Passports

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Passports

Thomas Ehrlich*

Three interrelated theses are presented in this Article. First, a United States passport ought to serve no function other than identification of the bearer as a United States national.1 Second, such limitations as are imposed on the foreign travel of American nationals ought to be imposed directly by statute, not through the medium of passport denials or restrictions. Finally, passport administration ought to be transferred from the Department of State to the Department of Justice.

The burden of supporting these theses is heavy. The first two cut against current notions of a passport's purposes and require proving a negative—that the disadvantages of other possible uses of a passport outweigh the advantages. The third calls for a change in an entrenched bureaucratic status quo. In the course of analyzing these issues, I also hope to cast at least some doubt on the merits of current travel restrictions, apart from the appropriateness of passports as the means to implement them.

I.

Until World War I, American travelers abroad seldom bothered to obtain a passport. With brief wartime exceptions, they were free to leave the United States without one, and few foreign countries demanded that entering aliens exhibit the document.2

United States passports were, of course, issued in this period, even though they were not required. They were apparently seen as serving three purposes. First, a passport was evidence to both United States and foreign officials of the bearer's American nationality. Second, from the eighteenth century to the present, United States passports have contained a request to "whom it may concern" that the bearer be given "aid and protection" in case of need. Finally, it may have been thought that the United States Government provided a greater measure of assistance abroad to United

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My thanks are due to my colleague, Herbert L. Packer, and to Lee R. Marks, of the District of Columbia Bar, for helpful suggestions concerning this Article during its preparation.

1. "United States nationals," as the term is used in this Article, are "those owing allegiance, whether citizens or not, to the United States." 22 U.S.C. § 212 (1964) (defining those to whom the Secretary of State is authorized to issue passports). As a practical matter, the phrase includes all American citizens plus noncitizen residents of certain United States outlying possessions. See 22 C.F.R. § 51.23-24. 26 (1966).

2. For general histories of United States passport policies, see 3 G. Hackworth, Digest of International Law 435-52 (1942); G. Hunt, The American Passport (1898); 3 J. Moore, Digest of International Law 855-1022 (1906); Special Comm. To Study Passport Procedures of the Ass'n of the Bar of the City of New York, Report on Freedom To Travel (1958).
States nationals who held American passports than to those who did not. Of these three purposes, only the first remains valid today. Most foreign countries now require entering aliens to carry a passport or some other certificate of identity issued by his country of nationality. There appears no evidence, however, that these countries provide more "aid and protection" to United States nationals bearing passports than they offer to other Americans. Their assistance is based on considerations of foreign relations and international law quite apart from the printed supplication in a passport. Furthermore, the statutory obligation of the executive branch to aid American nationals abroad in no way depends on possession of a passport. And the administrative regulations concerning the provision of assistance to American travelers contain no indication that a passport is a critical factor.

Although only one of these purposes of a passport is still meaningful, another aim—to restrict travel—has become increasingly significant since World War I. In 1918 Congress adopted legislation making it unlawful in time of war and upon a Presidential finding of necessity "for any citizen of the United States to depart from or enter ... the United States unless he has a valid passport." Between the World Wars, the restriction was lifted, but it was imposed again in 1941, and essentially the same

3. "The possession of a United States passport is evidence that the holder is entitled to the protection of this Government while he is abroad. However, absence of a passport does not preclude the taking of protective measures by the United States on behalf of American citizens ...." Hearings on Passport Legislation Before the Senate Committee on Foreign Relations, 85th Cong., 2d Sess. 27 (1958) (State Department response to committee question) (emphasis added). See also 22 C.F.R. § 51.76 (1966).


5. 22 U.S.C. § 1732 (1964) provides: "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

6. See 7. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL §§ 350-56. As the Administrator of the Department's Bureau of Security and Consular affairs testified in 1958, "[I]f a man is a citizen, he is a citizen and entitled to our protection. He cannot be half a citizen or less than a citizen." Hearings on Denial of Passports to Persons Knowingly Engaged in Activities Intended To Further the International Communist Movement Before the House Committee on Foreign Affairs, 85th Cong., 2d Sess. 23 (1958).

The view that a passport is requisite to United States Government protection abroad may have gained currency because one of the alleged bases for refusal to validate passports to such countries as Albania has been the Government's inability to protect its citizens traveling in these countries. See, e.g., Hearings on Department of State Passport Policies Before the Senate Committee on Foreign Relations, 85th Cong., 1st Sess. 3 (1957). Such a rationale is, however, somewhat inconsistent with actual policy—it should be no more difficult to provide protection in Albania than in several other eastern European countries. If the issue of protection is a factor at all in establishing area restrictions, it is probably because were such travel allowed the United States Government might be compelled by domestic political considerations to intervene to provide assistance when it would prefer not to be involved.

prohibition has been carried forward to the present under the 1952 Immigration and Nationality Act.8

Until the 1950's the Government maintained that the issuance of passports was a matter within the complete discretion of the Secretary of State.9 And prior to the 1950's there were no discernible standards for the exercise of that discretion.10 This administrative position was at least arguable when neither the United States nor most foreign countries required Americans visiting abroad to carry passports. It became quite another matter when a passport became requisite for all foreign travel outside the Western Hemisphere.11 Currently, State Department officials may issue the equivalent of a temporary restraining order prohibiting such travel by any American.

The last decade's developments in constitutional law concerning travel restrictions have been frequently analyzed.12 The focus of this Article, however, is on the appropriateness of passports as an instrument of restraint and on the merits of existing restrictions, apart from questions of constitutionality. A series of recent events, in combination if not singly, makes it timely to take a new look from this perspective.

First, an international conference on passport and other travel policies met under United Nations auspices in 1963. A group of experts had recommended that the conference propose “replacement of passports by national identity documents . . .”13 In part because of American opposition to this proposal, however, the conference members could agree only that national passport requirements should “be reduced ‘to the minimum that is compatible with . . . national interests and security.”14 Second, the next year the Supreme Court held in Aptheker v. Secretary of State that section

9. As late as 1957, in response to the question, “Do you consider the Secretary of State has complete discretion as to whether any American citizen may leave the United States?” Under Secretary of State Murphy testified, “Yes sir, I think he does under our law and regulations.” Hearings On Department of State Passport Policies, supra note 6, at 9.
14. U.N. Doc. No. E/Conf. 47/18, at 6 (1965). The Conference concluded that “a valid passport is still the most suitable international travel document, and therefore it is not feasible at present to recommend the abolition of passports on a world-wide basis.” Ibid.
6 of the Subversive Activities Control Act of 1950 was unconstitutional.\textsuperscript{15} That provision made it unlawful for members of any "Communist organization," as defined in the act, to apply for or attempt to use a passport. Third, the Court's 1965 decision in \textit{Zemel v. Rusk}\textsuperscript{16} upheld the Secretary of State's refusal to issue passports valid for travel to Cuba. Fourth, this year the Court will consider two criminal cases concerning travel to Cuba without a passport validated for that purpose.\textsuperscript{17} Fifth, one of the peripheral benefits of the Warren Commission's investigation was the release of substantially more information concerning passport practices than had previously been made public.\textsuperscript{18} Finally, several congressional committees recently held hearings on passport policies,\textsuperscript{19} and proposed passport legislation has been sponsored by the State Department.\textsuperscript{20}

II.

The basic legislative authority applicable to passports is a 1926 statute, 22 U.S.C. section 211a. Its language was taken from legislation adopted in 1856:\textsuperscript{21} "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe . . . ." An Executive order delegates to the Secretary the authority, without further Presidential action, "to designate and prescribe for and on behalf of the United States rules governing the granting, issuing, and verifying of passports."\textsuperscript{22} The 1856 statute presumably was enacted to prevent energetic local officials from issuing passports on their own authority. But its 1926 descendant has acquired a quite different role. In recent years, questions concerning passport policies have focused on three problems: (i) passport denials on national security grounds; (2) passport denials on other grounds; and (3) area restrictions.

\textsuperscript{16} 381 U.S. 1 (1965).
\textsuperscript{18} The issuance and renewal of Lee Harvey Oswald's passports are discussed in \textit{President's Commission on the Assassination of President Kennedy, Report}, app. XV (1964).
\textsuperscript{20} In May 1966 Congressmen Hays and Selden introduced identical bills on behalf of the State Department. H.R. 14896, H.R. 14895, 89th Cong., 2d Sess. (1966) [hereinafter referred to collectively as "the State Department Bill"].
\textsuperscript{22} Exec. Order No. 11295, 37 Fed. Reg. 10603 (1966). This order superseded a Presidential delegation of authority to the Secretary that was the basis for passport regulations from 1938 until August 1966. See Exec. Order No. 7856, 3 Fed. Reg. 681 (1938). Individuals whose passport applications are denied have the right to a hearing before a Passport Office representative and to a review of his decision by a Board of Passport Appeals appointed by the Secretary of State. 22 C.F.R. § 51.137--167 (1966).
A. Passport Denials on National Security Grounds

Passports were denied to leading American Communists for a decade and a half immediately after the Russian Revolution. This policy was reversed in 1931 and for the next twenty years no restrictions were imposed on travel abroad by alleged Communist subversives. In 1951, however, the State Department began denying passports not only to Communist Party members but to others “supporting the Communist movement” as well.23 In 1958 the Supreme Court held in Kent v. Dulles that the right to travel was “part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment” and that the Secretary of State had no statutory authority to deny a passport on the ground of an applicant’s political beliefs.24 After the Kent case, it was not until 1962 that a new statutory restraint—section 6 of the Subversive Activities Control Act—went into effect against members of any “Communist organization.” This was the provision invalidated by the Supreme Court in the Aptheker case.

The Court in Aptheker did not preclude the possibility that Congress might constitutionally restrict certain travel of certain members of certain organizations. The opinion made it clear, however, that the statute must meet several standards. First, the member must have actual rather than constructive notice of the nature of the organization. Second, criteria must be provided concerning “the member’s degree of activity in the organization and his commitment to its purpose.” Third, it must be shown that the purpose of the applicant’s travel is inimical to United States security interests. Finally, the Government must prove that “‘less drastic’ means of achieving the congressional objectives” are not feasible.25

Even though passport legislation might be drafted to meet these standards,26 the effort would, in my judgment, be misguided. If past history is any measure, only a handful of cases would arise under such legislation. Section 6 of the Subversive Activities Control Act was in effect from October 196227 to June 1964, when the Court handed down the Aptheker opinion. During this period, the State Department revoked the passports of six Communist Party members—including those of the litigants in Aptheker—as test cases.28 The Department did not, however, deny passports to any applicants on section 6 grounds.29 It is possible that section 6 deterred some

23. See Hearings on Department of State Passport Policies, supra note 6, at 60–61.
29. Ibid. The great majority of passport cases involve the refusal to issue a passport rather than the revocation of a passport already issued. The two administrative actions have been traditionally considered as raising identical legal issues. See 22 C.F.R. § 51.170 (1966); Subcommittee To Inves-
members of Communist organizations from applying for passports—application was itself a crime—but the State Department's record of passport issuances combined with the Justice Department's admitted hesitancy to prosecute section 6 cases makes this seem questionable.

The Director of the Passport Office and at least one congressional report have blamed the statute's ineffectiveness on a State Department regulation that no passport may be denied except on the basis of a full-confrontation hearing. The regulation is in my view rooted in sound considerations of policy as well as constitutional law. But quite apart from its merits, the Passport Office concluded—on the basis of confidential information—that during the effective life of section 6, an average of only about one applicant per month was a Communist Party member.

Assuming such infrequent cases do merit congressional attention, however, there would seem substantial problems to proving the subver-

TIGATE THE ADMINISTRATION OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS OF THE SENATE COMM. ON THE JUDICIARY, 87TH CONG., 2D SESS., REPORT ON THE NEW PASSPORT REGULATIONS 72 (Comm. Print 1962) [hereinafter cited as REPORT ON THE NEW PASSPORT REGULATIONS]. In fact, the problems of proof involved may be quite different. For example, whatever the standards for defining activities "prejudicial to the interests of the United States," see text accompanying notes 54-55 infra, it is substantially less difficult to show that an American abroad is already engaging in such activities than that he is going abroad to do so. Furthermore, State Department regulations are unclear whether a passport revocation hearing may be held abroad. See 22 C.F.R. § 51.137-170 (1966). The individual involved may have to return to the United States if he wishes to appear at the hearing. In any event, the foreign country where he is located may force him to return before the hearing is held.

Except where otherwise stated, the phrase "passport denial" in this Article includes both the refusal to issue a passport and the revocation of a passport already issued.

32. See 5 Hears. Before the President's Comm. To Investigate the Assassination of President Kennedy 380 (1964) (testimony of the Passport Office Director) [hereinafter cited as HEARINGS BEFORE THE PRESIDENT'S COMM'N]; REPORT ON THE NEW PASSPORT REGULATIONS 49-91.
33. The regulation was based on the judgment of the Justice Department, concurred in by the State Department's Legal Adviser, that "section 6(b) must be read to require the officer to deny a passport only where he acts on information that is capable of disclosure. If the applicant sought to contest the denial, he would, in our view, be entitled under the statute to be confronted with the precise information against him and to be apprised of the source of such information. A proceeding that may result in curtailment of the right to travel, and that does not afford an opportunity for such confrontation would raise serious questions as to whether the requirements of the due process clause were satisfied (see Greene v. McElroy, 360 U.S. 474, 496-97 (1959)). In such circumstances we believe the Supreme Court would hold that the statute should not, without more explicit language, be read to authorize curtailment of travel upon the basis of secret information." Letter From Assistant Attorney General Yeagley to Deputy Under Secretary of State Jones, Jan. 5, 1962, in Hearings on State Department Security, The New Passport Regulations, Before the Subcommittee To Investigate the Administration of the Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary, 87th Cong., 2d Sess., pt. 3, at 251-52 (1962).

The State Department Bill would grant an individual whose passport application has been denied the right "[t]o be informed of the evidence on which the adverse action is based and the source of such evidence" and "[t]o confront and cross-examine adverse witnesses." § 208(b)(3)-(4).
34. Letter From Robert D. Johnson, Chief Counsel, Passport Office, Aug. 8, 1966 (written on behalf of the Director of the Office). The information had been obtained from the Federal Bureau of Investigation, which had apparently decided that revelation of its sources was too high a price to pay for keeping those few individuals from traveling outside the Western Hemisphere or to Cuba. Mr. Johnson testified that during the first eighteen months § 6 was in force, there were only four such applicants. Hearings on State Department Security, supra note 19, pt. 3, at 609. He also stated that the FBI supplied the Passport Office with information concerning the Communist Party membership of seventeen other persons after the issuance of their passports. Ibid.

Ambassador Wilson C. Plake, who made a full study of the Passport Office, testified that the Office concluded on the basis of confidential information that only three applicants in 1963 were Communist Party members. Id. at 765.
sive purpose of a Communist Party member's travel, even with the most generous presumptions and quite apart from whether such proof would have to be made in a full-confrontation hearing. I doubt, therefore, that application of the Aptheker standards would result in denial of a passport to anyone. But what of the unlikely case in which the Secretary of State has evidence, revealable in a public hearing, that an applicant is going abroad "to further the purposes of the Communist movement"? Should the Secretary then have the power to deny a passport? My answer is still no. The United States does not require its nationals to obtain a passport for travel to any of the Americas except Cuba. Is it not probable that the foreign activity sought to be precluded by a passport denial could be carried out somewhere in this hemisphere? Certainly this is true with respect to couriers; it would seem almost as likely for those going abroad to exchange ideas. Furthermore, the Government has a substantial arsenal of criminal statutes applicable to subversive activities carried on without as well as within the United States. If there is sufficient evidence within the mandate of Aptheker to prove both the specific purpose of travel and the requisite degree of involvement in the Communist movement, is it not likely that there will also be sufficient evidence to prove violation of such a statute? I do not mean to suggest that the hurdles that must be cleared to restrict foreign travel are or should be equivalent to the burdens of proof and other paraphernalia of the criminal process. But, if these hurdles are more than gloss on administrative discretion, the problems should not be substantially different.

I am not so convinced of these conclusions, however, to hold that the opposite view is beyond the range of permissible choice. What does seem clear to me is that if travel controls are imposed on individuals this should be done directly and not through passport restrictions.

There are several reasons for this approach. First, it would focus attention on the real problem—foreign travel—rather than on a document, the passport. In particular, it would concentrate congressional consideration on the merits of travel restrictions. Too often in the past, legislative obfuscation has been possible because of the aura of sovereign prerogative surrounding passports. Today a hodge-podge of press releases and miscellaneous administrative actions govern the issuance of passports, under the most general of legislative mandates formulated more than a century ago.

37. Notice of current area restrictions will not be found in the Code of Federal Regulations, but only in the Federal Register and State Department press releases. And, although some area restrictions are printed in passports, the limitation on travel to Cuba, imposed in January 1961, was not stated in new passports until the spring of 1963. See Hearings on State Department Security, supra note 19, pt. 3, at 717-22. Furthermore, the State Department makes no effort to stamp outstanding passports with new restrictions.
If travel is part of "the liberty" protected by the fifth amendment, it deserves the current and considered attention of Congress in terms of whose travel ought to be restricted to what places.

Second, this approach would, I suspect, make the resolution of substantive issues involving travel control a good deal easier. Almost any question becomes less difficult when squarely met; these should be no exception.

Third, this scheme would move decisions to restrict travel out of the realm of foreign policy and into that of law enforcement. That is where those decisions belong. The existing procedure merely overlays a confusing facade of international involvement on an essentially domestic issue.

Finally, the change would eliminate a major administrative burden from an already overburdened agency. It would enable the Passport Office to devote its full time and talents to the job of issuing more than one million passports per year.

If Congress concluded that a class of individuals, however defined, ought to be prohibited from foreign travel, several alternative mechanisms would be available to carry out this judgment. Legislation might provide that the Government must prove in court that an individual is within the statutory definition of citizens whose travel is prohibited. Alternatively, an administrative agency might apply statutory criteria of ineligibility for foreign travel—subject, of course, to judicial review. In either case, criminal penalties could be provided as sanctions against travel by designated individuals. Difficult questions of policy and constitutional law would be involved in developing statutory standards. But these issues are also present under the existing scheme—as are many others that would be avoided by the proposed approach.

38. The Director of the Passport Office testified that in the last 6 months of 1963 "over . . . 500 security reports a month [were received], and in order to be effective and to render the ultimate in security these reports should be read by individuals who are knowledgeable; who are trained to spot information of security significance. "The staff that is assigned to this task is very limited, and it is heavily overburdened with many assignments, some of which take priority to the reading of reports, and it is physically impossible for the present staff of our legal division . . . to read and analyze the information in these reports as promptly and as thoroughly as should be done. "The eternal question that we are faced with is a matter of diminishing returns. It is almost impossible to staff the Passport Office 100 percent for security and with knowledgeability of everything that goes on, and in the course of the year the Passport Office puts in thousands of hours of overtime, uncompensated overtime, trying to catch up with this work and believe me, this makes little or no impression on the vast amount of paperwork, the reading, the reporting and the analyzing of reports which come in to us." 5 Hearings Before the President's Comm'n 385.

39. The Justice Department would seem the appropriate agency since it would bring criminal actions for violations of the restrictions. See Part III infra concerning the transfer of passport administration to the Immigration and Naturalization Service of the Justice Department.

40. Several minor problems would also be eliminated. For example, the Passport Office has long been concerned that it has no way to force individuals whose passports have been withdrawn to return the documents to the Government. See Hearings on State Department Security, supra note 19, pt. 3, at 642. In an attempt to meet this problem, § 401 of the State Department Bill provides that "[a] passport . . . shall at all times remain the property of the United States," apparently on the ground that this would provide the basis for a Government suit for replevin. The provision would raise obvious difficulties—e.g., could the Government sue for negligent loss of a passport—that would be avoided by simply providing criminal penalties for failure to return a passport upon de-
There might, as an original matter, be sound reason to use passports as a supplementary means to enforce a travel control statute. Coming to the problem anew, it might well be advisable for Congress to provide that the passport of anyone against whom such a statute was properly applied should be canceled or restricted as one of the means to ensure compliance. But at this stage, I doubt the wisdom of this alternative. Passports are so deeply imbued with notions of privilege and governmental sanction that I suspect anything but a clean break with the past will bring confusion, not clarity, to the problem.

B. Passport Denials on Grounds Other Than National Security

Since 1938 State Department regulations have provided that a passport "shall be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) Violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States." In my judgment, none of these categories of restrictions on foreign travel should be continued. One may disagree with this view, however, and still conclude, as I do for the reasons stated in the previous section, that passports are not an appropriate means to implement the restrictions.

On the basis of the standards quoted above, passports were regularly refused during the 1950's to "habitual criminals," "persons likely to become public charges," and individuals in other questionable categories. In recent years, however, the State Department has sharply narrowed the bases on which passports are denied. In the first three months of 1964, only eight passports were denied for reasons other than citizenship or security, and seven of these were for violations of the Department's area restrictions. And in the whole period from January 1962 through March 1964 all but three of the individuals to whom passports were denied were either area

mand by an authorized official (as § 401 of the State Department Bill also proposes). But quite apart from these difficulties, the whole issue could be side-stepped by the alternative suggested above.

41. See, e.g., Hearings on Providing Standards for the Issuance of Passports and for Other Purposes Before the House Committee on Foreign Affairs, 86th Cong., 1st Sess. 32-33 (1959) (testimony of the Administrator, Bureau of Security and Consular Affairs, Department of State).
44. See Hearings on Department of State Passport Policies, supra note 6, at 38. A memorandum prepared by the Passport Office in 1955 stated that the Office "refused passports to the Americans who were close associates in Italy of 'Lucky' Luciano. We told them of the reason for the refusal and considered their explanations were not satisfactory." Nicholas, Discretionary Refusal of Passports in Non-Communist Cases, in Hearing on the Right To Travel, supra note 50, pt. 2, at 267.
45. In 1955, 106 passports were denied for reasons unrelated to citizenship or security. See Hearings on Department of State Passport Policies, supra note 6, at 38. In 1956 the figure was 85. Id. at 39. In 1962 it was only 15. 18 Hearings Before the President's Comm'n 250-51. It rose to 82 in 1963, id. at 251-53, but most of these were members of two student groups that went to Cuba.
46. 18 Hearings Before the President's Comm'n 254.
restriction violators or "fugitives from justice"—subjects of outstanding arrest warrants or court restraining orders. The former category is considered in the next section. It may be useful here to begin with "fugitives from justice."

Is the category even covered by the quoted regulations? These regulations, although vague in the extreme, seem aimed at activities outside the United States. The rationale for denying a passport to the subject of an arrest warrant or court restraining order relates solely to activities within the United States. The Supreme Court did suggest in the Kent case that the Department has the power to deny passports to those "trying to escape the toils of the law." The Court did not, however, imply that the Department's regulations adequately defined this category. And definition is no easy task. The spectrum of individuals that might be included ranges from anyone subject to an outstanding arrest warrant for any crime committed anywhere to those subject to outstanding warrants for a narrowly defined category of crimes. The State Department Bill proposes a reasonable middle ground. It provides that passports shall not be issued if "the applicant is the subject of an outstanding Federal warrant of arrest for a felony, including a warrant issued under the Federal Fugitive Felon Act [or] . . . subject to a court order, or conditions of parole, or conditions of probation forbidding his departure from the United States . . . ."

At the same time, however, should any such category be included at all? Obviously, if a passport official knows that an applicant is a "fugitive from justice," he should notify the appropriate law-enforcement officers, who will presumably take immediate action to apprehend the applicant. The real question, therefore, is whether the Passport Office should be required to check a list of "fugitives from justice" each time it issues a passport, and, if so, what standards should be followed in preparing the list.

47. Id. at 250-54. For a discussion of the other three cases, see note 54 infra.

Passports were denied in 104 cases during this period. See 18 Hearings Before the President's Comm'n 250-54. Two other adverse passport actions were also taken on the ground of "passport fraud." Ibid. It is not clear whether the frauds were committed in applications for the very passports that were denied or prior to those applications. The denial of a passport to one who previously committed passport fraud would raise substantial questions. Even assuming that the denials were consistent with the regulations although the frauds were committed within the United States, why should passport fraud be considered differently than any other criminal offense? Penalties ranging up to a $2,000 fine or five years' imprisonment, or both, may be imposed on persons making false statements in passport applications, forging or altering passports, or using other persons' passports. 18 U.S.C. §§ 1542-44 (1964). These penalties should be adequate sanctions; there would seem to be serious constitutional objections to administrative imposition of additional ones through the mechanism of passport denials.

48. No other provisions in the Code of Federal Regulations are applicable.

49. Apparently the State Department currently considers that the category includes only individuals within the United States and not those abroad. "[T]he remedy against persons abroad who are charged with crime is extradition rather than the use of the passport power to get them returned." 5 Hearings Before the President's Comm'n 327 (testimony of the State Department's Legal Adviser).


51. State Department Bill § 205 (a), (b).
From available statistics, it appears that approximately one passport per month is denied to a "fugitive from justice." The administrative burdens of operating this system would not seem worth the problems of maintaining it.

Are there other classes of United States nationals to whom passports should be denied? The first group covered in the State Department's regulations is "individuals whose activities abroad . . . would violate the laws of the United States." Apparently no passports have been denied on this ground in over a decade. On this basis alone, the provision is ripe for deletion from the regulations. But, quite apart from past administrative practice, application of this standard would raise serious problems.

First, the State Department is not the appropriate organization to make such determinations. It is not a law-enforcement agency and is ill equipped to become one. Second, and most important, it is questionable whether travel restrictions ought ever to be used as a means of crime prevention. The same concerns that trouble us about prosecutions for preparatory crimes and about preventive-detention statutes are applicable here—the standard lacks the traditional nexus between past conduct and future behavior. But the dangers of abuse in passport proceedings are much greater, for the procedural safeguards are minimal in comparison to those of the criminal process.

If there is sufficient evidence to convict for an attempt to commit a crime, prosecution is the proper course. What less than such evidence constitutes evidence "to the satisfaction of the Secretary of State"? Does the Constitution require the same standards? Whatever the answers to these questions, a substantial burden falls on those who would adopt such a category.

A few persons are also apparently still denied passports on the ground that their activities abroad would come within the second or third category in the regulations: "prejudicial to the orderly conduct of foreign relations . . . or otherwise . . . prejudicial to the interests of the United States." One such case in the 1950's, for example, involved an individual who "had participated in the local political affairs of a friendly foreign power, had been the source of complaint by the friendly power, and by his behavior had become an internal problem to the friendly power." Why should the

52. See 18 Hearings Before the President's Comm'n 250-54.
53. In 1958 the State Department's Legal Adviser testified that this category was limited to individuals whose criminal activities abroad would be within the reach of United States jurisdiction under applicable statutes. See Hearings on Denial of Passports, supra note 6, at 23-24. A Passport Office memorandum prepared in 1955, however, stated that the category covered persons "going abroad to engage in activities while abroad . . . which if carried on in the United States would violate such laws designed to protect the security of the United States . . . ." Nicholas, Discretionary Refusal of Passports in Non-Communist Cases, in Hearing on the Right To Travel, supra note 10, pt. 2, at 266. Although the language of the regulation may bear this meaning, it seems a strained interpretation.
54. Hearings on Department of State Passport Policies, supra note 6, at 74 (1957) (State Department response to committee question). From January 1962 through March 1964, in marked con-
United States Government have assumed the burden of acting on behalf of "the friendly power"? As long as a foreign nation acts consistently with its treaty obligations, it may always bar an American from its territory for engaging in activities that it considers harmful. But lodging the responsibility in United States officials arms them with the most dangerous kind of administrative discretion—dangerous and unnecessary. As a special committee of the Association of the Bar of the City of New York wrote:

It may be that the Department of State will wish to advise other countries of the suspected purposes of travel abroad of some United States citizens. But surely the primary interest is in the foreign government rather than in the United States.

... It is of course unfortunate that not all Americans conduct themselves in accord with standards of propriety that the United States might wish for. Equally regrettable is the conduct of some Americans within the United States. Yet, short of a punishable offense, there is no recognized sanction for such activities.  

It is conceivable that an American might engage in activities abroad that were fully consistent with the foreign policy of the country where he was located but were, by any standards, "prejudicial to the interests of the United States." Supplying weapons to rebel forces in some third country might be one example. Such cases, if they exist at all, are extremely rare. And in most cases our criminal statutes would seem adequate to deal with them. The sanctions that may be imposed under such statutes, the difficulties of proof in the passport proceedings, and the risks of abuse of power, particularly in the light of the experience of the 1950's, appear to me to outweigh the advantages of retaining such an open-ended standard. In recent years, by all accounts, the State Department has exercised its authority under the regulations with marked restraint. There is no evidence, for example, that the activities of Americans abroad who criticize United States foreign policies are classified as "prejudicial." But in light of past history, the risks that they could be are too real to be dismissed.

Two other bases for passport denials should also be briefly mentioned. First, an American abroad who is without funds may receive a Government repatriation loan for his direct return to the United States. His passport
will be canceled, however, and he must sign a promissory note in which he agrees that he will not be furnished a new passport until the loan is repaid. It is not completely clear that such a debt is wholly different from other financial obligations to the Government, but some distinction may be made. As a practical matter, if an applicant has sufficient funds for another trip abroad, he generally should be able to repay his loan. At the same time, only a handful of these cases arise each year, and the Oswald affair indicates that the problems of administration may outweigh the benefits. 57

Second, there are two categories of nationals who are denied passports on grounds of incompetency—the mentally ill and minors one or both of whose parents object to their travel. 58 The State Department obviously should not take on the function of determining the mental qualifications or the proper custodian-parent of an applicant. But even if an individual has, by judicial authority, been declared incompetent or the ward of the objecting parent, why should the Government be involved in the restraint of his foreign travel any more than his domestic travel? If a guardian considers that travel should be limited, he has the necessary means to enforce his views. My concern here—not a strong one—is substantially influenced by the fact that the United States does not require its nationals to possess a passport for travel anywhere within the Western Hemisphere except Cuba.

The State Department Bill would substitute new standards for the vague trio in the current regulations. There is no reason to believe that the fate of the bill will be any different from that of other passport legislation proposed in the past decade. 59 The Department could, however, adopt by regulations all of the bill’s passport provisions. As a matter of tactical wisdom in congressional relations, this might be a questionable course, but the Department clearly has the power to issue such regulations under section 211a and the President’s delegation of authority to the Secretary of State. On this basis, the criteria proposed by the Department deserve examination.

Apart from the provisions already mentioned, the bill would establish two categories of nationals to whom passports could be denied as a matter of administrative discretion. First,

- a passport or renewal of a passport may be refused in any case in which: (a) the applicant has not repaid a [Government repatriation] loan . . . ; or (b) the ap-

57. Because of an administrative slip-up, Lee Harvey Oswald apparently could have received a passport during the time his repatriation loan was outstanding. See 5 Hearing Before the President’s Comm’n 315, 375–76; 18 id. at 285–86.
58. See Hearings on Department of State Passport Policies Before the Senate Committee on Foreign Relations, 85th Cong., 1st Sess. 38–40 (1957). 22 C.F.R. § 51.3 (1966) provides, “Unless a request is made by the parental or other guardian that a passport be denied, passports may be issued to minors upon their own application.” There are no provisions in these regulations concerning denial of passports to the mentally ill.
59. Passport policies are a perennial congressional concern. From 1958 to 1963, more than fifty bills on the subject were introduced and numerous hearings were held. As in many issues, however, conservative and liberal congressional factions have been able to hold each other in check. As a result, no legislation relating to passports has been adopted since 1952.
plicant has been legally declared incompetent, unless he is accompanied on his
travel abroad by the ... person responsible for his custody ... ; or (c) the appli-
cant is under the age of eighteen, unmarried, and not in the military service of the
United States, unless [his guardian] ... agrees to reimburse the United States
for any [repatriation loan] ... ; or (d) the national has violated [an area restric-
tion] ... ; or (e) the Secretary determines that the applicant's activities abroad
are causing or are likely to cause serious damage to the national security or the
foreign policy of the United States; or (f) the applicant has been the subject of
prior adverse [passport] action ... and has not shown that a change in circum-
stances ... warrants issuance or renewal of a passport.60

Second,

a passport may be revoked, restricted, or limited where: (a) the national would not
be entitled to issuance of a new passport under [any of the above standards] ... ;
or (b) the passport has been obtained by fraud or has been fraudulently altered, or
has been fraudulently misused; or (c) the national's activities abroad are in vio-
lation of the laws of the United States.61

These standards would be a substantial improvement over those that
have guided the Department since 1938. Although it is unlikely that
actual administrative practices would be significantly changed, for the
first time there would be some articulated bases for these practices. Most of
the concerns raised above, however, would still remain. The burdens of
administering the "fugitive from justice" and repatriation loan categories,
for example, would be identical. Passport denials would continue as a
means to restrain foreign travel on the ground of incompetency, though
the categories of the incompetent would be more sharply drawn than
before. "[A]ctivities abroad ... in violation of the laws of the United
States ..." would avoid the dangers of predicting future criminal activity,
but the criterion would involve the other problems mentioned in reference
to its current regulatory counterpart. And most troublesome, "activities
abroad ... causing or ... likely to cause serious damage to the national
security or the foreign policy of the United States" seems no more than a
slight variation on the existing catchall categories, "prejudicial to the or-
derly conduct of foreign relations ... or otherwise ... prejudicial to
the interests of the United States."62 The dangers of abuse would be pre-
cisely the same.

Furthermore, the administrative discretion proposed in the bill must be
measured against a substantial prior history of arbitrary action in individual
passport cases. The State Department was apparently unable to specify the
circumstances in which a passport that may be denied should be denied.
In what situations, for example, should a passport "obtained by fraud" not

60. State Department Bill § 206 (paragraphing omitted).
61. State Department Bill § 207.
be revoked? It might be argued that the variables in such situations are too difficult to predict and too numerous to state. Furthermore, one might contend that the alternative of nondiscretionary revocation in all such cases would be too harsh. Yet the Department has been revoking passports on this ground for many decades. It should have an adequate basis to establish firm tests. In these circumstances, the advantages of certainty outweigh the benefits of administrative flexibility.

Finally, the bill would make possession of "a valid passport" a determinative issue in judging the legality of an American's foreign travel, thus raising all the previously discussed inadequacies of this approach.

C. Area Restrictions

In the Zemel case the Supreme Court relied heavily on past history in upholding the State Department's position that it had authority to refuse to validate passports for travel to Cuba. Throughout the first half of this century the State Department periodically refused to issue passports for travel to certain countries and areas. Belgium, for example, was on the restricted list in 1915 because of a famine. And passports were stamped "not valid for travel in Spain" during the Spanish Civil War.

The Court's reliance on such incidents, however, may have been misplaced. It is by no means clear that during those times the Department of State actually sought to prohibit Americans from traveling abroad. The Department's restrictions may have been aimed only at discouraging such travel. There are apparently no records of how many, if any, United States citizens went to Belgium in 1915. But it is certain that many Americans were in the midst of the Spanish Civil War. In any event, no criminal sanctions were available to enforce the restrictions. Furthermore, the whole concept of foreign travel has changed since World War II. Before then it was in large measure an exotic adventure for a privileged few. In 1929 only 517,000 Americans left their country; in 1964 the figure was 2,220,000.

Today a trip abroad is a commonplace undertaking. The impact of restraints on foreign travel, therefore, is obviously substantially greater than

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63. State Department Bill § 201(c). A separate criminal provision would apply to area-restriction violators. See note 82 infra.

64. See Zemel v. Rusk, 381 U.S. 1, 8-9 (1965). For a full discussion of this history, see Nicholas, Geographic Limitations on Validity of Passports During Past 40 Years and Their Application to the Cases of Journalists, in Hearing on The Right To Travel Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., pt. 2, at 190 (1957).

65. As late as 1952, a State Department press release announcing that new passports would be stamped "not valid for travel to [eight Communist countries]... unless specifically endorsed..." also stated that "this procedure in no way forbids American travel to those areas." Dep't of State Press Release No. 341, May 1, 1952, reprinted in Hearing on the Right To Travel, supra note 64, pt. 2, at 247. This statement was probably intended only to underscore the possibility of specific endorsement; but the phrasing, at the very least, is ambiguous. See id., pt. 2, at 92-93. See also Hearings on Department of State Passport Policies, supra note 58, at 59.

66. See E. HEMINGWAY, FOR WHOM THE BELL TOLLS (1940).

was true a few decades ago—entirely apart from the different character of those restraints.

Whatever the weight of past area restrictions, it was not until 1938 that the President specifically authorized the Secretary of State to impose such limitations.8a Currently the Secretary has placed Albania, Cuba, and the Communist-controlled portions of Korea, Vietnam, and China on the restricted list.8b

Two criminal statutes may be applicable to an area-restriction violator. First, 18 U.S.C. section 1544 applies to anyone who "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 . . . ." There are no reported decisions applying this provision to an area-restriction violator. The reason is obvious. Anyone desiring to travel to a country on the Department's restricted list must, of course, obtain that country's permission to enter. If the country wants him to come, it will not condition permission on display of a United States passport at the border. An American may, therefore, go to Cuba without "using" his passport for that purpose. An argument might be made that he violated the statute if he needed his passport at some point en route,8a but the Government has apparently concluded that this position would not withstand judicial scrutiny.

Second, 18 U.S.C. section 1185(b), adopted in 1952, provides that upon a Presidential proclamation that a national emergency exists and that travel restrictions must be imposed, "it shall, except as otherwise provided by the President, and subject to such limitations 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." The language of section 1185(b) was adopted almost verbatim from legislation passed in 19188c as an antiespionage measure. In 1953 President Truman issued the proclamation necessary to trigger application of the statute.8d

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8b. Recently the State Department has expanded the categories of those whose passports will be validated for travel to restricted areas. See 55 Dep't State Bull. 234-35 (1966). These categories now include certain reporters, doctors, scientists, scholars, and others whose travel is, "in the discretion of the Secretary of State, . . . considered to be in the national interest of the United States." Ibid. See N.Y. Times, July 17, 1966, at 10, col. 1.

8c. Cf. Hearing on the Right To Travel, supra note 64, pt. 2, at 92-93.


72. Presidential Proclamation No. 3004, Jan. 17, 1953, 67 Stat. 331. Since this proclamation was a prerequisite to application of § 1185(b), see Zemel v. Rusk, 228 F. Supp. 65, 71-72 (D. Conn. 1964), aff'd, 381 U.S. 1 (1965), it should be cause for some concern to the Government that the proclamation is referred to as "eliminated" in the 1958 edition of the United States Code, at 9257, and is not even mentioned in the 1964 edition. The "matter" in the Code is "prima facie" evidence of "the laws of the United States." 1 U.S.C. § 204(a) (1964).
As under 18 U.S.C. section 1544, a defendant’s passport, or lack of it, is critical to a violation of section 1185(b). The difficulties of this statutory formulation are underscored by two recent lower federal-court decisions now before the Supreme Court, United States v. Travis73 and United States v. Laub.74

In Travis the defendant departed from the United States for Cuba “without a valid passport for such travel.”75 Both lower-court opinions in the case are unclear whether she possessed a passport not specifically endorsed for travel to Cuba or whether she had no passport at all. Apparently neither court considered the issue critical. The trial court in Laub ascertained, however, that Travis’ passport had probably expired when she left the United States.76 On appeal, the conviction in Travis was affirmed on the ground that “a reading of the statute and the regulations demonstrates the plain and unambiguous meaning to be that a person is subject to criminal penalties on leaving the United States for Cuba without a valid passport.”77

To the district court in Laub, however, the statute appeared neither plain nor unambiguous. This was the first case (with the possible exception of Travis) in which prosecution under section 1185(b) was based on departure for a restricted country with an unexpired passport not specially validated for such travel. In a lengthy opinion, the court held the statute inapplicable. The term “valid,” the court said, means “unexpired,” not “validated.” Since the defendants left the United States with unexpired passports in hand, they could not be convicted.78

75. 241 F. Supp. at 473, 253 F.2d at 507.
76. 253 F. Supp. at 444. See also Government Brief 5 n.7, 43.
77. 253 F.2d at 508.
78. The court based its judgment that § 1185 is a “border control statute” not authorizing “travel to’ restrictions,” 253 F. Supp. at 466, on several main grounds. First, it concluded that the restriction on travel to Cuba was issued under the authority of 22 U.S.C. § 211a, not that of 8 U.S.C. § 1185 (b). 253 F. Supp. at 446-49. Second, a series of bills was introduced in Congress in the 1950’s that would have expressly prohibited travel to any country without a passport specifically endorsed for such travel. “This statutory authority sought by the Secretary but not granted by the Congress is the very power claimed by the Government in the instant case.” Id. at 455. Third, the court emphasized its obligation to construe strictly a criminal statute, particularly when it affects a fifth amendment liberty. Id. at 456-57. Fourth, the court found no support for the Government’s contention in the legislative history of § 1185(b) or in its predecessor statutes of 1918 and 1941. Id. at 457-59. Finally, the court suggested that “if the Congress ... intended to prohibit travel to prescribed areas ... one may reasonably wonder why the Congress did not expressly provide for such a prohibition.” Id. at 459.
In effect, the Laub decision establishes a one-bite rule for criminal enforcement of area restrictions. An American may travel to a restricted area once without criminal penalty, provided he has an unexpired passport. But upon his return, the State Department will revoke his passport. After that his travel outside the Western Hemisphere or to Cuba will result in violation of section 1185(b).

As a matter of statutory interpretation, Laub may be questioned on several grounds. But whether or not criticism of the opinion is justified, the decision underscores the inadequacy of a system of sanctions in which “passport” rather than “travel” is the key word. The real issues involved are the dimensions of the constitutional protection of foreign travel and the appropriate exercise of administrative discretion within the range of permissible regulation. Current passport practices tend to obscure these issues, not because they raise considerations different from those concerning restrictions on the right to travel abroad, but because they may seem to. If, as a matter of policy, anyone’s foreign travel is to be forbidden, this should be done directly by a travel control statute and not indirectly through passport restrictions. Similarly, if it is proper to prohibit all Americans from travel to a particular country, this should be done by such legislation. The Secretary of State should be delegated the responsibility of determining, at any particular time, which countries ought to be on the prohibited list. But enforcement of the restriction should not be a matter of passport policy.

79. The defendants clearly held passports “valid” for departure to any nonrestricted area. At the same time, it is likely that the purpose of § 1185(b) was to authorize an absolute prohibition on departure but not a prohibition on departure with intent to visit a particular country? Prior to 1952 the State Department repeatedly asserted and exercised authority to restrict the issuance of passports for travel to certain areas. During World War I, passports were issued for travel to specific countries for specific purposes only. See Circular Letter From the Secretary of State to American Diplomatic and Consular Officers, Feb. 8, 1915, in 9 AM. J. INT’L L. 383 (Special Supp. 1915). And restrictions were applicable to Albania, Bulgaria, China, Czechoslovakia, Hungary, Poland, Rumania, and the Soviet Union when the 1952 act was passed. See 26 DEP’T STATE BULL. 736 (1952). It may well be that these administrative actions were aimed at discouraging not prohibiting travel. But neither this nor the fact that the State Department did not refer to § 1185(b) in promulgating the Cuban restriction would seem to preclude use of the provision as an enforcement mechanism. The legislative history of the 1918 and 1941 measures provides some support for the position that Congress was concerned primarily about wartime border control. See, e.g., S. REP. No. 444, 77th Cong., 1st Sess. (1941); H. R. REP. No. 485, 65th Cong., 2d Sess. 2–3 (1918). But if this history is reviewed with a presumption that Congress intended to authorize restrictions on foreign travel in part as well as in whole, the presumption is not overcome. That there were subsequent unsuccessful legislative efforts to clarify the power has little to do with whether it was granted in 1952.

The court referred to the case as one of first impression, noting that in Zemel, a suit for declaratory judgment, the Supreme Court sustained the Cuban restriction solely on the basis of 22 U.S.C. § 211a and refused to pass on the applicability of § 1185(b). The court recognized, however, that prior to Zemel, several lower-court opinions concluded that power to refuse to validate passports for travel to certain areas was granted by § 1185(b), 255 F. Supp. at 458 n.61, citing Worthy v. Herter, 270 F.2d 905, 912 (D.C. Cir.), cert. denied, 361 U.S. 918 (1959); MacEwan v. Rusk, 228 F. Supp. 306, 310–12 (E.D. Pa. 1964), aff’d, 344 F.2d 963 (3d Cir. 1965). This conclusion was also reached by the lower court in the Zemel case. 228 F. Supp. at 71–74. In Worthy v. United States, 328 F.2d 386 (5th Cir. 1965), the court held that § 1185(b) could not constitutionally be applied to make criminal an American citizen’s re-entry into the United States without a valid passport. The court stated, however, that “it was the clear intent of the statute . . . to permit reasonable restrictions to be placed upon foreign travel, and to impose criminal penalties for willful violations.” Id. at 391.

80. For purposes of notice, however, restricted areas might be listed in passports.
The question remains where procedural safeguards ought to be imposed on the exercise of the Secretary of State's power, upheld in *Zemel*, to impose area restrictions. Two such safeguards are adopted in the State Department Bill. First, the bill provides that area restrictions would expire after a year, unless specifically extended. Second, the Secretary would be required to state the reasons for the limitation on travel to each country on the restricted list. These safeguards would assure periodic review by the Secretary of each restriction. They would seem to me more effective than a legislative attempt to narrow the bases on which restrictions could be imposed.

In some cases, stating the reasons for limiting travel to a particular country may be a fairly simple undertaking. The Government prepared a full statement in its *Zemel* brief on the need for restrictions against travel to Cuba. At the same time, however, it may be that some area limitations are maintained because those with authority to remove them are too involved in other, seemingly more important, problems or because conceivable international implications are thought sufficient to make removal not worth the trouble. Starting on a clean slate, it seems doubtful that travel to Albania, for example, would be restricted. If the Secretary were required annually to state the reasons for continuing the restriction (or, alternatively, that national security interests precluded stating them), it might well not be renewed.

There is a danger, of course, that such statements by the Secretary might become routine, or even that the rationales they expressed might take on lives of their own, more permanent because they were articulated. But on balance the idea seems worth trying. An analogy may be drawn to the pre-*Kent* passport cases in which several courts required the State Department to grant hearings to unsuccessful passport applicants and, if the hearings resulted in new denials, to state the reasons "with particularity." The Department subsequently decided to grant the applications rather than assume these burdens.

III.

Under the proposal developed above, the only basis for denial of a passport would be lack of United States nationality. A passport would be-

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81. § 301(b)–(c).
82. The State Department Bill also provides that "the Secretary may by public notice restrict the travel of nationals and limit the validity of passports with respect to travel to the following places: (1) Countries with which the United States is at war; (2) Countries or areas where armed hostilities are in progress; (3) Countries or areas to which the Secretary determines that travel must be restricted in the national interest because such travel would seriously impair the conduct of United States foreign affairs." § 301(a) (paragraphing omitted).
Section 302 of the bill would make it "unlawful for any national to travel to, in, or through any country or area as to which there is in effect a restriction imposed pursuant to section 301."
84. See *Hearing on the Right To Travel*, supra note 64, pt. 2, at 172.
come a document of identity, evidencing nationality and nothing more. The Passport Office's only nonclerical work would, therefore, involve determinations of nationality. On grounds of efficiency and policy, the task of making these determinations, and with it the entire operation of issuing passports, should be transferred to the Immigration and Naturalization Service in the Department of Justice. 85

As a matter of efficiency, this move would be sound because it would centralize in one agency all issues of law concerning nationality. Under the 1952 Immigration and Nationality Act, the Attorney General is charged with resolving, within the executive branch, all legal questions relating to naturalization of aliens in the United States. 86 In the main, he has delegated this responsibility to the Immigration and Naturalization Service.

In determining whether passport applicants are United States nationals, the Passport Office must pass on many of the same kinds of legal issues considered by the Immigration and Naturalization Service. It is hardly surprising that in some cases their conclusions differ. 87 The Attorney General is responsible for resolving these differences—if they are brought to his attention. But it is obviously impossible for him to pass on all conflicts between the two agencies. As a means of avoiding duplication and ensuring uniformity of decision within the executive branch, therefore, there is much to be said for transferring the resolution of all passport problems involving nationality issues to the Immigration and Naturalization Service. In fact, an argument can be made that the 1952 act requires that nationality determinations concerning persons within the United States must be made by the Service, on the ground that the statutory grant of authority to the Secretary of State refers only to "the determination of nationality of a person not in the United States." 88

The rationale for moving the entire Passport Office out of the State Department goes deeper than issues of efficiency. For years the issuance of passports has been considered closely linked to foreign policy. I have argued that passports should have nothing to do with foreign policy, that they

85. A 1953 study of passport policies in twenty-five nations determined that "half the countries surveyed consider the passport as a foreign affairs document and half consider it a police control measure." STAFF OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS, 86TH CONG., 2D SESS., REORGANIZATION OF THE PASSPORT FUNCTIONS OF THE DEPARTMENT OF STATE 29 (Comm. Print 1953). In eleven of these countries, passports were issued by the foreign ministries in charge of police functions. Id. at 30.


87. At least in the past, for example, the two offices apparently disagreed on the interpretation of § 2 of the Immigration Act of 1907, ch. 1134, 34 Stat. 898, regarding the consequences of an act that "confirms" an oath of allegiance to a foreign state taken by a United States citizen during his minority. The Immigration and Naturalization Service has considered that a "confirmatory act," such as acceptance of a foreign passport, results in expatriation of the individual. See, e.g., W—, 4 I. & N. Dec. 22 (1950). The Passport Office maintains that such an act does not cause expatriation unless the act is itself expatriating. See 8 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 223.5 (interpretations).

should be issued to any applicants who can prove American nationality. If the only question involved in the issuance of a passport were nationality, there would be no reason to maintain this function within the State Department.

Beyond this, those in the Justice Department who supervise the Immigration and Naturalization Service are likely to be more sensitive to the importance of procedural protections for individual rights than senior State Department officials. In part this is because those officials are generally not lawyers. But more important, except for the Passport Office, the State Department has virtually no direct dealings with American citizens. Too often, passport problems are there seen as raising petty irritations rather than basic issues.

Finally, for decades the Passport Office has been the focus of controversy within the State Department and, particularly, within Congress. As an annual ritual, congressional committees criticize the Department for abusing the Passport Office. Whatever the merits of any side in these controversies, there is much to be said for relocating the Passport Office, if only to try a new slate.

Addendum

In October 1966, after this Article went to press, the State Department issued new passport regulations. Provisions in the new regulations relevant to issues I have discussed were copied almost verbatim from the State Department Bill. The discussion of the bill in this Article is, therefore, equally applicable to the new regulations.