Constitutional Law--Right to Travel--Prohibition on Travel to Cuba Upheld as Valid Area Restriction (Zemel v. Rusk, 381 U.S. 1 (1965))
However, this is not to say that Congress' hands are tied in dealing with propaganda of this type. The purpose of the statute in the instant case was to protect the American people from the subversive ideas disseminated by this propaganda. This purpose can just as easily be attained if Congress apprises the citizenry of the fact that large quantities of propaganda are being introduced into the United States from abroad, and that all citizens who do not wish to receive this mail can so notify the Post Office, and have it detained there.

In conclusion, the principal case indicates the Supreme Court's growing discontent with indirect governmental interference with freedom of speech through control of the mails. The case represents a further judicial extension of first amendment's guarantees and will provide a precedent for future cases in which petitioners allege unconstitutional restrictions upon derivative first amendment rights.

CONSTITUTIONAL LAW — RIGHT TO TRAVEL — PROHIBITION ON TRAVEL TO CUBA UPHeld AS VALID AREA RESTRICTION.—In compliance with a requirement of the Department of State, the plaintiff applied for validation of his passport for travel to Cuba. The request was denied on the ground that it was not in the best interest of the United States to allow tourist travel to Cuba, and the plaintiff brought suit against the Secretary of State. In affirming a special three-judge district court's dismissal of the action, the United States Supreme Court, on direct appeal, held that refusal to validate a passport for travel to Cuba was a proper exercise of power by the Secretary of State under the Passport Act of 1926, and was not an unconstitutional deprivation of plaintiff's right to travel. Zemel v. Rusk, 381 U.S. 1 (1965).

The use of passports and the concept of the right to travel have distinct histories which did not merge until recent years. The term passport arose in relation to a privilege afforded an alien or foreign ambassador to pass safely through the territory of the issuing sovereign. Later, passports evolved into documents issued to the citizens of a country, solely for the purpose of identifying the bearer in order to insure his safety while traveling in foreign countries. It was never a requirement that a traveler obtain a passport in order to leave the United States.

2 Jaffe, The Right to Travel: The Passport Problem, 35 FOREIGN AFFAIRES 17 (1956).
4 Ibid.
The right to travel, which is ingrained in English common law, was expressly provided for in the Magna Carta, and was described by Blackstone as a personal liberty "consisting in the power . . . of moving one's person to whatever place one's inclination may direct." In the United States, the right to travel enjoyed a comparable status, and consequently, any congressional action dealing with passport issuance only attempted to facilitate, and not to regulate, travel. The right to travel was treated historically as a right to travel within the United States.

The first congressional regulation of passports, enacted in 1803, declared it unlawful to issue a passport to an alien who represented himself to be a citizen. The practice of issuing passports to anyone who could prove himself a citizen was ended after the Civil War, when an oath of allegiance was required of an applicant. No longer was a passport "an act of government to which the citizen is entitled precisely because he is a citizen." Legislation in 1856 placed passport issuance exclusively within the domain of the Department of State. This act, which remains in force today as the Passport Act of 1926, centralized the issuance of passports in order to eliminate confusion and to remedy the abuses practiced upon the unwary by many unauthorized persons purporting to issue passports. The power to issue passports became discretionary with

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5 Magna Carta, ch. 42 (1215).
6 1 Blackstone, Commentaries* 134.
7 See Kent v. Dulles, 357 U.S. 116, 126 (1957), wherein the Court stated: "freedom of movement is basic in our scheme of values," and which contains an excellent history of regulation of the right to travel.
9 In Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867), the right to travel was stated to be "in its nature independent of the will of any State over whose soil [a person] . . . must pass in the exercise of it." In 1900, the Supreme Court specifically termed the right to travel within this country an "attribute of personal liberty," which is "secured by the Fourteenth Amendment and by other provisions of the Constitution." Williams v. Fears, 179 U.S. 270, 274 (1900). Again, in 1941, the Court dealt with a citizen's right to travel within the United States and struck down a restriction on migrant workers on the basis of the commerce clause. Edwards v. California, 314 U.S. 160 (1941). The majority reasoned that interstate commerce was adversely affected by denying workers in search of employment the right to travel from state to state.
10 2 Stat. 205 (1803).
11 Jaffe, supra note 2, at 22.
12 Boudin, supra note 8, at 52.
13 Act of August 18, 1856, 11 Stat. 52, 60-61. This act authorized the Secretary of State to "grant and issue passports . . . under such rules as the President shall designate and prescribe, and no other person shall grant, issue or verify such passports."
15 3 Moore, International Law Digest 862-63 (1906).
the Secretary of State, and this authority was recognized by both the United States Supreme Court and the President.

The Secretary of State exercised his discretion in 1903 by rejecting the application of all those who desired a passport for unlawful or improper purposes. The Department also denied passports to communists, or to those whose activities abroad were contrary to the laws or interests of the United States. Between 1917 and 1931, the Department refused passports to American communists who desired to leave the country for purposes of indoctrination or instruction in communism. In 1948, passports were denied to those whom the Department deemed to be traveling abroad with the intention of subverting the interests of the United States. In addition, passports have been denied to "political adventurers," and "revolutionary radicals."

Historically, the right of an American citizen to travel abroad was not dependent upon the issuance of a passport by the Secretary of State, except during war time. However, in 1941, Congress extended this requirement to include foreign travel during those periods designated by the President as national emergencies. This provision was superseded by Section 215 of the Immigration and Nationality Act of 1952 which was essentially the same as the 1941 Act. As a result of a 1953 Presidential Proclamation invoking the 1952 Act, it is presently unlawful to leave or enter the United States without a valid passport. Consequently, the passport has assumed a new function: it is a control over egress, and the Secretary of State, by controlling passports can, in effect, control travel to and from the United States.

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16 Kent v. Dulles, supra note 7, at 124.
19 Jaffe, supra note 2, at 22.
20 Id. at 23.
21 Kent v. Dulles, supra note 7, at 139 (dissenting opinion).
22 Ibid.
23 Id. at 141; see Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review, 61 Yale L.J. 171 (1952).
24 During the War of 1812, Congress required passports for travel across enemy lines (3 Stat. 199-200 (1815)); during the Civil War, similar steps were taken (Kent v. Dulles, supra note 7, at 123); and during World War I, passports were required for travel abroad (40 Stat. 559 (1918)).
25 Jaffe, supra note 2, at 18.
26 53 Stat. 252 (1941).
27 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1964). This act provides that whenever the President proclaims a national emergency and deems it in the interests of the United States, he may "require that restrictions and prohibitions . . . be imposed upon the departure of persons from and their entry into the United States . . . ." and until otherwise ordered, it shall be unlawful for "any citizen of the United States to depart from or enter the United States unless he bears a valid passport."
Since the advent of administrative control over the right to travel in foreign countries, the Supreme Court has decided two cases which dealt with the State Department's refusal to grant passports to communists or to persons affiliated with the communist party. The first was Kent v. Dulles,\textsuperscript{2} in which the State Department predicated its power to refuse passports to communist party members on the Passport Act of 1926. The Court found that a restriction of the right to travel imposed upon the basis of political belief was not one of the restrictions previously imposed by the State Department, nor impliedly sanctioned by the Passport Act. The Court stated that so far as was material to passport restrictions based on the character of the individual, passports might be denied in two areas: where the applicant refused allegiance to the United States; and where he was a criminal or was trying to escape the law.\textsuperscript{30} The Court reaffirmed that the right to travel was constitutionally guaranteed, stating that it was included within the "liberty" protected by the fifth amendment.\textsuperscript{31} Since the applicant in Kent was not a fugitive from the law, nor had he refused allegiance to the United States, the denial by the Secretary of State was held an abuse of discretion.

Aptheker v. Secretary of State\textsuperscript{32} was the first Supreme Court case which actually decided the constitutionality of a restriction on the right to travel. Section 6 of the Subversive Activities Control Act\textsuperscript{33} made it illegal for any person required to be registered as a subversive to apply for, use or attempt to use a passport. The Court declared the act unconstitutional on its face, since it required these individuals to forfeit their derivative first amendment right of association in order to obtain a passport.\textsuperscript{34}

The instant case presented issues as to whether the Secretary of State had the statutory power to refuse to issue passports and, if so, whether the exercise of that authority was constitutional. Since there is no express statutory grant of power authorizing passport restrictions, the Court, as in Kent, was faced with the interpretation of the Passport Act\textsuperscript{35} and Section 215 of the Immigration and Nationality Act.\textsuperscript{36} Here, it found that the Passport Act impliedly authorized the passport restriction in question.\textsuperscript{37} The Court distinguished Kent by noting that the restriction there, which was grounded upon political belief or association, was not evidenced by any long-standing administrative practice which could warrant the

\textsuperscript{2} 357 U.S. 116 (1957).
\textsuperscript{30} Id. at 127.
\textsuperscript{31} Id. at 125.
\textsuperscript{32} 378 U.S. 500 (1963).
\textsuperscript{34} Aptheker v. Secretary of State, 378 U.S. 500, 514 (1963).
\textsuperscript{37} Zemel v. Rusk, 381 U.S. 1, 8 (1965).
conclusion that Congress had given its implied approval.\(^3\) On the contrary, in Zemel, the Court discussed many examples of area restrictions both before \(^4\) and after \(^8\) the 1926 Passport Act, in peacetime and during war. Relying on the history of area restrictions prior to 1926, the Court found that Congress, by the broad language of the act, intended to maintain the executive's authority to impose such restrictions. This construction was derived from the continued imposition of area restrictions subsequent to 1926, particularly a 1938 Executive Order,\(^4\) still in force, which specifically authorizes these restrictions by the State Department. It was observed that the 1952 Immigration and Nationality Act dealt with passports, but in no way repealed or revised the 1926 Act. These factors, together with the rule of construction charging courts to give weight to the interpretation of statutes by those who administer them,\(^4\) led the Court to conclude that Congress intended that the executive be given the authority to impose area restrictions on passports.\(^4\)

After establishing that Congress had impliedly authorized the Secretary of State to impose area restrictions, the Court proceeded to examine the constitutionality of such a grant. It reiterated the Kent ruling, that the right to travel is a fifth amendment liberty which cannot be denied without due process of law, but made it clear that the due process clause does not preclude every restriction. The Court examined the political situation existing between Cuba and the United States in order to determine the necessity, as well as the extent, of any such restrictions. The State Department had judged that travel to and from Cuba by American citizens would be an instrumental means of effectuating the goal of the Cuban government to spread communism. In addition, since American citizens had been arrested and imprisoned without charges by that government, and since it is the President's duty to use necessary and proper means to secure the release of citizens unjustly im-

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\(^3\) Id. at 16.

\(^4\) The Court mentions a 1915 restriction on travel in Belgium due to a famine in that country; restrictions imposed during World War I on travel in Germany and Austria which lasted until 1922; and restrictions on travel in the Soviet Union until 1923.

\(^8\) Restrictions were imposed in 1935 on travel to Ethiopia following the outbreak of war there with Italy; in 1936 on travel to Spain as the result of the Spanish Civil War; in 1937 to China; in 1952 to Albania, Bulgaria, Communist China, Czechoslovakia, Hungary, Poland, Rumania, and the Soviet Union; and as late as 1956 to Egypt, Jordan, and Syria for a brief period.


\(^4\) Udall v. Tallman, 380 U.S. 1, 16 (1965).

\(^4\) Zemel v. Rusk, supra note 37, at 12; cf. Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 313 (1933). "Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years." Ibid.
prisoned abroad, the Court concluded that the Secretary was constitutionally justified in authorizing area restrictions on passports to Cuba in order to prevent dangerous international incidents.

The Court rejected plaintiff's contention that a first amendment right was violated by the prevention of an unfettered flow of information, by indicating that "the right to speak and publish does not carry with it the unrestrained right to gather information." Moreover, plaintiff's argument that the 1926 Act was unconstitutionally devoid of sufficient standards and controls for travel restrictions was rejected on the theory that in the area of foreign affairs, where conditions are volatile and subject to unforeseeable change, the President must be afforded broad legislative grants of power in order to satisfactorily meet any contingency. The Court indicated that in the sphere of foreign affairs, it is willing to uphold a congressional grant of power that would be struck down as being too broad in domestic areas. In concluding, the Court did not interpret the 1926 Act as giving an unrestricted freedom of choice to the President, but only as authorizing those passport restrictions which Congress impliedly included in view of prior administrative practice.

Dissenting opinions were written by three justices, two of whom believed that Congress did not authorize passport restrictions, and that the President, by authorizing such restrictions, was in fact performing a legislative function. The third dissent, written by Mr. Justice Douglas, the author of the majority opinion in Kent, sought to establish that the right to travel is protected by the first amendment. According to this dissent, the Court in Kent held this right to be a fifth amendment liberty because it was, in actuality, a peripheral right of the first amendment, since a restriction of the right to travel results in a limitation upon the rights to know, to converse and to consult with others. Mr. Justice Douglas then argues that any restriction of a first amendment right must be narrowly drawn and addressed at a "precise evil." The presence of a communist regime in Cuba, he feels, is not a sufficient evil to warrant the curtailment of a first amendment right.

The decision in Kent held a restraint on passports invalid because there was no specific authority from Congress for such restrictions. Faced with the same statute, the Court in Zemel upheld a restriction, concededly on a different factual basis, despite the reasoning of Kent, which requires a strict construction of statutes

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45 Zemel v. Rusk, supra note 37, at 12-15.
46 Id. at 17.
47 Id. at 17-18.
48 Id. at 20 (dissenting opinion of Mr. Justice Black); id. at 28 (dissenting opinion of Mr. Justice Goldberg).
49 Id. at 23-24 (dissenting opinion).
50 Id. at 25.
Neither the Passport Act nor the Immigration and Nationality Act expressly allows any type of passport restriction. If construed narrowly, such a grant of authority is difficult to derive from these statutes. In justification of this derivation of power, the Court in *Zemel* argued that an unspecified grant of power may be implied in the light of the executive's historical assumption of that power. The Court mentions several cases which have so construed statutes, but in none was a restriction of a constitutional right sought. The mandate of *Kent* and many other Supreme Court decisions—to narrowly construe statutes restricting constitutional rights—appears to have been displaced by the Court's argument.

Since the enactment of Section 215 of the Immigration and Nationality Act, and with the Presidential Proclamation of 1953 which declared the state of a national emergency, it is presently unlawful for a person to leave the country without a passport. Coupled with the recognition of the executive's power to impose area restrictions on passports, the President and his delegated agents may curtail an affirmed constitutional right without any clearly defined restraints. Neither Congress nor the Court has given any indication of the extent to which restrictions may be carried. Without any statutory or judicial restraints, the power to restrict passports could become an arbitrary control over travel, which the State Department might effectuate by increasing the number of restricted areas. This potentiality may become aggravated by the Court's apparent willingness to accept without question the State Department's opinion as to what constitutes a national emergency. In cases where express congressional approval is lacking, courts should examine extensively the reasons for restricting the right to travel, and should not permit the violation of any constitutional right in the absence of a compelling necessity.

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**Criminal Law—Age of Infant Defendant Not Ground for Holding Confession Involuntary.**—In 1947, the defendant, then fourteen years old, was taken from his home at 9:30 P.M., and was interrogated by police officers until a formal confession was obtained in the absence of parents or counsel. After the grand

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52 The Court cites *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294 (1933), which considered tariff duties imposed upon foreign manufacturers; *Costanzo v. Tillinghast*, 287 U.S. 341 (1932), which dealt with the deportation of aliens; *United States v. Midwest Oil Co.*, 236 U.S. 459 (1914) and *Udall v. Tallman*, supra note 42, both of which were concerned with oil and gas leases on government-owned land.