Department is at present denying passports for political reasons.

RECENT CASES OF PASSPORT DENIAL

The Kamen Case:

Dr. Martin Kamen was first refused a passport in 1947. He was informed that his travel abroad would not be in the "best interests of the United States."²¹ He had applied for the passport in order to accept an invitation to lecture at the Weizmann Institute of Science in Israel.²² Kamen was then, and still is, teaching radiation physics and biochemistry at Washington University, St. Louis, Missouri.²³ He is an expert in his field, having written a standard text and many articles.²⁴ His work involves research in photosynthesis, with a view toward manufacture of synthetic foods, and also research in radio-isotopic tracers, which have great potential value in tracing the causes of such ailments as cancer.²⁵

These four are the cases of *Robeson*, text, *infra* at note 42; *Isacson*, text, *infra* at note 34; the two Daily Worker reporters, text, *infra* at note 56; and *Davis*, text, *infra* at note 54. The notoriety certain to ensue from these denials probably explains why the State Department broke the stories.

17. The practical difficulties involved in a court test are set forth in the text, *infra*, following note 189.

18. 23 OPS. ATT'Y GEN'L 511 (1901).

19. MS. Dep't of State, file 130H7223, quoted in 3 HACKWORTH at 493.

20. Quoted in 3 HACKWORTH at 501-2.

21. Communication to the YALE LAW JOURNAL from Nathan H. David, counsel for Dr. Kamen, dated June 12, 1951, on file in Yale Law Library.

22. *Ibid.*

23. *Ibid.*

24. Deutsch, *The Case of Professor Kamen*, New York Star, Sept. 20, 1948.

25. Deutsch, *Scientists Confined by Atomic Curtain*, New York Star, Sept. 28, 1948. Since 1945 all of Dr. Kamen's work has been in non-restricted areas. Communication from Nathan H. David, *supra* note 21.

Since the initial refusal, Kamen has thrice been refused a passport. In 1948 he was prevented from attending a scientific conference in France; later the same year he was refused permission to go to Australia to accept a visiting professorship; and in 1950 he was prevented from attending an international scientific symposium in England.²⁶

In 1944 Kamen was doing radio-isotopic research for the Manhattan Project at the University of California. At a cocktail party he met the Soviet vice-consul who asked him to persuade a fellow staff member at the University, who was developing a radioactive treatment of leukemia, to treat a Russian consular official in Seattle suffering from the disease. Dr. Kamen approached his colleague, but the Russian died shortly thereafter. Kamen was then asked to lunch by the Soviet vice-consul. They ate at a public restaurant, and two army intelligence agents sitting at a nearby table recorded the conversation.²⁷ When all these facts became public in 1948 as a result of Kamen's appearing before the House Committee on Un-American Activities, Kamen testified that the only scientific information discussed involved radioactive treatment of leukemia.²⁸ But at an earlier closed hearing, a scientist who had looked over the transcript of the conversation had testified that Kamen disclosed classified information on the Manhattan Project.²⁹ At any rate, although the House Committee concluded that Kamen had disclosed classified information, it found that he had not done so willfully or deliberately.³⁰ Moreover, they found no evidence connecting Kamen "otherwise than casually" with Communist espionage agents.³¹

Nevertheless, the Passport Division apparently considers this incident sufficient grounds for denying Dr. Kamen the right to leave the country. Fear that Kamen might disclose secret information is not behind the refusal, since the Atomic Energy Commission has informed the Passport Division that it can see no objection to Kamen's leaving the country.³² Nor was fear of Kamen's

26. Communication from Nathan H. David, *supra* note 21.

27. The details of this incident will be found in Deutsch, *Prof. Kamen: Tartar to Thomas and Co.*, New York Star, Sept. 21, 1948, as well as in the printed record of Kamen's appearance before the House Un-American Activities Committee in 1948. *Excerpts from Hearings Regarding Investigation of Communist Activities in Connection with the Atom Bomb, Hearings before the House Committee on Un-American Activities on Pub. Law 601, Sec. 121, Subsec. Q(2), 80th Cong., 2d Sess. 11 et seq. (1948).*

28. *Excerpts from Hearings, op. cit. supra* note 27 at 20.

29. *Id.* at 21. That there should be some dispute as to the contents of the conversation is understandable, since the agents were sitting some distance away, and since the restaurant involved is among San Francisco's most crowded. According to the scientist who looked over the transcript, it was in large part incomprehensible. *Ibid.*

30. REPORT ON SOVIET ESPIONAGE ACTIVITIES IN CONNECTION WITH THE ATOMIC BOMB, 80th Cong., 2d Sess. 182 (1948) (Committee Print for the House Committee on Un-American Activities).

31. *Ibid.*

32. The writer was told of the existence of this communication from the AEC to the State Department by three different individuals, all of whom prefer anonymity. When the writer questioned Mrs. Shipley, Chief of the Passport Division, about its existence

divulging secret information while overseas the basis of the Department's action.³³

The Isacson Case:

In April of 1948 a passport was denied to United States Representative Leo Isacson, a member of the American Labor Party. The State Department, in one of the few instances in which it has publicly explained a refusal, announced that the purpose of Isacson's projected trip abroad was to attend an international conference in Paris as an observer for the American Council for Aid to Democratic Greece.³⁴ According to the Department, the conference was to be attended by organizations whose purpose it was to aid the Greek rebels.³⁵ Such aid was contrary to American foreign policy and hence "issuance of a passport . . . is not in the interests of the Government of the United States."³⁶ Despite its objections to Isacson's travels, the State Department allowed actual members of the American Council for Aid to Democratic Greece to attend the conference.³⁷

According to Isacson, his projected trip was for the purpose of investigating charges of atrocities committed by the Greek government and to get first-hand information on the situation in Greece to back up his opposition to a bill pending in Congress to aid the Greek government.³⁸ He protested the refusal,³⁹ which was meantime creating a good deal of controversy.⁴⁰ But the controversy was of no aid to Isacson, for the State Department did not reverse itself.⁴¹

The Robeson Case:

In the summer of 1950, Paul Robeson's passport was revoked by the State Department at a time when Robeson was preparing to go abroad to speak and

she said that such a letter "may" exist, but that she was not sure. She did say, however, that the AEC had interposed no objections to Kamen's leaving the country.

33. After stating that the AEC had interposed no objections to Kamen's departure, see note 32 *supra*, Mrs. Shipley immediately added, "Anyway, that's not why Mr. Kamen was refused a passport." Mrs. Shipley then asked the writer if he had seen the record of Dr. Kamen's testimony before the House Committee on Un-American Activities. To an affirmative answer she replied, "Well, I think that sums up the situation." She also mentioned that she did not feel that Kamen had been completely frank in evaluating to her the importance of his work on the Manhattan Project and the importance of his appearance before the House Committee on Un-American Activities.

34. N.Y. Times, April 3, 1948, p. 1, col. 6.

35. *Ibid.*

36. *Ibid.*

37. N.Y. Times, April 9, 1948, p. 6, col. 6.

38. N.Y. Times, April 3, 1948, p. 1, col. 6.

39. N.Y. Times, April 4, 1948, p. 30, col. 1.

40. Representative Celler of Brooklyn accused the State Department of "aping Russian policy and asked whether it was being used by the Administration to censor and punish legislators." *Ibid.* The New York Times, on the other hand, editorially approved the State Department's action, stating that "No citizen is entitled to go abroad to oppose the policies . . . of his country. . . ." N.Y. Times, April 4, 1948, § 4, p. 8, col. 2.

41. N.Y. Times, April 8, 1948, p. 28, col. 7.

give concerts. Robeson was notified that his "travel abroad would not be in the interests of the United States."⁴² In the complaint filed by Robeson in a suit to prevent revocation, Robeson charged that State Department officials informed him that the basis for the revocation was disapproval of "the political thoughts, opinions, and ideas theretofore expressed by [him] at meetings outside the United States and [his] associations outside the United States with individuals, associations, and groups having similar political thoughts, opinions, and ideas. . . ."⁴³ In the face of this complaint, the State Department stands by its contention that it has absolute discretion over the issuance of passports. On this ground it moved to dismiss Robeson's suit.⁴⁴ The motion to dismiss admits as true the allegations of the complaint for purposes of the proceeding.⁴⁵ Nevertheless, the District Court granted it,⁴⁶ and the case is now on appeal.⁴⁷

The Lamont Case:

Corliss Lamont, left-wing writer, applied for an extension of his passport in April of 1951.⁴⁸ In May he was informed that his application had been disapproved.⁴⁹ He was later informed that the reason for the refusal was that his travel would not be in the best interests of the United States.⁵⁰ Lamont charged that the refusal was based either on the fact that he is critical of present United States foreign policy⁵¹ or on an allegation that he was a member of a Communist-front organization.⁵² In a letter to the Passport Division, he admitted being critical of both United States and Russian foreign policy, but denied being a member of a Communist-front group, "even under the broad interpretation laid down by the Attorney General's so-called subversive list."⁵³ The State Department has consistently refused to reverse its decision.

42. N.Y. Times, Aug. 4, 1950, p. 1, col. 2.

43. Complaint filed in United States District Court for the District of Columbia, *Robeson v. Acheson*, Civil Action No. 5500-50, p. 6 (1950).

44. *Robeson v. Acheson*, *supra* note 43, Government's Motion for Dismissal, pp. 3-4.

45. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 124 (1951).

46. N.Y. Times, April 13, 1951, p. 12, col. 7.

47. Communication to the YALE LAW JOURNAL, from Nathan H. Witt, Mr. Robeson's counsel, dated June 11, 1951, on file in Yale Law Library.

48. Communication to the YALE LAW JOURNAL from Corliss Lamont, dated Nov. 8, 1951, on file in Yale Law Library.

49. *Ibid.* See also N.Y. Times, Oct. 15, 1951, p. 17, col. 5.

50. Communication from Corliss Lamont, *supra* note 48.

51. Communication from Corliss Lamont to Mrs. Ruth Shipley, Chief of the Passport Division, dated May 31, 1951, copy on file in Yale Law Library. See also N.Y. Times, Oct. 15, 1951, p. 17, col. 5.

52. Communication from Corliss Lamont to Willis H. Young, Acting Chief of the Passport Division, dated Nov. 27, 1951, copy on file in Yale Law Library.

53. Communications from Corliss Lamont, *supra* notes 51 and 52.

The Davis Case:

In October of 1951, Charles E. Davis was convicted by a Swiss court of having spied for Senator McCarthy on Communists and United States diplomatic personnel "to the prejudice of Switzerland." The Swiss court suspended sentence and ordered Davis to leave Switzerland. Davis' plan to visit Italy, Germany or Austria was frustrated by the State Department's invalidating his passport for travel anywhere but to the United States. Since Davis could not stay in Switzerland, he had little choice but to return home. The United States vice-consul in Switzerland told reporters, following Davis' conviction, that he hoped to get Davis aboard a plane for the United States the next day.⁵⁴

Other Cases:

Recently the State Department turned down the application of a prominent left-wing writer, who had contracted to report for a group of American papers on the land reform program and the effect of Marshall Plan aid in Italy. One reason given him for the refusal was that nothing "constructive" could be expected of his writings. For a while it appeared that the refusal might be reconsidered if he promised to write "constructively". He was willing to accede to this demand, but a passport has not yet been granted.⁵⁵

The State Department also refused passports to two reporters for Communist newspapers who wished to go abroad as correspondents. The refusal was based in part on the theory that the Internal Security Act of 1950, passed subsequently to the refusals heretofore discussed, showed a Congressional policy favoring denial of passports to Communists.⁵⁶ Perhaps because no organization had yet been brought within the terms of the Act, the State Department also used the "best interests" phrase.⁵⁷

These cases and several others⁵⁸ indicate that the State Department may consider a test of political views, activities, and associations one which it has discretionary authority to apply.

54. All the above facts are from an article in the N.Y. Times, Oct. 18, 1951, p. 20, col. 5.

55. Communication to the YALE LAW JOURNAL from ——— dated June 20, 1951, on file in Yale Law Library.

56. N.Y. Times, Feb. 11, 1951, p. 1, col. 5. The Internal Security Act's relation to passport denials is discussed in the text, *infra* at notes 144-52.

57. N.Y. Times, Feb. 11, 1951, p. 1, col. 5.

58. In January, 1948, Max Weiss, Educational Director of the Communist Party, charged that the State Department had refused to issue him a passport to attend a meeting of the Party in Italy. The State Department replied that it had not yet made its decision. N.Y. Times, Jan. 6, 1948, p. 14, col. 2. No further information on this dispute has appeared.

In March, 1948, the State Department refused a passport to A. B. Magil, Daily Worker reporter who wished to go to Palestine. It later reversed itself. N.Y. Times, April 2, 1948, p. 25, col. 8.

In August, 1948, the State Department refused passports to elected delegates to the International Conference of Working Youth being held in Warsaw on the grounds

PROCEDURES IN PASSPORT REFUSALS

The State Department's Passport Division describes its procedures in the denial of passports as follows:⁵⁹

"When a passport is refused under the discretionary authority of the Secretary of State, the applicant is notified of the decision by the Passport Division. The decision is, however, the decision of the Department and does not represent the judgment of the Passport Division alone. The decision is reached through consultation by responsible officers of the Passport Division, the Security Division, and the political office handling affairs in the area involved. This group varies according to the area or areas in which the applicant desires to travel.

that the trip "would not contribute to United States interests." *N.Y. Times*, Aug. 9, 1948, p. 8, col. 2.

In March, 1950, the State Department refused a passport to Dr. Bernard Peters, research physicist at the University of Rochester, on the grounds that his travel abroad would be "contrary to the best interests of the United States." *N.Y. Times*, March 23, 1950, p. 24, col. 2. In August, 1950, the State Department reversed itself without explanation. *N.Y. Times*, Sept. 1, 1950, p. 13, col. 1.

In May, 1950, another research physicist, Dr. Edward Corson, was told that his travel abroad to give scientific lectures was not "in the public interest." Dr. Corson said he thought the reason was that he had expressed faith in the confessed spy, Klaus Fuchs, albeit prior to Fuchs' confession. *N.Y. Times*, May 5, 1950, p. 4, col. 2.

In August, 1950, Rockwell Kent's passport was invalidated. The State Department said that artist Kent had used his passport in areas for which it was not validated. Kent admitted having gone to Russia with it, but said that his passport only said that it was invalid for travel to Yugoslavia. *N.Y. Times*, Aug. 19, 1950, p. 6, col. 3.

In August, 1950, A.E. Kahn's passport was not renewed since his travel abroad would "on his past record . . . be contrary to the best interests of the United States." Mr. Kahn had planned to attend a meeting of the International Association of Journalists. *N.Y. Times*, Aug. 22, 1950, p. 25, col. 7.

In September, 1950, Dr. Ralph Spitzer, who had partially supported the Lysenko theory of genetics, and his wife had their passports invalidated, since their further travel abroad was "not in the national interest." *N.Y. Times*, Sept. 19, 1950, p. 25, col. 5.

Howard Fast, the novelist, was denied a passport in November, 1950. *N.Y. Times*, Nov. 8, 1950, p. 2, col. 6.

Dr. Norton L. Ginsburg, a geographic expert, was forced to return from abroad in June, 1951 by State Department pressure. Whether or not this pressure involved passport invalidation is not clear. *N.Y. Times*, June 17, 1951, p. 43, col. 1.

In May, 1951, passports of two returning travelers were picked up when they arrived in the United States. One had led a delegation to visit the May Day Parade in Moscow. No information was given with respect to the other. *N.Y. Times*, May 23, 1951, p. 36, col. 6.

See also the statement of President Truman in vetoing the Internal Security Act: "It is claimed that this bill would deny passports to Communists. The fact is that the Government can and does deny passports to Communists under existing law." *H.R. Doc. No. 703*, 81st Cong., 2d Sess. 7 (1950).

59. Communication to the *YALE LAW JOURNAL* from Mrs. Ruth Shipley, Chief, Passport Division, dated Feb. 8, 1951, on file in Yale Law Library.

"Any applicant who has been refused a passport may request further consideration of his case and may present any additional evidence or information which he may wish to have considered. The request for reconsideration should be directed to the Passport Division. Any additional evidence or information presented is examined in the Passport Division and, if it is believed that further investigation is needed, the case is referred to the proper investigative agency. Whether or not the case is investigated further, it is again reviewed in the light of the new evidence or information, and the views of the security and political officers having an interest in the proposed travel are obtained. Here again, the combined views of responsible officers determine whether or not a passport shall be issued."⁶⁰

The actual operation of this procedure is illustrated by the case history of Paul Robeson.⁶¹ The State Department demanded that Robeson surrender his passport. He refused to comply and wrote the State Department, asking why the action was taken. Before any reply to this letter was received, the State Department notified the press of the cancellation of Robeson's passport. Robeson then wired the State Department, requesting a discussion of the matter. The Passport Division replied that the action was taken under authority of Executive Order 7856 of March 31, 1948,⁶² because "the Department considers that Paul Robeson's travel abroad at this time would be contrary to the best interests of the United States."⁶³ Again Robeson requested a meeting. The Passport Division said it doubted that it would revoke its decision, but that Robeson could, if he wished, confer with one of its officers.⁶⁴ This meeting was held, and at its end Robeson was told that he had no further recourse within the Department of State.⁶⁵

The Lamont case also sheds light on State Department procedures. Lamont was informed on May 30th of 1951 that no passport extension would be granted him.⁶⁶ On May 31, he protested the refusal and the fact that no

60. A feature article in the New York Times on Mrs. Shipley suggests, however, that the original decision to refuse a passport is generally Mrs. Shipley's, and that she is unlikely to change her mind having once decided. N.Y. Times, April 27, 1941, §7, p. 21, col. 1. To the same effect is an article by a New York Times correspondent, who, writing of a passport refusal, speaks of Mrs. Shipley's "complete discretion." N.Y. Times, Jan. 6, 1948, p. 14, col. 2.

61. The following facts are taken from Mr. Robeson's Complaint and accompanying affidavits, *supra* note 43.

62. This is the most recent of the Executive Orders which have recognized the discretionary authority of the State Department. See note 10 *supra*.

63. See Robeson's Complaint, *supra* note 43, Plaintiff's Exhibit C.

64. *Id.*, Plaintiff's Exhibit E.

65. *Id.* at 6.

66. Communication from Corliss Lamont to the YALE LAW JOURNAL, dated Nov. 8, 1951, on file in Yale Law Library.

reason for it had been given; he also asked that his case be reconsidered.⁶⁷ On July 3 he was informed that the Passport Division had reconsidered the matter and concluded that his travel abroad would not be in the best interests of the United States.⁶⁸ On October 12, Lamont wrote to the President,⁶⁹ and on Nov. 6 the Passport Division informed him that it had considered the letter but had not changed its mind.⁷⁰ On Nov. 27th, Lamont again wrote the State Department, denying membership in any Communist-front organization (on the understanding that such alleged membership was one reason for the denial) and formally demanded a hearing.⁷¹ Over two weeks later, no reply to this demand had been received.⁷²

It appears, therefore, both from the Lamont case and the State Department letter, that the State Department does not invariably grant hearings. At any rate it does not take any initiative in informing refusees that they may have a hearing. Furthermore, although Robeson states that he was told specific reasons for the action taken against him, this does not seem to be the general practice. When a hearing is granted, or where there is a steady correspondence, the protesting party must guess on what evidence his passport has been refused and attempt to refute that evidence. Under such circumstances, the right to present "additional evidence and information," which the State Department claims it grants, is unlikely to be of much help.

THE PROBLEM OF JUDICIAL REVIEW

If an individual denied a passport cannot persuade the State Department to change its stand, his only possible recourse is to the courts. A "best interests" refusal raises at least three substantial legal issues. These are: first, whether the Passport Statute is an invalid delegation of legislative power because of the absence of any appropriate standards; second, whether the standards used to deny a passport conflict with the Constitution; and third, the adequacy of the procedures followed by the State Department in refusing passports, as tested by the due process clause of the Fifth Amendment.

But before these issues can be raised, the passport refusee must leap a major hurdle; he must establish that the State Department's denial of a passport is susceptible of challenge in the courts. Up to now, no court has ever considered the merits of a "best interests" refusal, and the State De-

67. Communication from Corliss Lamont to Mrs. Ruth Shipley, Chief of the Passport Division, dated May 31, 1951, copy on file in Yale Law Library.

68. Communication from Corliss Lamont, *supra* note 66.

69. Communication from Corliss Lamont to President Harry S. Truman, dated Oct. 12, 1951, copy on file in Yale Law Library.

70. Communication from Corliss Lamont to the YALE LAW JOURNAL, dated Nov. 28, 1951, on file in Yale Law Library.

71. Communication from Corliss Lamont to Willis H. Young, Acting Chief, Passport Division, dated Nov. 27, 1951, copy on file in Yale Law Library.

72. Communication from Corliss Lamont to the YALE LAW JOURNAL, dated Dec. 13, 1951, on file in Yale Law Library.

partment assumes that its actions are non-reviewable.⁷³ A survey of the legal problems of passport denial must, therefore, begin with a consideration of whether such agency action is or should be subject to judicial review.⁷⁴

An initial question of reviewability is raised by the wording of the passport statute. The statute,⁷⁵ little more than a reenactment of the 1866 Act,⁷⁶ has long been interpreted to confer absolute discretion.⁷⁷ It simply states that the Secretary of State "may" issue passports under rules and regulations set forth by the President. Therefore, it can be argued, a passport may lawfully be refused for any reason, without judicial interference.

But statutory discretion does not necessarily preclude any court consideration of passport refusals. True, some statements by courts in discretion cases support an opposite view.⁷⁸ Such statements, however, are often qualified, either specifically⁷⁹ or indirectly.⁸⁰ In the first place, existence of discretion does not foreclose judicial consideration of the constitutionality of the statute under which the discretionary action is taken.⁸¹ Where the statute is attacked as an invalid delegation of powers, a different holding would be absurd, since the theory behind invalid delegation is that the legislature

73. See Government's Motion to Dismiss in the Robeson suit, Civil Action No. 5500-50 (Dist. Ct., D.C., 1950), copy on file in Yale Law Library.

74. See generally the discussion of reviewability in Mr. Justice Frankfurter's concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 150-7 (1951).

75. 44 STAT. 887 (1926), 22 U.S.C. § 211a (1946).

76. 14 STAT. 59 (1866).

77. See text, *supra* at notes 9 and 10.

78. "[T]he judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion." *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163, 184 (1919) (state challenge to rates set by President in taking over telephone system for war purposes).

79. Courts commonly say that they will not review exercises of discretion unless there is an "abuse of discretion," or unless the action is "plainly arbitrary" or "capricious" or "unreasonable." See cases cited in DAVIS, *ADMINISTRATIVE LAW* 850 (1951) (hereinafter cited as DAVIS).

80. Thus one court, although holding an agency's action not subject to review, declared that the action conformed with the statute. *United States v. George S. Bush and Co.*, 310 U.S. 371, 380 (1940). Other examples where the courts review at the same time they refuse to review are set forth in DAVIS at 816-17.

81. *Ex Parte Young*, 209 U.S. 123 (1908). The court held a railroad rate regulation statute unconstitutional because in effect it was confiscatory. The Administrator was held in contempt for attempting to enforce an order under the Act subsequent to a lower court injunction. To the contention that the injunction interfered with the Administrator's discretion, the court replied that it is no interference with discretion to enjoin performance of illegal action.

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), a municipal ordinance forbade operating laundry establishments in wooden buildings without obtaining a license. Reading the Act to give absolute discretion to the licensing authority, the Supreme Court condemned in no uncertain terms such a standardless ordinance as one under which arbitrary and discriminatory actions might result. The Court reversed convictions for violating the Act, however, on the basis of the equal protection clause of the Fourteenth Amendment, since the facts showed discriminatory enforcement.

cannot completely abdicate its law-making powers to agency discretion.⁸² Secondly, discretion cannot be exercised in an arbitrary or unconstitutional way. *Ad hoc* determinations have no place in our government, since ours is a government of laws, not of men. Determinations must be based on standards, and these standards must be compatible with the Constitution. Although no decision has directly overturned administrative action on the ground that an unconstitutional standard was applied, the Supreme Court has sometimes substituted its own interpretation of a statutory standard for that applied by the agency, clearly implying that the agency's interpretation would raise serious constitutional doubts.⁸³ In no case has a claim of discretion foreclosed consideration of constitutionality of standards. Thirdly, existence of discretion does not permit violation of traditional procedural safeguards. In almost all cases upholding agency discretion full and fair administrative hearings preceded agency determinations, and courts often stress this fact.⁸⁴ Where the procedures are questionable, the courts often refuse to enforce discretionary decisions.⁸⁵

82. See text, *infra* at note 129.

83. In *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), the Postmaster-General cut off petitioner's mail privileges on the statutory ground that the mails were being used to defraud. Petitioner was a group advocating mental healing. The Court avoided what it obviously considered to be a First Amendment abridgment by holding that petitioner's activities did not constitute "fraud" within the meaning of the statute. The same technique was applied in *Bridges v. Wixon*, 326 U.S. 135 (1945). In that case the Attorney-General ordered the deportation of Harry Bridges on the statutory ground that he was "affiliated" with the Communist Party. Congress had specifically provided that the final decision in such a case should be up to the Attorney-General. The Court decided that the definition of affiliation applied by the Attorney-General involved a misconstruction of the statute, but its discussion makes clear that it considered the standard actually applied one which involved guilt by association.

In *Hannegan v. Esquire*, 327 U.S. 146 (1946), the Postmaster-General denied second-class mailing privileges to *Esquire* magazine on the statutory ground that the magazine was not devoted to the public interest. The Court found that the Postmaster-General's interpretation of the statute required a standard of "good v. bad" and that such a standard, involving an ideology foreign to our system of government, was not authorized by the statute.

See also the dictum in *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), to the effect that Congress could not provide that no "Republican, Jew or Negro" shall be appointed to federal office, repeated with approval in *American Communications Association v. Douds*, 339 U.S. 382, 405 (1950). If Congress is powerless to apply such standards, they are a fortiori beyond the authority of an administrative official acting under color of discretion.

84. See *Pike v. Walker*, 121 F.2d 37, 40. (D.C. Cir. 1941). See also *United States ex rel Milwaukee Social Democrat Publishing Co. v. Burleson*, 255 U.S. 407, 403-9 (1921).

85. In *Lloyd Sabauo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329 (1932), petitioner was fined for having transported to the United States, contrary to statute, aliens with diseases which a competent medical examination would have discovered. Admitting that discretion was involved, the Court said that this still left open the question of whether elementary standards of fairness and reasonableness were followed. It held

What courts do generally leave to agency discretion falls into two major categories—determinations of facts and questions of statutory interpretation. Thus in most cases courts refuse to reverse an administrative conclusion of fact on a claim that the decision is against the weight of the evidence,⁸⁰ often pointing out, however, that the agency determination was not shown to be “arbitrary” or “capricious”,⁸⁷ *i.e.* have little support from the evidence. Similarly, courts give the agency the benefit of the doubt in interpreting an ambiguous phrase in a statute⁸⁸ or deciding whether certain facts fall within one or another of two statutory categories, where the line between the categories is difficult to draw.⁸⁹ But again, the courts have not stepped completely aside.⁹⁰ And where personal rather than property rights are involved, agency decisions even on facts are likely to be carefully scrutinized.⁹¹

that the probability that the agency had either ignored certain evidence or had failed to make it available to the doctors upon whose opinions it relied, constituted either exceeding authority (if ignored) or arbitrary and unfair action (if withheld).

In *Bridges v. Wixon*, *supra* note 83, the great weight which the court felt had been given to hearsay evidence on the issue of “membership” in the Communist Party was an alternative ground of reversal.

In *Fleenor v. Hammond*, 116 F.2d 982 (6th Cir. 1941) the court held that even though it would accept as final a Governor’s decision as to whether or not a pardon would be revoked (this finality of decision was a condition of the pardon), due process required a hearing before revocation.

86. *See, e.g.*, *Lloyd Sabauda Societa Anonima Per Azioni v. Elting*, 287 U.S. 329 at 338 (1932).

In *Martin v. Mott*, 25 U.S. 19 (1827), the Court refused to review the President’s factual determination that exigencies required calling out the militia. The Court stressed the fact that the nature of the power required prompt action. A war power was also involved in *Dakota Central Telephone Co. v. South Dakota*, 230 U.S. 163 (1919), where the court refused to review as to abuse of discretion. In *United States v. Wrightwood Dairy*, 127 F.2d 907 (7th Cir. 1942), the court refused to review a decision to change the base price for computing parity prices made on the statutory ground that inadequacy of available statistics required such a change. If the court had reviewed, it would have had to look into the adequacy of available statistics.

87. *See, e.g.*, *Schram v. United States*, 118 F.2d 541, 544 (6th Cir. 1941). *Cf.* discussion of *Lloyd Sabauda* case, *supra* note 85.

88. Thus, in *United States v. Wrightwood Dairy Co.*, 127 F.2d 907 (7th Cir., 1942), the court found that the Secretary of Agriculture’s decision as to the relevant market area for purposes of fixing parity prices was “reasonable and from an administrative view practical, and, in the absence of a showing of a clear abuse of discretion, it is not reviewable.” *Id.* at 911.

89. *See, e.g.*, *Bates and Guild Co. v. Payne*, 194 U.S. 106, 107-8 (1904).

90. *See, e.g.*, *Lane v. Hoglund*, 244 U.S. 174, (1917) where the Court reviewed and decided against a statutory interpretation of the General Land Office. *See also McAnnulty, Wixon, and Hannegan* cases, *supra* note 83.

91. Thus, in *Bridges v. Wixon*, *supra* note 83, a case involving deportation, the Court seems to have given as wide a scope of review as is possible. And in the *Lloyd Sabauda* case, *supra* note 85, at 335-6, the Court summarized the law of judicial review in immigration cases by saying that the courts would see “whether there was any evidence to support (the) determination . . . whether the procedure . . . adopted in making it satisfies elementary standards of fairness and reasonableness.”

Applying these generalizations to the passport problem it is apparent that the State Department's discretion means no more than that it will be given the benefit of the doubt on determinations of factual matters. The validity of the delegation of power, the constitutionality of the standards being applied by the Department and the procedures followed in applying them are issues by no means foreclosed by statutory discretion.

The discretion granted by statute has another effect, however. It presumably exempts passport action from the judicial review provisions of the Administrative Procedure Act.⁹² Section 10 of the APA provides that agency action may be appealed to the courts "except so far as . . . by law committed to agency discretion."⁹³ Since passport issuance has long been considered discretionary, Congress may have meant to put it beyond APA's ambit. However, the fact that agency action is discretionary could hardly prevent consideration of substantive and procedural constitutional questions. In other words, although a holding that Section 10 of the APA applies to the Passport Division would simplify matters considerably, a contrary holding would not make much difference.⁹⁴

A second question casting doubt on reviewability is whether granting of passports is part of the State Department's foreign affairs function, which is generally beyond any judicial review. Courts will not interfere with top level policy decisions in foreign affairs, such as recognition of foreign governments⁹⁵ or determination of disputed sovereignty.⁹⁶ These are policy decisions, not governed by statute, and not directed toward individual activities. Because of the complex political considerations entering into such decisions, they have long been considered a purely executive function, and courts have generally refused to interfere.⁹⁷

In a number of areas Congress has concurrent authority in "foreign policy" and delegates some of its authority to the Executive. Two modern Supreme

But cf. United States *ex rel* Kaloudis v. Shaughnessy, 180 F.2d 489 (2d Cir., 1950), where only a limited review of the sufficiency of the evidence was allowed in a deportation case. Petitioner was technically deportable, but Congress had allowed the Attorney-General to use his discretion in suspending deportation orders where the grounds were technical. This discretion was not to be exercised when the individual was "subversive," and the court refused to review the Attorney-General's determination that petitioner was subversive, although the evidence was sketchy. The case is criticized in Note, *The Attorney-General and Aliens; Unlimited Discretion and the Right to Fair Treatment*, 60 YALE L.J. 152 (1951).

92. 60 STAT. 243 (1946), 5 U.S.C. § 1009(a) (1946).

93. *Ibid.*

94. *Cf.* discussion in DAVIS, § 240.

95. Jones v. United States, 137 U.S. 202, 212 (1890); Oetgen v. Central Leather Co., 246 U.S. 297, 302 (1918); United States v. Belmont, 301 U.S. 324, 330 (1937).

96. Foster v. Neilson, 2 Pet. 253, 307-9 (U.S. 1829); Williams v. Suffolk Insurance Co., 13 Pet. 414, 419-20 (U.S. 1839).

97. See cases cited in preceding two footnotes.

Court cases illustrate the law in this field. In *United States v. Curtiss-Wright*,⁹⁸ Congress had empowered the President to prohibit the sale of munitions to certain countries, with whatever limitations and exceptions he wished. In a prosecution for violation of the Act, the Court rejected the argument that the Act was an invalid delegation of legislative power. It said that both Congress and the executive have power in the foreign policy area and, since a wide area of discretion is essential in dealings with foreign countries, Congress can delegate its powers to the President in broad terms.⁹⁹ The Court did not say that it could not or would not throw out a statute in this area; it merely said that it would "hesitate" to do so.¹⁰⁰

In *Chicago and Southwest Airlines, Inc. v. Waterman Steamship Corporation*,¹⁰¹ Congress had given authority to the Civil Aeronautics Board to grant licenses to airlines where public convenience and necessity requirements were met, and provided for court review of the Board's decision. But Congress also provided that where the application was for an overseas license, the President should have the final word. The Court refused to review a denial of an overseas license by the President, since aerial navigation routes involve national defense and foreign relations and the President must make a "political" decision using secret intelligence services.¹⁰²

In supporting its contention that issuance or denial of passports is a "foreign policy" matter, the State Department speaks of the "function" of a passport. It says that a passport requests that foreign governments aid and protect the bearer and that issuance of passports implies the intention of the American government to extend the bearer diplomatic protection.¹⁰³ If these were the only functions of a passport, perhaps their issuance could be called a matter of foreign policy, since requests for, and extensions of protection definitely involve relations with foreign governments.

But these are no longer the only functions of a passport; today and in the future their most crucial function is control over exit, and exit, as will be shown below, is a right of citizens. Moreover, the decision as to whether a given amount of evidence against an individual is sufficient to warrant denying him a passport requires at least a quasi judicial process. Passport policy in general may involve foreign affairs judgments, but a particular refusal is presumably an adjudication having little to do with foreign policy. Control over exit is

98. 299 U.S. 304 (1936).

99. *Id.* at 319-22 and at 329.

100. *Id.* at 322. See also *id.* at 329.

101. 333 U.S. 103 (1948).

102. *Id.* at 108-11. Similar points were made in the *Curtiss-Wright* case, 299 U.S. 304, 320 (1936).

103. See Government's Motion to Dismiss in the *Robeson* suit, *supra* note 43. United States passports, on their face, bear a request that foreign governments give protection to the bearer. The passports of the majority of nations bear no such request. Diplock, *Passports and Protection in International Law*, 32 THE GROTIUS SOCIETY 42 at 56 (1946).

significantly distinguishable from the sort of situation which courts have placed within the "foreign policy" area. None of those cases involved a situation where the Executive action was specifically directed at restraining the freedom of a particular individual.¹⁰⁴ 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.

Furthermore, judicial interference with restrictions on exit need not have any effect on the admittedly foreign affairs aspects of passports. If the State Department does not feel able to provide a citizen with diplomatic protection abroad, it need not do so. There is no judicially enforceable right to such protection.¹⁰⁵ And although it is true that United States passports, on their face, request protection for the bearer, there is nothing in the passport statutes to prevent the State Department, with Presidential approval, from eliminating this request. In fact the basic statute would seem to authorize such elimination.¹⁰⁶ There is no reason, therefore, why the "foreign affairs" function of the passport should preclude court review of the more judicial question of restricting an individual's right of exit.

Assuming the foreign policy function barrier to be overcome, a further obstacle remains in the passport refugee's path to judicial review. The State Department can argue that passport denial belongs with a class of government actions—particularly those involving internal government management—which the courts decline to review. Thus the Supreme Court long ago held that the government's action in granting pensions was not subject to review.¹⁰⁷ And a company bidding for government contracts could not get judicial review of the contracting agency's actions;¹⁰⁸ the court explained that no one had a right

104. It is true that in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), see text *supra* at notes 101-2, the Civil Aeronautics Board denied the Waterman Corporation a certificate of convenience and necessity to operate an overseas airline. The issue in that case, however, was not whether or not the Waterman Corporation should have been granted a certificate, but whether it *or* Chicago & Southern should receive the certificate.

105. Diplock, *Passports and Protection in International Law*, 32 *THE GROTIUS SOCIETY* 42 at 54 (1946). It is true that by statute the President is under a duty to take measures short of war to secure the release of American citizens unjustly deprived of their liberty by foreign governments. 15 *STAT.* 224 (1868); 8 *U.S.C.* §903b (1946). However, no cases have arisen under this enactment, and it is doubtful if the courts would ever order the President to meet its requirements, at least in a situation where to do so would be politically dangerous.

106. See text, *supra* at notes 8-10. The passports issued by a majority of the world's nations bear no such request for protection. See Diplock, *Passports and Protection in International Law*, 32 *THE GROTIUS SOCIETY* 42 at 56 (1946). Diplock also argues that such requests have no legal significance. *Id.* at 57.

107. *Decatur v. Paulding*, 14 *Pet.* 496 (U.S. 1840).

108. *Perkins v. Lukens Steel*, 310 U.S. 113 (1940).

to a government contract.¹⁰⁹ Similarly, it has been held there is no right to government employment.¹¹⁰

Among the government activities which courts do review are post office fraud orders which may cut off mailing privileges.¹¹¹ Use of the mails might be analogized to contracting with or working for the government. But it has been held that postal services are of such importance to the general welfare that the government will not be heard to argue that no one has a right to use the mails.¹¹²

The most recent expression of the Supreme Court on reviewability is *Joint Anti-Fascist Refugee Committee v. McGrath*.¹¹³ Pursuant to the President's loyalty order, the Attorney General placed plaintiff on a list of "subversive" groups. The purpose of this listing was to guide the Loyalty Review Board in determining the loyalty of government employees. The Court rejected the government's argument that the listing was mere publication of administrative information and held that the organization could protest the action. Justiciability, said Mr. Justice Frankfurter, depends on the existence of a right protected under common law, statutes, or the Constitution.¹¹⁴ Since the right to conduct business activities free from injury by defamatory statements is a common law right, the Court held review available.¹¹⁵

The group of cases in which the "right" argument has been considered do not form a consistent body of law. But when they are considered in light of the peculiar facts of each case, together with the legal contentions of the parties, a few conclusions pertinent to the passport problem are suggested. First, if some activity of a citizen is directly restricted, courts will review if the activity is of a class considered to be protected by the Constitution or common law. Even in the absence of such specific protection, the courts will consider any constitutional contentions.¹¹⁶ Only in cases where the internal management

109. *Id.* at 125-30.

110. See, e.g., *Bailey v. Richardson*, 182 F.2d 46 at 57 (D.C. Cir. 1950), affirmed by an equally divided Supreme Court, 341 U.S. 918 (1951), discussed in detail in text, *infra* at notes 181-7, and also in note 117, *infra*.

111. See, e.g., *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902) (Court finds Postmaster-General incorrectly interpreted statute.) Cf. *Leach v. Carlile*, 258 U.S. 138 (1922) (record supports issuance of fraud order).

112. *Pike v. Walker*, 121 F.2d 37 (D.C. Cir. 1941), *cert. denied*, 314 U.S. 625 (1941). Cf. *Hannegan v. Esquire*, 327 U.S. 146, 156 (1946).

113. 341 U.S. 123 (1951).

114. *Id.* at 152 (concurring opinion).

115. *Id.* at 140-1. Mr. Justice Jackson, concurring, did not believe that any legal right of the petitioning organizations had been infringed, but favored allowing the organizations to protest their listing in order to safeguard the rights of their members, who might be kept out of or dismissed from government employ on the basis of the Attorney-General's list. *Id.* at 183-5.

116. With respect to procedural constitutional issues, see note 177, *infra*.

With respect to substantive constitutional issues, See *Yick-Wo v. Hopkins*, discussed *supra*, note 81; *Pike v. Walker*, discussed in text, *supra* at note 112. And see also the cases in note 83, *supra*.

of government is involved, *i.e.* typical business functions such as selection of personnel, is the rule likely to be stricter.¹¹⁷

The stress which courts place on the question of whether a claimed right is protected by the Constitution or common law makes necessary an inquiry into the nature of the interests affected by passport refusal. It is essential to reiterate at the outset that the question concerns not merely the grant of a passport but the right of legal exit and, under modern circumstances, the possibility of travel abroad. As was pointed out earlier, even when it is once more possible to leave the United States without a passport, regulations of foreign countries will make passportless travel a practical impossibility. Past court dicta to the effect that the Secretary of State has unreviewable discretion in issuing passports date from a time when people were free to leave the country without a passport.¹¹⁸ And since entry to other countries without a passport has become difficult only recently, these dicta should not be persuasive. 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.¹¹⁹ Similarly new conditions have given greatly increased importance to passports.

Is exit a protected right? The only applicable Constitutional provision is the due process clause of the Fifth Amendment, which protects, among other things, the "liberty" of "persons." The content of the word "liberty" in the Fifth Amendment is not a static conception. It is, like the other great constitutional protections, a broad and pervasive idea, adaptable to the changing

Cf. *Frost and Frost Trucking Co. v. RR Commission of California*, 271 U.S. 533 (1926). The statute in issue required private carriers for profit to subject themselves to regulations applicable to common carriers. The Court said that it is a violation of due process to turn, by legislative fiat, a private carrier into a common carrier. And, continued the court, although a legislature can deny a privilege altogether, it cannot "impose conditions which require the relinquishment of constitutional rights." *Id.* at 594.

117. See *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), affirmed by an equally divided Supreme Court, 341 U.S. 918 (1951). The case involved a dismissal under the Federal employee loyalty program, and in rejecting several constitutional arguments of petitioner, the Court of Appeals repeatedly stressed the fact that there is no "right" to government employ. *Id.* at 57, 59, 61, and 63. *But cf.* the Statement of Mr. Justice Jackson, concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 at 185: "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally."

118. *Miller v. Sinjen*, 289 Fed. 388, 394 (1923); *Perkins v. Elg*, 307 U.S. 325, 350 (1939). In the *Elg* case, the Court interfered with the "unreviewable discretion" to the extent of enjoining the State Department from denying Miss Elg a passport if its sole ground for denial was her alleged lack of United States citizenship, the Court having found that Miss Elg was indeed a citizen.

119. See *Pike v. Walter*, 121 F.2d 37 (D.C. Cir.), *cert. denied*, 314 U.S. 625 (1941). "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted. . . ." 121 F.2d at 39.

circumstances of American life. One source often used in defining constitutional terms is the common law prior to the adoption of the Constitution,¹²⁰ and Blackstone is the traditional authority. Blackstone says that "personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclinations may direct."¹²¹ Exit certainly comes within that definition. And it is a definition that the courts regularly accept.¹²²

But even assuming that Blackstone was not concerned with exit, it is difficult to see how it can be denied that exit is part of "liberty." If "liberty" meant anything at common law, it meant absence from physical restraint.¹²³ And the distinction between restriction to a jail, to a city, to a state, or to a nation is merely one of degree. No such distinctions were made by the Supreme Court, in a case involving restrictions on movement between states, when it said: "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty."¹²⁴ And the Fifth Amendment's language is not limited to deprivations of liberty within the borders of the United States; it speaks in absolute terms.

But such technical arguments are not, nor should they be, decisive in determining whether or not an activity is a "right". A better test is one which considers the importance of the activity, both to the individual and to the state. Such a test is especially appropriate where courts are to consider for the first time whether particular agency action is reviewable.

Exit is important, in the first place, in terms of the number of people affected. As improvements in transportation make the world a relatively smaller place, more and more people are traveling abroad. In 1950, 299,965 people applied for passports.¹²⁵ Probably only a fraction of that number

120. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

121. 1 BL. COMM. *134. Blackstone also says that the King, by a prerogative writ, can prohibit people from leaving the realm without "license", since this "may be necessary for the public service and safeguard of the Commonwealth." *Id.* at *137. The last quoted phrase indicates a belief that restriction on exit should be only for good cause.

Modern British authorities agree that exit was a common law right recognized at the time of Blackstone. Diplock, *Passports and Protection in International Law*, 32 THE GROTIUS SOCIETY 42, 44 (1947).

122. See, e.g., *Williams v. Fears*, 179 U.S. 270, 274 (1900).

123. See 1 BL. COMM. *134-7.

124. *Williams v. Fears*, 179 U.S. 270, 274 (1900). In this case the court held that Georgia's tax on persons engaged in hiring laborers for out-of-state work affected movement only "incidentally," if at all. *Ibid.*

See also *Crandall v. Nevada*, 6 Wall. 35 (U.S. 1867) (tax on carriers for transporting people out of state invalidated); *Edwards v. California*, 314 U.S. 160 (1941) (California law making it a misdemeanor to aid nonresident "indigents" to enter the state invalidated on Commerce Clause grounds; Justice Douglas, Black, Murphy, and Jackson argue for wider rationale). See dicta in *Slaughter-House Cases*, 16 Wall. 36, 79 (U.S. 1872); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908).

125. N.Y. Times, March 11, 1951, § 2, p. 17, col. 5.

were traveling cross-country in 1867 when the Supreme Court first protected interstate movement.¹²⁶

Exit is also important in terms of why people travel abroad. The very livelihood of certain individuals may necessitate their traveling abroad. Foreign correspondents and lecturers on foreign affairs are obvious examples. To others, travel abroad, although not absolutely essential, may be of great potential value. Physical and social scientists may find personal consultation with foreign colleagues vital. The State Department itself has stressed this fact, pointing out the importance of free movement for such people in terms of national welfare.¹²⁷ Businessmen, performing artists, and students may find travel abroad worthwhile, even if not particularly necessary, in the successful conduct of their professions.

Finally, travel abroad can play an important part in keeping our citizens well-informed on the vital issues before them today. What transpires abroad today has a crucial bearing on matters not only of foreign policy, but of domestic policy as well. Citizens should not be required to make up their minds on these matters merely on the basis of what they are told by the government or a few foreign correspondents. The right of individuals to go abroad and to gain their own impressions of people and events in other countries is a matter of importance to them as citizens and to a government which draws all its powers from their votes. The First Amendment, and indeed the entire conception of effectively functioning democratic society, rests on a belief in the need for a free and fully informed exchange of opinion prior to the making of decisions.¹²⁸ Travel abroad contributes to that exchange and thereby can help both our own nation, and the world community of which it is a leading member, to make decisions wisely.^{128a} This importance of exit to individuals, their states, and their world is the strongest argument for effective judicial consideration of passport refusals.

CONSTITUTIONALITY OF STATE DEPARTMENT POLICIES

Substantive Issues

A passport refusee who established his right to judicial review would then face the task of showing that the State Department's action was unconstitutional. As a preliminary argument, it could be asserted that the statute which

126. *Crandall v. Nevada*, *supra* note 124.

127. See DEPT STATE, INTERNATIONAL SCIENCE POLICY SURVEY GROUP, SCIENCE AND FOREIGN RELATIONS: INTERNATIONAL FLOW OF SCIENTIFIC AND TECHNOLOGICAL INFORMATION (1950) in particular C. 6. See also N.Y. Times, Dec. 16, 1951, §4, p. 7, col. 6 (State Department officials and prominent United States scientists upset by provisions of the Internal Security Act of 1950 which make it impossible for scientists of friendly nations who have had left-wing affiliations to visit the United States).

128. See Landis, *Freedom of Speech and of the Press*, 6 ENCYC. SOC. SCI. 455, 457-8.

128a. See Message from President Truman to Nikolai M. Shvernil, President of the Soviet Presidium, *infra* note 191.

says the Secretary of State "may" issue passports is an invalid delegation of legislative power. Statutes delegating authority must, insofar as practicable, clearly set forth standards to guide administrative action.¹²⁹ This doctrine was first used by the Supreme Court to invalidate legislation in 1935.¹³⁰ It has been a frequent contention of petitioners ever since, but to no avail. Since 1935, the Supreme Court has either held the doctrine inapplicable,¹³¹ or found that the challenged statute did set forth sufficient standards,¹³² even if only by implication.¹³³

The passport statute seems as clear an example of invalid delegation as is possible to imagine. No standards are set forth, nor can any be implied from legislative history. The sole purpose of the act was to centralize the issuance of passports in the Federal Government.¹³⁴ True, courts regularly refuse to overturn as an invalid delegation any statute involving foreign policy, since Congress and the Executive have concurrent powers in that field. Control over exit, however, is unlike "foreign policy functions" which courts have declined to review.¹³⁵

Beyond the invalid delegation argument lies a more difficult constitutional question: what standards could validly be used in denying passports? Some standards, such as race or religion, would be clearly unconstitutional.¹³⁶ On the other hand, preventing a convicted criminal from fleeing justice, or from avoiding a court's order to remain within its jurisdiction, would be entirely proper reasons to deny passports.¹³⁷

Between these extremes, however, is an area of doubt into which fall the "best interests" refusals. If the State Department revealed the reasons be-

129. On invalid delegation up to and including the *Ryan* and *Schechter* cases, *infra* note 130, see Cousins, "The Delegation of Federal Legislative Power to Executive Officials", 33 MICH. L. REV. 512 (1935); Lukens, *The Delegation of Power—A Neglected Constitutional Question*, 9 TEMPLE L.Q. 367 (1935). See also Jacoby, *Delegation of Powers and Judicial Review: A Study in Comparative Law*, 36 COL. L. REV. 871 (1936).

130. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935).

131. *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) (inapplicable to state laws); *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) (mere regulation in field in which law well established).

In *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), the doctrine was held inapplicable in a proceeding involving exclusion of aliens, on the theory that alien exclusion is an executive as well as a legislative power. See also discussion of the *Curtiss-Wright* case in the text, *supra* at note 98.

132. *Currin v. Wallace*, 306 U.S. 1, 16 (1939); *United States v. Rock Royal Cooperative, Inc.*, 307 U.S. 533, 574 *et seq.* (1939); *Bowles v. Willingham*, 321 U.S. 503, 514-5 (1944).

133. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-6 (1943).

134. DEP'T STATE, *THE AMERICAN PASSPORT* 41 (1898).

135. See text, *supra* at note 104.

136. See dictum in *United Public Workers v. Mitchell*, 330 U.S. 75 at 100 (1947).

137. The State Department applies this standard. See text, *supra* at note 12.

hind "best interests" refusals, the constitutionality of these standards might be weighed with fair accuracy. But no revelations have been made. Given only the facts in the first part of this Comment, it is necessary to guess what standards the State Department may be applying. The facts suggest four possible criteria for refusal: (1) left-wing political views, activities and associations; (2) the same as (1) together with the likelihood that the applicant will criticize United States domestic and/or foreign policy while abroad; (3) the same as (1) together with the likelihood that left-wingers' travel abroad aids the "international Communist conspiracy" which Section 2 of the Internal Security Act of 1950 describes;¹³⁸ and (4) likelihood that the applicant will commit a crime while abroad.

A passport refusal based solely on the applicant's political views, activities or associations would be *prima facie* unconstitutional.¹³⁹ Such standards may be valid, according to the most recent Supreme Court pronouncement, only if (1) there is a rational connection between the classification and some evil which the government can prevent and (2) the threatened evil is substantial enough at least to balance the infringement on free speech.¹⁴⁰ But this test is obviously not met if a restriction is based on no more than political views, activities and associations, for there is no "evil" to justify the infringement.

One "evil" which may motivate the State Department's passport denials is criticism abroad of United States domestic and/or foreign policy. But this is not an "evil" which the government can lawfully prevent, for a basic purpose of the First Amendment is to bar the government from silencing its critics.¹⁴¹ In *Near v. Minnesota*,¹⁴² the Supreme Court invalidated a state's attempt to ban the future publication of a newspaper which had a history of malicious and defamatory criticism of government officials. Denying a passport to prevent a citizen from exercising his rights under the First Amendment in foreign countries should also be considered invalid as a prior restraint. Moreover, the Court held in *Thomas v. Collins*¹⁴³ that a state cannot force one to obtain a license before speaking at a union organizing meeting, even though the license issues as a matter of course and the license statute does not seek to prevent any particular speech, much less speech critical of the government. Viewing passports as licenses to speak abroad, the *Thomas*

138. Public Law 831, 81st Cong., 2d Sess. (Sept. 23, 1950); 50 U.S.C. §731 (Supp. 1951).

139. See *American Communications Association v. Douds*, 339 U.S. 382 at 391 (1950), where the Court stated that such circumstances are "ordinarily irrelevant to permissible subjects of government action."

140. *Id.* at 391-400. See note 161 *infra*, for a discussion of the present Supreme Court's rejection of the "clear and present danger" test where political standards are used by the government in restricting non-speech activities.

141. See discussion in *Near v. Minnesota*, 283 U.S. 697 at 716-20 (1931) and authorities cited therein.

142. 283 U.S. 697 (1931).

143. 323 U.S. 516 (1945).

case seems clear authority that passport refusal to prevent criticism is unconstitutional.

The third possible standard is left-wing political beliefs or affiliations, coupled with likelihood that the applicant's travel abroad will aid an international communist conspiracy. This hypothetical standard must be considered in relation to the Internal Security Act of 1950 (ISA).¹⁴⁴

Section 6 of the ISA¹⁴⁵ forbids members of "communist organizations" ("communist-action" and "communist-front" groups),¹⁴⁶ registered or finally ordered to register under the Act, to apply for or use passports. To justify this prohibition, Congress made a finding that "[d]ue to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."¹⁴⁷

The ISA sets up a Subversive Activities Control Board (SACB) to determine whether a given organization must register as a "communist organiza-

144. Public Law 831, 81st Cong., 2d Sess. (Sept. 23, 1950). The provisions of the Act pertinent to this comment are in 50 U.S.C. § 781 *et seq.* (Supp. 1951).

145. 50 U.S.C. § 785 (Supp. 1951).

146. 50 U.S.C. § 782(5) (Supp. 1951). "communist-action" is defined in § 782(3) and "communist-front" is defined in § 782(4).

Section 6 also makes it illegal for government officials to issue passports to individuals whom they know, or have reason to know, are members of organizations registered or ordered to register under the Act. 50 U.S.C. § 785(b) (Supp. 1951).

147. 50 U.S.C. § 781(8) (Supp. 1951).

Also pertinent is Paragraph 9 of Section 2, 50 U.S.C. § 781(9) (Supp. 1951): "In the United States those individuals who knowingly and wilfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States. . . ." This statement could refer to 22 U.S.C. § 212 (1946), which provides that passports shall be issued only to those owing "allegiance" to the United States. Congress has never defined "allegiance," and courts have defined it in terms of obligations owed by individuals to the State. See *e.g.* Carlisle v. United States, 83 U.S. 147, 154 (1872). Furthermore, courts have stated that a citizen owes an "absolute and permanent allegiance, . . . at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or sovereign. . . ." *Ibid.*

If a citizen can lose allegiance only by a disavowal of citizenship accompanied by acquisition of citizenship in another country, Section 2(9) of the ISA, insofar as pertinent to Section 6, probably means no more than that wilful aid to the Communist conspiracy shows lack of "allegiance" in the sense in which that term is used in the statute forbidding issuance of passports to persons not owing allegiance to the United States, or—more simply—that wilfully aiding the Communist conspiracy makes one ineligible for a passport. Since continued membership in a communist organization ordered to register under the ISA would undoubtedly involve wilful aid to the Communist conspiracy, Section 2(9) raises no problems not presented by Section 6.

tion.¹⁴⁸ To date the Board has ordered no group to register.¹⁴⁹ And before any order of the Board could become final, it is subject to court review.¹⁵⁰ Thus, Section 6 will not be operative for some time.

Nevertheless, the State Department has specifically relied on the ISA in supporting some of its passport denials.¹⁵¹ The Department apparently believes that the Congressional finding of fact justifies refusing passports solely on the basis of membership in a "communist organization." If this is the Department's position, it may be criticized as usurping the function of the SACB. It could be argued, however, that the ISA shows a Congressional intent to restrict the exit of Communists and fellow travelers, and the State Department is conforming to this intent when it denies passports to members of groups which it finds are "Communist organizations." But this argument assumes that, while Congress surrounded ISA restrictions on exit with elaborate procedural safeguards,¹⁵² it intended that the State Department should impose similar restrictions without so much as a hearing.

If, however, the courts should find that the Congressional finding of fact in the ISA does justify the State Department in denying passports on the basis of political affiliations per se, the constitutionality of such a standard would be brought into issue. Insofar as curtailment of exit is concerned, the question would be the same as that raised by Section 6 of the ISA itself.

The constitutionality of Section 6 of the ISA may best be determined by analysis of the Supreme Court's views in *American Communications Association v. Douds*.¹⁵³ The *Douds* case determined the validity of a provision of the Taft-Hartley Act withdrawing NLRB privileges from unions whose officers fail to sign affidavits denying (1) membership in the Communist Party and (2) membership in an organization that believes in or advocates overthrow of the government by force or any illegal or unconstitutional methods. Although the decision may well be attacked as out of line with the main tradition of First Amendment interpretation, its rationale is law for the present.¹⁵⁴

148. 50 U.S.C. § 791 (Supp. 1951).

149. For a summary of the Board's activities through Nov. 2, 1951, see Rovere, *Letter from Washington*, *The New Yorker*, Nov. 10, 1951, pp. 99-102.

150. 50 U.S.C. § 793 (Supp. 1951).

151. See text, *supra* at note 56.

Congressional pressure may explain the State Department's pre-enforcement of the ISA. The Senate Subcommittee on Internal Security recently blasted the State Department for having issued passports to 18 labor union representatives who traveled to Russia. None of the travelers had, in applying for their passports, stated an intention to visit Russia, but the Subcommittee insisted that since 14 of them had "notorious Communist records," they should not have been issued passports in any case. *N.Y. Times*, Dec. 19, 1951, p. 1, col. 2. In an editorial criticizing the Subcommittee's position the *New York Times* stated that "in the spirit of the [ISA] the State Department has been all too vigorous in refusing or withdrawing passport facilities from American citizens." *N.Y. Times*, Dec. 20, 1951, p. 30, col. 2.

152. See text *infra* at notes 172-6.

153. 339 U.S. 382 (1950).

154. See dissenting opinion of Mr. Justice Black, *id.* at 445-53.

The Supreme Court first stated that, although political affiliations are "ordinarily irrelevant to permissible subjects of government action,"¹⁵⁵ they become relevant if there is a reasonable relation between the classification and some "evil" which the government has power to prevent.¹⁵⁶ The Court held that Congress could rationally conclude that Communist Party members were likely to foment political strikes, an "evil" which the Commerce Clause enables Congress to prevent.¹⁵⁷ By itself, similar reasoning might support the passport provisions of the ISA. The nature of the Communist Party would allow Congress rationally to conclude that travel of its members abroad would aid the international communist conspiracy. And one of the objectives of that conspiracy is, according to the ISA, forceful overthrow of the United States government¹⁵⁸—an "evil" which Congress surely may prevent.¹⁵⁹

But the establishment of a rational connection did not satisfy the Court in *Douds*. The Court said that where a statute draws lines on the basis of political affiliations, First Amendment issues arise.¹⁶⁰ The duty of the court then is to balance the reasons advanced in support of the restriction against the effect of the restriction on personal freedom.¹⁶¹ Hence, under the *Douds* rationale the constitutionality of the ISA passport provisions is tested by "weighing." The "weight" in the *Douds* case was held to be on the side of the restriction. First, the Court pointed out that the National Labor Relations Act gives unions power over the employees they represent; hence Congress may ensure that the unions will act in good faith.¹⁶² This argument is inapplicable to the passport situation. The Court's second point was that union leaders have a "position of great power over the economy of the country."¹⁶³ By calling a political strike, they could disrupt the national economy. The First Amendment, said the Court, "does not require that [one] be permitted to be the keeper

155. *Id.* at 391.

156. *Id.* at 391-2.

157. *Id.* at 390-1.

158. Congress so found in Section 2 of the ISA. 50 U.S.C. §781(15) (Supp. 1951). See also opinion of Mr. Justice Jackson, concurring in part and dissenting in part, in *American Communications Ass'n v. Douds*, 339 U.S. 382, 422 at 429-30 (1950). See also *Dennis v. United States*, 341 U.S. 494 at 510-11 (1951).

159. See *Dennis v. United States*, 341 U.S. 494 at 501 (1951).

160. 339 U.S. 382, 392-3 (1951).

161. *Id.* at 399-400. The Court said the "clear and present danger" test did not apply, because the restriction on speech was only "indirect." *Id.* at 393-400. This restriction on the application of the "clear and present danger" test was spelled out more clearly in *Dennis v. United States*, 341 U.S. 494 at 502-11 (1951), where the Court concluded that the test applies only where speech itself is made a crime or where speech is relied on to evidence a violation of a non-speech crime. This direct-indirect distinction makes little sense in terms of the First Amendment. That Amendment speaks in absolute terms, and the difference between jailing people for voicing political opinions and excluding them from avenues of gainful employment is merely one of degree.

162. 339 U.S. 382, 401-2 (1950).

163. *Id.* at 403-4.

of the arsenal."¹⁶⁴ The passport situation is significantly distinguishable. While it is obvious that removing Communists from positions of union leadership will make it difficult for them to call political strikes, it is unlikely that passport denials will significantly impede communication between members of the communist conspiracy—the objective of ISA. If “communication” refers to orders, directives, and policy statements, the Soviet Embassy in Washington is probably all that the communist conspiracy needs. If “communication” means private policy and planning discussions, the ban on travel would have some effect, but in all likelihood it would only be a nuisance to the Communists. If Congress sought to prevent Communists and their sympathizers from participating in international Communist activities such as “Peace” rallies, the ban on travel is undoubtedly effective, but the dangers from such participation seem negligible compared to the danger of political strikes called by Communists in key union positions.

In considering the effect of the non-communist affidavit on free speech, the *Douds* opinion again stressed two factors. First, the restrictions touch a “relative handful of persons,” *i.e.*, only Communists in positions of union leadership.¹⁶⁵ The passport provisions of the ISA would affect more than a “handful.” The Act is aimed at “thousands.”¹⁶⁶ And since the “thousands” are, according to the Act, only the “rigidly and ruthlessly disciplined” followers of communism,¹⁶⁷ this figure presumably does not include fellow travelers who may have joined a communist-front organization. The Court also said that “the loss of a particular position is not the loss of life or liberty.”¹⁶⁸ The right to travel abroad, however, should be considered part of liberty.

Thus there are distinctions between the factual situation in the *Douds* case and that in the passport area. Whether these distinctions are sufficient to tip the balance on the present Supreme Court toward unconstitutionality is difficult to predict.¹⁶⁹

164. *Id.* at 412.

165. *Id.* at 404.

166. 50 U.S.C. § 781(15) (Supp. 1951).

167. *Ibid.*

168. 339 U.S. 382, 409 (1951).

169. Under the view of the First Amendment accepted by Mr. Justice Black, Section 6 of the ISA would undoubtedly be unconstitutional. See his dissenting opinion in the *Douds* case, *Id.* at 445-53, and in *Dennis v. United States*, 341 U.S. 494 at 579-81 (1951). In his *Dennis* dissent, Justice Black stated his belief that the First Amendment forbids prior restraints. Denial of a passport to prevent occurrence of acts abroad would obviously be such a restraint. The *Dennis* majority held, however that “[i]f the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.” *Id.* at 511.

Mr. Justice Douglas’ position, judging from his dissent in the *Dennis* case, *Id.* at 581-92, is that he would allow no restriction, direct or indirect, on First Amendment rights absent a strong showing of clear and present danger. *Ibid.* And he suggests strong doubts that the Communist Party in the United States constitutes such a danger. *Id.* at 588-9.

The fourth possible standard is likelihood that the applicant will, while abroad, commit a crime, for example espionage, sabotage or sedition.¹⁷⁰ Denial of passports on such grounds would involve punishment for acts which the individual has not yet committed. Of course, the government need not stand by helpless until acts dangerous to its existence have occurred. It can and does protect itself by prohibiting attempts and conspiracies to commit crimes of this sort.¹⁷¹ If the government has insufficient evidence to indict an individual on an attempt or conspiracy count, it has no power to restrict his freedom on the basis of its suspicions. If it has sufficient evidence it should be forced to fish or cut bait, rather than inflict the punishment of passport denial without the safeguards of criminal procedure. And where the individual has already been convicted and punished for violation of either United States or foreign law, denial of passports constitutes an additional punishment which could be imposed only if authorized by Congress.

Procedural Issues

Assuming the validity of the State Department's standards, its procedures might still be questioned. An applicant first learns that he will not receive a passport when he is informed that his application has been refused because his travel abroad would not be in the best interests of the United States. Even if he receives a "hearing," he will not be told *why* his travel abroad would be contrary to the best interests of the country. He must attempt to guess what facts have been persuasive to the Department and attempt to explain those facts away.

170. See text, *supra* at note 14 for examples of passport denials based on activities more immoral than dangerous. What is said with respect to the latter type of activity would apply a fortiori to the less dangerous type.

171. Various crimes constituting sabotage are set forth in 18 U.S.C. §§ 2151-6 (Supp. 1951). §§ 2153-6 also prohibit attempts to commit these crimes and §§ 2154 and 2155 ban conspiracies.

Crimes constituting espionage are set forth in 18 U.S.C. §§ 791-7 (Supp. 1951). §§ 793 and 794 punish both attempts and conspiracies.

Crimes of treason, sedition and subversion are set forth in 18 U.S.C. §§ 2381-9 (Supp. 1951). There are attempt provisions in §§ 2385, 2387, and 2388 and conspiracy provisions in §§ 2384 and 2388.

18 U.S.C. § 371 (Supp. 1951) is a general conspiracy statute, punishing any conspiracy to commit an offense against the United States.

See also Section 4 of the ISA, 50 U.S.C. § 783 (Supp. 1951), making it illegal to knowingly conspire to perform any act which would substantially contribute to the establishment of a totalitarian dictatorship in the United States which would be under the control of a foreign power.

See *Dennis v. United States*, 341 U. S. 494 (1951), which upheld against charges of unconstitutionality a conspiracy count under the Smith Act, 54 STAT. 671 (1940), 18 U.S.C. § 11 (1946), as applied to top Communist leaders. The Smith Act made illegal conspiracies to advocate or organize groups to advocate violent overthrow of the United States government.

If passport refusals are based solely on membership in "communist organizations," these procedures may be contrary to Congress' intent expressed in the ISA. The ISA's passport provisions apply only to members of organizations registered, or ordered to register, under the Act.¹⁷² Before any organization can be made to register, the SACB must hold hearings,¹⁷³ at which the organization has, among other rights, the right to subpoena witnesses and cross-examine.¹⁷⁴ Furthermore, members and officers of communist-action groups and officers of communist-front groups, all of whose names are made public,¹⁷⁵ can also protest their listing in a hearing before the SACB.¹⁷⁶

But even if the ISA does not help the passport applicant to obtain fuller procedural protection, the due process clause of the Fifth Amendment may. Before governmental action can infringe an individual's rights, the Fifth Amendment requires fair procedures.¹⁷⁷ A basic minimum in political passport

172. 50 U.S.C. § 785 (Supp. 1951).

173. *Id.* at § 792.

174. *Id.*, §§ 792(c) and 792(d).

175. *Id.* at § 788.

176. *Id.* at § 792(b).

177. See Frankfurter, J., concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 149 at 160-5 (1950).

Courts often distinguish "rights" from "privileges" in cases involving denials or revocations, without hearings, of commercial licenses. When the "right" label is applied, lack of hearing violates due process; when the "privilege" label is applied, there is no violation. The cases are collected and critically discussed in DAVIS, ADMINISTRATIVE LAW, § 69 (1951); Hale, *Hearings: The Right to a Trial with Special Reference to Administrative Powers*, 42 ILL. L. REV. 749, 752-6 (1948); and Note, *Necessity of Notice and Hearing in the Revocation of Occupational Licenses*, 4 WIS. L. REV. 180 (1927).

As all these commentators point out, the more important the activity, the greater the likelihood that it will be called a "right." Thus, the United States Supreme Court has held that the Board of Tax Appeals cannot turn down a lawyer's application to practice before it without affording a hearing. *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117 (1926). Similarly, the Supreme Court interpreted a real estate broker licensing statute to require a hearing, implying that otherwise the statute would violate due process. *Bratton v. Chandler*, 260 U.S. 110 (1922). And in a case involving revocation of a pardon, pardons admittedly being "privileges," it was held that due process requires a hearing before revocation. *Fleenor v. Hammond*, 116 F.2d 982 (6th Cir. 1941).

Where, however, the activity is one such as selling liquor or operating a pool hall, courts have gone the other way. See *e.g.*, *Darling Apartment Co. v. Springer*, 18 Del. Ch. 420, 22 A.2d 397 (Sup. Ct. 1941) (liquor license). This group of cases has been severely criticized, see DAVIS, ADMINISTRATIVE LAW 251 (1951), and the trend appears to be toward requiring hearings even when an activity such as the sale of liquor is concerned. *Id.* at 254. Cf. the statement of Justice Rutledge while on the Court of Appeals: "The protections of procedural due process do not disappear because the substantive right affected is not a full-grown vested right like that in one's castle at the common law." *National Broadcasting Co. v. FCC*, 133 F.2d 545 at 549 (D.C. Cir. 1942), *affirmed*, 319 U.S. 239 (1943) (modification of radio station license).

The importance of exit argues against labeling passports as "privileges." See Comment, "*Passport Denied*": *State Department Practice and Due Process*, 3 STAN. L. REV. 312, 316 *et seq.* (1951).

denials would be "notice of charges, evidence of guilt, and a chance to meet it."¹⁷⁸ To be told that travel abroad is not in the "best interests" of the country is insufficient notice, since the phrase could mean almost anything. This defect might be overcome if the State Department told a passport refusee what evidence led to its decision. But no such information is given. Absent notice of charges and evidence, the applicant's right to meet with State Department officials is an empty one.

Two recent Supreme Court cases uphold agencies' use of evidence kept secret from a party. In *Knauff v. Shaughnessy*,¹⁷⁹ an alien war bride was, without a hearing, excluded on the basis of confidential information "the disclosure of which would be prejudicial to the public interest."¹⁸⁰ And in *Bailey v. Richardson*,¹⁸¹ a government employee was dismissed for disloyalty without being told the names of those who gave information against her or the dates and places at which she was alleged to have been active in certain subversive organizations. The Supreme Court divided 4-3 in *Knauff* and 4-4 in *Bailey*.

If the courts force the State Department to grant hearings, this secret evidence problem may well arise, even though much of the information which influences passport decisions probably is anything but secret. If it does arise, and if the *Bailey* and *Knauff* cases are followed, the applicant will stand little chance of successfully appealing an adverse administrative decision. The *Knauff* case is, however, easily distinguishable from the passport situation, for courts have long held that since the exclusion of aliens is a sovereign right, Congress, in admitting them, may impose whatever conditions it wishes.¹⁸² Mrs. Knauff's objection was based on a Congressional intent theory, and it was on this intent that the Supreme Court split 4-3.

The *Bailey* case is more in point, for Miss Bailey was able to raise due process questions. The Court of Appeals majority insisted that there is no "right" to government employ: such employment is neither "life," "liberty," nor "property."¹⁸³ In addition the court emphasized the President's need for a free hand in dealing with his subordinates.¹⁸⁴ The case may, however, be distinguished on the ground that passports involve rights even if it is held that government jobs do not; moreover, passports do not affect internal government management.

178. This phrase appears in the dissenting opinion of Justices Jackson, Black, and Frankfurter in *Knauff v. Shaughnessy*, 338 U.S. 537 at 552 (1950), and probably represents what these judges consider to be the minimum requirement of a fair procedure in a situation similar to the passport situation.

179. 338 U.S. 537 (1950).

180. *Id.* at 541-2.

181. 182 F.2d 46 (D.C. Cir. 1950), affirmed by an equally divided Supreme Court, 341 U.S. 918 (1951). Judge Edgerton dissented in the Court of Appeals.

182. See *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892), cited with approval in the *Knauff* case, 338 U.S. 537 at 542 (1951).

183. 182 F.2d 46, 57 (1950). See note 117 *supra*.

184. *Id.* at 57-8, 61.

The *Bailey* case is also distinguishable from the passport situation in that Miss Bailey received far fairer treatment than does a passport applicant. She was specifically told what the charges were against her, *i.e.*, membership in the Communist Party and other named groups.¹⁸⁵ Although dates and places were concealed,¹⁸⁶ she at least had a clear idea of what sort of countervailing evidence she would have to produce. The *Bailey* court stressed the fact that Miss Bailey had, apart from the opportunity to confront adverse witnesses and know dates and places, a full hearing on two separate administrative levels.¹⁸⁷

Although secret evidence may sometimes be necessary, its basic unfairness requires that its use be strictly limited. From this point of view, both *Knauff* and *Bailey* seem unfortunate decisions. The close division of the Supreme Court in these cases gives hope that the distinctions in the passport case would swing a majority the other way.

CONCLUSIONS °

All of the four possible standards for passport refusal discussed above should be held unconstitutional. And even if the standards are upheld, the procedures presently used by the State Department violate due process.

As far as they are able, courts should require the State Department to obey the spirit of the Constitution. Assuming that the passport statute itself is not declared an invalid delegation of powers, the first step should be to require fair hearings. This could be done in one of two ways. First, courts could enjoin the State Department from denying passports without affording complainants due process. This would result in a further and more satisfactory administrative proceeding. Second, they could order the State Department to show cause why a passport should not be issued, thus affording the complainant at the judicial level the due process he was denied at the administrative level. Either approach would bring to light the actual standards now being applied by the State Department. They could then be challenged both as unauthorized by Congress and as unconstitutional. And if the courts find that illegal standards are being used, they can enjoin the State Department from denying passports on the basis of such standards.¹⁸⁸

The *Robeson* case, now before the courts, affords them an opportunity to begin forcing reforms in passport procedure.¹⁸⁹ Failure to examine the ques-

185. *Id.* at 49-50.

186. *Id.* at 58.

187. *Ibid.*

188. The most desirable remedy for a person denied a passport is, of course, a passport. But mandatory writs do not issue to compel executive authorities to perform discretionary acts. *United States ex rel Boynton v. Blaine*, 139 U.S. 306, 319 (1891). However, "an injunction to prevent [an administrative officer] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Ex parte Young*, 209 U.S. 123 at 159 (1908) (Injunction to restrain enforcement of an unconstitutional state law.) See also the *Elg* case, *supra* note 118.

189. The allegations of Robeson's complaint, combined with the District Court's granting of the government's motion to dismiss, may result in the *Robeson* case staying

tions raised by the *Robeson* suit would be unfortunate, for it might effectively foreclose future judicial consideration of passport refusals. Court tests are expensive. Furthermore, by the time a refusal can be successfully protested, the applicant might no longer desire to travel abroad. In addition, a passport refusal for one trip does not necessarily mean a refusal for another trip, so that the applicant may consider a court test unnecessary. If a judicial refusal to consider the *Robeson* complaint is added to these factors, only a wealthy optimist is likely to raise the issue again.

There is every reason for the courts to reject their past dicta allowing the State Department complete discretion. The days when the discretionary denial of passports had little effect on the right of exit are past. Even when it is no longer illegal for United States citizens to leave the country without a passport, there will be few places to which they can travel without one.

The denial of passports to its citizens has long been one of the principal instruments of intimidation and of control used by totalitarian governments: of intimidation, since the individual is virtually imprisoned at home without a passport; of control, in that the government can thus determine what information and opinion about conditions abroad reach its people. 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,¹⁹⁰ and has repeatedly urged a policy of enlarged human interchange as a step towards international understanding and the relief of international tension.¹⁹¹ It is the thesis of this Comment that under the circumstances of modern international life every American citizen has a constitutional right to

in the courts for quite some time before the general problems raised by passport denials are considered. *Robeson's* complaint charged that one reason for the revocation was that *Robeson* is a Negro, and this point is being stressed on appeal. Appellant's Brief, pp. 6, 10-11. If this were true, revocation would certainly be unconstitutional. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 at 369 (1886) and *United Public Workers v. Mitchell*, 330 U.S. 75 at 100 (1947). Since the motion to dismiss admits allegations in the complaint as true, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 124 (1951), the courts may, as the Supreme Court did in the *Joint Anti-Fascist* case, remand to determine the merit of this allegation, ignoring until later the general constitutional issues involved.

190. See, e.g., Kohler, *Soviet Isolation of the Russian Peoples*, 22 DER'T STATE BULL. 430 (1950).

191. In July, 1951, President Truman wrote to Nikolai M. Shvernik, President of the Soviet Presidium, as follows: "The unhappy results of the last few years demonstrate that formal diplomatic negotiations among nations will be largely barren while barriers exist to the friendly exchange of ideas among peoples. The best hope for a peaceful world lies in the yearning for peace and brotherhood which lies deep in the heart of every human being. But peoples who are denied the normal means of communication will not be able to attain that mutual understanding which must form the basis for trust and friendship. We shall never be able to remove suspicion and fear as potential causes of war until communication is permitted to flow, free and open, across international boundaries." N.Y. Times, July 8, 1951, p. 5, col. 1.