Freedom To Travel

By RUSSELL D. STETLER, JR.*

The recent activities of the Passport Office of the State Department have recently made headlines in the press. Official maneuvers to restrict the passport of Professor Staughton Lynd have been matched by FBI demands that Professor H. Stuart Hughes be officially observed on his visits abroad. No friend of liberty can fail to abhor any interference with the freedom to travel, a freedom that has been one of the most basic liberties in American constitutional development. Long before the recognition of freedom of speech or assembly, the Magna Carta established the freedom to travel. Moreover, any attempt by the US government to interfere with free expression by Americans anywhere in the world by restricting their travel is a violation of the First Amendment by the Constitution. Senator George Malone (Rep., Nev.) expressed the libertarian view when, in 1957, he broke the State Department's travel ban by visiting a country on the Department's proscribed list: "It has always been my view that an American citizen could travel anywhere he liked." Or, as the Wall Street Journal declared editorially (June 18, 1958): "As for us, we don't like government by bureaucratic whim. We prefer government by law. . . We think American citizens who have broken no laws are as entitled to travel outside the 48 states as they are entitled to travel within them."

The freedom to travel no longer exists absolutely for citizens of the United States. The recent ruling

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of the Supreme Court in the Zemel case has reaffirmed very serious limitations on the freedom of Americans to travel when and where they please. The high court has upheld the power of the State Department to invalidate passports for travel to certain nations at a time when we are legally at war with none of them and when de facto war exists between the United States and only one of these nations. It has not yet been decided by the Court whether it is constitutional to impose criminal sanctions on those who violate the travel ban. The long-delayed decision in United States v. Laub, Martinot, etc. will settle that question.

It would be misleading for us to suppose at the outset that the question we are considering ever receives the attention of anyone who has no prejudgments about the various extra-constitutional factors that impinge on the final decision. We are all well aware of the political and historical context in which these decisions have been and will be rendered. That the justices of the High Court are confessedly relying in their decisions on a number of dubious prejudgments about the internal nature and foreign policies of the various countries which Americans are not permitted to see with their own eyes, was brought home in the remarks of the Chief Justice in the Zemel case. According to the report of the New York Times of May 4, 1965:

> "In the case of Cuba, Justice Warren said, the restrictions are justified because the Communist Government there seeks to export revolution through travelers."

I admit frankly that my own prejudices differ sharply from those of the court as expressed by the Chief Justice. I believe, for example, that "revolution" cannot be exported; instead, revolutions grow out of particular sets of conditions that make large numbers of people discontented with existing regimes and encourage them to develop and follow that ideology which will alter the conditions that breed dissatisfaction.

A more important point, however, is to show that the Court does not function outside the influence of certain hypotheses, and that these hypotheses and judgments outweigh other determinants in recent decisions limiting freedom to travel. I myself start with the assumption that holds quite simply that the freedom to travel ought not to be limited.

The Passport: Political or Functional

The basic restriction on travel from and returning to the United States involves the passport. It is important to note at the outset that the passport need not be per se a limitation on the freedom to travel. In fact, the original purpose of passports in the United States was merely to facilitate travel abroad. There was no prior assumption that the Government had to grant permission for travel. From the beginning, there were no official obstacles to travel. Only convicts and accused persons awaiting trial or on appeal were restricted.

Passports were issued not to authorize a right already enjoyed by most Americans but to certify that these individuals were citizens of the United States. Passports were to serve as a mere convenience to identify Americans to foreign principals. At first they were issued simultaneously by a variety of agencies, including the Secretary of State, other federal officials, state and local officials, and notaries public. In Urtetiqui v. D'Arcy, 34 U. S. (9 Pet.) 692 (1835), the Court noted that,

> ". . . there is no law of the United States in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect."

The fact that several different agencies employing diverse criteria had taken on the task of issuing passports created a number of obvious problems, not the least of which was that of forgery. It was thought to be in the general interest, then, to provide legislation to rectify these difficulties. In a circular of July 1845 the State Department declared:

> "For the information of citizens of the United States about to visit foreign countries, where they may be subjected to inconvenience for the want of sufficient evidence of their national character, it is stated that passports will be granted gratis, by the Secretary of State, to such citizens, on his being satisfied that they are entitled to receive them."[1]

The precedent for this action had been established in

1. U. S. Department of State, The American Passport, by Gaillard Hunt (Washington: Government Printing Office, 1898), p. 46.

wartime, particularly in the last days of the War of 1812. But in 1850 Congress first established its concern with the passport question by ratifying a treaty with Switzerland providing that the two nations would furnish passports to their nationals for travel to the other nation.

In 1856 Congress enacted a full-fledged passport statute, which stands today as our basic law on this subject. The Act of August 18, 1856 provided:

> "That the Secretary of State shall be authorized to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify any such passport; nor shall any passport be granted or issued to, or verified for, any other persons than citizens of the United States. . ." [2]

The Government has since argued that this statute is permissive, rather than mandatory. While conceding that the statute does not stipulate that a passport is required for egress or entry, many assert that the Secretary of State is not constrained by the Act to issue passports to any citizen. But this position seems to be opposed by the majority of earlier practitioners of the statute, such as Secretary of State Hamilton Fish (who spoke of the "right to be furnished with. . . evidence of citizenship"), Attorney-General Alphonso Taft, and the authors of the 1905 Rules Concerning the Granting and Issuing of Passports in the United States (who spoke of persons being "entitled to receive a passport"). [3] Thus, the historical development of the passport in the United States indicates that there was wide acceptance of the notion that all citizens had the right to be granted passports on request -- even though the passport was not at the time necessary to foreign travel.

Much of the controversy turns on the question of whether the passport is to be regarded as a political document or a functional instrument. In other words, we must examine the nature of the passport to de-

2. 11 Stat. 60 (1856).
3. Quoted in Leonard B. Boudin, "The Constitutional Right to Travel," Columbia Law Review, Vol. 56 (January 1956), p. 53, especially footnote 53.

termine whether it should be subject to the kinds of restrictions that have been imposed. The earliest legal statement on this question is to be found in a case cited above, Urtetiqui v. D'Arcy.[4] Here the Court holds:

> "It (the passport) is 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 safely and freely; and 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; and which, by usage and the law of nations, is received as evidence of the fact." (My emphasis.)

Whether this case remains good law would seem to depend on the context in which this decision was written and whether the context has been substantially altered since then.

The Government holds that a passport is still a political document. It is partly on this basis that the Government argued in the Robeson, Nathan, Clark, and Kamen cases, holding that passports came within the foreign affairs function of the State Department. Ultimately, the decisions in these cases (including only the second of the two Robeson cases) failed to uphold the position of the Government.[5]

The difference in the positions of the courts in these cases and the earlier determination in Urtetiqui, is, as we have suggested above, due to a difference in context. The most important aspect of context is the change in the meaning and function of the passport over the years. In 1835, the passport was official identification, political in nature because it was a Government-issued certificate to foreign powers. The passport was not a necessary condition of travel at that time. Later, the passport became such a necessary condition. As a functional instrument to travel -- and thus a possible restriction on the freedom to travel -- it is hardly to be thought of as a "political" document. From the context of "convenience" to the context of "necessity" the passport moves to the status of an indispensable document which cannot any longer be termed merely "political".

Without a passport it becomes impossible to travel from the United States (and indeed for some time it

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4. Urtetiqui v. D'Arcy, 34 U. S. (9 Pet.) 692 (1835).
5. See Boudin, op. cit., p. 51.

was also regarded as impossible to enter the country without a passport); this encroachment on the freedom to travel should never be further aggravated by political conditions, particularly when the term "political" is endowed with an unconstitutional vagueness.

Restrictions on Passports

Restrictions on freedom to travel were originally introduced as temporary war measures whenever the United States embarked on an interventionist or warlike foreign policy. During the War of 1812, travel was restricted in areas controlled by the enemy. Restrictions were again imposed during the Civil War. In 1918, during World War I, citizens of the United States were required to have a passport to enter or leave the country. This statute was terminated by an act of March 3, 1921; but, on June 21, 1941 the law was reenacted, giving the Executive the power to require passports whenever the President should declare a "national emergency". When the Japanese persisted in not accepting US dominance in Asia, President Roosevelt proclaimed a national emergency on November 14, 1941 -- three weeks before war was officially declared. After the war the restrictions were not strictly enforced. In 1952, however, they were replaced by the Walter-McCarran Act, which extended the 1918 and 1941 statutes into peacetime. Actually, the Walter-McCarran Act was passed and proclaimed (January 17, 1953) during the Korean "police action". And President Truman's declaration of national emergency during the Korean "police action" (December 16, 1950) has not yet been rescinded, even though over fifteen years have since elapsed. On top of the restrictions on Americans' freedom to travel to China, Korea, Vietnam, and Albania, President Kennedy added prohibition of travel to Cuba (January 19, 1961). Thus, the attacks on civil liberties that began during war emergencies have now become part of the permanent powers of government.

Once it was decided that the passport is a requirement for travel abroad, the State Department attempted to restrict freedom to travel according to its "discretion". Broadly speaking, there are two major categories of restriction on the freedom to travel imposed by the State Department. The first is an attempt to deny passports to particular individuals on the basis of a political test. The second is an attempt to deny all Americans access to particular foreign nations by refusing them valid passports for travel to these areas.

The State Department's initial attempt to deny passports on the basis of a political test occurred at the height of the McCarthy period. At that time, anyone who wished to travel abroad was required to sign an affidavit, swearing that he was not presently, nor had he ever been, a member of the Communist party or connected with a "Communist front" organization. Clearly the imposition of such a political test seriously threatens the liberties of all Americans; when the espousal of particular political beliefs and the active exercise of basic rights may be construed as a basis for confining an individual to this country, there is an important question of the vitality of the Constitution.

Moreover, the non-communist affidavit itself -- objectionable and vague as it was -- was but a necessary and not a sufficient condition for obtaining a passport. In other words, even if an individual signed the affidavit, he was not guaranteed to receive the passport since the State Department reserved the right to deny passports on accusations from certain undisclosed sources. Thus, Leonard Boudin, Clark Foreman, Corliss Lamont, Otto Nathan, Paul Robeson, and Max Schachtman sued the State Department during the nineteen fifties on the ground that "undisclosed" accusations constituted a denial of certain Fifth Amendment rights. The courts sided with the plaintiffs and demanded that hearings be held in accord with due process before the State Department could deny passports.

The constitutionality of the affidavit itself was later called into question by Dr. Walter Briehl and the artist Rockwell Kent. In Kent v. Dulles, 357 U. S. 116 (1958), the Supreme Court held that the Secretary of State had not been authorized to exercise such broad "discretionary" powers as he had exercised in requiring the non-communist affidavit. In addition to this narrowly legalistic decision, the court added that even if he had been properly authorized by an act of Congress it "would be faced with important constitutional questions".

In the second category of encroachments on the freedom to travel is the so-called "travel ban". In addition to the passport's being generally necessary for travel abroad, it must also be "valid" for travel to those countries that one may wish to visit. Thus, Dr. Waldo Frank, in possession of a "valid passport" (i.e., a passport that had not expired), was unable to accept an invitation to lecture on Walt Whitman at the University of Peking because his passport was not spec-

ially "validated" for travel in China. This dual validity -- general and special -- seems in itself to be a problem meriting judicial attention. But the Supreme Court refused to review the Frank case.[6]

The already ambiguous concept of validity becomes incomprehensible in any further consideration of the travel ban. Whenever particular individuals have violated the travel ban, their penalty has been confiscation of passport. Dr. W. E. B. DuBois, for example, traveled to China in 1956. When he returned to the United States, his passport was removed. Furthermore, when he promised not to violate the travel ban in the future, his passport was returned. Scrutinizing the various changes that occur in this process, we find that Dr. DuBois left the United States with the necessary condition (a valid passport). However, his passport was not sufficiently valid to cover his eventual trip to China. Moreover, he returned to the United States with the necessary condition (a valid passport). His passport was then rendered absolutely invalid; then, on his promise not to visit any proscribed country in the future, his passport was restored to him. It is extremely difficult to find any consistency or logic in the actions of the Government in this entire matter.

The case of William Worthy is slightly more consistent. Mr. Worthy, a well-known Negro journalist of the Baltimore *Afro-American*, traveled to China and lost his passport as a result. His was never returned, and subsequent excursions by Worthy resulted in his ultimately being indicted for entering the country without a valid passport. Worthy's conviction was reversed by the Fifth Circuit Federal Court of Appeals (which also stated explicitly that it would have upheld a conviction for leaving the country without a valid passport, had that been the issue). Once again, it is difficult to discern the logic of the courts.

Most recently, the Court has denied Louis Zemel's petition to obtain a passport that would be valid for travel to Cuba. The explanation given by the Court on this matter merits some consideration; the New York *Times* of 4 May 1965 reports:

> In affirming that decision today, by a vote of 6 to 3, the Supreme Court distinguished the situation

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6. See Philip Abbott Luce, "The Freedom to Travel: A Study", *Rights* (November-December 1963), p. 16.

> from earlier cases in which it had invalidated efforts of the Secretary of State to deny passports on the ground of political belief or association.
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> . . .
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> In the Court's ruling today, Chief Justice Earl Warren said that the area restriction is different from those (Kent, etc.) cases because it was based on "foreign policy considerations affecting all citizens," and was not used to penalize individuals for their beliefs.
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> He said that the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.

It would seem to be unnecessary to mention that the Constitution does not speak explicitly of passports and the freedom to travel. But the confusion on this matter constrains us to state the obvious: the State Department's authority on the passport question does not stem from the Constitution itself. Phrases like "foreign policy considerations affecting all citizens" must not be used to cloud this issue; the simple fact is that whatever powers the State Department has in this regard are bestowed on it by Congress.

The Act of August 18, 1856, which made the issuance *of passports the unique prerogative of the State Department*, was modified by the Act of July 3, 1926, which states:

> "The Secretary of State may grant and issue passports. . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports." [7]

There is one important alteration in the wording of the statute. The earlier version contained the phrase 'shall be authorized to' rather than the word 'may'. This construction does not, of course, alter the fact that this law of Congress is authorizing the Secretary of State to perform the particular tasks designated. It has been used, however, to suggest that the Secretary of State is not obligated to issue passports. We need only note that at the time this statute was passed Congress did not contemplate making the passport a necessary condition for travel.

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7. Title 22, United States Code, Section 211 (a).

It is quite clear that whatever "discretionary" powers may be said to derive from this statute are procedural, and not substantive. This contention is in fact supported by the Executive Order that provides the firmest basis for the Government's contention that discretionary powers exist. Executive Order No. 7856, March 31, 1938, states:

> The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict the passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.[8]
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> The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.[9]

Once again, it is to be noted that this proclamation is made in reference to the 1926 statute which did not contemplate making passports a condition for travel.

In any case, the Executive Order stipulates that whatever rules the Secretary of State shall make must not be inconsistent with already existing provisions. Additionally, it in no way suggests that the "discretion" of the Secretary of State could be used to deny someone the right to travel -- except to certain proscribed regions. Moreover, the only basis for denial of passport must conform substantively to previous directions; namely, that citizenship and absence of criminal indictments be the sole criteria for granting passports.

The passport did not become a necessary condition for entry and exit until 1952, with certain wartime exceptions. The Act of June 27, 1952 states that, after a prescribed proclamation by the President, it is "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."[10] A similar provision had existed for wartime and had been extended in 1941 to include states of emergency.

In 1947 the Passport Division initiated the procedure of employing political tests as criteria for issuance

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8. Title 22, Code of Federal Regulations, Section 51.75.
9. Title 22, Code of Federal Regulations, Section 51.77.
10. Title 8, United States Code, Section 1185.

of passports. This new procedure came at a time of so-called emergency in which the passport was already necessary for travel abroad. Leonard Boudin sums up the event thus:

> "Suffice it to say that without statutory support, an executive order, or even its own formal regulations, the Passport Division (now called the Passport Office) added its own political criteria to the list of qualifications requisite for passport issuance. Individuals of widely contrasting views were told, without benefit of charges, hearing, or evidence, that their travel would not be 'in the best interests of the United States.'"[11]

Two cases tested the State Department's unprecedented action. The first was brought by Paul Robeson to return his passport, which had been invalidated by the State Department. His case presented broad issues, and the courts dodged them. It was dismissed on various technicalities, such as jurisdiction and the contention that the passage of time would have caused the passport to expire anyway, thus mooting the matter at hand after that amount of time. A more limited attack came in Bauer v. Acheson, in which the appellant conceded that the Secretary of State had certain discretionary powers but contended that these powers had been abused by an arbitrary exercise of them. A three-judge statutory court decided in favor of that contention.

Relying on the court's recognition of its nebulous discretionary powers -- provided they not be used arbitrarily -- the State Department soon formalized its regulations. On August 28, 1952 regulations were instituted which deny passports to persons associated in one way or another with "the Communist movement". Membership in the Communist party is only one type of damning connection; persons otherwise under the "control" of the Communist movement are prevented from obtaining passports.

The reaction of the courts to these attempts by the State Department to limit the freedom to travel of political dissidents has been described earlier. At this point, we have only to add the comments of the court in regard to discretionary power in the Kent case:

> "Since we start with an exercise by an American citizen of an activity included in constitutional pro-

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11. Boudin, op. cit., p. 60.

> tection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does not more than 'request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection' to this citizen of the United States. But that function of the passport is subordinate. Its critical function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. . . And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. . . Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. . . We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen."[12]

Thus, Mr. Kent has scored a Pyrrhic victory. He has won his case, but much has been lost to the State Department. The abuses of Mrs. Ruth Shipley (head of the Passport Office during the height of the McCarthy period) are terminated, without abolishing or even challenging the original basis of that power which she so clearly abused.

Conclusions

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law of the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Chafee, Three Human Rights in the Constitution (1956), 171-181, 187 et. seq., shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was part of our heritage. Travel

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12. Kent v. Dulles, 357 U. S. 116 (1958).

abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, wears, or reads. Freedom of movement is basic in our scheme of values. . . 'Our nation,' wrote Chafee, 'has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.' Id., at 197.

"Freedom of movement also has large social values. As Chafee put it,

> Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons close to the core of personal life -- marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. . .[13]

The Supreme Court has spoken eloquently and clearly on the value of freedom to travel. It has regarded it as a precious liberty, already enshrined in the glorious tradition dating from the Magna Carta. The right to travel has been viewed as basic to the preservation of democracy. But the courts have also shown their willingness to set aside such statements in order to preserve a less glorious tradition, that of Cold War American diplomacy.

It appears that the Supreme Court is unwilling to assert libertarian doctrine in an anti-libertarian climate. The courts explicitly (Zemel) or implicitly (Worthy) accept the hypothesis that there is an imminent danger to our liberties from an international communist movement aiming to conquer the world. The alleged external danger is introduced as a balancing factor against our basic liberties. Even when this balancing test is not explicitly acknowledged, its presence may be discerned in the attitude of the court. For example, the New York Times of May 4, 1965 reported Earl Warren's off-the-record remarks thus:

13. Kent v. Dulles, 357 U. S. 116 (1958).

> In delivering his opinion from the bench he ad libbed that such restrictions were needed "in these turbulent times when explosion after explosion occur in the world".

The unacknowledged balancing test is also to be read between the lines in the Worthy opinion. The Appeals Court found banishment to be unconstitutional (in effect voiding one half of the provision of the Walter-McCarran Act of 1952, which requires passports for entry to and exit from the United States in time of war or national emergency). But it balanced this libertarian contention by offering an obiter dictum that upheld the provision for prosecution for leaving the country without a valid passport. The Court's argument in this latter case is an interesting example of its ability to disregard its own professions about "freedom" and "basic values". After quoting from the Kent decision in regard to the necessity of freedom to travel, the Court states:

> A citizen (intending to leave the United States) at an airport or pier without a passport, can refrain from a violation of the statute (1185) by remaining in the country. So doing, he can continue to exercise all the rights and privileges of a citizen.[14]

What the court seems to be averring is that (1) all Americans have the right to travel, (2) traveling without a passport is a crime, (3) a failure to exercise the right to travel is a means of avoiding criminal prosecution for exercising the right to travel, (4) a failure to exercise the right to travel allows the possibility of exercising "all the rights and privileges of a citizen". *This last proposition seems to be inherently* contradictory. It seems to embody the position that the freedom to travel means the "freedom to travel with a passport" or the "freedom not to travel without a passport".

Such specious arguing hardly results from a logical attempt to examine statutes and regulations abstractly. The confusion derives from an attempt to balance reason and unreason, liberty and alleged dangers, constitutional principles and Cold War hysteria.

14. Quoted in Levi Lee Laub, "Recent Decisions on Travel," Rights (April-May-June 1964), p. 18.

The same attempts at balance are to be found in Zemel. This time the court has supported the Government's position; but it leaves open the possibility that in the future it will once again respect certain basic liberties by refusing at this time to make advisory statements on the application of criminal sanctions for violation of the travel ban.

The question of punishment for traveling to Cuba may be settled in the case of Helen Travis, whose conviction by the Federal District Court of California has been upheld on appeal. Miss Travis traveled to Cuba without a "valid" passport; the prosecution is based on the Immigration Act of 1952. The whole matter will be settled finally in the cases involving the students who organized and led student trips to Cuba in the summers of 1963 and 1964. The representatives of the Student Committee for Travel to Cuba who are under indictment are charged with entering and leaving the country without valid passports (a violation of the Walter-McCarran Immigration Act of 1952) and with "conspiring" to commit a crime (i.e., to travel to Cuba).

These cases provide a supreme test of the Court's position: does its acceptance of a "Red menace" overbalance its belief that criminal sanctions ought not to be imposed on those who exercise what have been considered to be basic and elementary rights?

The Supreme Court's role at this time is cautious. It advocates liberties on rare occasions, while opting for procedural due process with good consistency. But nearly always there is evidence for believing that the Court is fearful of opposing not the "paramount interest" of the nation, but the orthodox madness of Cold War policy. The nation fears, and the Court will not show courage. Our liberties are in our own hands.