taken together with other nations, to isolate a hostile foreign country such as Cuba because of its attempts to promote the subversion of democratic nations. See Senate Hearings 63–69. The Department of State also has imposed different types of travel restrictions in different circumstances. All newsmen, for example, were prohibited from traveling to China, see Senate Hearings 67, but they have been allowed to visit Cuba. See Public Notice 179 (Jan. 16, 1961), 26 Fed. Reg. 492; Press Release No. 24, issued by the Secretary of State, Jan. 16, 1961. In view of the different types of need for travel restrictions, the various reasons for traveling abroad, the importance and constitutional underpinnings of the right to travel and the right of a citizen and a free press to gather information about foreign countries, it cannot be presumed that Congress, without focusing upon the complex problems involved, resolved them by adopting a broad and sweeping statute which, in the Court's view, confers unlimited discretion upon the Executive, and which makes no distinctions reconciling the rights of the citizen to travel with the Government's legitimate needs. I do not know how Congress would deal with this complex area were it to focus on the problems involved, or whether, for example, in light of our commitment to freedom of the press, Congress would consent under any circumstances to prohibiting newsmen from traveling to foreign countries. But, faced with a complete absence of legislative consideration of these complex issues, I would not presume that Congress, in 1926, issued a blanket authorization to the Executive to impose area restrictions and define their scope and duration, for the nature of the problem seems plainly to call for a more discriminately fashioned statute.

III. CONCLUSION.

In my view it is clear that Congress did not mean the 1926 Act to authorize the Executive to impose area re-

strictions in time of peace, and, with all deference, I disagree with the Court's holding that it did. I agree with the Court that Congress may authorize the imposition of travel restrictions consistent with constitutional guarantees, but I find it plain and evident that Congress has never considered and resolved the problem. After consideration Congress might determine that broad general authority should be delegated to the Secretary of State, or it might frame a narrower statute. I believe that here, as in other areas, appropriate delegation is constitutionally permissible where some standard for the application of delegated power is provided. See, *e. g., Lichter* v. *United States*, 334 U. S. 742, 785. However, in light of my conclusion that the 1926 Act did not deal with area restrictions I do not find it necessary to consider the question of whether the language of the 1926 Act might constitute an unconstitutionally broad delegation of power.

In view of the different types of need for area restrictions asserted by the Government, the various reasons for travel abroad, the importance and constitutional underpinnings of the right of citizens and a free press to gather information about foreign countries—considerations which Congress did not focus upon—I would not infer, as the Court does, that Congress resolved the complex problem of area restrictions, which necessarily involves reconciling the rights of the citizen to travel with the Government's legitimate needs, by the re-enactment of a statute that history shows was designed to centralize authority to issue passports in the Secretary of State so as to prevent abuses arising from their issuance by unauthorized persons. Since I conclude that the Executive does not possess inherent power to impose area restrictions in peacetime, and that Congress has not considered the issue and granted such authority to the Executive, I would reverse the judgment of the District Court.

UNITED STATES v. LAUB ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

No. 176. Argued November 16, 1966.—Decided January 10, 1967.

Appellees were indicted for conspiring to violate § 215 (b) of the Immigration and Nationality Act of 1952 by recruiting and arranging the travel to Cuba of 58 United States citizens whose passports, although otherwise valid, were not specifically endorsed for travel to Cuba. Section 215 (b) provides that during wartime or a National Emergency, and when the President finds and proclaims that such restrictions are necessary in the national interest, "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." The required finding and proclamation were made on January 17, 1953, and valid passports were thereafter required of United States citizens except when traveling to or from areas exempted by State Department regulations. After diplomatic relations with Cuba were severed on January 3, 1961, a State Department regulation excluded Cuba from Western Hemisphere countries exempted from the passport requirement. On the same day the Department issued a Public Notice and a press release, declaring outstanding passports invalid for travel to Cuba unless endorsed therefor. Thereafter, appellees allegedly engaged in the charged conspiracy. The District Court dismissed the indictment for failure to state an offense of conspiracy to violate § 215 (b). A direct appeal was taken to this Court. *Held:* Area restrictions upon the use of an otherwise valid passport are not criminally enforceable under § 215 (b). Pp. 479–487.

(a) "Section 215 (b) is a criminal statute. It must therefore be narrowly construed. *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96, 105 (1820) (Marshall, C. J.)." P. 480.

(b) As the Government concedes, "Section 215 (b) does not, in so many words, prohibit violations of area restrictions . . . ." P. 480.

(c) "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law. . . ." *Kent* v. *Dulles*, 357 U. S. 116, 125 (1958). P. 481.

(d) "There is no doubt that with the adoption and promulgation of the 'Excluding Cuba' regulation, a passport was required for departure from this country for Cuba and for entry into this country from Cuba. Departure for Cuba or entry from Cuba without a passport would be a violation of § 215 (b) . . . . But it does not follow that travel to Cuba with a passport which is not specifically validated for that country is a criminal offense." P. 481.

(e) Neither the State Department's Public Notice nor its press release referred to § 215 (b) or to criminal sanctions. "On the contrary, the only reference to the statutory base of the announcement . . . is a reference to the nonpenal 1926 Act . . . [which authorizes] the Secretary of State to impose area restrictions . . . ." P. 482.

(f) The "unbroken tenor of State Department pronouncements on area restrictions," has cast them "exclusively in civil terms, relating to the State Department's 'safe passage' functions." P. 483.

(g) "Until these indictments . . . the State Department had consistently taken the position that there was no statute which imposed or authorized . . . prohibition" of travel in violation of area restrictions. P. 485.

(h) "The area travel restriction, requiring special validation of passports for travel to Cuba, was a valid civil regulation . . . [b]ut it was not and was not intended or represented to be an exercise of authority under § 215 (b). . . ." P. 487.

253 F. Supp. 433, affirmed.

Nathan Lewin argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Robert L. Keuch.*

Leonard B. Boudin argued the cause for appellees. With him on the brief was *Victor Rabinowitz.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

Appellees were indicted under 18 U. S. C. § 371 for conspiring to violate § 215 (b) of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C.

§ 1185 (b). The alleged conspiracy consisted of recruiting and arranging the travel to Cuba of 58 American citizens whose passports, although otherwise valid, were not specifically validated for travel to that country.[1]

The District Court granted appellees' motion to dismiss the indictment. Chief Judge Zavatt filed an exhaustive opinion (253 F. Supp. 433 (D. C. E. D. N. Y.)). Notice of direct appeal to this Court was filed and we noted probable jurisdiction under 18 U. S. C. § 3731 because the dismissal was "based upon the . . . construction of the statute upon which the indictment . . . is founded." We affirm. Our decision rests entirely upon our construction of the relevant statutes and regulations.

Two statutes are relevant to this case. The first is the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. § 211a. This is the general statute authorizing the Secretary of State to "grant and issue passports." It is not a criminal statute. The second statute is § 215 (b) of the Immigration and Nationality Act of 1952, *supra*, under which the present indictments were brought. Section 215 (b) was enacted on June 27, 1952. It is a re-enactment of the Act of May 22, 1918 (40 Stat. 559), and the Act of June 21, 1941 (55 Stat. 252). It provides that:

> "When the United States is at war or during the existence of any national emergency proclaimed by the President . . . and [when] the President shall find that the interests of the United States require that restrictions and prohibitions . . . be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, *it shall* . . . (b) . . . *be unlawful for any citizen of the United States to depart from or*

[1] In response to a motion for a bill of particulars, the Government alleged that the individuals concerned possessed "unexpired and unrevoked United States passports which . . . had not been specifically validated by the Secretary of State for travel to Cuba."

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enter, or attempt to depart from or enter, the United States unless he bears a valid passport." (Italics added.)

Wilful violation is subjected to a fine of not more than $5,000 or imprisonment for five years, or both.

On January 17, 1953, President Truman made the finding and proclamation required by § 215 (b).[2] As a consequence, a valid passport has been required for departure and entry of United States nationals from and into the United States and its territories, except as to areas specifically exempted by regulations. The proclamation adopted the regulations which the Secretary of State had promulgated under the predecessors of § 215 (b) exempting from the passport requirement departure to or entry from "any country or territory in North, Central, or South America [including Cuba]." 22 CFR § 53.3 (b) (1958 rev.). On January 3, 1961, the United States broke diplomatic relations with Cuba. On January 16, 1961, the Deputy Under Secretary of State for Administration issued the "Excluding Cuba" amendment (22 CFR § 53.3 (1965 rev.), 26 Fed. Reg. 482). That amendment added the two words "excluding Cuba" to the phrase quoted above. Cuba was thereby included in the general requirement of a passport for departure from and entry into the United States.

On the same day, the Department of State also issued Public Notice 179, which stated that "Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State. . . ." 26 Fed. Reg.

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[2] Proclamation No. 3004, 67 Stat. c31, 3 CFR 180 (1949–1953 Comp.). The current "National Emergency" was proclaimed by President Truman on Dec. 16, 1950. Proclamation No. 2914, 64 Stat. A454, 3 CFR 99 (1949–1953 Comp.).

492. It simultaneously issued a press release announcing that:

> "*. . . in view of the U. S. Government's inability,* following the break in diplomatic relations between the United States and Cuba, *to extend normal protective services to Americans visiting Cuba,* U. S. citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports . . . are being declared invalid for travel to Cuba unless specifically endorsed for such travel. . . . *These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.*" [3] (Italics added.)

In *Zemel* v. *Rusk,* 381 U. S. 1 (1965), the petitioner sought a declaratory judgment that the Secretary of State does not have statutory authorization to impose area restrictions on travel; that if the statute were construed to authorize the Secretary to do so, it would be an impermissible delegation of power; and that, in any event, the exercise of the power to restrict travel denied to petitioner his rights under the First and Fifth Amendments. This Court rejected petitioner's claims and sustained the Secretary's statutory power to refuse to validate passports for travel to Cuba. It found authority for area restrictions in the general passport authority vested in the Secretary of State by the 1926 Act, relying upon the successive "imposition of area restrictions during both times of war and periods of peace" before and after the enactment of the Act of 1926. 381 U. S., at

[3] State Department Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178. The full text is in the Appendix to this opinion.

8–9. The Court specifically declined the Solicitor General's invitation to rule also that "travel in violation of an area restriction imposed on an otherwise valid passport is unlawful under the 1952 Act." *Id.*, at 12.[4]

We now confront that question. Section 215 (b) is a criminal statute. It must therefore be narrowly construed. *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96, 105 (1820) (Marshall, C. J.). Appellees urge that § 215 (b) must be read as a "border control" statute, requiring only that a citizen may not "depart from or enter" the United States without "a valid passport." On this basis, they argue, appellees did not conspire to violate the statute since all of those who went to Cuba departed and re-entered the United States bearing valid passports. Only if, as the Government urges, § 215 (b) can be given a broader meaning so as to encompass specific destination control—only if it is read as requiring the traveler to bear "a passport endorsed as valid for travel to the country for which he departs or from which he returns"—would appellees be guilty of any violation.

We begin with the fact, conceded by the Government, that "Section 215 (b) does not, in so many words, prohibit violations of area restrictions; it speaks, as the district court noted in the *Laub* case . . . in the language of 'border control statutes regulating departure from and entry into the United States.'" Brief for the United States, p. 11. Nevertheless, the Government requests us to sustain this criminal prosecution and reverse the District Court on the ground that somehow, "the text is broad enough to encompass departures for geographically restricted areas . . . ." *Ibid.* We conclude, however, that in this criminal proceeding the statute cannot be applied in this fashion. Even if ingenuity were able to find concealed in the text a basis for this

[4] But cf. *United States* v. *Healy*, 376 U. S. 75, 83, n. 7 (1964).

criminal prosecution, factors which we must take into account, drawn from the history of the statute, would preclude such a reading.

Preliminarily, it is essential to recall the nature and function of the passport. A passport is a document identifying a citizen, in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers. See *Urtetiqui* v. *D'Arcy,* 9 Pet. 692, 699 (1835); *Kent* v. *Dulles,* 357 U. S. 116, 120–121 (1958); 3 Hackworth, Digest of International Law 435 (1942). 8 U. S. C. § 1101 (a)(30).

As this Court has observed, "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law. . . ." *Kent* v. *Dulles, supra,* 357 U. S., at 125. See *Aptheker* v. *Secretary of State,* 378 U. S. 500, 517 (1964); *Zemel* v. *Rusk,* 381 U. S. 1 (1965).

Under § 215 (b) and its predecessor statutes, Congress authorized the requirement that a citizen possess a passport for departure from and entry into the United States,[5] and there is no doubt that with the adoption and promulgation of the "Excluding Cuba" regulation, a passport was required for departure from this country for Cuba and for entry into this country from Cuba. Departure for Cuba or entry from Cuba without a passport would be a violation of § 215 (b), exposing the traveler to the criminal penalties provided in that section. But it does not follow that travel to Cuba with a passport which is not specifically validated for that country is a criminal offense. Violation of the "area restriction"—"invalidating" passports for travel in or to

[5] It is the exception rather than the rule in our history to require that citizens engaged in foreign travel should have a passport. *Kent* v. *Dulles,* 357 U. S. 116, 121–123 (1958); Jaffe, The Right To Travel: The Passport Problem, 35 Foreign Affairs 17 (1956).

Cuba and requiring specific validation of passports if they are to be valid for travel to or in Cuba—is quite a different matter from violation of the requirement of § 215 (b) and the regulations thereunder that a citizen bear a "valid passport" for departure from or entry into the United States.

The area restriction applicable to Cuba was promulgated by a "Public Notice" and a press release, *supra*, pp. 478–479, neither of which referred to § 215 (b) or to criminal sanctions. On the contrary, the only reference to the statutory base of the announcement appears in the "Public Notice," and this is a reference to the nonpenal 1926 Act and the Executive Order adopted thereunder in 1938.[6] These merely authorize the Secretary of State to impose area restrictions incidental to his general powers with respect to passports. *Zemel* v. *Rusk*, *supra*. They do not purport to make travel to the designated area unlawful.

The press release issued by the Department of State at the time expressly explained the action as being "in view of the U. S. Government's inability . . . to extend normal protective services to Americans visiting Cuba." It explained that the action was taken in conformity with the Department's "normal practice" of limiting travel to countries with which we do not have diplomatic relations.[7] That "normal practice," as will be discussed, has not included criminal sanctions. In short, the relevant State Department promulgations are not

[6] The "Public Notice" recites that "pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 FR 681, 687, 22 CFR 51.75 and 51.77) under authority of . . . the Act of . . . July 3, 1926 . . . all United States passports are hereby declared to be invalid for travel to or in Cuba . . . ." Department of State, Public Notice No. 179, Jan. 16, 1961, 26 Fed. Reg. 492.

[7] State Department Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178. The full text is in the Appendix to this opinion.

only devoid of a suggestion that travel to Cuba without a specially validated passport is prohibited, or that such travel would be criminal conduct, but they also contain positive suggestions that the purpose and effect of the restriction were merely to make clear that the passport was not to be regarded by the traveler in Cuba as a voucher on the protective services normally afforded by the State Department.

This was in keeping with the unbroken tenor of State Department pronouncements on area restrictions. Prior to enactment of § 215 (b) on June 27, 1952, area travel restrictions were proclaimed on five occasions while the 1918 and 1941 Acts were in effect (1918–1921 and 1941–1953).[8] These were the predecessors of § 215 (b), and they similarly specified criminal sanctions.[9] But in each of the five instances, the area restrictions were devoid of any suggestion that they were related to the 1918 or 1941 Acts or were intended to invoke criminal penalties if they were disregarded. They were cast exclusively in civil terms, relating to the State Department's "safe passage" functions.[10] In two of these instances, the Department of State specifically emphasized the civil,

[8] The 1918 Act was in effect by Presidential proclamation only between August 8, 1918, and March 3, 1921. (40 Stat. 1829 and 41 Stat. 1359.) The 1941 Act was in effect by successive Presidential proclamations and congressional extensions from November 14, 1941 (55 Stat. 1696), to April 1, 1953 (66 Stat. 57, 96, 137, 333), by which date § 215 (b) was already in effect by Presidential Proclamation No. 3004, Jan. 17, 1953, 67 Stat. c31, 3 CFR 180 (1949–1953 Comp.).

[9] See p. 477, *supra*.

[10] 1. Restriction in 1919 as to Germany (3 Hackworth, Digest of International Law 530 (1942). 2. Restriction in 1950 as to Bulgaria and Hungary (22 Dept. State Bull. 399). 3. Restriction in 1951 as to Czechoslovakia (24 Dept. State Bull. 932). 4. Restriction in 1951 as to Hungary (26 Dept. State Bull. 7). 5. Restriction in 1952 as to East European countries, China, and the Soviet Union (26 Dept. State Bull. 736).

nonprohibitory nature of the restrictions.[11] For example, in 1952 the State Department issued area restrictions with respect to Eastern European countries, China, and the Soviet Union. The Department's press release emphasized that the "invalidation" of passports for travel to those areas "in no way forbids American travel to those areas." [12]

Since enactment of § 215 (b), the State Department has announced area travel restrictions upon three occasions in addition to Cuba.[13] Again, although § 215 (b) was fully operative, none of these declarations purported to be issued under that section or referred to criminal sanctions. Each of them, like the Cuba regulation, sounded in terms of withdrawal of the safe-passage services of the State Department.[14]

In 1957, the Senate Foreign Relations Committee asked the Department: "What does it mean when a passport is stamped 'not valid to go to country X'?" After three months, the Department sent its official reply. It stated that this stamping of a passport "means that if the bearer enters country X he *cannot be assured of the protection* of the United States. . . . [but it] *does not necessarily mean that if the bearer travels to country X he will be*

[11] These were the 1919 Germany restriction and the 1952 East Europe, Soviet Union, and China restriction. See n. 10, *supra*. The texts of the Department's announcements of these restrictions are in the Appendix to this opinion.

[12] See the Appendix to this opinion.

[13] 1. Restriction in 1955 as to Albania, Bulgaria, China, North Korea, and North Viet Nam (33 Dept. State Bull. 777). 2. Restriction in 1956 as to Hungary (34 Dept. State Bull. 248). 3. Restriction in 1956 as to Egypt, Israel, Jordan, and Syria (35 Dept. State Bull. 756, 21 Fed. Reg. 8577).

[14] In the 1956 area restriction relating to Egypt, Israel, Jordan, and Syria, *supra*, n. 13, as well as the Cuba restriction, the Department expressly recited the 1926 Act as its basis. It did not mention § 215 (b). 21 Fed. Reg. 8577.

violating the criminal law." [15] (Italics added.) Similarly, in hearings before another Senate Committee, a Department official explained that when a passport is marked "invalid" for travel to stated countries, this means that "this Government is not sponsoring the entry of the individual into those countries and does not give him permission to go in there under the protection of this Government." [16]

Although Department records show that approximately 600 persons have violated area travel restrictions since the enactment of § 215 (b),[17] the present prosecutions are the only attempts to convict persons for alleged area transgressions.[18]

Until these indictments, in fact, the State Department had consistently taken the position that there was no statute which imposed or authorized such prohibition. In the 1957 hearings, referred to above, the Acting Director of the Bureau of Security and Consular Affairs, Department of State, testified that he knew of no statute providing a penalty for going to a country covered by an area restriction without a passport (as distinguished from

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[15] Hearings before the Senate Committee on Foreign Relations, on Department of State Passport Policies, 85th Cong., 1st Sess. (1957), p. 59.

[16] Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on the Right To Travel, 85th Cong., 1st Sess., part 2 (1957), p. 86; see also *id.*, at 62.

[17] The Government conceded this to the court below. See also the Department's testimony to the same effect in Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Senate Committee on the Judiciary, on S. 3243, 89th Cong., 2d Sess. (1966), p. 43. The Chief of the Security Branch of the Legal Division of the State Department testified to the court below that he was unaware of any prosecution for violation of area restrictions under the predecessors of § 215 (b).

[18] See also *Travis* v. *United States*, No. 67, *post*, p. 491; *Worthy* v. *United States*, 328 F. 2d 386 (C. A. 5th Cir., 1964).

departing or entering the United States).[19] The Government, as well as others, has repeatedly called to the attention of the Congress the need for consideration of legislation specifically making it a criminal offense for any citizen to travel to a country as to which an area restriction is in effect,[20] but no such legislation was enacted.[21]

In view of this overwhelming evidence that § 215 (b) does not authorize area restrictions, we agree with the District Court that the indictment herein does not allege a crime. If there is a gap in the law, the right and the duty, if any, to fill it do not devolve upon the courts.

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[19] Hearings, n. 16, *supra*, at 91–95.

[20] See, *e. g.*, President Eisenhower's request for legislation, H. R. Doc. No. 417, 85th Cong., 2d Sess. (1958). The Administration's bill was S. 4110, H. R. 13318. In 1957, the Commission on Government Security, specifically established by Congress to study travel and passport legislation, among other things (Public Law 304, 84th Cong., 1st Sess., 69 Stat. 595 (1955)), recommended that "Title 8, U. S. C. A., section 1185 (b), should be amended to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid." Report (S. Doc. 64, 84th Cong.), at 475. The next year, the Special Committee To Study Passport Procedures of the Association of the Bar of the City of New York published a report entitled "Freedom To Travel." One of the authors of this Report was the Honorable Adrian S. Fisher, former Legal Advisor to the Department of State. This Report concluded, at 70, as to criminal enforcement of area restrictions:

"The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case."

[21] The most recent bill, introduced by the Department after two years of study, was H. R. 14895, 89th Cong., 2d Sess. (1966). See Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Senate Committee on the Judiciary, on S. 3243, 89th Cong., 2d Sess. (1966), p. 73. Some of the other bills which failed in Congress are discussed in the opinion of the court below.

The area travel restriction, requiring special validation of passports for travel to Cuba, was a valid civil regulation under the 1926 Act. *Zemel* v. *Rusk, supra.* But it was not and was not intended or represented to be an exercise of authority under § 215 (b), which provides the basis of the criminal charge in this case.

Crimes are not to be created by inference. They may not be constructed *nunc pro tunc.* Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. As this Court said in *Raley* v. *Ohio,* 360 U. S. 423, 438, we may not convict "a citizen for exercising a privilege which the State clearly had told him was available to him." As *Raley* emphasized, criminal sanctions are not supportable if they are to be imposed under "vague and undefined" commands (citing *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939)); or if they are "inexplicably contradictory" (citing *United States* v. *Cardiff,* 344 U. S. 174 (1952)); and certainly not if the Government's conduct constitutes "active misleading" (citing *Johnson* v. *United States,* 318 U. S. 189, 197 (1943)).

In view of our decision that appellees were charged with conspiracy to violate a nonexistent criminal prohibition, we need not consider other issues which the case presents.

Accordingly, the judgment of the District Court is

Affirmed.

APPENDIX TO OPINION OF THE COURT.

The following three Department of State statements in connection with area restrictions are referred to in the foregoing opinion:

(1) State Department Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178:

> "The Department of State announced on January 16 that in view of the U. S. Government's

inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, U. S. citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of U. S. citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

"The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

"Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the U. S. Immigration and Naturalization Service.

"Federal regulations are being amended to put these requirements into effect.

"These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations."

(2) State Department Press Release No. 341, May 1, 1952, 26 Dept. State Bull. 736:

"The Department of State announced on May 1 that it was taking additional steps to warn American citizens of the risks of travel in Iron Curtain countries by stamping all passports not valid for travel in those countries unless specifically endorsed by the Department of State for such travel.

"In making this announcement, the Department emphasized that this procedure in no way forbids

American travel to those areas. It contemplates that American citizens will consult the Department or the consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized.

"All new passports will be stamped as follows: THIS PASSPORT IS NOT VALID FOR TRAVEL TO ALBANIA, BULGARIA, CHINA, CZECHOSLOVAKIA, HUNGARY, POLAND, RUMANIA OR THE UNION OF SOVIET SOCIALIST REPUBLICS UNLESS SPECIFICALLY ENDORSED UNDER AUTHORITY OF THE DEPARTMENT OF STATE AS BEING VALID FOR SUCH TRAVEL.

"All outstanding passports, which are equally subject to the restriction, will be so endorsed as occasion permits."

"Freedom to Travel," a 1958 Report of the Special Committee To Study Passport Procedures of the Association of the Bar of the City of New York, characterized this as "an honest admission of the lack of statutory power to enforce an area restriction of this nature." At 70. The Department gave a practical construction of this area restriction in 1954 when it informed two newsmen desiring to travel to Bulgaria that they could go there without a passport and "use, as a travel document . . . an affidavit in lieu of a passport," and that, if Bulgaria would permit them entry, "the Department . . . [would hold] no objection." Hearings on Department of State Passport Policies before the Senate Committee on Foreign Relations, 85th Cong., 1st Sess. (1957), p. 65.

(3) 3 Hackworth, Digest of International Law 530 (1942) (1919 Germany restriction):

"The Department is not now issuing or authorizing issuance or amendment of passports for Ger-

many. However, the Department interposes no objection to the entry into Germany of Americans who have important and urgent business to transact there. In view of the present situation, such persons should understand that they go upon their own responsibility and at their own risk. They cannot be guaranteed the same protection which they might expect under normal conditions."

Staughton LYND, Appellant,

v.

Dean RUSK, Secretary of State, Appellee.
Jane WITTMAN, Appellant,

v.

SECRETARY OF STATE, Appellee.

Nos. 20448, 20790.

United States Court of Appeals
District of Columbia Circuit.

Decided Dec. 20, 1967.

Suits for injunction against revocation by Secretary of State of passports and for declaratory relief. The United States District Court for the District of Columbia, Edward M. Curran and Alexander Holtzoff, JJ., granted summary judgment to defendant in both cases, and appeals were taken. The Court of Appeals, Leventhal, Circuit Judge, held, inter alia, that inability of citizen to make any definite specific plans until the underlying general controversy was resolved provided a basis for an appropriate general declaration that the Secretary could not withhold citizen's passport because of citizen's failure to give assurances that he would refrain from travel to designated areas without a passport.

Judgments affirmed in part, reversed in part.

1. Citizens ⇐10.2
Constitutional Law ⇐274

Right to travel is protected by the Fifth Amendment, and statutory limitations upon that right will be strictly construed. U.S.C.A.Const. Amend. 5.

2. Citizens ⇐10.2

Secretary of State may not revoke or withhold a passport because of citizen's refusal to promise that he will not travel to restricted area without using a passport.

3. Citizens ⇐10.2

Congressional silence does not permit inference that Congress, which has been unready to support Secretary of State by making travel to restricted areas a crime, has authorized Secretary to impose administrative sanctions of passport withdrawal, which deprives citizen of liberty to travel to nonrestricted areas as well as restricted ones.

4. Citizens ⇐10.2

Secretary of State may deny a passport, or revoke one already extant, when sole travel that is intended by citizen is to an area that Secretary has declared restricted, but the silence of Congress did not permit an inference that it had authorized executive curtailment of constitutionally protected liberty of travel to nonrestricted areas to achieve the objective of restraining travel to restricted areas. 22 U.S.C.A. § 211a; Executive Order No. 11295, 22 U.S.C.A. § 211a

note; Immigration and Nationality Act § 215(b) 8 U.S.C.A. § 1185(b).

5. Citizens ⇐10.2

Secretary of State has authority to control the lawful travel of the passport, even though Congress has not given authority to control the travel of the person, since passport is an official document which is the property of the Government. 22 U.S.C.A. § 211a; Executive Order No. 11295, 22 U.S.C.A. § 211a note; Immigration and Nationality Act, § 215(b), 8 U.S.C.A. § 1185(b).

6. Citizens ⇐10.2

Citizen had no right to use a passport issued to her in violation of the conditions and restrictions which by law governed its use, so that Secretary of State properly revoked and withheld her passport until she agreed to refrain from the passport's use in restricted areas. 22 U.S.C.A. § 211a; Executive Order No. 11295, 22 U.S.C.A. § 211a note; Immigration and Nationality Act, § 215(b), 8 U.S.C.A. § 1185(b).

7. Citizens ⇐10.2

Reasonably concrete and specific travel outside the country must be in contemplation before a complainant can obtain injunctive relief against the revocation of his passport.

8. Declaratory Judgment ⇐203

A court may issue a declaration that the Secretary of State has erred as a matter of law in the reason assigned for denial of a passport without necessarily determining whether or how a passport should be issued.

9. Declaratory Judgment ⇐203

Inability of citizen seeking injunction against Secretary of State's revocation of his passport and for declaratory relief to make any definite specific plans until the underlying general controversy was resolved provided a basis for an appropriate general declaration that the Secretary could not withhold citizen's passport because of citizen's failure to give assurances that he would refrain from travel to designated areas without a passport.

Mr. David Carliner, Washington, D. C., with whom Messrs. Edward J. Ennis, Stephen W. Porter and Jack Wasserman, Washington, D. C., were on the brief, for appellant in No. 20,448.

Mr. Leonard B. Boudin, Washington, D. C., with whom Mr. David Rein, Washington D. C., was on the brief, for appellant in No. 20,790.

Mr. Robert L. Keuch, Attorney, Department of Justice, with whom Asst. Atty. Gen., Yeagley, Messrs. David G. Bress, U. S. Atty., and Kevin T. Maroney, Attorney, Department of Justice, were on the brief, for appellee.

Before BAZELON, Chief Judge, LEVENTHAL and ROBINSON, Circuit Judges.

LEVENTHAL, Circuit Judge:

The present cases raise the question whether and to what extent the Secretary of State may enforce compliance with area restrictions on foreign travel, following his determination that travel by United States citizens to five designated countries—China, Cuba, North Korea, North Vietnam, and Syria—would be inimical to the nation's foreign relations.[1]

In Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965), the Supreme Court held that the Passport Act of 1926, 22 U.S.C. § 211a (1964),[2] authorizes the Secretary to make such a determination and to restrict the validity of United States passports for travel in these countries. United States v. Laub, 385 U.S. 475, 87 S.Ct. 574, 17 L.Ed.2d

1. See Public Notices 256, 257, 258, 259, 32 Fed.Reg. 4140 (1967); Public Notice 270, 32 Fed.Reg. 9175 (1967).

2. "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." The President has delegated his rule-making authority under this statute to the Secretary, Exec. Order No. 11295, 3 C.F.R. 1966 Comp. at 138.

526 (1967), however, held that travel to these forbidden places without a specially validated passport has not been made a criminal offense by Congress.

The question that remains is whether the Secretary may withhold or revoke a passport if the person declines to give assurances that he will not travel to the designated areas.

Congress has not given the Secretary any power to proscribe travel. His power is limited to controlling the issuance of passports and granting of diplomatic facilities. However we must recognize, as the Supreme Court did in *Zemel*, that denial of a passport has the undoubted practical consequence of effectively limiting travel. This may also be a legal consequence, since Section 215(b) of the Immigration and Nationality Act, 8 U.S.C. § 1185(b) (1964), which is operative because of the Presidentially declared national emergency,[3] makes it a crime to leave the country without a passport—except for travel to certain areas not within the ambit of appellants' cases.[4] Taking account of these consequences and the constitutional dimension of the right to travel, the Secretary's power over passports must be construed in such a way as to minimize interference with legitimate travel.

Appellant Lynd's difficulties with the Passport Office arise out of his January 1966 self-styled "fact-finding and investigating" mission to North Vietnam to "clarify the negotiating position of the other side." He obtained a North Vietnamese visa in Czechoslovakia. Appellant Wittman, in an earlier and more modest venture, visited Cuba in 1964 with a group of American students. One of her goals was "to study the educational system." On their respective returns to the United States each appellant was informed that his passport had been "tentatively withdrawn." They individually pursued administrative remedies within the Passport Office, and hearings were held.

At Lynd's hearing two questions of chief importance were posed. He was asked:

> If you are issued a passport, will you use the passport issued to you to travel in violation of the conditions or restrictions contained therein, or any subsequent restrictions imposed upon the use of the passport by the United States Government acting through the Secretary of State or other responsible official?

Lynd replied: "My answer to that question is no." He was then asked this question, which was put forward as embodying a "subtle difference."

> If you are issued a passport will you travel in violation of the restrictions or conditions contained in the passport, or any subsequent restrictions or conditions imposed upon the travel of a United States citizen by the United States Government acting through the Secretary of State or other responsible official with or without using the passport?

Lynd's answer was that he agreed not to use the passport in areas restricted by the Secretary, but reserved the right to travel to those areas without using a passport.[5]

The record makes clear that the Secretary's action was based on Lynd's refusal to give a categorical "no" reply to this second question, phrased as a failure to provide assurances that he would not again violate area restrictions

3. Proclamation No. 3004, 3 C.F.R. at 180 (1949–53 Comp.).

4. The Secretary has broadened somewhat the travel vistas of those without passports by issuing regulations, 22 C.F.R. § 53.2(b) (1967), exempting journeys in the Americas (excluding Cuba) from the operation of this criminal law. We understand, however, that foreign countries have visa requirements that greatly limit even this travel.

5. Lynd amplified that he considered himself "an open and honest person, not an indiscriminate lawbreaker," and that he was asserting his constitutional right to travel as embracing a freedom of speech, a need in the interest of peace for constructive "contact between persons separated by war."

in his passport. Miss Wittman was asked similar questions. It suffices here to say that she refused to give any assurances as to her travel "with or without a passport." The hearing officer recommended final withdrawal of their passports pursuant to a regulation, since revoked, which authorized refusal of passport facilities on a finding that the traveler's "activities abroad would * * * (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States," 27 Fed.Reg. 344 (1962), formerly codified as 22 C.F.R. 51.136 (1965). This recommendation and accompanying findings were adopted by the Director of the Passport Office, and subsequently this decision was upheld by the Secretary [6] following an appeal to the Board of Passport Appeals. Suits were brought for injunctions against the Secretary's revocation of the passports and for declaratory relief. Summary judgment was granted to defendant in both cases.

I

We begin our consideration of the issues by taking note of the complication that the regulation pursuant to which the Secretary acted has been withdrawn, and more narrowly drafted provisions substituted in its stead. These new regulations specifically provide that someone who has traveled "to, in, or through a restricted country or area without a passport specifically validated for such travel" may be subject to a passport revocation proceeding and may be refused a new passport "until such time as the Secretary receives formal assurance and is satisfied that the person will not again travel in violation of the travel restrictions." 31 Fed.Reg. 13544, October 20, 1966, codified as 22 C.F.R. § 51.74 (1967). Appellant Lynd, while recognizing that the new regulations are narrower, has mounted an extensive attack on the old regulation, arguing that it was both unconstitutionally vague and unauthorized by statute. We see little point in providing an academic ruling on the vagueness of the rescinded regulation. In view of the refusal to give "assurance" there is no basis for suggesting that the result would be different if the case were reconsidered under the new regulation.[7] No substantial rights are being disregarded for, as appellant Lynd concedes (Brief, p. 19 n. 3), "no purpose would be served in remanding this case for further proceedings under the new regulation in view of the fact that the premise of the appellee's decision would remain unchanged." In the circumstances, we think it appropriate to consider the question whether the Passport Act of 1926 authorizes the Secretary to withhold or revoke passports for failure to provide appropriate assurances concerning travel to designated areas.

II

The principles that in our view govern these cases may be summarized as follows: We think Congress has authorized the Secretary to require an applicant for a United States passport to refrain from using it in a restricted area and indeed from transporting it into a restricted area. Although the Secretary has the authority to decline to issue a passport when the traveler's sole purpose is to journey to restricted areas, he cannot extend that authority so as to withhold a passport when the applicant seeks to travel to a non-restricted area for any of the myriad purposes—business, tourism, scholarship—which make travel part of the "liberty" the Constitution protects. The passport must be issued to such a

6. The Secretary withdrew Lynd's passport, and requested its surrender, on the ground of Lynd's admitted travel to North Vitnam notwithstanding the area restrictions in his passport, his refusal to provide assurances that he would not again violate the area restrictions in his passport, and the Secretary's "conclusion that future travel by you to North Vietnam in violation of the area restrictions in your passport would be prejudicial to the orderly conduct of foriegn relations or otherwise be prejudicial to the interests of the United States."

7. The new regulations make explicit that any ground justifying a refusal to issue a new passport also justifies revoking one already issued. 2 C.F.R. § 51.71 (1967).

traveler even though while outside the United States he plans both to travel to a non-restricted area and also to visit a restricted zone. However, the Secretary may take reasonable steps to assure that any travel into or within a restricted area is done without a passport.

We shall first present the analysis underlying these principles, and subsequently (in Part III) apply them to the cases before us.

1. The Secretary maintains that both these cases must be affirmed on the authority of Worthy v. Herter, 106 U.S. App.D.C. 153, 270 F.2d 905, cert. denied 361 U.S. 918, 80 S.Ct. 255, 4 L.Ed.2d 186 (1959). It is difficult to tell whether in *Worthy* the court had before it the contention urgently pressed by Lynd, that the Secretary has power to set area restrictions only for travel using a passport and is powerless to hinder travel without a passport. In any event, we cannot accept the *Worthy* ruling as dispositive. In *Worthy* the court supported its holding on two principal grounds. The first was the inherent foreign affairs power of the executive. But in the cases before us the Secretary does not press any claim that he has an "inherent" authority, and contends his action is valid under the Passport Act of 1926. It is not insignificant that the *Zemel* opinion, supporting the Secretary, did not rely on an inherent authority. We think any claim of inherent authority would fall afoul of the Supreme Court's warning in Kent v. Dulles, 357 U.S. 116, at 129, 78 S.Ct. 1113, at 1120, 2 L.Ed.2d 1204 (1958), that as freedom to travel is part of the "liberty" protected by the Fifth Amendment, "if that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." In deciding in the alternative that there was statutory basis for the Secretary's action *Worthy* relied significantly though not exclusively on Section 215(b) of the Immigration and Nationality Act. The unanimous opinion in United States v. Laub, 385 U.S. 475, 87 S.Ct. 574, 17 L.Ed.2d 526 (1967), completely undercuts the significance of Section 215(b).

2. Consequently, we face the issues anew. Kent v. Dulles, *supra*, and Zemel v. Rusk, *supra*, make plain that the language of the Passport Act of 1926 is broader than the authority it confers. That Act must "take its content from history: it authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.'" Zemel v. Rusk, 381 U.S. 1, at 17–18, 85 S.Ct. 1271 at 1281.

In upholding the Secretary's authority both to impose area restrictions and to refuse to validate passports for travel in the restricted area, the *Zemel* opinion stressed that in the absence of contrary indication in the legislative history, the broad language of the 1926 Act and its forerunners served to constitute approval of a practice going back to the War of 1812. The Court stressed the Secretary's long and consistent administrative interpretation of the statute as empowering him to impose these restraints. 381 U.S. at 10–11, 85 S.Ct. 1271. The Court relied on Exec.Order No. 7856, 3 Fed.Reg. 681, 687 (1938),[8] the basic delegation of executive rule-making authority under the 1926 Act to the Secretary of State, which provided:

> The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use 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.

This assertion of authority, insofar as area restrictions are concerned, is reflective of what has in fact been the reasonably consistent State Department prac-

8. This Executive Order was revoked in 1966, Exec. Order 11295, 3 C.F.R. 1966 comp. at 138. Plainly the revocation was not intended to withdraw the assertion of authority, nor does it undermine the inference of previous legislative assent to the assertion.

tice both before and after the issuance of this Executive Order. Passports were regularly denied to applicants when their stated travel destination was an area that the Secretary had restricted. Passports were denied for trips to Belgium in 1915, for all nonemergency European travel during World War I, for Ethiopia in 1935, and for Spain in 1937.[9] These refusals were more than mere warnings of the inability to provide normal diplomatic facilities. They were designed to keep Americans out of the troubled areas.[10] In light of this history, significant under *Zemel* and *Kent* for construction of the Secretary's discretion under the 1926 Passport Act, we must reject appellants' contention that the Secretary has no power whatever to refuse a passport because of the applicant's intended destination.

3. The power of the Secretary to act with reference to a traveler's destination serves not only as a ground for refusal to issue a passport, but also, we think, as a basis for revoking a passport.[11] A passport is not like a license, where the holder's legitimate reliance on its continuation may mandate vesting him with special protections against revocation. Citizens do not stand on different footings in asserting the right to travel merely by virtue of having received a passport in connection with prior trips abroad.

4. We are aware that at the time the administrative practice was jelling, the refusal to issue a passport did not have the legal consequence of prohibiting travel into restricted areas. It was not illegal to leave the country without a passport until 1941, except for a short period during World War I.[12] But the primary objective of the Secretary in refusing passports to restricted areas was to stop the travel to those areas. The Secretary's power—historically asserted and exercised—was not revoked merely because it is now reinforced by Section 215 of the Immigration and Nationality Act, in time of war or national emergency.[13]

5. The difficulty arises, however, because the power asserted by the Secretary in his regulations is not limited to a denial of a passport to go to a restricted area. If the Secretary denies a passport altogether—because he is not "satisfied" that the traveler will refrain from going to a restricted area—this amounts to a prohibition not only of travel to restricted areas, but also of most other travel. These travels stand on different constitutional planes.[14] To keep travelers from five countries, the Secretary bars them from visiting over one hundred others. We think this consequence is not permissible under the statutes thus far enacted and the cases thus far decided.

[1–3] The 1958 ruling in Kent v. Dulles, *supra*, is our touchstone. It establishes not only that the right to travel is protected by the Fifth Amendment, but that statutory limitations will be strictly construed. "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," 357 U.S. at 129, 78 S. Ct. at 1120. Mindful of the consequences to the citizen, the Court was unwilling to find that the broad language of the

9. See III G. Hackworth, Digest of International Law, 526–533 (1942).

10. See Riesman, Legislative Restrictions on Foreign Enlistment and Travel, 40 Colum.L.Rev. 793, 807 (1940).

11. This consequence is now expressly set forth in 22 C.F.R. § 51.71 (1967).

12. The pre-1926 forerunner of the present Section 215 of the Immigration and Nationality Act was operative only from 1918 to 1921—Act of May 22, 1918, 40 Stat. 559, Act of March 3, 1921, 41 Stat. 1359.

13. As already noted, however, travel in the Americas is permitted without passports. Apparently a trip outside the Americas can be made legally without a passport as long as the traveler sojourns for sixty days before leaving for a part of the world outside the Western Hemisphere. See 22 C.F.R. § 53.2 (1967).

14. See Zemel v. Rusk, *supra*.

1926 Act authorized the Secretary to take actions not legitimized by an administrative practice which Congress could fairly be said to have deliberately accepted.[15] The past administrative practice of the State Department (see point 2) justifies the refusal to issue a passport sought for the sole purpose of travel to a restricted area. But we see no substantial evidence that Congress approved the achievement of that objective by prohibiting travel to non-prohibited areas. When Congress approved denial of a passport in 1926 the passport was not, as today, an exit permit required by law for nearly all foreign travel. If the sole travel planned by the applicant is to an area reasonably restricted by the Secretary as off limits to passport holders, and hence carries no plenary constitutional protection, Congressional approval of the denial of a passport to undertake that travel is fairly inferred. But we see no comparable basis for inferring that Congress has given the Secretary the authority to deny legitimate, constitutionally protected travel, merely because that is a technique which provides greater assurance of hindering travel to designated areas.

Gleaning intention from Congressional silence is under the best of circumstances an elusive task. Our difficulties are magnified here, however, because we do not deal with a single Congressional enactment that is and has been periodically reenacted or revised.[16] The area of travel control is criss-crossed by three statutes, the Passport Act of 1926, 22 U.S.C. § 211a (1964), Section 215(b) of the Immigration and Nationality Act, 8 U.S.C. § 1185(b) (1964), and 18 U.S.C. § 1544 (1964),[17] which were drafted at different times, for different purposes, and without an overall design. They have been the source of considerable confusion, inside the State Department as well as in Congress and among the public,[18] as to the ways in which the travel rights of Americans can be limited by the Secretary's exercise of discretion. Although Congress has approved administrative action intended to limit travel to restricted areas through the means of restricting passports, as appears from *Zemel*, it has not made travel to restricted areas a crime and added possible deprivation of liberty as a sanction for achieving this objective. United States v. Laub, *supra*. Indeed, it has several times

15. Cf. Greene v. McElroy, 360 U.S. 474 at 506, 507, 79 S.Ct. 1400, at 1419, 3 L.Ed. 2d 1377 (1959), that since "decisions of great constitutional import and effect" must not be "relegated by default to administrators who, under our system of government, are not endowed with authority to decide them," delegation may not be inferred from mere acquiescence or implied ratification but must be made explicit, and "it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use."

16. Compare Cammarano v. United States, 358 U.S. 498, 508–509, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959); Massachusetts Mut. Life Insurance Co. v. United States, 288 U.S. 269, 273, 53 S.Ct. 337, 77 L.Ed. 739 (1933).

17. In relevant part: "Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports * * * shall be fined not more than $2,000 or imprisoned not more than five years, or both."

18. *See, e. g.*, Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, The Right to Travel, 85th Cong. 1st Sess., part 2 (1957) at 86–101. Law review writing on travel control is extensive, although primarily to the constitutional problems. *See, e. g.*, Ehrlich, Passports, 19 Stan.L.Rev. 129 (1966); Goodman, Passports in Perspective, 45 Texas L.Rev. 221 (1966); Pollitt & Raugh, Restrictions on the Right to Travel, 13 W.Res.L.Rev. 128 (1961); Velvel, Geographical Restrictions on Travel: The Real World and the First Amendment, 15 Kansas L.Rev. 35 (1966); Note, Constitutional Law: Resolving Conflict Between the Right to Travel and Implementation of Foreign Policy, 1966 Duke L.J. 233.

refused to enact legislation directed to precisely that end.[19] We see no basis for inferring that Congress, while unready to support the Secretary's area restrictions by adding the sanction of deprivation of personal liberty, has silently permitted the Secretary to impose administrative sanctions depriving a citizen of a part of his constitutional liberty (of travel to non-prohibited areas), a sanction often equal to and sometimes more stringent than criminal sanctions, without the protections inherent in the criminal process as a guarantee against executive excess.[20]

[4] 6. To recapitulate, we think the Secretary may deny a passport, or revoke one already extant, when the sole travel that is intended by the citizen is to an area that the Secretary has declared restricted. But the soft support of silence from Congress does not permit an inference that it has authorized executive curtailment of the constitutionally protected "liberty" of travel to non-restricted areas to achieve the objective of restraining travel to restricted areas.

Guidance in ascertaining legislative intention as to the Secretary's power under the 1926 Act is furnished by reference to the historical distinction between control over passports and control over travel. Today, the "crucial function" of a passport is as an exit permit, lifting what is otherwise the bar of Section 215 of the Immigration and Nationality Act. But historically, as was stressed by the Court in *Laub*, the prime role of the passport—and a role over which the Secretary has undeniable authority—was to identify the bearer as a United States national entitled to "receive the protection and good offices of American diplomatic and consular officers abroad" and to officially request on the "part of the Government of the United States that the officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection." III G. Hackworth, Digest of International Law at 435 (1942).

[5] In our view the Secretary's power includes but goes beyond a mere denial of diplomatic facilities to a citizen traveling in a restricted area. He has the authority under 18 U.S.C. § 1544 (1964) to determine how a passport may be "used." We think the Secretary may condition the issuance of a passport on the applicant's agreement to refrain from taking the passport into a restricted area, and, further, to lodge the passport in safe-keeping before such a trip is made. That a passport is an official document, issued under the Government's seal and embodying a formal Government request, makes acceptable considerable Governmental control over where and in what ways that document is used, provided that any such controls are generally applicable. A traveler's possession of an American passport, even in areas for which the passport is stamped "not valid," may well be deemed helpful both by the traveler and by the country involved, both as an official identification and as a lever in the event of some mishap during the journey.[21] The inability to take along a passport may inhibit some, although not the most determined, travelers to restricted areas. But we think that under *Zemel* this limited deterrence of travel, resulting from the Secretary's exercise of his power under the 1926 Passport Act, is not unconstitutional. See 381 U.S. at 13–15, 85 S.Ct. 1271. In short, we think the Secretary has authority to control the lawful travel of the passport, even though Congress has

19. *See, e. g.*, S. 4110, 85th Cong., 2d Sess. (1958), H.R. 14895, 89th Cong., 2d Sess. (1966).

20. See Chief Judge Bazelon's dissenting opinion in Briehl v. Dulles, 101 U.S.App. D.C. 239, 257, 248 F.2d 561, 579 (1957), the case in which the majority ruling was reversed *sub nom.* Kent v. Dulles, *supra*.

21. We note, for example, that both Lynd and Wittman took their United States passports with them. Although the North Vietnam visa was not stamped on the passport, it was brought out that Lynd displayed his passport to North Vietnamese officials (Hearing Tr. 70). Wittman refused to answer whether she had shown hers. (Hearing Tr. 45).

not given authority to control the travel of the person. This view is strengthened by the character of the passport, an official document that has consistently been regarded as the property of the Government.[22]

III

The foregoing principles result in the following disposition of the particular cases before us:

A. *Wittman*

[6] Appellant Wittman in effect declined to give any assurances as to her travel to designated areas "with or without using the passport." We do not think appellant has the right, which she asserted, to use a passport issued to her in violation of the conditions and restrictions which by law govern its use. We affirm the Secretary's revocation and withholding of a passport unless she agrees to refrain from the passport's use in (including transportation to) restricted areas.

B. *Lynd*

Unlike Miss Wittman, Professor Lynd gave all assurances requested of him with regard to the use of the passport. That does not establish his right to the injunctive relief requested. Although the cases arise in connection with the denial of a passport, the underlying right of the complainant with which this court is basically concerned is not the right to a passport as such. The right to a passport exists only in connection with intended travel. Passports are not issued merely because someone wants the document to frame on the wall. In his amended complaint, Lynd alleged as an irreparable injury his inability to travel to London to keep teaching commitments for the September, 1966 term. That particular journey is, of course, no longer an issue.

[7] We think that reasonably concrete and specific travel outside the country must be in contemplation before a complainant can obtain injunctive relief. There may be an inconvenience and irritation resulting from the temporary revocation of a passport during a period when the applicant has no desire to travel, but it is not an interest requiring injunctive relief either of a conventional or mandatory nature, directed to the Secretary, and the prayer for such relief may properly be tabled for want of equity.

We are aware that the Secretary routinely issues passports for millions of Americans whose travel plans are relatively indefinite. But they are not likely to travel into restricted areas. An applicant who will not give a commitment that would be given routinely by American tourists is not entitled to insist on the routine processing they receive. The Secretary may take measures reasonably suited to insure that such an applicant keeps his pledge not to use the passport in restricted areas, perhaps by requiring the applicant to leave the passport with a responsible depository, approved by the Secretary, in a country that has not been designated, before undertaking travel to designated countries. We therefore affirm the denial of an order intended to result in the issuance of a passport forthwith.

[8, 9] Lynd also seeks a declaratory judgment "that the defendant's action in refusing passport facilities to permit the plaintiff to travel to all countries, except to [restricted countries] is contrary to law." Although his travel plans may not be sufficiently definite to require an equity court to interpose a mandatory injunction restoring his passport at this time, the dispute as to the Secretary's power is sufficiently "definite and concrete, not hypothetical or abstract" to bring it within the spirit of Aetna Life Ins. Co. of Hartford Conn. v. Haworth, 300 U.S. 227 at 242, 57 S.Ct. 461, at 464, 81 L.Ed. 617 (1937). A court may issue a declaration that the Secretary has erred as a matter of law in the reason assigned for denial of a passport without necessarily determining whether or

22. *See* III G. Hackworth, Digest of International Law 437–439 (1942), 22 C.F.R. § 51.9 (1967).

how a passport should be issued. Perkins v. Elg, 307 U.S. 325, 59 S.Ct. 884, 83 L.Ed. 1320 (1939). Lynd's inability to make any definite specific plans until the underlying general controversy is resolved is, given his general intent to travel, basis for providing an appropriate general declaration. *Cf.* Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). The cause is reversed and remanded with instructions to declare that the Secretary may not withhold Lynd's passport because of Lynd's failure to give assurance that he will refrain from travel to designated areas without a passport.

The judgment in 20790 is affirmed.

The judgment in 20448 is affirmed in part and reversed in part.

INDIVIDUALS

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[1] Misspelled "Abby" in this reference.

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S

[1] Misspelled "Sydney" in this reference.

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