NEW YORK LAW SCHOOL

NYLS Law Review

Volume 3
Issue 4 *NEW YORK LAW FORUM, VOLUME III, OCTOBER 1957, NUMBER 4*

Article 5

October 1957

COMMENT: CONSTITUTIONAL LAW-ADMINISTRATIVE LAW-CITIZEN HAS ABSOLUTE RIGHT TO PASSPORT-DENIAL THIEREOF MUST BE PREDICATED ON HEARING COMPORTING WITH DUE PROCESS

COMMENT

CONSTITUTIONAL LAW—ADMINISTRATIVE LAW—CITIZEN HAS ABSOLUTE RIGHT TO PASSPORT—DENIAL THEREOF MUST BE PREDICATED ON HEARING COMPORTING WITH DUE PROCESS.—The right to travel freely, both within national boundaries and abroad, has been recognized since Blackstone's time as a "personal liberty [which] consists in the power of locomotion, of changing situation or moving one's person to whatever place one's own inclinations may direct."[1]

Before World War I Americans traveled abroad freely, without passports; they could leave this country and re-enter it at will. However, this is not to say that passports were not issued. Although they were not generally issued, an American citizen who desired to devote the time necessary to obtaining one could do so. The passport was recognized as a letter of introduction from this government to the governments of foreign nations—a "document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass freely. It is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen."[2]

Before 1865, the State Department had not been empowered by the Congress to issue passports, but did so as an extra-legal practice for the convenience of those few who desired them. By a statute enacted in 1856,[3] Congress "authorized" the State Department to issue passports, and by the Revised Statutes of 1875[4] Congress decreed that the State Department "may" issue passports.

The 1856 act required every citizen to have a passport if he wished to leave the country, not because Congress wanted to restrict travel abroad, but because by this time foreign countries were beginning to require such documents of all travelers. This procedure remained constant until the outbreak of World War I, when practically every border in the world was closed. When the United States entered that conflict, Congress acted to give the president the authority to issue a proclamation closing our borders and requiring a passport both for citizens and aliens entering or leaving the United States in time of war.[5] In 1941, the president was granted this same power by an amendment to this statute.[6] Thus, under these emergency statutes, citizens were forbidden under threat of criminal punishment to leave the United States without first obtaining a passport.[7]

[1] 1 Bl. Comm. 134.

[2] 3 Moore, International Law Digest c. 12 (Wash., D. C. 1906); Borchard, Diplomatic Protection of Citizens Abroad 492-514 (N. Y. C. 1905).

[3] 11 Stat. 60 (1856).

[4] Rev. Stat. § 4075 (1875), 22 U. S. C. § 211a (1952).

[5] 40 Stat. 559 (1918), 22 U. S. C. § 223-226 (1952).

[6] 55 Stat. 252 (1941), 22 U. S. C. § 223 (1952).

[7] 66 Stat. 190 (1952), 8 U. S. C. § 1185a, b (1952).

Although the national emergency was terminated by presidential proclamation on April 28, 1952, this criminal provision perpetuated the former statutory bans on travel abroad without a passport.[8]

I. The Discretion of the Secretary of State

The "Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe . . ."[9] It is the use of the term "may grant" which has been constantly used as the basis for saying that the issuance of passports is now a matter of discretion.[10] On two separate occasions the Attorney General of the United States has expressed the opinion that the power of the Secretary of State to issue and revoke passports is completely discretionary.[11] Both the federal courts[12] and Congress recognized this discretionary power of the Secretary of State. Congress most certainly recognized it when it passed the act of May 22, 1918.[13] While this power was comparatively unimportant when it was granted, it has, in the view of many experts in the field of constitutional law, become a serious curtailment of individual liberty today. The State Department has become vested with an absolute discretion as to who shall or shall not be granted a passport, generally justifying a denial on the basis of lack of citizenship,[14] attempt to avoid legal sanctions,[15] or the inability of the government to protect the applicant abroad.[16] However, the State Department has recently begun denying passports with no explanation other than that the applicant's activities are or may be "contrary to the best interests of the United States."[17]

The constitutionality of the Department's power to deny passports is not now and never has been questioned. It is the constitutionality of an arbitrary refusal of the State Department to grant a passport that is being questioned. If the issuance of a passport is regarded to be a privilege, the State Department could continue to exercise this discretionary power. The Secretary of State, of course, relies on this theory.[18] If, however, a citizen is entitled to a passport as a matter of right, this wide discretionary power

[8] The penal legislation embodies the same language as is found in the emergency statute.

[9] 44 Stat. 887 (1926), 22 U. S. C. § 211a (1952).

[10] 3 Hackworth, Digest of International Law 467-469 (Wash., D. C. 1942).

[11] 13 Ops. Attny. Gen. 89, 92 (1869); 23 Ops. Attny. Gen. 509, 511 (1901); 2 Hyde, International Law §§ 399, 401 (2d rev. ed., Bost., 1945).

[12] Perkins v. Elg, 307 U. S. 325, 59 S. Ct. 884, 83 L. Ed. 1320 (1939); see Gillars v. U. S., 182 F. 2d 962, 981 (D. C. Cir. 1950); Miller v Sinjen, 289 F. 388, 394 (8th Cir. 1923).

[13] 56 Cong. Rec. 6030, 6063 (1918).

[14] See note 10, *supra* at 498.

[15] *Id.* at 504.

[16] *Id.* 530-532.

[17] Bauer v. Acheson, 106 F. Supp. 445 (D. C. D. C. 1952); Shachtman v. Dulles, 225 F. 2d 938 (D. C. Cir. 1955).

[18] Hearings Before Committee on Foreign Affairs on H. J. Res. 205 and H. R. 9782, 66th Cong., 1st Sess. 10 (1919); 3 Hackworth 470.

is lost because due process attaches where there is an attempted abridgment of such rights.[19]

II. THE LIBERTY OF EXIT

In order to be classified as a right, international travel must be brought within the meaning of "life, liberty or property."[20] Clearly, travel abroad cannot be classified under either "property" or "life." Therefore, the existence of any right of Americans to travel abroad must be derived from the concept of "liberty."

One source often used for defining constitutional terms is the common law prior to the adoption of the Constitution.[21] Despite Blackstone's concept of the personal liberty of locomotion and free movement from place to place,[22] the King, by a prerogative writ, could prohibit people from leaving the realm without "license," since this "may be necessary for the public service and safeguard of the commonwealth."[23] This phrase indicates a belief that restrictions on exit should only be for a valid cause. Modern British authorities agree that exit was a common law right recognized at the time of Blackstone,[24] and has been so recognized with some regularity by the courts. If "liberty" had meaning at early common law, it meant freedom from physical restraint.[26] It is difficult to see how it can be denied that exit is a part of "liberty." The distinction between restriction to a jail, to a city, to a state or to a nation is merely one of degree. No such disinctions were made by the Supreme Court in a case involving restrictions on movement between states, when it said: "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty."[27] Clearly, the

[19] Brechen v. Riley, 187 Cal. 121, 200 Pac. 1042 (1921); Abrams v. Daugherty, 60 Cal. App. 297, 212 Pac. 942 (1923); Cassidy v. Mayor and Council of Macon, 133 Ga. 689, 66 S. E. 941 (1909); Martin v. State, 23 Neb. 371; 36 N. W. 554 (1888); Davis, *The Requirement of Opportunity to be Heard in the Administrative Process*, 51 Yale L. J. 1093, 1118 (1942); Hale, *Hearings: The Right to a Trial With Special Reference to Administrative Powers*, 42 Ill. L. Rev. 749, 775 (1948)

[20] U. S. Const., Amend. V.

[21] Myer v. Nebraska, 262 U. S. 390, 399, 43 S. Ct. 625, 628, 67 L. Ed. 1042, 1045 (1923).

[22] 1 Bl. Comm. 134.

[23] *Id.* at 137.

[24] Diplock, Passports and Protection in International Law, 32 The Grotius Society 42, 44 (1947).

[25] Williams v. Fears, 179 U. S. 270, 21 S. Ct. 128, 45 L. Ed. 186 (1900).

[26] See 1 Bl. Comm. 134-137.

[27] Williams v. Fears, 179 U. S. 270, 274, 21 S. Ct. 128, 131, 45 L. Ed. 186, 187 (1900). In this case, the Supreme Court held that Georgia's tax on persons engaged in hiring laborers for out of state work affected movement only "incidentally," if at all. See also Crandall v. Nevada, 73 U. S. (6 Wall.) 35, 18 L. Ed. 745 (1867), in which a tax on carriers for transporting people out of state was invalidated; Edwards v. California, 314 U. S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941), in which a California law making it a misdemeanor to aid non-resident "indigents" to enter the state was invalidated on commerce clause grounds. Justices Douglas, Black, Murphy and

language of the fifth amendment cannot be limited to deprivations of liberty within the territorial confines of the United States. Its terms are absolute and should not be subjugated to political expediency.

American history indicates that free movement is an integral part of the opportunities to be found in this country; it is "basic to any guarantee of freedom of opportunity." This feeling is clearly enunciated by Mr. Justice Douglas in his concurring opinion in *Edwards* v. *California*.[28] The same thought was later expressed as being applicable to the peoples of all countries by The Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations on December 10, 1948, wherein it was said, "Everyone has the right to leave any country, including his own, and to return to his country."[29] Although this declaration is not legally binding upon the member states, cognizance should be taken of it since it indicates the sentiment and policy of the United States as expressed by our adoption of this declaration.

However, the holdings of the Supreme Court and the declarations of the United Nations seem to have had little effect on the State Department. It continues to invoke its discretionary power arbitrarily to deny passports under its foreign affairs function. This function is generally beyond any judicial review since the courts are reluctant to interfere with powers solely within the purview of the executive branch of government. This view has often been expressed in the recognition of foreign governments,[30] or the determination of disputed sovereignty.[31] As these are policy decisions, they are not governed by statute, and, generally speaking, are not directed toward individual activities. Because of the underlying constitutional and political considerations which enter into decisions such as these the courts have been reluctant to interfere.[32]

III. Discretion and Due Process

Discretionary power vested in an agency should not mean that traditional procedural safeguards may be violated. In almost all cases upholding agency discretion, full and fair administrative hearings preceded the determinations of the agency, and the courts have often laid stress on this fact.[33] Where the procedures are questionable, the courts often refuse to

Jackson argued for wider rationale. See dicta in Slaughter-House Cases 83 U. S. (16 Wall.) 36, 79, 21 L. Ed. 394, 413 (1872); Twining v. New Jersey, 211 U. S. 78, 97, 29 S. Ct. 14, 17, 53 L. Ed. 97, 103 (1908).

[28] 314 U. S. 160, 181, 62 S. Ct. 164, 171, 86 L. Ed. 119, 125 (1941).

[29] Article 13(2), 19 Dep't. of State Bull. 752, 753 (1948).

[30] Jones v. U. S., 137 U. S. 202, 212, 11 S. Ct. 80, 83, 34 L. Ed. 691, 693 (1890); Octgen v. Central Leather Co., 246 U. S. 297, 302, 38 S. Ct. 309, 310, 62 L. Ed. 726, 727 (1918); U. S. v. Belmont, 301 U. S. 324, 330, 57 S. Ct. 758, 760, 81 L. Ed. 1134, 1136 (1937).

[31] Foster v. Neilson, 27 U. S. (2 Pet.) 253, 307-309, 7 L. Ed. 415, 431-432 (1829); Williams v. Suffolk Insurance Co., 38 U. S. (13 Pet.) 415, 419-420, 10 L. Ed. 226, 227 (1839).

[32] See notes 30 and 31, *supra*.

[33] Pike v. Walker, 121 F. 2d 37, 40 (1941); U. S. *ex rel.* Milwaukee Social

enforce discretionary decisions.[34] The Supreme Court has declared, broadly, that the right to a fair and open hearing in administrative determinations is one of the rudiments of fair play "assured to every litigant" by the Constitution as a "minimal" requirement; that "there can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."[35] Although often alluded to, this sweeping declaration has not been consistently applied.[36] Apparently, the State Department never felt that it was bound to give a hearing at all when it denied applications for passports or when passports granted have been revoked. However, at times, informal hearings have been allowed. However, in at least one case, decided more than thirty years ago, a lower court intimated that a fair hearing should be given as a matter of right.[37] This is the position which the district court adopted in 1952 in the case of *Bauer* v. *Acheson,* wherein the court recognized that the interest which we have in a passport is a right.[38]

Anne Bauer was traveling abroad when her passport was revoked by the State Department. She brought an action requesting a declaratory judgment ruling that the revocation of and refusal to renew her passport was null and void and that she was entitled to an unrestricted passport. She

Democrat Publishing Co. v. Burleson, 255 U. S. 407, 408-09, 41 S. Ct. 352, 353-54, 65 L. Ed. 704, 705-06 (1921). See generally the discussion of reviewability in Mr. Justice Frankfurter's concurrence in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 150-57, 71 S. Ct. 624, 633-35, 95 L. Ed. 817, 826-28 (1950).

[34] Lloyd Sabaudo Societa Anonima Per Azioni v. Etting, 287 U. S. 329, 53 S. Ct. 167, 77 L. Ed. 341 (1932). In Bridges v. Wixon, 326 U. S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945), the great weight which the court felt had been given to hearsay evidence on the issue of "membership" in the Communist Party was an alternative ground of reversal.

[35] Ohio Bell Telephone Co. v. Utilities Commission, 301 U. S. 292, 304-05, 57 S. Ct. 724, 728, 81 L. Ed. 1093, 1095-96 (1937); See also *Ex parte* Robinson, 86 U. S. (19 Wall.) 505, 513, 22 L. Ed. 205, 207 (1874); Davidson v. New Orleans, 96 U. S. 97, 105, 24 L. Ed. 616, 618 (1878); St. Joseph Stockyards Co. v. U. S., 298 U. S. 38, 51, 56 S. Ct. 720, 722, 80 L. Ed. 1033, 1037 (1936); Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 143, 60 S. Ct. 437, 440, 84 L. Ed. 656, 659 (1940); Opp Cotton Mills v. Administrator, 312 U. S. 126, 153, 61 S. Ct. 524, 533, 85 L. Ed. 624, 632 (1941); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1950); Rise & Co. v. U. S., 341 U. S. 907, 71 S. Ct. 607, 95 L. Ed. 1345 (1951).

[36] Goodnow, *Private Rights and Administrative Discretion,* 41 A. B. A. Report 408, 419 (1916); *The Right To A Hearing Before Administrative Tribunals,* 26 Harvard L. R. 198 (1914); *Due Process Requirements of Notice and Hearing in Administrative Determinations,* 80 U. Pa. L. Rev. 96 (1931); Magaw, *Legal Aspects of Administrative Hearings and Findings,* 12 Miss. L. J. 295, 393-424 (1940); Davis, *The Opportunity To Be Heard in the Administrative Process,* 51 Yale L. J. 1093 (1942); Frankfurter, J., concurring, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 164, 71 S. Ct. 624, 643, 95 L. Ed. 817, 836 (1951).

[37] Miller v. Sinjen, 289 F. 388, 394 (8th Cir. 1923).

[38] 106 F. Supp. 445 (D. C. Cir. 1952).

alleged that the Passport Act of 1918,[39] and especially the Act of 1926,[40] as amended by the Act of 1941,[41] was unconstitutional in that it violated the due process clause of the fifth amendment. The Secretary of State claimed that he had an unlimited power over the issuance of passports, since the passport is a purely political document addressed to foreign powers, and that, since a passport is in the realm of foreign affairs, its issuance or denial is a political matter entirely within his discretion, and not subject to judicial review. The court rejected this view saying that it was not willing to "subscribe to the view that the executive power includes any absolute discretion . . . encroach[ing] on the individual's constitutional rights, or that the Congress has the right to confer such absolute discretion."[42] The court went on to hold that the regulation of passports must be administered "not arbitrarily or capriciously, but fairly, applying the law equally without discrimination, and with due process adopted to the exigencies of the situation."[43]

The court in the *Bauer* case established the issuance of a passport as a right by giving recognition, in effect, to a principle established long ago by the Supreme Court when it recognized that personal liberty [under the due process clause] includes "the right of locomotion, the right to remove from one place to another according to inclination," stating, ". . . . liberty . . . means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways."[44]

[39] 40 Stat. 559 (1918), 22 U. S. C. § 211 *et seq.* (1952).

[40] 44 Stat. 887 (1926), 22 U. S. C. § 211a (1952).

[41] 55 Stat. 252, 253 (1941), 22 U. S. C. §§ 223-25 (1952).

[42] 106 F. Supp. 445, 452 (1952).

[43] 106 F. Supp. 445, 452 (1952).

[44] Williams v. Fears, 179 U. S. 270, 274, 21 S. Ct. 128, 129, 45 L. Ed. 186, 187 (1900); Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 S. Ct. 427, 431, 41 L. Ed. 832, 835 (1897). As the court said in the Bauer case, while the Supreme Court was there considering freedom to move from state to state within the United States, it is difficult to see where in principle, freedom to travel outside the United States is any less an attribute of personal liberty. See also Corfield v. Coryell, 6 Fed. Cas. 546, No. 3230 (C. C. E. D. 1823); Crandall v. Nevada, 73 U. S. (6 Wall.) 35, 18 L. Ed. 745 (1867); Paul v. Virginia, 75 U. S. (8 Wall.) 168, 180, 19 L. Ed. 357, 360 (1869); Ward v. Maryland, 79 U. S. (12 Wall.) 418, 430, 20 L. Ed. 449, 453 (1871); Slaughter-House Cases, 83 U. S. (16 Wall.) 36, 75, 21 L. Ed. 394, 403 (1872); *Passport Denied,* 3 Stan. L. R. 312, 315-316 (1951); *Passport Refusals For Political Reasons,* 61 Yale L. J. 186-191 (1952). However, in some earlier passport cases, the courts have reviewed the action of the State Department without any discussion of the nature of the interest at stake. Perkins v. Elg, 307 U. S. 325, 59 S. Ct. 884, 83 L. Ed. 1320 (1939), *affirming,* Elg v. Perkins, 99 F. 2d 408 (D. C. Cir. 1938); Miller v. Sinjen, 289 F. 388 (8th Cir. 1923). In the Elg case the court stated that courts will not undertake, by means of mandamus or otherwise, to compel the issuance of passports, or to control by means of a declaratory judgment the discretion of the Secretary of State in regard to their issuance. It should be noted that what the district court did in Bauer v. Acheson is just what it said it would not do in the Elg case. See comment on Perkins v. Elg in Virginia Stage Lines v. U. S., 48 F. Supp. 79, 83 (W. D. Va. 1942). In Nathan

It was not until 1955 that the federal district and circuit courts had the opportunity to reiterate and strengthen the principles laid down by the district court in that case.[45] The first of these cases was presented to the Court of Appeals for the District of Columbia concerning Max Shachtman, who was the chairman of the Independent Socialist League. Shachtman had been trying, unsuccessfully, to obtain a passport for three and a half years. His application had been turned down by the State Department on the ground that the Attorney General had listed this organization as subversive. Shachtman sued for a declaratory judgment in the district court and to enjoin the Secretary of State from denying his application for a passport. On appeal, Shachtman advanced the same theory on which Anne Bauer had proceeded. Shachtman was also successful. The court enlarged the concept, expressed in dicta in *Urtetique* v. *D'Arcy*,[46] as to what a passport is by stating, ". . . now, in addition [to its being a political document it is] a document which is essential to the lawful departure of an American citizen for Europe."[47] The court went on to reason:

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

The court went on to hold that, on the issue raised, the evidence showed that the Secretary of State in exercising his discretionary power was arbitrary[48] and "[this] the law cannot reconcile with due process."[49]

v. Dulles, 129 F. Supp. 951 (D. C. D. C. 1955), plaintiff was refused a passport on the ground that his travels might be in the interests of the Communist Party. Plaintiff filed an affidavit that he had never been a member of the Communist Party and upon the request of the State Department he filed a similar affidavit with information about alleged membership in Communist organizations. The State Department granted plaintiff a hearing by court order but again refused him a passport. On appeal to the district court, an order was issued commanding the State Department to issue to plaintiff a passport, the State Department having evaded the court's order to grant the plaintiff a prompt and appropriate hearing on its rejection of his application for a passport. This was the first court order commanding the State Department to issue a passport.

[45] Schachtman v. Dulles, 225 F. 2d 938 (D. C. Cir. 1955).

[46] 34 U. S. (9 Pet.) 692, 698, 9 L. Ed. 276, 278 (1835).

[47] See note 45, *supra.*

[48] Id. at.941.

[49] *Id.* at 944; In *Briehl* v. *Dulles,* — F. Supp. — (D. C. D. C. 1957), *cert. granted,* — U. S. — (November, 1957), petitioner failed to comply with a request for a "non-Communist" affidavit. The court upheld the denial of his passport on the ground that by so doing he had failed to complete his application for a passport. It also held that such a request does not deny the individual's right to freedom of travel or indirectly affect an exercise of his First Amendment rights, on the ground of a balancing of private right against public requirement. The court said: "It must be admitted, I think, that

Five months after the *Shachtman* case was decided, the State Department was once again in court for having denied a passport.[50] Louis Boudin had applied for a passport and had been granted a limited one, after he had executed an affidavit in which he stated, *inter alia,* that he was not then a member of the Communist Party. Upon his return, he requested that the restrictions be removed from his passport. He was asked to execute an affidavit relating to his past membership in the Communist Party, which he refused to do. Consequently, he was informed that he was not eligible for further passport facilities under § 51.135 of the Passport Regulations.[51] He appealed to the Board of Passport Appeals of the State Department, which recommended that the decision of the Passport Office be affirmed. Boudin then sought a declaratory judgment, stating that he was entitled to a passport and contended that the rules of the Board of Passport Appeals and the Passport regulations were invalid and unconstitutional. The Secretary of State filed an affidavit setting forth the reasons for his denial of passport facilities. These reasons were based on a review of the State Department files on the plaintiff, confidential security information and testimony of the plaintiff before the Board of Passport Appeals. The question before the court was whether the State Department should be forced to reveal the confidential information on which it had based its denial of passport facilities to the plaintiff. After a review of the *Bauer* and *Shachtman* cases, the court determined that a passport is a "right, an attribute of personal liberty."[52] It then went on to determine whether § 51.135 was in comport with due process. By reading § 51.135 together with § 51.170, the court came to the conclusion that the Passport Office had "substantially unrestricted discretion to deny passports. . . . Whether, in fact, evidence exists to warrant a denial neither [the] applicant [n]or the courts can ever know. The evidence which has guided the Board and been instrumental in its decision can be reviewed by no one."[53] This type of authority gave the Board a limitless power which made any hearing granted by it an empty gesture. The court said that the individual is entitled to a hearing which includes the right to be aware of all of the evidence against him so that he might have the opportunity to refute it directly. While con-

the affidavit requirement does infringe [applicant's] interests in maintaining privacy and upon interests protected by the First Amendment. But if the interests of the public are also involved, the problem is to determine which of these two conflicting interests demand the greater protection under the particular circumstances presented [citing American Communications Association v. Douds, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925, 1949]. The information as to Communist Party membership is asked for in connection with a passport application and might prove relevant to a valid denial of a passport. Under all the circumstances, it seems clear that the benefit to the public order, in having information of this sort available to the Secretary to enable him to exercise his lawful authority, substantially outbalances any abridgment of individual interests that may result."

[50] Boudin v. Dulles, 136 F. Supp. 218 (D. C. D. C. 1955).

[51] 22 C. F. R.

[52] See note 50, *supra.*

[53] *Id.* at 221.

fidential data may be important to executive officers in the discharge of their duties, it must be confined to "obtaining factual data which may itself be used of record."[54] The court finally determined that the evidence which the Passport Office may use under § 51.135 must be brought into the open and made a part of the record so that the applicant can have the opportunity to meet it and the court to review it.

The development of the law relating to the right of the individual to procedural and substantive due process where the issuance of a passport is concerned has been slow, but logical. So long as the discretionary power of the Secretary of State over the issuance of passports was absolute, due process was denied the individual. Here the groundwork was laid for later decisions when the courts decided that agency determinations which were not concerned with policy matters but which touched upon personal liberties were subject to judicial review. It was then only a matter of bringing passport cases within these principles. This was quickly accomplished by the courts in two phases: first, the determination that the issuance of a passport is a right and not a privilege; and, second, the determination that since a passport is a right, the denial of one to an individual solely at the discretion of the Secretary of State is arbitrary and a denial of due process since it denies the individual the liberty to travel.

IV. CONCLUSION

A passport is a declaration of citizenship issued by the State Department, authorizing the individual to leave and reenter the United States, and requesting safe conduct in countries of travel. Since freedom to travel is a privilege implicit in the Constitution, any citizen in good standing is entitled to a passport.

Therefore, the denial of a citizen's personal liberty of travel, without due process of law, is a transgression of that person's constitutional rights. Suspected, threatened, and even real injury to the United States does not entitle the State Department to deny an individual's privileges until such time as the courts have declared the person unworthy.

"[The] very delicate, plenary, and exclusive power of the executive branch as the sole organ of the Federal Government in the field of international relations . . . like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[55] It may fairly be said, in line with this, that there will be no judicial interference in the political conduct of foreign affairs provided that the personal liberties of American citizens are in no way restricted or curtailed. However, should this proviso go unheeded, the Judiciary will step in and require the Executive to afford to such individuals all of the safeguards of procedural due process. The basis of procedural due process is the giving

[54] *Id.* at 222.

[55] United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 320, 57 S. Ct. 216, 221, 81 L. Ed. 255, 260 (1936).

of notice, an opportunity to be heard and a presentation of all of the evidence so that the applicant may have the opportunity to meet it and the court to review it. It is not meant that the procedure must be rigid and inflexible; quite the contrary. The procedure may and *must* vary to meet and suit the exigencies of each case. All that is meant is that the basic principle of due process, which one court has succinctly termed "fair play,"[56] be observed.[57]

[56] L. B. Wilson, Inc. v. Federal Communications Commission, 170 F. 2d 793 (D. C. Cir. 1948).

[57] Of interest is a case currently before the Passport Board of Appeals, concerning William Worthy, a reporter for the Baltimore *Afro-American*. Mr. Worthy's passport was not validated for travel to China. Without permission of the State Department, he travelled to China. Thereafter, his passport was picked up. In seeking its return, counsel is contending that it is unconstitutional to make the issuance of passports depend on the State Department's foreign policy and that the press freedom guarantees are being violated by keeping accredited reporters from news sources. Recently, several American students visited China against the wishes of the State Department, and their passports were seized. The State Department's attitude toward the latter seems to be softening in that they can apparently reacquire their passports if they apologize and promise to be good in the future, a promise Worthy would not make. In the opinion of counsel, the Board will reissue Worthy's passport rather than allow the questions presented to be judicially determined. In *Dayton* v. *Dulles*, — F. Supp. — (D. C. D. C. 1957), a passport was denied petitioner after determination by the Secretary of State, based upon confidential information derived from sources available to him in the course of the performance of his duties, that petitioner intended to go abroad to advance the Communist movement. The Secretary disclosed to petitioner the substance of this confidential information. The court held the denial to be proper on the ground that the disclosure of the confidential information on which it was based would be detrimental to national interest in respect to internal security and the conduct of United States foreign affairs. But here the substantive regulations of the Secretary for denying passports were upheld as comporting with due process. Thus the denial was constitutional. In this respect, the decision does not affect prior ones. Rather, it bolsters them, as the court states, "The issuance of a passport is not the conduct of foreign affairs." Here the question concerned the procedure relating to the *evidence* on which the passport was denied. On this ground, the court stated that the Secretary could not be compelled to disclose information which he obtains "in this area."