COMMENTS

THE PASSPORT PUZZLE

In a time less charged with international tensions the passport was solely a useful but unnecessary diplomatic document\(^1\) issued or not issued to citizens at the supposed absolute discretion\(^2\) of the Secretary of State.\(^3\) Since then, motivated primarily by security considerations,\(^4\) Congress has attempted to regulate travel by citizens across the borders of the United States, but instead of setting up an independent agency to administer the issuance of exit and entry permits or setting up standards for the guidance of an existing agency or arm of the executive,\(^5\) Congress made the legality of leaving or entering or attempting to leave or enter the United States dependent solely upon the citizen's bearing a

\(^1\) For much the greater part of our history the passport constituted merely a "document of identity and nationality... indicat[ing] that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and request[ing] on the part of the Government of the United States that the officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need give him all lawful aid and protection." 3 Hackworth, Digest of International Law 435 (1942).

\(^2\) See Gillars v. United States, 182 F. 2d 962, 981 (App. D.C., 1950); Miller v. Sinjen, 289 Fed. 388 (C.A. 8th, 1923); Urtetiqui v. D'Arbel, 9 Pet. (U.S.) 692 (1835). Consult 23 Ops. Att'y Gen. 509 (1901). Leonard B. Boudin asserts that the original Passport Act of 1856 was passed in order that citizens' travel be facilitated. Accordingly, he queries whether the citizen was not entitled to a passport as of right even when the passport was merely a diplomatic document. Boudin, The Constitutional Right to Travel, 56 Col. L. Rev. 47, 52 et seq. (1956). But see notes 10, 28 infra.

\(^3\) Regulatory power over passport issuance is vested by statute in the Secretary of State subject to such rules as the President may prescribe, 11 Stat. 60 (1856), as amended, 22 U.S.C.A. § 211(a) (1952), hereinafter referred to as the Passport Act. Presidential regulations made pursuant to the statute currently authorize the Secretary "in his discretion to refuse to issue a passport, to restrict a passport for use only 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." 22 Code Fed. Regs. § 51.75 (1949). Section 51.77 authorizes the Secretary of State to make further regulations, hereinafter referred to as State Department Regulations, not inconsistent with those of the President, for "issuing, renewing, extending, amending, restricting, or withdrawing passports." These are found in 22 Code Fed. Regs. §§ 51.101-51.134 (1949), §§ 51.135-51.170 (Cum. Supp., 1955), and are set forth in notes 48, 77 infra. Consult Boudin, The Constitutional Right to Travel, 56 Col. L. Rev. 47, 52 et seq. (1956); Passports and Freedom of Travel: The Conflict of a Right and a Privilege, 41 Geo. L.J. 63, 70-76, for a history of passport legislation and practice. See note 65 infra.

\(^4\) Consult notes 70, 84, 85 infra.

\(^5\) Congress has established standards for passport denial under the Internal Security Act, 64 Stat. 987, 993 (1950), 50 U.S.C.A. §§ 781, 785(b) (1951), but these standards have not yet been utilized. Consult note 75 infra. Substantive standards established by the Secretary of State are discussed note 77 infra.
passport. Furthermore, since the First World War many foreign governments have refused to allow citizens of the United States to cross their borders without a passport issued by the United States. As a consequence of either the internal restrictions on exit from or entry into the United States, or the restrictions imposed by foreign governments on travel across their borders, it is now a practical impossibility for an American citizen to travel outside of the Western Hemisphere without a passport.

6 During the War of 1812 passports were first required by statute of citizens leaving the United States. 3 Stat. 199 (1815). The restriction lasted only for the duration of the war. In 1918 Congress enacted a comprehensive travel control statute providing in part that it was unlawful for a citizen to leave or enter or attempt to leave or enter the United States without a valid passport in time of war. 40 Stat. 559 (1918), as amended, 22 U.S.C.A. §§ 223–226 (1952). The provisions applicable to citizens ceased to be operative in 1921. 41 Stat. 1359 (1921). In 1941 the statute was amended to apply to the national emergency proclaimed on May 27, 1941. 55 Stat. 252 (1941), 22 U.S.C.A. § 223 (1952). The present version applies to war or any national emergency proclaimed by the President.

The Immigration and Nationality Act of 1952 provides that "[w]hen the United States is at war or during the existence of any national emergency proclaimed by the President . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, . . . (b) . . . it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." 66 Stat. 190 (1952), 8 U.S.C.A. § 1185 (1953). This statute was made operative by Proclamation No. 3004, 3 Code Fed. Regs. 20 (Supp., 1953). For current regulations and exceptions to the passport requirement consult 22 Code Fed. Regs. §§ 53.1–53.8 (1949), as amended, § 53.2 (Cum. Supp., 1955).

7 Only nine of thirty-seven governments responding in 1952 to questionnaires did not require passports of American citizens. Five required passports of no alien seeking entry. Some of the many Western Hemisphere countries to which an American is free to travel without a passport under State Department regulations require him to bear a passport as a condition of admission, e.g., Brazil, Colombia, Honduras, Nicaragua. Passports have been required for entrance into most countries only since the First World War. Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review, 61 Yale L.J. 171 n. 3, 172 (1952).

8 To a limited extent travel within the hemisphere is restricted by passport requirements of some Latin American countries. Consult note 7 supra.

9 Consult generally Boudin, The Constitutional Right to Travel, 56 Col. L. Rev. 47 (1956); Parker, The Right To Go Abroad: To Have and To Hold a Passport, 40 Va. L. Rev. 853 (1954); Barnett, Passport Administration and the Courts, 32 Ore. L. Rev. 193 (1953); Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review, 61 Yale L.J. 171 (1952); Passports and Freedom of Travel: The Conflict of a Right and a Privilege, 41 Geo. L.J. 63 (1952); "Passport Denied" State Department Practice and Due Process, 3 Stanford L. Rev. 312 (1951).

Increasing numbers of Americans each year are studying, vacationing or engaging in business activities abroad. The number of United States citizens going abroad (excluding travelers between the continental United States and outlying possessions and persons habitually crossing international boundaries) increased from 667,126 in the year ending June 30, 1951, to 971,025 in the corresponding period for 1954. The percentage among these of emigrants is unknown, but presumably small. Dept. of Commerce, Statistical Abstract of the United States 101 (1955). 334,284 passports were issued between January and July of 1955. N.Y. Times, p. 31, col. 3 (Nov. 7, 1955). The recent removal of passport restrictions on travel to certain communist countries, Chicago Tribune § 1, p. 2, col. 3 (Nov. 1, 1955), will probably give additional stimulus to foreign travel.
This new nature of the American passport and the citizen's interest in it, as contrasted to the passport's more traditional function as a desirable but unnecessary diplomatic document, has forced the issue of judicial reviewability of "discretionary" executive passport denials.\(^{10}\) The citizen's previously undefined interest in freedom of movement abroad is gradually becoming the subject of judicial delineation. Recent decisions in the District of Columbia make some progress in bringing due process to the area of passport administration. In *Shachtman v. Dulles*\(^{11}\) the Court of Appeals held that where the Secretary of State admitted that the organization of which the applicant was chairman and on whose behalf he desired to travel abroad was not subversive, to deny applicant a passport solely because the organization was listed as subversive by the Attorney General was an arbitrary deprivation of liberty without due process of law. In *Dulles v. Nathan*\(^{12}\) an order requiring the Secretary to issue a passport was stayed by the Court of Appeals but only on the condition, inter alia, that a "quasi-judicial hearing" be held.\(^{13}\) The opinion, however, is silent as to what specific procedural safeguards are guaranteed by a "quasi-judicial hearing." In *Boudin v. Dulles*\(^{14}\) the district court held it a denial of due process of law to use information *dehors* the record of a passport hearing in deciding to deny a passport.\(^{15}\) It is the purpose of this comment to examine the implications and limita-

\(^{10}\) So long as executive refusal to issue a passport deprived the citizen of only a valuable—but not indispensable—aid to foreign travel, the Secretary's control over passport issuance was considered a non-reviewable exercise of a legitimate function in the administration of foreign affairs. Consult authorities cited note 2 supra. At an early date passports were issued without statutory authorization, consult Geo. L.J., op. cit. supra note 9, at 72, apparently on the theory that the practice was an adjunct to the "inherent" power of the executive in the control of foreign affairs. Consult Corwin, *The President's Control of Foreign Relations* (1917) (passim).


\(^{12}\) 225 F. 2d 29 (App. D.C., 1955), vacating the stay order granted in App. D.C. No. 12,727 (June 2, 1955), and dismissing as moot.

\(^{13}\) In reviewing a refusal by the State Department to renew the passport of an American citizen abroad except for one immediate return to this country, a three-judge district court had previously held that in order that their constitutionality be sustained, the Passport Act and the executive order made pursuant thereto (see note 3 supra) must be construed to require that notice and a hearing be afforded before a passport renewal could be refused. Bauer v. Acheson, 106 F. Supp. 445 (D.D.C., 1952). The Bauer case is noted at 28 N.Y.U.L. Rev. 752 (1953); 14 U. of Pitt. L. Rev. 444 (1953).


\(^{15}\) Reportedly contra: Dayton v. Dulles, D.D.C. Civil No. 4890-55 (1956); N.Y. Times p. 3, col. 2 (Feb. 10, 1956). Ineligibility for a passport was asserted in Boudin v. Dulles, 136 F. Supp. 218 (D.D.C., 1955), under State Department passport regulation § 51.135(a) denying passports to "[p]ersons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party. ..." 22 Code Fed. Regs. § 51.135(a) (Cum. Supp., 1955). The use of confidential information is authorized by § 51.170, set out at note 110 infra. State Department passport procedural regulations are there summarized.
tions of these decisions, with particular regard to the Shachtman opinion, and to explore generally the question of judicial review of passport denials.

I. SUBSTANTIVE STANDARDS

Problems of adequate substantive standards for passport denials and of procedural due process for the applicant are raised by the recent cases. The courts have not considered the question of the possible absence of proper legislative standards for executive action, although undue assumption or delegation of legislative power may offer a third ground for judicial review.

To the extent that the citizen's interest in free foreign travel is protected by the Constitution, the standards utilized to curtail that interest are subject to judicial review. To determine which standards are constitutionally adequate, the nature of the citizen's interest must be ascertained and balanced against any legitimate governmental interests in controlling travel.

A. The Shachtman Case

Shachtman v. Dulles is the first opinion which challenges the nature and sufficiency of State Department standards. The petitioner alleged that the only reason given by the State Department in denying his application for a passport was that to grant a passport to the chairman of an organization listed by the Attorney General as subversive would be "contrary to the best interests of"

18 Consult note 74 infra.


18 In Perkins v. Elg, 307 U.S. 325 (1939), the Supreme Court held that the Secretary of State could properly be joined in a decree declaring that an applicant for a passport was a citizen and enjoining the Secretary from denying a passport solely because of her alleged lack of citizenship. Rather than representing an exercise of judicial review of the Secretary's reasons for denial, which the Court carefully pointed out it would leave in his discretion, ibid., at 350, the case more properly stands for the narrower proposition that a passport applicant is entitled to a judicial determination of his citizenship. Cf. Carmichael v. Delaney, 170 F. 2d 239 (C.A. 9th, 1948). Nevertheless, the case "shows that the subject of passports is not entirely beyond judicial assistance." Shachtman v. Dulles, 225 F. 2d 938, 940 (App. D.C., 1955). Moreover, as emphasized by Judge Edgerton in his concurring opinion in the Shachtman case, when the Supreme Court decided the Perkins case a passport was not a requisite for exit. Ibid., at 945.

19 Exec. Order No. 10450, 3 Code Fed. Regs. 72 (Supp., 1953), revoking Exec. Order No. 9835, 3 Code Fed. Regs. 129 (Supp., 1947), requires the Attorney General to furnish executive department heads with a list of organizations designated in accordance with Part III, § 3 of the prior order. The categories of organizations therein established are totalitarian, Fascist, Communist, subversive, those having a policy of advocating the use of force to deprive others of constitutional rights, and those having a policy of seeking to alter the form of government of the United States by unconstitutional means. Rules of procedure providing for notice, hearing and determination on the record before designation becomes final have been adopted. 28 Code Fed. Regs. §§ 41.1 et seq. (Cum. Supp., 1955).

Order 9835, supra, was held valid in Joint Anti-Fascist Refugee Committee v. Clark, 177 F. 2d 79, 84 (App. D.C., 1949), reversed on other grounds, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). The Supreme Court decided that an undenied allegation that the Attorney General acted arbitrarily in listing an organization stated a claim
the United States."²¹ Like other allegations in the complaint,²² this one was not denied by the respondent.²³ The district court, denying jurisdiction, dismissed Shachtman's suit to enjoin the Secretary from basing denial solely on the listing for failure of the complaint to state a claim upon which relief could be granted.²⁴ The court of appeals in reversing, however, found a sufficient predicate for judicial reviewability of passport denials:

The denial of a passport . . . causes a deprivation of liberty that a citizen otherwise would have. The right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under law. A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provisions of the Fifth Amendment that "no person shall be . . . deprived of . . . liberty . . . without due process of law." [Emphasis supplied.]²⁵

The court, in a careful though ambiguous opinion, held that due process is violated where "[t]he listing of the League by the Attorney General as subver-

²¹ The Independent Socialist League, of which Shachtman was chairman, was listed as "Communist" and "subversive." The letter of tentative passport disapproval allegedly had mentioned both classifications. The court interpreted the alleged reliance on the "subversive" listing in the letter of final denial as evidence that "[t]he hearing . . . convinced the Depart-

²² Petitioner alleged that his passport application had been tentatively denied because the League had been listed as Communistic and subversive; that the listings were erroneous; that at a State Department hearing he testified that the League was anti-Stalinist and had had no international affiliations and that he desired a passport solely to acquire material for his work of writing and lecturing and had no intention of engaging in any activity, political or otherwise, that would embarrass the United States; and that final denial was based on the ground stated. Shachtman v. Dulles, 225 F. 2d 938, 942–43 (App. D.C., 1955). Shachtman had tried for six years, consistently but unsuccessfully, to obtain a hearing before the Attorney General to con-

²³ The court ruled that the Secretary's motion to dismiss for failure to state a claim upon which relief could be granted must be taken as admitting the truth of the facts alleged. Ibid., at 942.

²⁴ Ibid., at 940.

²⁵ Ibid., at 941. Compare Bauer v. Acheson, 106 F. Supp. 445, 451 (D.D.C., 1952): "While the Supreme Court [in Williams v. Fears, 179 U.S. 270 (1900)] was . . . considering freedom to move from state to state within the United States, it is difficult to see where, in principle, freedom to travel outside the United States is any less an attribute of personal liberty." On the facts before the court in the Bauer case, see note 13 supra, the right of exit from and entry into the United States was not in issue, but merely applicant's ability to travel freely abroad. The court did not specify the precise question thus presented, whether the actions of foreign governments in requiring passports for ingress can create a right in a citizen enforceable against the United States.
sive was the [only] reason for the Secretary's refusal to issue the passport, that is
to say, [where] except for such listing the fact that [Shachtman] was head of the
organization and wished to go to Europe on its business would not have been
considered by the Secretary as ground for rejection of his application. The
opinion went on to say: "For us to hold that the restraint thus imposed . . . is
not arbitrary would amount to judicial approval of deprivation of liberty
without a reasonable relation to the conduct of foreign affairs." (Emphasis sup-
plied.)

The Shachtman court did not deny that the Secretary had discretionary power
to refuse passports but denied only that such power could be arbitrarily exer-
cised. This discretion results, according to the court, because of the executive
responsibility for the conduct of foreign affairs, and presumably it may be exer-
cised even though individual restraints on travel are the result. The test sug-
gested for arbitrariness was whether the grounds for denial have a "reasonable
relation to the conduct of foreign affairs," although at another place the right
to travel was made subject to "reasonable regulation under law." This dualism

Ibid., at 943. See note 22 supra. The court seemed to emphasize the inadequacies of the
listing procedure and the inability of the petitioners to obtain a hearing to contest the listing
and remove the cause. However, the court said that warning given by the Attorney General
"can at least lead to investigation, and in a proper case be an element in decision." Ibid.

Ibid. "No suggestion is made here that the basis for the denial may not be disclosed, for
reasons of national security or otherwise." Ibid., n. 9. See discussion infra at page 271 et seq.

This was also the theory of the court in Bauer v. Acheson, 106 F. Supp. 445, 451-52 (D.D.C., 1952), which found a "wide discretion" in the Secretary. The language in
Shachtman ("reasonable regulation" and "reasonable relation to the conduct of foreign
affairs") seems to assume somewhat less discretion.

Although most litigants, including Shachtman, have proceeded on the theory that the Secretary
has some discretion, some applicants have argued an absence of discretion. This point,
according to Boudin, has not been passed on by the courts. Consult Boudin, op. cit. supra note
9, at 56. Boudin's argument for an absence of discretion in the Secretary has two aspects. First,
that the original Passport Act of 1856 was passed to facilitate the citizen's travel and author-
ized the Secretary to act in conformity with Presidential directions which were intended to be
procedural only. Ibid., at 52-53, 55. For legislative history see note 65 infra. The "discre-
tion" of the Secretary exists only by virtue of an executive order. Ibid., at 58. Second, that the
1918 and 1941 restrictions on travel (note 6 supra) were intended to provide for total embargoes
upon travel to particular areas, and do not authorize the executive to pass on the qualifications
of a particular citizen. It is significant that the State Department has not relied upon these
emergency statutes for political refusals. Ibid., at 60. With regard to Boudin's first objection,
the Shachtman opinion suggests that the discretion may be inherent in the executive. Consult
also note 10 supra. For a resume of the evidence of legislative intent in passage of the 1918 act,
see notes 70, 71, 84, 85 infra.

The opinion in this regard is ambivalent. The court said that "[r]estraint upon travel
abroad might be reasonable during an emergency though in normal times it would be arbi-
trary." 225 F. 2d 938, 941 (App. D.C., 1955). The context suggests that the court may here
have been referring to general travel controls to particular areas, and Boudin so construes the
language. Boudin, op.cit. supra note 9, at 58. However, the general approach of the court and
other language in the opinion assume that particular restraints may be valid. Boudin denies
that the government generally has power to restrain travel of particular individuals for political
reasons, ibid., 74-75, apparently because of First Amendment limitations.


Ibid., at 941.
appears throughout the majority opinion. On the one hand it was said that "[t]he courts by reason of the Constitution have a responsibility in the matter although a limited one," and that "[constitutional safeguards] must be defined with cautious regard for the responsibility of the Executive in the conduct of foreign affairs." The inference here seems to be that a showing of a "reasonable relation to the conduct of foreign affairs" would remove the question from the judicial competence. However, it was also pointed out by the court that although the conduct of foreign affairs in a "political sense" is outside of the judicial competence, the problem before it was only within the scope of foreign affairs in a "broad sense" and was also within the due process clause. Accordingly, "[t]here must be some reconciliation of these interests..." This approach is that of "reasonable regulation under law." The majority opinion thus contains a fundamental ambiguity. The concurring opinion is less equivocal, at least insofar as the right to leave the country is concerned.

The questions posed by the Shachtman case must depend for their answers upon a judicious balancing of the citizen's interest in freedom of travel against any legitimate public concern in restricting that freedom. Because the problem is a new one for the courts and the Constitution supplies no ready answers, there are involved substantial difficulties in identifying and defining the legal interests of the citizen as against any legitimate interests of the government.

B. The Citizen's Interest: Natural Right

Although in Shachtman the court termed freedom of travel a "natural right," it is unlikely that it was consciously attempting to reintroduce natural law principles into the theory of judicial review. Freedom to travel is indeed part of the liberty to which Americans are likely to feel naturally entitled, and the "natural right" language of the Shachtman court perhaps can best be taken as expressing that feeling. Orthodox doctrine, however, requires that the citizen's interests as against his government, in order to be judicially cognizable, be provided for in specific constitutional provisions.

22 Ibid., at 940.  
23 Ibid., at 942.

34 Ibid., at 944. Also, "[w]e do not suggest that a passport is no longer a political document, or that its issuance is not allied to, and at times a part of, the conduct of foreign affairs... but only that it is not merely of this character." Ibid., at 940. Boudin suggests that the political character of the passport, if it exists at all, is insignificant compared to its function as an exit permit. Boudin, op. cit. supra note 9, at 51 n. 34.

35 E.g., "Freedom to leave a country or a hemisphere is as much a part of liberty as freedom to leave a State." Ibid., at 944.

36 The word "reintroduce" is used advisedly. Professor Corwin has maintained that rights under natural law were recognized and protected by early American courts and that in practice, at least, natural law principles still supply the meaning of such constitutional concepts as "liberty" and "due process." Corwin, Natural Law and Constitutional Law, 3 Nat. Law Inst. Proc. 47 (1950).

37 The question ordinarily arises with regard to the validity of legislation. See opinion of Iredell, J., Calder v. Bull, 3 Dall. (U.S.) 386, 399 (1798): "If any act of Congress, or of the
The founding fathers may well have considered the right of unrestrained exit from one's country as an incident of individual liberty. In 1765 Blackstone wrote that "every body has, or at least assumes, the liberty of going abroad when he pleases." This assumption had some basis in legal precedent. But the existence at early common law of a "right" to leave the country without royal license has been a matter of debate among legal commentators and historians, and whatever right there might have been was qualified by the royal prerogative to restrain a subject from leaving England by proclamation or issuance of the writ *ne exeat.* By the early part of the eighteenth century, however, the use of *ne exeat* as a prerogative writ had ceased. Although the "freedom to travel" may

Legislature of a state, violates... constitutional provisions, it is unquestionably void. If on the other hand [Congress or a state legislature] shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice." In United States v. Cruikshank, 92 U.S. 542 (1875), the rights of life and liberty, while recognized as "natural rights of man" were held constitutional rights only insofar as the Fifth and Fourteenth Amendments protect them from governmental interference. The classical doctrine is stated by Cooley: "The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision. ..." 1 Cooley, Constitutional Limitations 345 (8th ed., 1927).

A contention that the right of foreign travel is protected by the Ninth Amendment would probably meet with judicial disfavor. See United Public Workers v. Mitchell, 330 U.S. 75, 96 (1947): "If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail." For a recent work on the Ninth Amendment see Patterson, The Forgotten Ninth Amendment (1955). It has been suggested that the right to travel stems from the right of expatriation. See Parker, op. cit. supra note 9, at 856.

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29 Clergymen were early forbidden to leave the kingdom without license of the King, Constitutions of Clarendon (1164), in Stubbs, Select Charters Illustrative of English Constitutional History 135 (8th ed., 1900). The Magna Carta of King John in 1215, however, guaranteed the right of free departure from and return to the kingdom except in time of war. But when the Charter was reissued the following year by Henry III, this clause was deleted. McKenchnie, Magna Carta 407–408 (2d ed., 1914). In 1381 an act of Parliament prohibited all persons except the lords and "great men," merchants, and the King's soldiers from going abroad without license. 5 R. II, c. 2 (1381). This act was not repealed until 1606. 4 Jac. I, c. 1 (1606).

Fitz–Herbert, New Natura Brevium 192 (8th ed., 1755), 1 Bl. Comm. *265, and Beames, Ne Exeat Regno 1 (2d ed., 1824), believed that the common law gave the right to depart the realm without license of the King. Coke took the opposite view, that the Constitutions of Clarendon (and by implication the statute of 5 R. II) were declarative of the common law. 3 Inst. *179. Fitz–Herbert's view was also greatly doubted by the Justices of the Queen's Bench. See 2 Dyer. 165b. (1558).

40 Fitz–Herbert, New Natura Brevium 193 (8th ed., 1755). The standard form of the writ, formerly called *de securitate,* recited that the King was given to understand that the subject designed to go out of the realm "to prosecute there many Things prejudicial to [the Crown]." Ibid. The protection of manpower, as well as fear of reasonable activity abroad, were the grounds for the issuance of the writ. The cause was not traversable by the subject, 2 Dyer. 165b. (1558), and the writ could issue on the application of any of the principal secretaries without showing cause. 1 Bl. Comm. 199 n. 20 (Am. ed., 1832).

41 1 Bl. Comm. 199 n. 20 (Am. ed., 1832). The writ was still utilized in suits in equity to provide security against a defendant's leaving the country. At present, federal district courts may
thus have been a concept not unknown to the founders, there is no evidence how (or if) they may have intended to make constitutional provision for it.

**First Amendment**

It has been urged that restrictions on foreign travel may infringe First Amendment liberties. This position undoubtedly has some merit. Several arguments may be advanced. First, as suggested by Judge Wyzanski in a magazine article, travel may be assimilated to freedom of speech and other First Amendment liberties as a facet of freedom of expression and communication. Secondly, denial of a passport in order to prevent criticism abroad of American policy may be considered invalid as a prior restraint on freedom of speech. Although it has been urged that there are no geographical limitations to the Bill of Rights, the few relevant cases supply no clear answer to the question of the applicability of the First Amendment abroad.

issue a writ *ne exeat* subject to the "well settled principles of law" that "no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made . . . that the defendant designs quickly to depart from the United States." Reviser's Note to 28 U.S.C.A. § 1651 (1950). See Boudin, op. cit. supra note 9, at 47 et seq.

43 Boudin, op. cit. supra note 9, at 58–59 et seq.; Yale L.J., op. cit. supra note 9, at 193 et seq. See Judge Wyzanski's article, Freedom To Travel, 190 Atlantic Monthly, No. 4, at 66 (Oct., 1952).

44 Freedom To Travel, 190 Atlantic Monthly, No. 4, at 66, 68 (Oct., 1952).

45 Consult Boudin, op. cit., supra note 9, passim; Yale L.J., op. cit. supra note 9, at 193. Undoubtedly, the motive for most recent passport denials was to prevent activity abroad by persons of allegedly communistic or left-wing sympathies, which activity the State Department fears may be inimical to the "best interests of the United States." Consult, e.g., 26 Dept't State Bull. 919 (1952). Such activity would include, to a greater or lesser extent, the exercise abroad of privileges of free speech and assembly guaranteed by the First Amendment. Where travel abroad is incident to an applicant's writing or reportorial activities, as in Bauer v. Acheson, 106 F. Supp. 445 (D.D.C., 1952), freedom of the press may also be indirectly restrained to the extent that sources of information otherwise available may be closed. Freedom of religion might conceivably be invoked where an applicant seeks a passport to attend a religious conclave or to make a pilgrimage. Prior restraints are unconstitutional, Thomas v. Collins, 323 U.S. 516 (1945), Near v. Minnesota, 283 U.S. 697 (1931), other than in the most "exceptional cases." Ibid., at 716.

46 Boudin, op. cit. supra note 9, at 50.

A "clear and present danger" need not be shown where speech abroad is reasonable. Chandler v. United States, 171 F. 2d 921 (C.A. 1st, 1948), cert. denied 336 U.S. 918 (1949). (This case has been cited for the assumed implicit proposition that the Bill of Rights is applicable outside of the United States. Boudin, op. cit. supra note 9, at 50 n. 33.) The Fourth Amendment has been said to guarantee a citizen in occupied Germany against unreasonable searches and seizures by American military authorities, Best v. United States, 184 F. 2d 131, 138 (C.A. 1st, 1950), but the conclusion may have been based on the existence of an American military government. The Supreme Court has held that an American citizen is not entitled to Sixth Amendment protection in a trial in an American consular court for a crime committed in foreign territory. In re Ross, 140 U.S. 453, 464 et seq. (1891). Compare Eisentrager v. Forrestal, 174 F. 2d 961 (App. D.C., 1949), rev'd sub nom. Johnson v. Eisentrager, 339 U.S. 763 (1950). Consult generally The Constitution Abroad: The Operation of the Constitution Beyond the Continental Limits of the United States, 32 Tex. L. Rev. 58 (1953).
It could perhaps be contended that in any event the denial of a passport limits only the place of exercise of First Amendment privileges and does not affect at all their exercise within the United States. The limitation may be decisive, however, where basic to the purpose of the applicant's trip is an intention to attend a meeting or address a body abroad. Moreover, as Leonard Boudin has emphasized, the State Department regulations may affect First Amendment privileges at home by punishing those who in the past have exercised these privileges and (less clearly) by restraining their future exercise by holding out a passport as "bait." It is somewhat surprising that the reported opinions have not directly mentioned passport restrictions in terms of First Amendment problems. The Fifth Amendment has appeared more relevant, undoubtedly partially because it affords some authority for the constitutional character of the citizen's interest in free travel.

**Fifth Amendment**

The courts in the Bauer, Shachtman and Boudin cases included freedom to travel abroad within the Fifth Amendment concept of "liberty." The judicial authority for such an interpretation is hardly conclusive. Where the issue was the extent of state power to regulate interstate travel, the Supreme Court had said, however, in Williams v. Fears, that "the right to remove from one place to another according to inclination is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a

Boudin, ibid., argues for this result and accordingly rejects "reasonable regulation under law" which he conceives to be the test of the Shachtman court. The "clear and present danger" test has been applied to a prior restraint, Thomas v. Collins, 323 U.S. 516 (1945); see Terminiello v. Chicago, 337 U.S. 1 (1949). On the assumption that activities abroad, because of their distance from this country, pose less of a security threat than similar acts committed here, a more rigid test for government restrictions has been suggested. Yale L.J., op. cit. supra note 9, at 195 et seq. A contrary assumption may, however, be justified in some circumstances and this, plus the recognition that activities abroad may go unpunished, would argue for application of a less stringent test.

State Department Regulation 51.136 reads: "In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States." (Emphasis supplied.) 22 Code Fed. Regs. § 51.136 (Cum. Supp., 1955). Compare the language in the other substantive regulations, note 77 infra.


179 U.S. 270 (1900) (state tax on hiring within state for labor in another state upheld).
right secured by [the due process clause of] the Fourteenth Amendment. . . ."53
But none of the interstate travel cases explicitly recognizes a right of freedom of
movement, interstate or international, as against the federal government.54
It may be questioned whether confinement within the territory of the United
States (or the Western Hemisphere)55 can properly be considered a deprivation
of liberty within the proscriptive intendment of the due process clause of the
Fifth Amendment.56 Moreover, it should be noted that if liberty of travel is
protected by the Fifth Amendment rather than by the First, problems may
arise as a result of the fact that the Fifth Amendment is applicable to properly
qualified aliens57 as well as to citizens, and consequently such aliens share what-
ever right the citizen may have to leave or enter the United States to the extent
that the citizen's right is protected constitutionally by the Fifth Amendment.

C. The Government's Interest: The Passport's Diplomatic Function

Turning to the interests of the government, it would be difficult to deny that
it has a legitimate interest in the issuance of passports. Passports bear on their
face a request in the name of the United States that American diplomatic and
consular officers and the officials of foreign governments accord the bearer good
offices and protection.58 In addition to being prima facie evidence of a right to
consular and diplomatic protection and a "letter of introduction"59 to foreign
governments, the passport represents an official declaration of intent that the
issuing government will, if necessary, exercise in favor of the bearer the former's
right under international law to protect the interests of its nationals. It would
seem, however, that any government obligations of protection arise from the
citizenship of the traveler rather than his passport.60 Still, the executive division,
which has primary responsibility for the conduct of foreign affairs, may have a legitimate concern that it not be suffered to "vouch for" a citizen whose activities abroad are in its estimation likely to embarrass the United States in its foreign dealings.\footnote{61} Were a passport only a diplomatic document, the immunity from judicial review asserted by the Secretary of State in the exercise of passport discretion would undoubtedly be justified by the cases holding foreign affairs decisions "political questions" beyond judicial competency.\footnote{62}

THE MAINTENANCE OF SECURITY

The problem is completely transformed, however, when the refusal of a passport is tantamount to a denial of freedom to travel\footnote{68} and the vital question becomes the power of the government to restrain that freedom. Not only is the interest of the citizen in obtaining a passport made more critical, but the executive may now utilize passport controls to implement policies which could not be thus implemented when the passport constituted a mere diplomatic document. The reason for refusal of a passport may involve foreign affairs matters considered more crucial than any interest advanced or protected in denying the old passport, or it may be dictated by internal security considerations.\footnote{64} In order that appropriate standards for passport administration may be erected, it

\footnote{61} The Solicitor for the State Department wrote in 1906: "It may well be that we may not care to give a letter of introduction or request good offices for a citizen of the United States whose conduct as evidenced by his past and present actions is likely to embarrass the United States. Such a case would seem to be a proper one for the Secretary to exercise his discretion and refuse the issue of a passport." 3 Hackworth, Digest of International Law 499 (1942).

\footnote{62} Most of these cases deal with decisions on the strictly "political level" of international dealings, e.g., Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Jones v. United States, 137 U.S. 202 (1890) (both cases dealing with recognition); Foster v. Neilson, 2 Pet. (U.S.) 253 (1839) (international boundaries); Williams v. The Suffolk Insurance Co., 13 Pet. (U.S.) 415 (1839) (control of disputed territories); Terlinden v. Ames, 184 U.S. 270 (1901) (competency to perform treaty obligations). However, in Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948), the Supreme Court held that the President's approval of a Civil Aeronautics Board order granting a permit to operate a foreign airline route to one carrier and denying it to another was a non-reviewable exercise of discretion in the field of foreign affairs. But see United States v. Curtiss-Wright Export Co., notes 100, 101 and corresponding text infra. See also the passport cases cited in note 2 supra.

On the doctrine of "political questions" consult generally Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485 (1924); Finkelstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338 (1924); Weston, Political Questions, 38 Harv. L. Rev. 296 (1925); Finkelstein, Further Notes on Judicial Self-Limitation, 39 Harv. L. Rev. 221 (1925). The last three articles constitute a debate as to the basis for the doctrine.

Assuming that the constitutional principle of separation of powers (Weston, supra) rather than judicial self-limitation (Finkelstein, supra), restrains federal courts deriving their sole power under Article III from deciding "political questions," perhaps the area may theoretically be open for consideration by the courts of the District of Columbia. See, e.g., O'Donoghue v. United States, 289 U.S. 516, 545 (1933).

\footnote{63} Passport requirements for egress and ingress and for passage across foreign international boundaries are discussed supra, at 260–61.

\footnote{64} The public interest in restraining fugitives from justice, protecting against absconding debtors, etc., is not considered here.
is necessary first to determine under what authority and by the exercise of whose powers the interests of the government in travel control are sought to be advanced.

D. **Balancing the Interests: The Statutory Scheme**

Courts and applicants alike have assumed that the Secretary of State retains discretion in passport matters whereas refusal of a passport may operate to restrict or prevent travel. It is unclear whether such discretion is considered as resulting solely from the original Passport Act of 1856 and its successors or whether it is deemed to be inherent in the executive function. This would not seem vital, however, since in either event the Secretary’s passport discretion previous to 1918 had not involved the power to control the travel of individuals; certainly this latter power is not inherent in the executive control of foreign relations. Implicit, then, in the assumption of continued passport discretion is that the Travel Control Act of 1918 and its successor, the Immigration and

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65 Consult note 28 supra. The original statutory passport provision, **Section 23 of “An Act To Regulate the Diplomatic and Consular Systems of the United States,”** seemed to be concerned with who shall be authorized to issue passports and with restricting eligibility to citizens. 11 Stat. 60 (1856). Section 23 read in part: “[T]he Secretary of State shall be authorized to grant and issue passports, and cause passports to be granted or issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue or verify any such passport . . . nor shall any passport be granted or issued to or verified for any other persons than citizens of the United States . . . .” The references to the legislation in the Congressional Globe are meagre. With regard to the Senate bill, which was substantially like the House version which became law, Senator Seward said: “I have no doubt it will be . . . a convenience to Americans abroad. All that I was careful about was, that there should be no statute authorizing a charge for these passports abroad.” Cong. Globe, 34th Cong. 1st Sess. 1797 (1856).

By 1874, the language “shall be authorized” had been changed to “may,” Revised Stats. § 4075 (1874), and the language was retained in the current version, entitled “An Act To Regulate the Issue and Validity of Passports, and for Other Purposes.” 44 Stat. 887 (1926), 22 U.S.C.A. § 211(a) (1952). Section 2 of this Act also provides that the Secretary “may limit” the validity of a passport to a period shorter than the prescribed two years. The word “discretion” does not appear in the statute but only in the Presidential regulation pursuant thereto. Consult note 3 supra.

66 Consult note 10 supra and cases cited in note 2 supra. The position of the Shachtman court, for example, is unclear.

67 Passage of the Travel Control Act of 1918 reportedly was urged by the State Department primarily because it considered itself without legal authority to require passports for egress and ingress. 56 Cong. Rec. 6029–30 (1918). Consult note 70 infra. The Supreme Court has, however, recognized wide discretion in the President to proclaim embargoes in order to serve foreign policy ends. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) and cases there cited.

The Secretary has asserted discretionary authority to restrain individuals from departing the United States for countries travel to which does not require a passport. 22 Code Fed. Regs. § 53.5 (1949). It has been alleged that this power was exercised to restrain Paul Robeson from travelling to Canada. Brief for Appellant at 11, 55, Robeson v. Dulles, App. D.C., No. 12983. The case is pending.

68 Consult note 6 supra.
Nationality Act, must allow or authorize the discretion to be exercised where the purpose and effect are to control the travel of particular individuals.

That the Travel Control Act of 1918 impliedly recognized the discretion of the executive in passport matters seems manifest by the scheme of the Act itself. Passport administration was chosen as the instrument to effect travel controls designed by the executive in accordance with the purposes of the Act. However, it is unclear whether the purposes of the Act went beyond providing general prohibitions on travel to particular areas. All that the debates reveal is that the House was certainly aware that discretionary limitations on the travel of individuals, as well as general embargoes to restricted areas, might be the effect of the proposed legislation. The language of the statute does not make this result necessary.

Discretionary limitations on individual travel have resulted, however, and given the vagaries of congressional intent we may assume for purposes of further analysis that this result was within the objectives of the Act. The inquiry then becomes whether Congress has power to provide for restrictions on the free egress and ingress of citizens and by what standard that power is to be measured. This issue has not been tested. In Communist Party v. Subversive Activities Control Board, testing the validity of the registration requirements of the Internal

69 For text of passport provisions, consult note 6 supra. But for minor amendments, the language is the same as that of the Travel Control Act of 1918.

Representative Flood, chairman of the House Committee on Foreign Affairs which reported the House bill, said the purpose of the law was "to give the executive departments of the Government power to control ingress to and egress from this country." 56 Cong. Rec. 6029 (1918). Subjected to inquiries as to whether the bill would allow the Executive to decide who shall and who shall not have a passport, Representative Flood replied that the President could make proclamations regarding "particular places or particular persons." The context of these and similar remarks suggests, however, that the reference might have been to "particular persons" who wanted to go to different countries, i.e., Mexico and Canada. Ibid., at 6030.

Representative Huddleston recommended unsuccessfully that the bill be amended to apply to egress only. He pointed out that passports were granted at the will of administrative officers, and "under . . . the bill a citizen temporarily and lawfully absent may be deprived of the right to come back to this country . . . without due process of law." This was applauded. Ibid., at 6063-64. No due process argument was made regarding egress. Representative Flood said that some citizens in Germany were known by this government to be disloyal but that the proof probably would not stand up in court. A purpose of the legislation, he asserted, was to keep spies out. Ibid., at 6066. The Senate debates add little other than emphasizing the concern that Canadian travel should not be restricted. Ibid., at 6191-95, 6246-48.

The Travel Control Act of 1918 appeared originally after the general passport provisions as §§ 223-26 of Title 22 U.S.C.A. Its successor legislation is found at 8 U.S.C.A. § 1185 (1953). Following the current regulations under this legislation appears this language: "Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries." 22 Code Fed. Regs. § 53.8 (1949).

The "except as otherwise provided" clause (consult note 6 supra) was said by Representative Flood to refer to excepting certain countries, there being particular concern for Canada. 56 Cong. Rec. 6029 (1918).

Security Act, the Court of Appeals for the District of Columbia, while terming the passport a "privilege" subject to reasonable congressional restriction, explicitly reserved decision on the due process question where legislative denial of a passport deprives the citizen of his freedom to travel. Assuming congressional power, legislation which provides no standards for egress and ingress restrictions imposed by the executive would seem to constitute an invalid delegation. It may also be argued that the Internal Security Act, which prescribes security

73 223 F. 2d 531, 555 (App. D.C., 1954). The restriction being considered was Section 6 of the ISA; consult note 75 infra.

74 The combined effect of the Passport Act and 66 Stat. 190 (1952), 8 U.S.C.A. § 1185(b) (1953), consult notes 3 and 6 supra, would appear to vest in the executive a complete discretion to set the standards for egress and ingress.

Because the foreign relations power is "inherent" in the executive (see, e.g., Knauff v. Shaughnessy, 338 U.S. 537, 542 [1950] and consult generally Corwin, The President's Control of Foreign Relations [1917]), the doctrine of non-delegation, requiring the legislature to provide sufficiently clear standards to guide executive action, is not applicable to a statute merely "implementing" that power. Knauff v. Shaughnessy, supra. Compare United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). The power to restrict travel is not, however, included in the inherent foreign relations power of the executive; consult note 67 supra and corresponding text. Merely finding the existence of a "reasonable relation to the conduct of foreign affairs" in the Secretary's reason for denial of a passport would not suffice to make legislative standards unnecessary.

The doctrine of non-delegation is rarely successfully invoked—in only three cases have congressional delegations been invalidated by the Supreme Court. Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). In other cases, the Court has found vague standards sufficient, e.g., Lichter v. United States, 334 U.S. 742 (1948); inferred standards from context or legislative history, e.g., Carlson v. Landon, 342 U.S. 524 (1952); or dismissed the contention of undue delegation with a bare assertion that sufficient standards were present, e.g., McKinley v. United States, 249 U.S. 397 (1919). Consult, generally, Davis, Administrative Law 41–59 (1951).

However, if "the power to delegate is . . . still subject to some limits," Davis, ibid., at 86, granting unbridled discretion to set the standards for travel control would appear to be a clear case requiring limitation. Consult Yale L.J., op. cit. supra note 9, at 192 and Boudin, op. cit. supra note 9, at 62 et seq.

75 The provisions of the ISA regarding passport regulation have not yet been invoked by the State Department. Section 6(b) of the ISA, 64 Stat. 987, 993 (1950), 50 U.S.C.A. §§ 781, 785(b) (1951) provides: "When an organization is registered, or there is in effect a final order of the [Subversive Activities Control] Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization." (Emphasis supplied.) Subsection (a) makes it unlawful for a member of "a Communist organization as defined in paragraph (5) of section 782 of this title . . . registered, or [as to which] there is in effect a final order of the Board requiring such organization to register . . . with knowledge or notice that such organization is so registered or that such order has become final—(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or (2) to use or attempt to use any such passport." (Emphasis supplied.) Violators are subject to a $10,000 fine, 5 years' imprisonment or both. 64 Stat. 1002 (1950), 50 U.S.C.A. § 794(c) (1953). Definitions of groups as "Communist-action," "Communist-front," "Communist-infiltrated," and "Communist" may be found at 64 Stat. 989 (1950), as amended 50 U.S.C.A. § 782 (Cum. Supp., 1954).

Because no group has registered or been finally ordered to register (ISA §§ 7, 13, 14), the statutory passport provisions are currently applicable only to persons who knowingly become
standards for passport denials, has pre-empted the premises. In either event, the State Department's adopted standards would seem to be an invalid assumption of legislative power.

**The Search for a Proper Standard**

In this context, when viewed as a precedent delineating governmental power to restrict foreign travel, the *Shachtman* opinion with its "dual standard" pre-

or remain members of the Communist Party with knowledge of its objectives. Such persons were made subject to the ISA sanctions as members of a Communist-action group by the Communist Control Act of 1954, 68 Stat. 775, 776 (1954), 50 U.S.C.A. §§ 841, 843 (Supp., 1954). The Communist Party has been ordered to register under the ISA but the order is not final, the Party having carried the issue of the Act's constitutionality to the Supreme Court. Communist Party v. Subversive Activities Control Board, 223 F. 2d 531 (App. D.C., 1954), cert. granted 349 U.S. 934 (1955).

One difficulty with this argument is that the ISA provides only for situations in which granting a passport or applying for a passport may be punishable. It does not otherwise set standards for denial. Consult note 75 supra. Opposite inferences may be drawn from this. Also, congressional pressure apparently existed for the adoption of State Department standards. Consult Yale L.J., op. cit. supra note 9, at 195 n. 5. The statutory purpose of providing for review prior to the imposition of sanctions would appear, in any event, to be subverted by independent State Department standards.

The sections of the passport regulations embodying these standards and the accompanying procedural regulations, 22 Code Fed. Regs. §§ 51.137–51.170, summarized in note 110 infra, were adopted in September and January 1952, certainly partially in response to Bauer v. Acheson, 106 F. Supp. 445 (D.D.C., 1952), decided in August, but also possibly in reaction to congressional pressure for accomplishing the results of ISA Section 6 without the necessity for applying the Act's complicated registration procedure. Consult Yale L.J., op. cit. supra note 9, at 195 n. 5. It has been suggested that the regulations, substantive and procedural, are invalid for failure to comply with the rule-making provisions of the Administrative Procedure Act, 60 Stat. 238 (1946), 5 U.S.C.A. § 1003 (Cum. Supp., 1950) requiring public notice and opportunity for submission of views on proposed rules by interested parties before the rules are published as adopted. Brief for Appellant at 29–31, Robeson v. Dulles, App. D.C., No. 12983, pending. The applicability of the APA is discussed infra pages 285–87.

The basic substantive rules are: "In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement." 22 Code Fed. Regs. § 51.135 (Cum. Supp., 1955). Section 51.136, prescribing an additional standard for denial, is set out note 48 supra.
sents a perplexing ambiguity. The opinion suggests that a passport may be de-
nied if the grounds for denial bear a "reasonable relation to the conduct of
foreign affairs." It is uncertain, however, what interests of the citizen in free-
dom of travel were intended to be subject to limitations upon compliance with
this test.

A mere showing of a "reasonable relation" may suffice as a ground for pass-
port denial without more, but it is a dubious standard when applied to statutory
restrictions on egress and ingress. However, the Shachtman opinion proposed, in
addition to the "reasonable relation" test, that the right of travel is subject to
"reasonable regulation under law." From this latter it may be inferred that the
court was deciding standards appropriate for the administration of the travel
control statute, but a careful consideration of the opinion raises a caveat. It may
be proper to interpret the decision as meeting the problem of the Secretary's
discretion only where no legal restraint on exit is threatened. Conceivably, be-
cause the travel control statute was not directly before the court in the Shacht-
man case and because of the practice not to anticipate constitutional ques-
tions, the court may have been reluctant to review the denial of a passport under
standards appropriate for exit controls. Since the court had to assume the con-
stitutionality of the travel control statute, it would have been anomalous for it
to imply standards appropriate for egress and ingress when one of the principal
costitutional issues which would be presented if the travel control statute were
before the court would be whether or not it was an unconstitutional delegation
of powers. Although it is not obvious the Shachtman court used this analysis,
the difficulties it suggests may best account for the ambiguity in the opinion.

Assuming that the current travel control statute impliedly prescribes a
"reasonable relation to the conduct of foreign affairs" standard to guide the
Secretary's discretion, any resulting restrictions on freedom of travel are valid
only if these restrictions constitute a reasonable means for accomplishing a
legitimate congressional objective which the statute is designed to serve.
Though partially, perhaps, an intended exercise of the foreign affairs power,

"reasonable regulation" tests are not related in this opinion. Consult page 265 supra.
80 See, e.g., United States v. Petrillo, 332 U.S. 1, 10 (1947); United Public Workers v. Mitch-
81 A violation of the statute may be considered unlikely: (1) because the deterrent force of
the statute is so great; and (2) because a carrier generally will afford passage to persons
required to bear a passport only upon presentation of that document.
83 Finding an implied standard seemingly would save the statute from non-delegation ob-
jections. Consult note 74 supra.
84 There is evidence that Congress in 1918 intended to act in the sphere of foreign relations.
The bill, sponsored by the State Department, was referred to the House Committee on For-
eign Affairs. When enacted, it was codified in Title 22 of the United States Code, which deals
with foreign affairs.
the Travel Control Act of 1918 was aimed primarily at protecting the national security. Today, given the international conspiratorial nature of the Communist movement, recognized by Congress and the courts alike, it cannot be denied that the conduct of foreign affairs is peculiarly affected with the gravest security considerations which moreover cannot be nicely divided into "external" and "internal" sectors. Such considerations cannot be divorced from the "cold-war" tactics of foreign policy, the ultimate aim of which always is to protect and foster the national interest and security. It does not follow, however, that egress and ingress restrictions on grounds merely "reasonably related" to the conduct of foreign affairs necessarily imply a reasonable means-end relationship to the legitimate object of preserving the national security.

Since the travel control statute was not properly before the court in the Shachtman case the "reasonable relation to the conduct of foreign affairs" test may have been advanced solely to indicate the limits of judicial protection of the citizen's interest in unhampered crossing of international boundaries while abroad. As a measure of the limits upon the citizen's right to be "vouched for" by his government, where failure to do so will result in denying him entry to a friendly foreign nation, the "reasonable relation" test might seem peculiarly appropriate. A failure to show a "reasonable relation" in denying a passport, since the travel control statute was not properly before the court in the Shachtman case the "reasonable relation to the conduct of foreign affairs" test may have been advanced solely to indicate the limits of judicial protection of the citizen's interest in unhampered crossing of international boundaries while abroad. As a measure of the limits upon the citizen's right to be "vouched for" by his government, where failure to do so will result in denying him entry to a friendly foreign nation, the "reasonable relation" test might seem peculiarly appropriate. A failure to show a "reasonable relation" in denying a passport, since the travel control statute was not properly before the court in the Shachtman case the "reasonable relation to the conduct of foreign affairs" test may have been advanced solely to indicate the limits of judicial protection of the citizen's interest in unhampered crossing of international boundaries while abroad. As a measure of the limits upon the citizen's right to be "vouched for" by his government, where failure to do so will result in denying him entry to a friendly foreign nation, the "reasonable relation" test might seem peculiarly appropriate. A failure to show a "reasonable relation" in denying a passport,
where the citizen's interest in free travel while abroad is involved, would thus constitute an arbitrary exercise of the Secretary's discretion.91

The "reasonable relation" test is not, however, without its difficulties even assuming the absence of internal travel restrictions. First, it imposes upon the judiciary the task of determining what is and what is not germane to the conduct of foreign affairs—a question which involves the evaluation of political, not legal, criteria.92 There is a more crucial difficulty with the "reasonable relation" standard when viewed against constitutional recognition of the citizen's "right to travel, to go from place to place."93 This difficulty stems from the fact that foreign governments by requiring a passport for entry into their territories have indirectly provided the Secretary of State with means to restrict travel from the United States to their countries. Though this power stems from the action of the foreign governments rather than the United States, the effect of an arbitrary denial of a passport is equally onerous on a citizen seeking to travel to a country requiring a passport for entry.

The Shachman court proposed that restrictions on the "right of travel, to go from place to place as the means of transportation permit" must conform to the Fifth Amendment provision that "[n]o person shall be ... deprived of ... liberty ... without due process of law,"94 i.e., restraints must conform to "reasonable regulation under law." It is unclear whether this language was prompted solely by the internal restrictions on exit or whether the court was also considering foreign requirements of a passport for entry.

Certainly the language of the Shachman opinion is broader than would be required strictly to meet the problem of the travel control statute if the latter is read as only prohibiting egress and ingress without "a [any?] valid passport,"95 and not controlling the legality of the citizen's travel once outside the Western Hemisphere.96 If standards of substantive due process are appropriate for travel


92 The requirement that the grounds for the denial be "reasonably" related to the conduct of foreign affairs negates the inference that a mere allegation of relatedness will suffice to preclude judicial review, i.e., that the "test" is merely a formal rule of pleading. The State Department cannot be the judge of the reasonableness of the relation. It may be, however, that only a minimal showing will be required. Nonetheless, a judicial determination of reasonable relatedness appears to be contemplated. Problems of the allocation of the burden of proof are beyond the scope of this note. It would seem that their resolution would be crucial, given the "reasonable relation" substantive standard. Regarding the "political question" problem consult note 62 supra.


94 Ibid.


96 It may be asked whether the Secretary could avoid standards appropriate to the travel control statute by merely issuing a passport restricted to one country (and that, perhaps, not one to which the applicant desired to travel). By so doing the citizen certainly could not complain that his freedom to leave the country had been restrained. On the other hand, if
restriction, they should certainly be applied to internal restrictions on citizens' egress and ingress. And if, in addition, the travel control statute gives the Secretary power to proscribe travel by citizens to certain countries, the same standards should probably apply to such restrictions, although the citizen has "a valid passport" and is free to leave the United States. Finally, were there no internal restrictions on exit or entry (or assuming that the Secretary of State does not have the power to make unlawful travel to a particular country and has issued a passport to another country) so that the only restriction stemmed from a foreign government’s requirement of a passport for entry it can be argued, for the reasons suggested above, that a standard akin to "reasonable regulation under law" should still be required. However, in this latter situation the power of the Secretary of State to refuse to issue a passport might well be construed as being incidental solely to the executive control over foreign relations, and it is doubtful that the Constitution would require more than that the grounds for a

the interest of the citizen deserving constitutional protection is not only the freedom to leave the country but also to travel once abroad, the question becomes whether the citizen would be guilty of any unlawful conduct if he traveled, once legally out of the United States, to countries specifically excepted from his passport.

The applicant is required by the regulations to reveal "[t]he names of the countries ... [he] intends to visit and the object of the visit to each" (22 Code Fed. Regs. §§ 51.23[d] and 51.24[o] [Cum. Supp., 1954]) and it would be a violation of the statute to "willfully and knowingly [make] any false statement in an application for [a] passport ... contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws" (62 Stat. 771 [1948], 18 U.S.C.A. § 1542 [1950]). Presumably, then, it would be punishable for an applicant to fail to reveal his intention to travel to certain countries when making his application.

However, this does not answer the question whether an applicant who fully disclosed his intention to travel to a certain country (e.g., France) and was denied a passport to that country but issued a passport restricted to another country (e.g., England) could then lawfully travel to France from England, returning to the United States by way of England. The statute provides: "Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports ... [s]hall be fined not more than $2,000 or imprisoned not more than five years, or both." (Emphasis supplied.) Ibid., at § 1544. Assuming, though, that the citizen did not use his passport in traveling between England and France or while he was sojourning in France (an unlikely assumption in view of entry restrictions), it would seem that he had not violated this provision. Since on his departure from the United States and on his return from England he would be bearing "a valid passport," which is all that is required by the current travel control statute, it could well be argued that he had not been guilty of any unlawful conduct. To date, the interpretive problem here suggested has not been considered in any reported opinion.

Some doubt is cast on the above interpretation by the fact that a citizen who travels to other countries in the Western Hemisphere (travel to which a passport is not required) cannot avoid the prohibition of the statute by traveling via those countries to ones outside the Western Hemisphere. The regulations specifically provide that the non-requirement of a passport to Western Hemisphere countries does not apply where the citizen intends to leave the hemisphere or where he is returning from countries travel to which a passport is required. 22 Code Fed. Regs. § 53.2(b) (Cum. Supp., 1954).

97 Consult page 278 infra.

98 Consult notes 10, 61, 62 supra.
denial of a passport bear a "reasonable relation to the conduct of foreign affairs." What acceptance of this last proposition amounts to is this: If the presence of internal restrictions should alter the applicable standard to "reasonable regulation under law" (though it may seem less incongruous as an aspect of constitutional doctrine), it must be assumed that the freedom to travel is a right merely to leave the United States or that the legality of a restraint on a citizen's freedom to travel from this country to another depends on whether the restraint (which requires in either case for its effectiveness denial of a passport by the Secretary) was imposed on his departure or on his arrival abroad.

The Shachtman opinion contemplates standards of substantive due process for internal travel controls even though foreign affairs considerations may be involved. For the point that the foreign affairs power is subject to some constitutional limitations the courts in the passport cases have relied solely on Mr. Justice Sutherland's dictum in United States v. Curtiss-Wright Export Corp. regarding the "inherent" power of the President "as the sole organ of the federal government in the field of international relations." Although the later case of Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp. seems to hold that executive discretion in the field of foreign relations will not be reviewed even where private rights may be adversely affected, whatever power the executive has to effect restraints on individual egress and ingress he has solely by virtue of an act of Congress.

The possible presence of foreign affairs factors may make some demands upon traditional concepts of judicial self-limitation, but the interests of the citizen in freedom of travel, which may be so substantial as to involve the latter's livelihood, demand at least the protection envisaged by a "reasonable relation" test. "Reasonable regulation under law" contemplates a reasonable means-end relationship between the means chosen and legitimate congressional purposes. The fact that passport administration, considered traditionally a foreign affairs


100 299 U.S. 304 (1936). The case held that a joint resolution making unlawful the sale of arms and munitions to belligerents in the Chaco "if the President finds that the prohibition of the sale . . . may contribute to the reestablishment of peace between those countries . . . [and] makes proclamation to that effect" was not an invalid delegation of legislative power. Ibid., at 312.

101 "[This] . . . power of the President . . . [is] a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." Ibid., at 320. For a narrow interpretation of the Curtiss-Wright dictum, see Levitan, The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory, 55 Yale L.J. 487, 490 (1946).


function, was chosen as the instrument to effectuate at least egress and ingress controls, certainly cannot remove those controls entirely from judicial scrutiny.

II. PROCEDURAL DUE PROCESS

The District Court for the District of Columbia has several times acknowledged the constitutional character of the citizen's interest in freedom of travel by requiring that procedural due process be accorded him in passport hearings. In Bauer v. Acheson, a three-judge district court decided that, in order that their constitutionality be sustained, the Passport Act and Presidential Passport Regulation § 51.75 must be construed to require that notice and a hearing be afforded before a passport renewal could be refused. In Dulles v. Nathan, a "quasi-judicial" hearing was required. In Boland v. Dulles, the court invalidated a State Department procedural regulation providing for the

Minimal procedural due process requires "notice and opportunity for hearing appropriate to the nature of the case." See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Dohany v. Rogers, 281 U.S. 362 (1930) ("reasonable" notice and "reasonable" opportunity to be heard); Twining v. New Jersey, 211 U.S. 78 (1908). The clause has been held to require that administrative agencies accord a hearing to parties affected by their decisions. Shields v. Utah Idaho Cent. R. Co., 305 U.S. 177 (1938). To comply with due process the administrative hearing must preserve "the rudimentary requirements of fair play." Morgan v. United States, 304 U.S. 1 (1938).

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106 See supra notes 3, 6.

107 It was consequently held that the Secretary's denial without a hearing was not authorized. Bauer v. Acheson, 106 F. Supp. 445 (D.D.C., 1952). Accord: Nathan v. Dulles, 129 F. Supp. 951 (D.D.C., 1955); Clark v. Dulles, 129 F. Supp. 950 (D.D.C., 1955); Foreman v. Dulles, D.D.C., Civil No. 4924-54; all cases requiring a hearing "contemplated by law." 225 F. 2d 29 (App. D.C., 1955). After the State Department failed to provide a passport hearing as ordered by the district court, a subsequent order requiring the Secretary to issue a passport was stayed on the conditions, inter alia, that a "quasi-judicial hearing . . . with opportunity provided to the government and to the [applicant] to offer evidence" be accorded, and that "if a passport is denied, the State Department immediately either (a) inform the Court and the [applicant] with particularity of the reasons for such denial or (b) show cause to this Court with particularity for any failure to supply such reasons." Ibid., at 30-31. This language looks toward the result in Boudin v. Dulles, 136 F. Supp. 218 (D.D.C., 1955), discussed at page 282 infra. The reported decision in the Nathan case vacates the stay order and dismisses for mootness.


109 22 Code Fed. Regs. § 51.170 (Cum. Supp., 1954): "In determining whether there is a preponderance of evidence supporting the denial of a passport the Board [of Passport Appeals] shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the credibility of confidential informants."

Sections 51.138-51.170 prescribe the procedure to be followed when a passport is denied for one of the reasons set out in Sections 51.135-51.136, discussed at notes 48, 77 supra and corresponding text. (Whether this procedure must be followed in other cases of denial is uncertain.) Notice of tentative denial and the reasons therefor must be given "as specifically as in the judgment of the Department of State security considerations permit." The applicant is entitled to an informal hearing before the Passport Office with assistance of counsel and the
use by the Board of Passport Appeals of confidential information as "not com-
port[ing] with due process," and ordered that "all the evidence upon which the
[Passport] Office may rely for its decision . . . must appear on record so that the
applicant may have the opportunity to meet it and the court to review it."\textsuperscript{111}

It is not clear from the opinion in \textit{Boudin v. Dulles} that due process would re-
quire disclosure of the identity of confidential informants and, in addition, the
right to cross-examine,\textsuperscript{112} as well as the contents of confidential information upon
which the Board of Passport Appeals may rely for its decision. The language of
the court indicates a primary concern with disclosure of the latter,\textsuperscript{113} but a pos-
sible right to cross-examination is mentioned cursorily.\textsuperscript{114} Where the administra-
tive agency is dealing with commercial matters the Supreme Court has consid-
ered the opportunity to cross-examine a necessary element of due process.\textsuperscript{115}

right to present an affidavit. Adverse decision at this level entitles him to notice with reasons
subject to the security precautions quoted supra. He has a right to appeal to the Board of
Passport Appeals which must provide a hearing with benefit of counsel and the right
to present witnesses. At the Board hearing the government files become part of the
record, but the applicant may examine only his application and related papers, and each
witness may examine the transcript of his testimony. The Board is instructed to "conduct the
hearing proceedings in such manner as to protect from disclosure information affecting the
national security or tending to disclose or compromise investigative sources or methods"
(section 51.163). At any stage of the procedure the applicant may be required to make an
affidavit respecting present or past membership in the Communist Party as a condition for
proceeding further (section 51.142). Robeson v. Dulles, D.D.C., Civil No. 169-55, appealed,
in which applicant refused to execute a non-Communist affidavit, is the only other reported
case in which the validity of a particular state department passport regulation was before the
court. The court in the Robeson case dismissed the complaint, holding that the applicant
had failed to exhaust his administrative remedies.


\textsuperscript{112} The right to confront one's accusers as guaranteed by the Sixth Amendment applies
only to criminal proceedings. We are here concerned with other situations in which a right to
know one's accusers and to cross-examine them must be deemed an element of due process
under the Fifth Amendment. Consult generally An Informer's Tale: Its Use in Judicial and
Administrative Proceedings, 63 Yale L.J. 206 (1953). Governmental evidentiary privileges
present different problems, of course, as the undisclosed material is technically unavailable
to the tribunal as well as the adversary and is thus not relied upon for decision. On the govern-
ment's evidentiary privileges consult, generally, 8 Wigmore, Evidence §§ 2374-2378 (3d ed.,
1940); American Law Institute, Model Code of Evidence, Rules 227, 228, 230 (1942).


\textsuperscript{114} Ibid.

\textsuperscript{115} See, e.g., Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88, 93
(1913): "All parties must be fully apprised of the evidence submitted or to be considered, and
must be given opportunity to cross-examine witnesses, to inspect documents and to offer
evidence in explanation or rebuttal." Accord: Powhatan Mining Co. v. Ickes, 118 F. 2d 105
(C.A. 6th, 1941); Argonaut Ins. Exchange v. Industrial Accident Com'n, 260 P. 2d 817 (Cal.
App., 1953). Although the constitutional question was not directly involved in the Louisville
& N.R. Co. case, supra, due process notions were used prior to the Administrative Procedure
Act to construe statutory requirements for a "hearing." Compare the suspension of deporta-
tion cases, note 119 infra, where the right to a hearing is based on regulations having the
force of law.
Where secrecy of sources is allegedly maintained for security or effective investigative purposes, however, the compulsions of due process are less clear.

The federal courts have consistently required that an alien be accorded the right to cross-examine in deportation proceedings, although the Supreme Court at one point indicated that the use of information from undisclosed sources need not render the hearing "so manifestly unfair as to require reversal if there were nothing else objectionable in the record." Where the issue is the "discretionary" suspension of deportation, however, disclosure of sources seems not to be required. A Selective Service registrant claiming classification as a conscientious objector has full access only to such files or recommendations as are made available by the Department of Justice to his local board, which has the final power of decision, failure to disclose the identity of FBI informants not being a violation of due process in the ordinary case. Cases involving alien exclusion and discharge from government employment have also allowed the use by an administrative tribunal of confidential information, although here


116 The Attorney General may, in his discretion, suspend the deportation of various classes of deportable aliens upon the fulfillment of residence and application requirements that vary with the ground of deportability, provided that the alien is of "good moral character" and his deportation would result in "exceptional and extremely unusual hardship" either to the alien, or to a spouse or child who is a citizen or an alien lawfully admitted for permanent residence. 66 Stat. 214 (1952), 8 U.S.C.A. § 1254 (1953).


122 Normally, the Justice Department supplies the local boards with only a résumé of the investigative file, a copy of which is furnished the applicant. The applicant is entitled on a preliminary refusal to a hearing before the Justice Department, due process here requiring that a "fair résumé of any adverse evidence in the investigator's report" be supplied, Simmons v. United States, 348 U.S. 397 (1955), more not being necessary since the Department's decision is merely advisory. United States v. Nugent, 346 U.S. 1, 6 (1953). Accord: Imboden v. United States, 194 F. 2d 508 (C.A. 6th, 1952) (failure at Department hearing to disclose identity of informers not a violation of due process); cf. United States v. Bouziden, 108 F. Supp. 395 (W.D. Okla., 1952).


The Supreme Court has not yet recognized a constitutional right to procedural due process.

The recent case of Parker v. Lester must be deemed a significant development in the growth of administrative due process in "sensitive" areas. It was a class action brought to test the constitutionality and to enjoin the enforcement of the maritime employment security program. The relief prayed for was denied, but the district court required that before both the local and national appeal boards the seaman must be furnished "[u]pon demand a statement of particulars setting forth the alleged acts, associations or beliefs or other data which formed the basis for the determination that . . . [the] seaman is a poor security risk or is not entitled to security clearance." However, the decree was qualified to provide that "such bill of particulars need not set forth the source of such data, nor disclose the data with such specificity that the identity of any informers who have supplied such allegations or data will necessarily be disclosed. . . ."

Upon appeal it was held that the regulations, as amended to conform to the decree below, were violative of due process. The court did not deny the necessity for security and screening but said the question was "the public need for a screening system which denies such [traditional] right to notice and hearing." While the ground for decision might have been that the proviso in the decree made it possible for the Coast Guard to withhold contents on the claim that dis-. 

That an alien seeking admission has no such right seems established, Knauff v. Shaughnessey, 338 U.S. 537, 542, 544 (1950). The nature of a citizen's interest in continuation of government employment is controversial. An individual cannot be barred from future federal employment, even temporarily, without compliance with the Sixth Amendment, Bailey v. Richardson, 182 F. 2d 46, 55 (App. D.C., 1950); cf. United States v. Lovett, 328 U.S. 303 (1946) (act of Congress permanently barring named individuals void as a bill of attainder). Nor can a state impose arbitrary or discriminatory conditions on eligibility, Weimann v. Updegraff, 344 U.S. 183 (1952). However, a right to due process in proceedings for removal has been denied, Bailey v. Richardson, supra. The decision was affirmed by an equally divided Supreme Court, 341 U.S. 918 (1951), and in Peters v. Hobby, 349 U.S. 331 (1955), the Supreme Court avoided the same constitutional issue, reversing the Loyalty Board order on other grounds. Compare Parker v. Lester, 227 F. 2d 708 (C.A. 9th, 1955), discussed infra at page 284, in which the court said that the liberty of a merchant seaman to follow his chosen employment "is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job." Ibid., at 717.


The district court found that the government had sustained its "burden of affirmatively justifying . . . all deviations from accepted procedure." 112 F. Supp. 433, 443 (N.D. Cal., 1953). The "compromise" solution of disclosing information, but preserving secrecy of sources, was said to be the current practice of the Loyalty Review Board. 112 F. Supp. 433, 444. See suspension of deportation cases, note 119 supra.


Ibid., at 718 (italics in original).
closure would reveal the identity of informers, the court, relying on Mr. Justice Jackson's dissent in *Shaughnessy v. Mezei*, condemned generally a "system of secret informers, whisperers and tale bearers." However, the court did acknowledge that regulations in some degree limiting the right of confrontation and cross-examination might be valid.

The Administrative Procedure Act, which requires opportunity for "such cross-examination as may be required for a full and true disclosure of the facts," was found inapplicable to the proceedings under review in *Parker v. Lester*. No reported passport decision has considered the possible applicability of the APA. It has apparently been assumed that passport hearings, which are not required by the language of any statute, are by inference excluded from

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132 Ibid., at 722.
133 345 U.S. 206, 224–27 (1953). Mr. Justice Jackson said at 225: "The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one's behalf, is especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed."

134 227 F. 2d 708, 719 et seq. (C.A. 9th, 1955). It was noted that the members of the appeal board may themselves not be able to furnish names of informers as the reports relied on were obtained from the FBI or other government investigative agencies. Ibid., at 717. Douglas, J., dissenting in United States v. Nugent, 346 U.S. 1, 13 (1953), and Jackson, J., dissenting in Knauff v. Shaughnessy, 338 U.S. 537, 550–51 (1950), expressed the view that the government must disclose completely relevant confidential files or refrain from enforcing administrative sanctions allegedly justified by the information contained therein.

135 *Parker v. Lester, 227 F. 2d 708, 723 (C.A. 9th, 1955).* The trial court found that "opportunity for confrontation and cross-examination of adverse witnesses cannot be afforded a petitioner in these situations without destroying the security program." 112 F. Supp. 433, 443 (N.D. Cal., 1953). Circuit Judge Healy, dissenting, would have affirmed the decree in order that the Supreme Court might pass upon the constitutional questions. 227 F. 2d 708, 724 (C.A. 9th, 1955).


137 The principal rights guaranteed a party by the APA (§§ 5–8) are: to subpoena evidence relevant to his case; to present "oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts"; to have decisions supported by "reliable, probative, and substantial evidence"; to have the transcript of testimony, exhibits, and papers filed in the proceeding constitute the exclusive record for decision; to refute matters of which official notice is taken; to submit proposed findings of fact the rulings on which must appear of record; to have findings of all material issues and conclusions with the reasons therefor made on the record; to be heard and have the decision of his case participated in exclusively by officers who are neither engaged in investigative or prosecuting functions for any agency in his or any factually related case nor "responsible to or subject to the supervision or direction" of personnel engaged in such functions for any agency.

138 "The District Court held that the exception in that Act, of cases involving 'the conduct of military, naval, or foreign affairs functions...' applied here. Whether or not this exception applies, this is not a 'case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,' within the meaning of Title 5, Sec. 1004." 227 F. 2d 708, 715–16 n. 12 (C.A. 9th, 1955) (italics in original).

139 Bauer v. Acheson, 106 F. Supp. 445 (D.D.C., 1952), held, however, that hearings are required by the Passport Act, absence of specific language notwithstanding.
the ambit of the APA by the language of Section 5 which makes applicable the
Act's hearing provisions "[i]n every case of adjudication required by statute to
be determined on the record after opportunity for an agency hearing, except to
the extent that there is involved . . . (4) the conduct of military, naval, or
foreign affairs functions. . .." 140

However, the effect of the excepting language generally, and more particu-
larly when applied to passport hearings, is not altogether clear. The foreign
affairs exception has been relied upon to preclude applicability of the Act to
deposition hearings, 141 but in Wong Yang Sung v. McGrath 142 the Supreme
Court did not mention the exception in holding that deportation proceedings
were subject to the APA. It might be argued that the foreign affairs function is
more generally involved in passport than in deportation matters. Still, the lan-
guage of the Act excepts foreign affairs only "to the extent that" that function
is involved. Partial applicability would hardly be feasible, however, and perhaps
it may be presumed that the exception would operate fully on passport proceed-
ings wherever foreign affairs administration is involved. 143

In the Sung case the Supreme Court construed the "required by statute"
qualification to include "hearings, the requirement for which has been read into
a statute by the Court in order to save the statute from invalidity." 144 While
the specific holding of the Sung case has since been reversed by Congress, 145
the Supreme Court's construction of the "required by statute" clause has not been
subsequently modified by that Court. 146 The approach of the court in Bauer v.

141 Yiakoumis v. Hall, 83 F. Supp. 469 (E.D. Va., 1949), appeal dismissed for mootness,
177 F. 2d 804 (1949).

143 The Hoover Commission has recommended that the foreign affairs exception be abol-
ished. Commission on Organization of the Executive Branch of the Government, Legal Services
and Procedure: A Report to the Congress 51-52 (1955) (hereinafter referred to as Commission
Report); Commission on Organization of the Executive Branch of the Government, Task Force
Report on Legal Services and Procedure 406 (1955) (hereinafter referred to as Task Force
Report).

144 Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). The committee draft had read
"required by law." The Attorney General suggested "required by statute or Constitution."
Consult Davis, Administrative Law 428 (1951). The Court refused to follow the implication
of this legislative history that Congress had not intended the Act to apply to hearings not
expressly required by statute.

145 In Marcello v. Bonds, 349 U.S. 302 (1955), the Court held that by providing for "sole
and exclusive" deportation procedure (differing significantly from the APA only with respect to
(1952), 8 U.S.C.A. § 1101 et seq. (1953), had made the hearing provisions of the APA in-
applicable to deportation cases. See APA § 12. The Immigration Act repealed a previous
congressional exception of deportation hearings from the APA made as a reaction to the Sung

146 That construction is favored by the Hoover Commission. Recommendation No. 34(b),
Commission Report 58; Task Force Report 406. Compare Model State Administrative Pro-
Acheson would appear to bring passport hearings within the clause as construed in the Sung case. The further suggestion, supported by persuasive dictum in Sung, that the APA sets the standard for constitutional due process has, however, been rejected in subsequent decisions.

III. Conclusion

The passport cases to date settle decisively only one vital question: The Secretary of State cannot arbitrarily deny a passport. The courts have decided that the Constitution recognizes the right to travel abroad, but the ambiguity of the Shachtman opinion and analytical difficulties with the substantive due process theory raise doubts as to whether the courts are convinced by the Fifth Amendment approach. Moreover, the cases do not settle the question whether the constitutionally protected right is one merely to leave the country or whether it is a right to leave this country for particular foreign lands.

Pushed into the Fifth Amendment as the only available authority supporting freedom of movement, the courts have favored calling the citizen’s interest an aspect of “liberty” within the meaning of that Amendment. By so doing the courts may have created for themselves an uncomfortable precedent. If (a) all internal travel controls are eliminated, or (b) internal restrictions on citizens’ egress and ingress are divorced from the passport, or (c) the current travel control statute is found not to vest authority in the Secretary to restrict the ingress and egress of particular citizens by denying them passports, the citizen

_147_ "Since the Act... is susceptible of an interpretation which would permit due process, it follows that it is not in violation of the Fifth Amendment. The President’s regulation... is susceptible of and must be construed as exacting notice and opportunity to be heard prior to any judgment effecting revocation or refusal to renew a passport... [As so interpreted and applied by the Secretary of State, the Passport Act] would be unconstitutional." 106 F. Supp. 445, 452 (D.D.C., 1952).

_148_ "It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings [where human liberty is involved] the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake." Wong Yang Sung v. McGrath, 339 U.S. 33, 50-51 (1950).


_150_ Consult page 270 for suggestions as to some of these difficulties.

_151_ Query, where under the authority of the travel control statute the Secretary of State makes travel by a citizen impossible to but one (or perhaps a few) foreign countries.

may still be able to base a claim for a passport on the theory that a denial will bar him from entry abroad and accordingly that his liberty to travel is as effectively restrained as if the restriction were imposed by his own government. To avoid this dilemma the courts might then say that the Fifth Amendment protects only the citizen's liberty to leave the country. But to say this is seriously to depreciate his freedom to travel. Travel can only be from one place to another; it cannot be merely "away."

Even assuming the continuing existence of internal travel controls, there is difficulty with labeling the freedom of travel a Fifth Amendment substantive right. If the courts are obliged eventually to weigh more exactly the competing interests of the citizen as against his government, they probably will be compelled to talk in terms of the First Amendment. How else could they evaluate the reasonableness of the government's denial of a passport for security reasons than in terms of something akin to "clear and present danger"? Having reached this stage, it would seem that the citizen's freedom to travel would more accurately be classified as an incident to the liberties guaranteed him in the First Amendment than a substantive right protected by the Fifth Amendment. It should be noted, however, that no court has labeled the citizen's interest a First Amendment privilege and that the analytical justification for such a holding is itself not free from difficulties. First, not only is such a privilege not clearly implied in the First Amendment but freedom to travel is in kind unlike the privileges secured by that Amendment. First Amendment standards may be pertinent, though, where it is the curtailment of the exercise abroad of First Amendment privileges which is being sought and is in fact indirectly effected by the imposition of travel controls. Thus, it may be meaningful to discuss the citizen's interest as a First Amendment privilege where the grounds for a passport denial are the protection of the nation's security, but it would be straining so to evaluate the denial of a passport when the Secretary claims (or shows) that to issue a passport to the applicant would seriously prejudice the nation's foreign relations. To pose this problem is, in turn, partially to indicate the difficulties involved in holding that the First Amendment is applicable abroad. In any event, since the court dearly cannot weigh the possible impact on foreign relations against the citizen's First Amendment interest, the most rigorous standard imaginable here would probably be the "reasonable relation to the conduct of foreign affairs."

This may not be for some time, as it has been the practice of the Secretary of State when challenged by the courts to issue a passport, thus mooting the issue. Consult Boudin, op. cit. supra note 9 at 72 et seq. And there is also the unresolved question of when the courts may consider the standards appropriate to exit controls. Consult notes 80, 81 supra and corresponding text.

Although the determination of appropriate procedural guarantees must await a more exact delineation of the citizen's substantive interest, it would seem that the same guarantees ought to be available to him, since, as has been suggested, his interest is equally affected regardless of whether the restrictions are internal or external, or whatever the nature of the government's interest may be.
Perhaps the only way out of this labyrinth, at least where both internal and external restrictions are involved, is to make the standard turn in every case on the Secretary's defense in an action for wrongful denial of a passport. If the Secretary claims the denial is grounded on protection of the nation's security the court may well require a showing of a "clear and present danger" or some similar standard to uphold the denial of a passport. If, on the other hand, the defense is that to grant a passport would impair the conduct of foreign affairs the court's competence should be limited to a determination of whether or not the denial was "reasonably related to the conduct of foreign affairs." In the last analysis, perhaps, the basic political process must be relied upon to compel the Secretary to answer the charge in good faith.\(^{155}\)

\(^{155}\) Judge Wyzanski has advanced two considerations which seem particularly appropriate from the standpoint of legislative policy: (1) If through travel controls criticism of American policy abroad is prevented, we tacitly take responsibility for that which is "uncensored"; (2) Our international status would be improved by allowing our citizens freely to speak abroad—this policy best sells a tradition of liberty. Consult Wyzanski, Freedom To Travel, 190 Atlantic Monthly, No. 4, at 66 (Oct., 1952). Constitutional rights and passport procedures have been recently the subject of hearings of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. N.Y. Times, p. 22, col. 3 (Nov. 16, 1955).

**BANK ACCOUNTS: TRANSFER OF PROPERTY AT DEATH**

**I. THE JOINT AND SURVIVORSHIP ACCOUNT—ADMISSIBILITY OF PAROL EVIDENCE**

"The familiar joint bank account has had an uneasy career in the courts,"\(^1\) because the joint bank account with right of survivorship, to which one party has contributed all the funds,\(^2\) resists characterization as either a gift or a contract.\(^3\) There is a lack of that divestment of control over the res of the account required for the finding of an executed inter vivos gift,\(^4\) and there is a problem in finding consideration to support a transfer of funds from the donor to the donee by contract.\(^5\) Yet characterization as gift or contract affects the result in a con-

2 Most of the cases involve an account to which total contribution was made by one depositor. This party is usually called the donor or donor-depositor, even though the transaction is not always cast in terms of gift. The terms donor and donee will be used throughout to denote the parties to the joint account. For the origin of this terminology see Matthew v. Moncrief, 135 F. 2d 645 (App. D.C., 1943).
3 The account is upheld by a variety of theories: Contract, Hill v. Havens, 242 Iowa 920, 48 N.W. 2d 870 (1951); Gift, State Board of Equalization v. Cole, 122 Mont. 9, 195 P. 2d 989 (1948); Trust, McDevit v. Sponseller, 160 Md. 497, 154 Atl. 140 (1931).
4 Consult Cleveland Trust Co. v. Scobie, 114 Ohio 241, 151 N.E. 373 (1926). The question of delivery, in that case regarded as delivery of funds, can more accurately be thought of in terms of a gift of a chose in action against the bank that creates a joint and survivorship interest in the donee. See page 294 infra.
5 Estate of Schneider, 6 Ill. 2d 180, 127 N.E. 2d 445 (1955); see also Estate of Edwards, 140 Ore. 431, 14 P. 2d 274 (1932) (discussing problem of consideration where both depositors