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PASSPORT REVOCATIONS OR DENIALS
ON THE GROUND OF NATIONAL
SECURITY AND FOREIGN POLICY

INTRODUCTION

Section 215 of the Immigration and Nationality Act (INA) requires
that aliens and citizens who wish to enter or leave the country have
passports. A passport is also a practical necessity for world travel
because it is almost impossible to enter a foreign country without
one. Directly competing with this need of individual travelers,

shall . . . be unlawful—(1) for any alien to depart from or enter or attempt to depart
from or enter the United States except under such reasonable rules, regulations, and
orders . . . as the President may prescribe." Id. § 1185(a). It also states that "It shall . . . 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." Id. § 1185(b).

(1835); United States v. Browder, 113 F.2d 97, 98 (2d Cir. 1940), aff'd, 312 U.S. 335
(1941). It requests permission for the bearer to come and go freely, as well as for all
lawful aid and protection. United States v. Laub, 385 U.S. 475, 481 (1967); Urtetiqui
v. D'Arcy, 34 U.S. at 456, 9 Pet. at 699; Worthy v. United States, 328 F.2d 386, 391
(5th Cir. 1964); United States v. Browder, 113 F.2d at 98; Department of State, The
American Passport 4 (1898) [hereinafter cited as The American Passport]; 3 J. Moore,
A Digest of International Law 856 (1906). It identifies a citizen and is evidence of his
citizenship for the purpose of foreign travel. United States v. Laub, 385 U.S. at 481;
Gillars v. United States, 182 F.2d 962, 981 (D.C. Cir. 1950); United States v. Brow-
der, 113 F.2d at 98; 3 G. Hackworth, Digest of International Law § 259, at 435
(1942); 3 J. Moore, supra, at 856; The American Passport, supra, at 4. A passport, as
it relates to aliens, is defined as "any travel document issued by competent authority
showing the bearer's origin, identity, and nationality if any, which is valid for the
Miller v. Sinjen, 289 F. 388, 394 (8th Cir. 1923) (passport not even evidence of
citizenship). Furthermore, on re-entry into the United States, it is the usual and
convenient manner of proving citizenship. Kent v. Dulles, 357 U.S. at 121; United
States v. Browder, 113 F.2d at 99. The passport is also evidence of permission to
travel, Worthy v. United States, 328 F.2d at 391, and recognizes the bearer's right
to receive American diplomatic protection abroad. United States v. Laub, 385 U.S.
at 481; 3 G. Hackworth, supra, § 259, at 435; 2 C. Hyde, International Law Chiefly
As Interpreted and Applied by the United States 1196-97 (2d rev. ed. 1945). Accord-
ing to Professor Borchard, a passport is merely a certificate of citizenship. 2 E.
Borchard, The Diplomatic Protection of Citizens Abroad 493 (1915). Technically, a
passport is the visa affixed to the certificate by the foreign country. Id. This is the
political nature of a passport. Urtetiqui v. D'Arcy, 34 U.S. at 456, 9 Pet. at 699; 8
M. Whiteman, Digest of International Law 197 (1967). Originally, this was the sole
function of the passport. It was merely a desirable incident to travel. See Shachtman
v. Dulles, 225 F.2d 938, 940 (D.C. Cir. 1955); Gillars v. United States, 182 F.2d at
981.

3. Aptheker v. Secretary of State, 378 U.S. 500, 507 (1964); Kent v. Dulles, 357
U.S. 116, 121 (1958); Browder v. United States, 312 U.S. 335, 339 (1941); Shacht-
however, is the concern of the federal government in managing foreign affairs. As the Supreme Court has observed, travel abroad can have a direct impact on foreign policy by involving the United States in "dangerous international incidents."¹

During the first eighty years of this nation’s history, public officials at all levels of government issued passports. With the enactment of the Act of August 18, 1856,² however, Congress gave exclusive authority to the Secretary of State to issue a United States passport.³ Although the current version of this Act has been construed to grant the Secretary discretion to withhold a passport in certain circumstances,⁴ the extent of his authority is disputed.⁵

Litigants have challenged the Secretary’s authority to revoke or deny passports on such grounds as illegality,⁶ citizenship,⁷ and Communism,⁸ with varying degrees of success.⁹ The Executive

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¹ Zemel v. Rusk, 381 U.S. 1, 15 (1965); see B. Schwartz, Constitutional Law § 3.15, at 100 (2d ed. 1979).
² 4. Zemel v. Rusk, 381 U.S. 1, 15 (1965); see B. Schwartz, Constitutional Law § 3.15, at 100 (2d ed. 1979).
³ 5. See The American Passport, supra note 2, at 37-40. Passports have been in use since before the Constitution. Id. at 36-37. In the early days of the Republic, when there was no specific statute on the subject, federal authority for passport issuance was exercised by the State Department as part of its traditional duties in the conduct of foreign affairs. Id. Passports continued to be issued, however, by local authorities. Id.
⁵ 7. Id. § 23, 11 Stat. 60. Although some of those who had issued passports prior to the Act continued to do so after its enactment, these documents had become illegal. The American Passport, supra note 2, at 41-42.
¹¹ 13. The Secretary’s authority to deny passports on grounds of illegality, citizenship, and fraudulent use of a passport, or to impose area restrictions has been expressly upheld. Zemel v. Rusk, 381 U.S. 1, 7 (1965); Kent v. Dulles, 357 U.S. 116, 127 (1958). His authority to deny passports on grounds of communism and failure to take an oath of allegiance, however, has been expressly repudiated. Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964); Kent v. Dulles, 357 U.S. 116, 129-30
Branch and, in particular, the State Department, have asserted, however, that the Passport Act of 1926, the successor to the Act of August 18, 1856, grants the Secretary power to deny a passport. In Agee v. Muskie, the Secretary revoked the passport of a former member of the Central Intelligence Agency (C.I.A.) who was revealing the names of undercover C.I.A. agents around the world. The

14. 22 U.S.C. §§ 211a-218 (1976). Section 211a provides that "[t]he Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other persons shall grant, issue, or verify such passports." Id. § 211a. Section 211a was amended in 1978 by the Foreign Relations Authorization Act, Fiscal Year 1979, which added the sentence: "Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers." 22 U.S.C. § 211a (Supp. II 1978) (codifying Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, 92 Stat. 971 (1978)). In Executive Order No. 11,295, 3 C.F.R. 138 (1966 Compilation), pursuant to the authority granted in 3 U.S.C. § 301 (1976), the President delegated to the Secretary of State the power "to exercise, without the approval, ratification, or other action of the President, the authority conferred upon the President by the first section of the Act of July 3, 1926 (22 U.S.C. § 211a), to designate and prescribe for and on behalf of the United States rules governing the granting, issuing, and verifying of passports."


16. The Secretary has for many years claimed discretion to withhold passports on various grounds. Some of these grounds include the applicant's illegal conduct, 2 E. Borchard, supra note 2, at 495; 3 G. Hackworth, supra note 2, § 268, at 498-504; 2 C. Hyde, supra note 2, at 1195; 3 J. Moore, supra note 2, at 920-23, the applicant's loyalty and citizenship, 3 G. Hackworth, supra note 2, § 268, at 498, 501; 3 J. Moore, supra note 2, at 919-20, fraudulent use of a passport, 3 G. Hackworth, supra note 2, § 268, at 502, travel to certain areas, 4 Fed. Reg. 3892 (1939) (Europe); 3 G. Hackworth, supra note 2, § 272, at 531-33 (Ethiopia, China, Spain); 33 Dep't State Bull. 777 (1955) (Albania, Bulgaria, China, Korea and Vietnam), communism or furtherance of Communist goals, Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961), mental illness, 22 C.F.R. § 51.70(3) (1980), and conduct that would seriously damage our national security or foreign policy. 22 C.F.R. §§ 51.70-.72 (1980).


18. Id.

19. Id. at 81.
grounds for revocation were that Agee's travel was seriously damaging the national security and foreign policy of the United States. The
District of Columbia Circuit held that the Secretary lacked the power to revoke Agee’s passport for national security reasons.\(^2\)

This Note examines whether Congress has delegated authority to the Secretary to revoke or deny passports on the ground of national security and foreign policy. Because it concludes that the Secretary has this authority, this Note also considers whether such a revocation is consistent with the due process guarantee of the fifth amendment.

I. Construing the Statute—Implied Authorization

Although the President has broad, inherent power to manage the nation’s foreign affairs,\(^2\) he has no inherent authority to burden the

\(^2\) Agee v. Muskie, 629 F.2d at 82.

\(^2\) Id. at 87.

\(^2\) The President’s power to conduct foreign affairs has been described as “plen- nary.” United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936); L. Henkin, Foreign Affairs and the Constitution 37 (1972); L. Tribe, American Constitutional Law § 4-3, at 164 (1978). Some of this authority is enumerated in the Constitution. For example, the Constitution provides that “[t]he President shall be Commander in Chief of the Army and Navy,” U.S. Const. art. II, § 2, cl. 1, “[h]e shall have Power . . . to make Treaties . . . and . . . shall appoint Ambassadors, other public Ministers and Consuls,” id., cl. 2, and “shall receive Ambassadors and other public Ministers.” Id. § 3. Moreover, the power to “receive Ambassadors” gives the President the ability to decide whether a foreign government will be recognized by the United States. B. Schwartz, supra note 4, § 5.13, at 186; see Baker v. Carr, 369 U.S. 186, 211-12 (1962); Guaranty Trust Co. v. United States, 304 U.S. 126, 137-38 (1938); Jones v. United States, 137 U.S. 202, 212 (1890). He also shares with Congress the power to conduct foreign affairs. L. Henkin, supra, at 27; B. Schwartz, supra note 4, § 5.13, at 185. Although the President has few enumerated foreign affairs powers, and shares with Congress those unenumerated powers inherent in the federal government, the President has the greater role in the area of foreign affairs. B. Schwartz, supra note 4, § 5.13, at 185; see L. Tribe, supra, § 4-3, at 163-64. John Marshall observed in 1820 that “[t]he president is the sole organ of the nation, in its external relations, and its sole representative with foreign nations.” Address by Hon. John Marshall, House of Representatives of the United States, reprinted in 18 U.S. 212, 5 Wheat. app. 26 (1820).
constitutional rights of individual citizens. Only Congress has the power to burden a constitutional right, such as the right to travel embodied in a passport. In section 211a of the Passport Act, however, Congress delegated its authority to restrict travel to the Executive Branch. The section provides that “[t]he Secretary of State may grant and issue passports . . . under such rules and regulations as the President shall designate.” Pursuant to this power, the Secretary has promulgated regulations under which he may revoke or deny a passport if he “determines that the national’s activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States.” Because sec-

25. Kent v. Dulles, 357 U.S. 116, 127-29 (1958); see Reid v. Covert, 354 U.S. 1, 5-6 (1957); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (the President must act in subordination to the Constitution); L. Henkin, supra note 24, at 87-88, 106 (both Congress’ and the President’s powers are limited by the Constitution; when Congress has acted, Congress should prevail); L. Tribe, supra note 24, at 164 (the President’s foreign affairs power is limited by Congress). Moreover, both Congress’ and the President’s authority in foreign affairs is limited by what the Constitution enumerates as being exclusively within the other’s authority. See L. Henkin, supra note 24, at 92-93. For example, the President cannot declare war and Congress cannot make treaties. Id. at 92-95.

26. Kent v. Dulles, 357 U.S. 116, 129 (1958). In Kent, the Court stated in dicta that if Congress has delegated the power to revoke passports under this Act to the Secretary “the standards must be adequate to pass scrutiny by the accepted tests.” Id. The Court in Zemel v. Rusk, 381 U.S. 1 (1965), decided whether Congress had given the Secretary sufficient standards. Id. at 17-18. Congress has extensive authority in the area of foreign affairs. As Professor Henkin has stated, “[t]oday, there is surely no warrant for confident assertion that there is any matter relating to foreign affairs that is not subject to legislation by Congress.” L. Henkin, supra note 24, at 76. Congress has both enumerated and inherent constitutional powers over foreign affairs. Id. at 67-68; B. Schwartz, supra note 4, § 5.13, at 185. Congress also has the authority to protect our national security. Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964); see United States v. Robel, 389 U.S. 258, 266-67 (1967); Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 95-96 (1961). Nevertheless, Congress may not ignore the Bill of Rights merely because those affected by the legislation are abroad. Reid v. Covert, 354 U.S. 1, 5-6 (1957).


28. See id.; note 14 supra.

29. 22 C.F.R. § 51.70(b)(4) (1980). This regulation also allows the Secretary to refuse to issue a passport, among other reasons, if the applicant has not repaid money lent by the United States for return to this country, id. § 51.70(b)(1), is incompetent, id. § 51.70(b)(3), or is an unmarried minor whose guardian does not authorize the passport’s issuance or does not guarantee any United States loans to the minor for his return to the country. Id. § 51.70(b)(3). The regulations also permit the Secretary to revoke passports on these grounds. Id. § 51.71. The Secretary has also promulgated a regulation under which passports must be denied. Id. § 51.70(a). The regulation mandates the denial of a passport, except for direct return to the United States, if the applicant is the subject of a federal warrant for a felony, id. § 51.70(a)(1), is required by a court order to remain in the country, id. § 51.70(a)(2), has been committed to a mental institution, id. § 51.70(a)(3), is the subject of a request for extradition from a foreign country, id. § 51.70(a)(4), is under subpoena for a federal prosecution or investigation of a felony, id. § 51.70(a)(5), or has not repaid a
toc 211a contains neither language expressly authorizing passport revocations or denials on the ground of national security and foreign policy, nor language expressly proscribing such refusals, it is unclear whether Congress intended the Secretary to have this authority. To justify the use of this power, therefore, it must be determined whether Congress has implicitly consented.

A. Administrative Practice

In Kent v. Dulles, the Supreme Court established a test to determine whether Congress has implicitly approved of certain grounds for passport refusals. Grounds for denial are proper only if it can "fairly be argued" that Congress has adopted the particular category of refusals "in light of prior administrative practice." Subsequently, the Court clarified the Kent test in Zemel v. Rusk. It explained that congressional adoption of an administrative practice could be determined by examining two factors. First, Congress must have enacted new legislation on the subject of passports in which it had the opportunity to rebut the Secretary's claimed authority. Second, it clearly must not have taken that opportunity. Moreover, implicit in these guidelines is the requirement that Congress must have been aware of this administrative practice.

The Secretary has clearly established an administrative practice of revoking or denying passports for national security reasons. He has consistently revoked or denied passports whenever necessary to pro-

30. 22 U.S.C. § 211a (1976 & Supp. II 1978); see note 14 supra. The only limitation on the Secretary's authority that is expressly stated in the statute is a limitation on the ability to impose area restrictions. 22 U.S.C. § 211a-218 (1976 & Supp. II 1978); see Zemel v. Rusk, 381 U.S. 1, 7-8 (1965).
31. See Ex parte Endo, 323 U.S. 283, 301 (1944).
33. Id. at 128; accord, Zemel v. Rusk, 381 U.S. 1, 17-18 (1965). In deciding what constitutes an administrative practice, both passport denials and revocations are equally relevant because they restrict the right to travel abroad. Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Kent v. Dulles, 357 U.S. 116, 125 (1958). In Zemel v. Rusk, 381 U.S. 1 (1965), the Court considered the Secretary's administrative practice of restricting passports for travel to certain areas. Id. at 8-11. It considered both restrictions imposed on newly issued passports as well as on those outstanding at the time of the imposition of the restrictions. Id. This includes restrictions on the right to travel both before and after the right has been exercised and, thus, includes situations similar to both denials and revocations.
34. 381 U.S. 1 (1965).
35. Id. at 11-12.
36. Id. at 12.
37. Id.
tect the safety of the nation, to prevent the overthrow of the government by subversion or espionage, or to ensure that American relations with foreign countries will not be impaired. Although the Agee court determined that the Secretary had not established a consistent administrative practice, it did not consider all the evidence of that practice. The court stated that only eleven cases contesting the Secretary’s practice had arisen both before and after the enactment of the Passport Act. The Secretary, however, has revoked or denied

39. Department of State Passport Policies: Hearings on Department of State Passport Policies Before the Senate Comm. on Foreign Relations, 85th Cong., 1st Sess. 10 (1957) [hereinafter cited as 1957 Senate Hearings] (statement of Robert Murphy) (the Secretary claimed authority in 1957 to revoke the passport of a citizen engaging in activities detrimental to the national interest); see 3 J. Moore, supra note 2, at 920 (the Secretary refused to issue passports in 1861 to persons whose conduct would be “hostile and injurious to the peace of the country and dangerous to the Union”); 26 Dep’t State Bull. 919 (1959) (passport denied to person whose activities would be detrimental to the United States); Passport Refusals for Political Reasons, supra note 3, at 174-78, 178 n.58 (during period from 1947 to 1951, more than ten passport applications were refused on grounds that the applicant’s travel was not in the “best interests of the United States”).

40. See Passport Legislation: Hearings on S. 2770, S. 3998, S. 4110, and S. 4137 Before Senate Comm. on Foreign Relations, 85th Cong., 2d Sess. 22-23, 25, 30 (1958) [hereinafter cited as 1958 Senate Hearings] (statement of Robert Murphy) (the Department claimed authority to deny passports when it would otherwise be “inimical to the security of the United States”); Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement: Hearings on H.R. 13760 Before the House Comm. on Foreign Affairs, 85th Cong., 2d Sess. 7 (1958) [hereinafter cited as 1958 House Hearings] (statement of Loftus Becker) (Department felt that decision in Kent did not affect the Secretary’s authority to revoke passports on national security grounds because Kent dealt only with revocations on grounds of Communism); Staff of Senate Comm. on Government Operations, 86th Cong., 2d Sess., Report on S. 2095, Reorganization of the Passport Functions of the Dep’t of State 13 (Comm. Print 1960) (Secretary has authority to withhold a passport as part of his responsibility to protect the best interests of the United States); 2 C. Hyde, supra note 2, at 1195-96 (passports refused to those who might use them to engage in espionage or subversive activities).

41. See 1957 Senate Hearings, supra note 39, at 38-40 (State Department statistics of passport refusals for 1955 and 1956, including passports refused on grounds of participation in foreign political affairs deemed harmful to good relations and those refused to persons whose conduct abroad has brought discredit on the United States and caused difficulties for other Americans); 26 Dep’t State Bull. 919 (1952) (passport denied when it would impair the conduct of foreign relations); Department of State, Notice to All Bearers of Passports 2 (Jan. 1, 1948—Jan. 15, 1955) (interfering in political activities of foreign countries grounds for refusal of a passport); 2 Department of State, Papers Relating to Foreign Relations of the United States 1033 (1907) (passport refused because applicant was “disturbing, or endeavoring to disturb” United States relations with foreign countries); 3 C. Hackworth, supra note 2, § 268, at 501 (passport denied to someone who would bring “grave discredit on the United States” or take part in the military or political affairs of a foreign government in such a way that it would be “contrary to the policy or inimical to the welfare of the United States”).

passports on these grounds on many more occasions. Moreover, he has notified passport holders of this practice.

Additionally, Congress has been made aware of the Secretary's practice. The Executive Branch has frequently informed Congress of the Secretary's position in hearings on the State Department's passport policies, in hearings on passport legislation, and during debate on related bills. Moreover, Congress has recognized these policies in its own reports and documents concerning passport legislation.

Since the enactment of the Passport Act of 1926, Congress has enacted legislation amending the passport requirement of section 215 of the INA. Although it was aware of the Secretary's policy, in

43. Since 1861 the Secretary has revoked or denied passports for several reasons related to national security or foreign policy. See 1958 Senate Hearings, supra note 40, at 30 (State Dep't statistics; 57 passports revoked for illegal activities or activities prejudicial to foreign relations); 1957 Senate Hearings, supra note 39, at 38-40 (State Dep't statistics; 31 refusals for conduct harmful to good relations or detrimental to the United States; 411 refusals for "security reasons"); 2 C. Hyde, supra note 2, at 1195-96 (passport refused for subversive activities or espionage); 3 J. Moore, supra note 2, at 920 (refusals for national security reasons); 26 Dep't State Bull. 919 (1952) (passport refused for activities that would be detrimental to interests of United States or would impair foreign relations); Passport Refusals for Political Reasons, supra note 3, at 174-78, 178 n.58 (more than ten refusals on grounds that travel not in the best interests of the United States).


45. See 1957 Senate Hearings, supra note 39, in which the Senate Committee on Foreign Relations considered the passport policies of the State Department and was informed of the policy of revoking passports on grounds of national security, id. at 10 (statement of Robert Murphy), and was provided with statistics of passport revocations on foreign policy grounds. Id. at 38-40 (State Dep't statistics).

46. 1958 Senate Hearings, supra note 40, at 22-23, 30 (statement of Robert Murphy); 1958 House Hearings, supra note 40, at 7 (statement of Loftus Becker).


amending the Passport Act in 1978, Congress did not change section 211a in any way that would preclude the Secretary's practice of revoking passports on the ground of national security or foreign policy. Congress merely amended section 211a to curtail the authority to impose area restrictions on foreign travel. Thus, under the Zemel test, this action constitutes adoption of the administrative practice of the Secretary.

Admittedly, in 1958 and 1966, bills were introduced in Congress that would have expressly given the Secretary authority to deny passports on the ground of national security. Although these bills did not pass, this provides no inference that the Secretary did not already have this authority. Nor does it indicate that Congress intended to preclude this authority. Moreover, Congress may have failed to act for reasons unrelated to the Secretary's power to revoke passports on the ground of national security and foreign policy. For example, the 1958 bills were introduced in response to the Kent decision in which the Court held that Congress had not authorized the Secretary to deny passports to Communists. Although these bills were intro-

52. See notes 1 & 14 supra. Acquiescence and failure to repeal has often been held to be persuasive evidence that Congress has accepted an administrative practice, which is, therefore, entitled to great weight. Zemel v. Rusk, 381 U.S. 1, 11 (1965); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 313 (1933); Costanza v. Tillinghast, 287 U.S. 341, 345 (1932). When a constitutional right, such as the right to travel, is involved, however, authority to limit it cannot be assumed from mere "acquiescence or non-action." Greene v. McElroy, 360 U.S. 474, 507 (1959). This difficulty is obviated because this is not a case of mere inaction. Congress has remained active in this area by enacting new passport legislation since the Passport Act. Zemel v. Rusk, 381 U.S. 1, 11 (1965).

53. The Secretary's authority to impose area restrictions for travel abroad was limited to countries "with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers." Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, 92 Stat. 971 (1976) (codified at 22 U.S.C. § 211a (Supp. II 1979)).


duced to permit such revocations or denials, they only incidently included provisions for revocation or denial on the ground of national security. These bills did not pass primarily because Congress feared that they could be used to revoke or deny passports of individuals who were not proven Communists.

B. Construing sections 211a and 215 in pari materia

The Secretary's authority to revoke passports for national security reasons is also supported by the doctrine of in pari materia. According to this rule of construction, statutes relating to the same subject matter are to be construed together to give effect to the purposes of each. Both section 211a of the Passport Act and section 215 of the INA deal with passports. Section 215 requires travelers to obtain passports when entering or leaving the country. Section 211a gives the Secretary authority to issue passports and gives the President authority to promulgate rules and regulations concerning their issuance.
The purpose of section 215 is to protect the national security and foreign policy of the United States. An examination of the earlier versions of this section indicates that this has always been Congress' intention. The predecessor of section 215, enacted in 1918, was intended to prevent leaks of important military information to enemy countries and to prevent the travel of American citizens who were enemy agents. The Secretary, however, could only exercise this power during time of war and if the public safety so required. The INA was reenacted in 1941 to prevent subversive activities and to promote the national defense. Moreover, in 1952, when Congress kept the Act from lapsing by enacting a new statute, its express purpose was "to insure the national security." In 1978, Congress extended the requirement of section 215 to peacetime. Its stated reason was that the President should be able to control travel when it is inconsistent with a "greater government interest" or with American foreign policy interests.

69. The statute was intended to provide a "clearinghouse . . . where people coming and going . . . can be checked upon, so as to prevent sabotage and 'fifth column' activities." 87 Cong. Rec. 5049 (1941) (remarks of Rep. Johnson).
70. Id. at 5048 (letter of Ruth B. Shipley); S. Rep. No. 444, 77th Cong., 1st Sess. 2 (1941). It was also intended to prevent the travel of those whose activities were "inimical to the best interests of the United States." Id. at 1-2; 87 Cong. Rec. 5048 (1941) (letter of Ruth B. Shipley); id. at 5049 (remarks of Rep. Eberharter).
Because national security can be considered a "greater government interest," the Secretary's power to revoke passports under section 211a is consistent with the purposes of section 215. Most importantly, without this authority, the Executive Branch would be unable to effectuate the underlying congressional purpose of section 215. Consequently, section 211a must be read to authorize passport revocations on the ground of national security.

II. CONSTITUTIONAL CONSIDERATIONS

It is clear that section 211a of the Passport Act delegates authority to the Secretary to revoke or deny passports on the ground of national security and foreign policy. Moreover, even though the right to travel abroad is constitutionally protected, governmental infringement on this right in the form of revocations or denials of passports does not violate the procedural and substantive due process rights of travelers abroad who threaten the nation's safety or foreign relations.

76. Id. In Snepp v. United States, 444 U.S. 507 (1980) (per curiam), the Court found that national security was a compelling governmental interest, id. at 509 n.3, and that it was sufficient to override the constitutional rights of a citizen. Id. at 509 & n.3.

77. Agee v. Muskie, 629 F.2d 80, 108 (D.C. Cir.) (MacKinnon, J., dissenting), cert. granted, 101 S. Ct. 69 (1980) (No. 80-83); Petitioner's Brief for Certiorari at 31, Agee v. Muskie, No. 80-83 (filed July 18, 1980). Additionally, the decision in Zemel v. Rusk, 381 U.S. 1 (1965), suggests that Congress implicitly authorized passport revocations on the ground of national security and foreign policy. The Court held that the Secretary was not required to issue passports if he had concluded that the travel of any citizens to an area might involve the United States in "dangerous international incidents." Id. at 15. The Court justified its conclusions with the "weightiest considerations of national security." Id. at 16. Hence, the Court recognized the Secretary's authority to deny passports to all citizens for travel to any area when such travel is contrary to our national security. This broad power necessarily includes the lesser power to deny a passport to one citizen for travel to any area when such travel is contrary to national security. Agee v. Muskie, 629 F.2d 80, 95 (D.C. Cir.) (MacKinnon, J., dissenting), cert. granted, 101 S. Ct. 69 (1980) (No. 80-83). The soundness of this argument can be demonstrated under principles of formal logic. It reduces to a mere case of "universal specification," which, under principles of formal logic, is a basic rule. Any sentence derived under that rule, from a true set of premises, is a valid sentence with a true conclusion. B. Mates, Elementary Logic 111-13 (2d ed. 1972).


79. The requirement that liberty not be deprived without due process does not mean that it can never be deprived. Worthy v. United States, 328 F.2d 386, 393 (5th Cir. 1964); Woodward v. Rogers, 344 F. Supp. 974, 986-87 (1972), aff'd, 486 F.2d 1317 (D.C. Cir. 1973); see Zemel v. Rusk, 381 U.S. 1, 14 (1965) (upheld infringement of right to travel by means of area restrictions); 1958 House Hearings, supra note 40, at 7 (statement of Rep. Vorys) ("An American citizen's right to locomotion is circumscribed by the law at every traffic light. To me to talk about a constitutional right to travel that can't be stopped in the public interest is puzzling to say the least.").
Procedural due process, in its strictest sense, requires notice and the opportunity to be heard. The notice given must be timely and adequate, and detail the reasons for the action. The hearing requirement is satisfied when the person who may be adversely affected has an effective opportunity to defend. He must be allowed to confront and cross-examine adverse witnesses and have access to adverse information used by the government. He is also entitled to present his own arguments and to be represented by an attorney, if he desires. Additionally, he has the right to a decision based on evidence presented at the hearing.

The Secretary’s procedures for passport revocations comport with the requirements of procedural due process. The regulations

80. Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Powell v. Alabama, 287 U.S. 45, 68 (1932); Grannis v. Ordean, 234 U.S. 385, 394 (1914); Twining v. New Jersey, 211 U.S. 78, 110-11 (1908). Procedural due process is flexible and of no fixed content. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). If the procedural protections are sufficient to protect the individual interests involved, formal notice and a hearing are not required. Id. at 333-35. In deciding what process is due, the Court in Mathews found that “due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” Id. at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970)). This Note is not concerned with what process is due because it concludes that passport revocations or denials satisfy the strictest standards of procedural due process. See notes 87-97 infra and accompanying text.


86. Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Ohio Bell Tel. Co. v. Public Util. Comm’n, 301 U.S. 292, 302-03 (1937); United States v. Abilene & S. Ry., 265 U.S. 274, 288 (1924). Goldberg suggested that to show compliance, the decision-maker should give reasons for his result and state the evidence on which it is based. “[A]n impartial decision maker is essential.” 397 U.S. at 271; accord, Parham v. J.R., 442 U.S. 584, 606 (1979). Twining v. New Jersey, 211 U.S. 78 (1908), indicates two other requirements of procedural due process that must be determined on an individual basis. The court hearing the action must have jurisdiction, and there must be a fair trial. Id. at 110-11.

promulgated by the Secretary for the denial or revocation of a passport contain the methods of notification of any adverse action, and the procedures for review. They require that written notice be given to the passport holder. The notice must state the reasons for the action and the available procedures for review. The regulations also provide that a hearing must be granted upon request and that no adverse action may be taken pending the outcome of the hearing. Moreover, the passport holder is expressly entitled to confront and cross-examine adverse witnesses, to be informed of all the evidence used against him and its source, to present his own evidence and arguments, and to be represented by counsel if he so desires. Furthermore, the hearing officer may base his decision only on information made available to the person adversely affected and made part of the record of the hearing.

Substantive due process requires, generally, that the government avoid unreasonable or arbitrary actions. The Supreme Court has formulated various standards of review to determine whether a particular governmental action satisfies substantive due process. The lowest standard requires that there be a rational relationship between the action and a legitimate governmental interest. The intermediate test requires a fair and substantial relationship to an important governmental interest. The strictest standard requires a compelling

88. 22 C.F.R. §§ 51.75-.89 (1980).
89. Id. § 51.75.
90. Id.
91. Id. § 51.81.
92. Id. The person affected also receives notice of the hearing date. Id. § 51.82.
93. Id. § 51.85.
94. Id.
95. Id.
96. Id. § 51.84.
97. Id. § 51.83.
99. These are the same standards used to determine whether a statute violates the equal protection clause of the fourteenth amendment. See Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); P. Freund, A. Sutherland, M. Howe & E. Brown, Constitutional Law 914 (4th ed. 1977).
100. Lindsey v. Normet, 405 U.S. 56, 74 (1972) (equal protection). The lowest standard is the one most often used by courts. It has been used, for example, in a commercial context, to determine the validity of a tax statute, Railway Express Agency v. Virginia, 358 U.S. 434 (1959) (equal protection), and in a social context, in measuring the fairness of a welfare termination procedure, Dandridge v. Williams, 397 U.S. 471 (1970) (equal protection), or a school districting system. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (equal protection).
101. The intermediate standard was developed by the courts for use in cases of alleged gender-based discrimination. The reasoning behind this test appears to be that statutes discriminating on the basis of sex should be reviewed under a stricter standard than the simple "rational relationship test." See Craig v. Boren, 429 U.S.
governmental interest, and that the means adopted be necessary to accomplish the government’s purpose. The strictest standard has been used when a statute infringes upon a fundamental right, which has been defined by the Supreme Court as one either “explicitly or implicitly guaranteed by the Constitution.”

The right to travel is twofold: it includes the right to travel interstate and the right to travel abroad. Interstate travel has been recognized by the Supreme Court as a fundamental right of citizenship. United States citizens have the right to pass through

190, 199-200, 204 (1976) (equal protection); Kahn v. Shevin, 416 U.S. 351, 355 (1974) (same); Reed v. Reed, 404 U.S. 71, 76 (1971) (same); Vorchheimer v. School Dist., 533 F.2d 880, 888 n.7 (3d Cir. 1976) (same), aff’d per curiam, 430 U.S. 703 (1977). The Supreme Court, however, could not agree as to whether gender-based classifications should be scrutinized under the strictest standard. Compare Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality opinion) (equal protection) with id. at 691-92 (Powell, J., concurring) (same).


every part of the country unhindered by statutes, rules, or regulations that unreasonably burden or restrict travel. The right of international travel, on the other hand, has been found to be inherent in the "liberty" guaranteed by the due process clause of the fifth amendment. Although the Court has tested actions infringing the right to travel interstate against the strictest standard, it has not yet


108. Kent v. Dulles, 357 U.S. 116, 125 (1958). "Liberty" has been read to include travel abroad. Califano v. Aznavorian, 439 U.S. 170, 176 (1978); Califano v. Torres, 435 U.S. 1, 4 n.6 (1978) (per curiam); Zemel v. Rusk, 381 U.S. 1, 14 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964); Kent v. Dulles, 357 U.S. 116, 125 (1958); Shachtman v. Dulles, 225 F.2d 938, 941 (D.C. Cir. 1955); cf. Williams v. Fears, 179 U.S. 270, 274 (1900) ("Undoubtedly the right of locomotion, 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 right secured by the Fourteenth Amendment and by other provisions of the Constitution.") The due process clause of the fifth amendment provides that "No person shall be deprived of liberty without due process of law." U.S. Const. amend. V, cl. 3. The term "liberty," as it is used in this clause, is broad. Board of Regents v. Roth, 408 U.S. 564, 571 (1972) ("Liberty and 'property' are broad and majestic terms. They are among the [great constitutional concepts . . . purposely left to gather meaning from experience . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."") (quoting National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)); accord, Stanley v. Illinois, 405 U.S. 645, 650-51 (1972); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); Williams v. Fears, 179 U.S. 270, 274 (1900).
expressly considered which test applies to a governmental action that directly infringes on the right to travel abroad. Regardless of which test is applied to passport revocations, however, the Secretary's actions will not violate due process.

Under the strictest standard, it can be demonstrated that maintaining the security of the nation and preserving the country's foreign policy are compelling governmental interests. In Snepp v. United States, these interests were weighed against fundamental rights protected by the first amendment. Holding that the C.I.A. could impose prior restraints on the otherwise constitutionally protected speech of its employees, the Court found that national security and foreign policy are compelling governmental interests.

The courts have distinguished the right to travel interstate from the right to travel abroad on the ground that the former is a fundamental right, long recognized as implicit in the Constitution, and the latter is merely an aspect of the liberty protected by the due process clause of the fifth amendment. Califano v. Aznavorian, 439 U.S. 170, 176 (1978); Califano v. Torres, 435 U.S. 1, 4 n.6 (1978) (per curiam).

The right to travel abroad is a right implicit in the Constitution because it is protected by the fifth amendment. Thus, by definition, see note 103 supra and accompanying text, it is a fundamental right entitled to review under the strictest standard, the same standard used for travel interstate. See Kent v. Dulles, 357 U.S. 116, 129 (1958). The Court has recently considered related questions in Califano v. Torres, 435 U.S. 1 (1978) (per curiam), and Califano v. Aznavorian, 439 U.S. 170 (1978). In Torres, the Court held that certain provisions of the Social Security Act were constitutional when applied to persons who, upon moving to Puerto Rico, lost benefits to which they were entitled while living in the United States. 435 U.S. at 4-5. Although the Court assumed for the purposes of the opinion that the right to travel between the United States and Puerto Rico was equivalent to the right to travel interstate, id. at 4 n.6, it did not have occasion to consider which standard of review was applicable. Id. Rather, the decision was based on the ground that although a new resident of a state is entitled to the same benefits as other citizens, he is not entitled to receive benefits superior to those of his fellow residents merely because he enjoyed them in the state from which he came. Id. at 4. In Aznavorian, although the Court stated that laws infringing on freedom to travel abroad are not to be judged by the same strict standard as those impinging on the right to travel interstate, 439 U.S. at 176-77, it distinguished between direct and incidental burdens on foreign travel. The Court expressly distinguished the cases of Zemel v. Rusk, 381 U.S. 1 (1965), Aptheker v. Secretary of State, 378 U.S. 500 (1964), and Kent v. Dulles, 357 U.S. 116 (1958), and based its decision on the ground that the legislation involved had only an incidental effect on the protected liberty, and thereby had to be "wholly irrational" before the Court would invalidate it. 439 U.S. at 177. Although Aznavorian used the rational relationship test to judge an incidental burden on a right, the same standard need not be used for a direct burden on that right. See Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 507-08 (1969); United States v. O'Brien, 391 U.S. 367, 377 (1968).

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111. Id.

112. Id. at 509 & n.3.

113. Id. at 509 n.3. The Court stated that "[t]he Government has a compelling interest in protecting . . . the secrecy of information important to our national secu-
Moreover, passport revocation or denial is a necessary means of protecting national security and foreign policy. Before the Secretary can revoke or deny a passport on this ground, it must be demonstrated that the person’s travel would seriously damage these interests.114 Because the government lacks other means of controlling travel, withholding a passport is the only way the government can prevent damaging travel.115

CONCLUSION

Protection of the national security is an essential function of the federal government. When citizens traveling abroad may compromise that security, the government must be able to act quickly to defend the national interest. Revocation of passports is an effective means to accomplish this goal.

Evelyn Capassakis

115. 56 Cong. Rec. 6029, 6065, 6192 (1918) (remarks of Rep. Flood); see notes 76-77 supra and accompanying text. The Congress that first enacted the statute requiring passports to enter or exit the country recognized that the government was otherwise without authority to control travel. 56 Cong. Rec. 6029, 6065, 6192 (1918) (remarks of Rep. Flood).