

6-1-1967

Passports - Statutory Construction of Section 215 (b) of Immigration and Nationality Act of 1952 Held To Preclude Criminal Sanctions Against United States Citizens Who Travel Into Geographically Restricted Areas. *United States v. Laub* (U.S. 1967)

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Recommended Citation

Howard L. Halm, *Passports - Statutory Construction of Section 215 (b) of Immigration and Nationality Act of 1952 Held To Preclude Criminal Sanctions Against United States Citizens Who Travel Into Geographically Restricted Areas. United States v. Laub* (U.S. 1967), 4 SAN DIEGO L. REV. 340 (1967).

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PASSPORTS—STATUTORY CONSTRUCTION OF SECTION 215 (b) OF IMMIGRATION AND NATIONALITY ACT OF 1952 HELD TO PRECLUDE CRIMINAL SANCTIONS AGAINST UNITED STATES CITIZENS WHO TRAVEL INTO GEOGRAPHICALLY RESTRICTED AREAS. *United States v. Laub* (U.S. 1967).

Appellees were organizers and leaders of the "Ad Hoc Student Committee for Travel to Cuba," also known as the "Permanent Student Committee for Travel to Cuba."¹ Their purpose was to recruit a group of United States citizens who would travel to Cuba to observe and formulate an objective opinion of the Cuban situation.² On June 25, 1963, appellees and followers, totaling 58, departed from Kennedy International Airport, and after circuitous routing,³ arrived in Havana on June 29, 1963. Following a two month visit, the group returned to the United States.⁴ Throughout the entire journey, appellees possessed unrevoked and unexpired passports which were not, however, specifically validated for travel to Cuba, an area restricted to American travel.⁵

Appellees were subsequently indicted and charged with conspiracy⁶ to violate section 215 (b) of the Immigration and Nationality Act of 1952⁷ which makes unlawful the entrance into or departure from the

¹ Many facts missing from the Supreme Court's opinion are detailed in the report of the lower court, *United States v. Laub*, 253 F. Supp. 433, 436-42 (E.D.N.Y. 1966).

² The evidence suggested that the Committee may have been formed in reaction to the United States' severance of diplomatic relations with Castro's Cuban government on January 3, 1961, and the following missile crisis in October, 1962. *Id.* at 436.

³ The group travelled from Kennedy International Airport to Paris; from Paris they proceeded to Havana with stops in Czechoslovakia, Ireland, and Newfoundland. *Id.* at 440-41.

⁴ On their return, the group made stops in Spain, Bermuda, and the Azores. *Id.* at 441.

⁵ Formerly Cuba was exempt from passport requirements. 22 C.F.R. § 53.3(b) (1958 rev.). Upon a break of diplomatic relations with Cuba, the State Department excluded Cuba from the exemption, 22 C.F.R. § 53.3 (1965 ed.); at the same time the Secretary of State announced that travel to Cuba would be restricted. State Department Press Release No. 24, January 16, 1961, 44 DEP'T STATE BULL. 178.

⁶ 18 U.S.C. § 371 (1964).

If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

⁷ 8 U.S.C. § 1185(b) (1964) [hereinafter cited as § 215(b)]. Section 215 in pertinent part states:

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States

....

United States without a valid passport when there exists a state of war or national emergency.⁸ After the district court granted appellees' motion to dismiss,⁹ the Government, appealing directly¹⁰ to the United States Supreme Court, contended that section 215(b) must be given a broader meaning in order to prohibit travel to areas restricted by the State Department. *Held*, affirmed: Section 215(b) does not make criminal those entries into and departures from the United States by its citizens who, although bearing valid passports, travel to restricted areas. *United States v. Laub*, 385 U.S. 475 (1967).¹¹

The passport policy of the United States and its attending confusion, subjected to heavy criticism for nearly two decades,¹² has been greatly clarified by the Supreme Court in recent years.¹³ For example, in 1958,

(b) . . . 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.

(c) Any person who shall willfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated . . . shall, upon conviction, be fined not more than \$5,000, or, if a natural person, imprisoned for not more than five years, or both . . . (emphasis added).

⁸ The national emergency, continuing through appellees' visit and presently in existence, was originally proclaimed by President Truman on December 16, 1950. Presidential Proclamation No. 2914, 15 Fed. Reg. 9029 (1950). The President, then, made the proclamation of national emergency as required by section 215 on January 17, 1953. Presidential Proclamation No. 3004, 18 Fed. Reg. 489 (1953).

⁹ 253 F. Supp. 433 (E.D.N.Y. 1966) (Zavatt, C.J., writing a lengthy and comprehensive opinion).

¹⁰ Jurisdiction was based on 18 U.S.C. § 3731 (1964), whereby an appeal may be made by the United States from the district court directly to the Supreme Court of the United States in criminal cases involving the construction of the statute upon which the indictment issued.

¹¹ *Accord*, *Travis v. United States*, 385 U.S. 491 (1967) (companion to instant case).

¹² For historical reviews and criticisms of passport policy see 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 435-52 (1942); SPECIAL COMM. TO STUDY PASSPORT PROCEDURES OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, REPORT ON FREEDOM TO TRAVEL (1958); Goodman, *Passports in Perspective*, 45 TEXAS L. REV. 221 (1966); Gould, *The Right to Travel and National Security*, 1961 WASH. U.L.Q. 334; Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 VA. L. REV. 853 (1954); Comment, *Unanswered Questions in Recent Passport Cases*, 10 HASTINGS L.J. 290 (1959); Comment, *The Future of American Passports as Restrictions on Travel*, 60 NW. U.L. REV. 511 (1965); Note, 50 CORNELL L.Q. 262 (1965).

For further discussion in this area see Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47 (1956); Ehrlich, *Passports*, 19 STAN. L. REV. 129 (1966); Rauh & Pollitt, *Restrictions of the Right to Travel*, 13 W. RES. L. REV. 128 (1961); Velvel, *Geographical Restrictions on Travel: The Real World and the First Amendment*, 15 KAN. L. REV. 35 (1966); Comment, *The Passport Puzzle*, 23 U. CHI. L. REV. 260 (1956); Comment, *Authority of the Secretary of State to Deny Passports*, 106 U. PA. L. REV. 454 (1958); Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171 (1952); Note, 3 STAN. L. REV. 312 (1951).

¹³ On an early occasion, the Court ruled that a United States citizen who willfully and knowingly used a passport secured by a false statement was guilty of an offense

the Court in *Kent v. Dulles*¹⁴ held that the right to travel is "a part of the 'liberty' of which a citizen cannot be deprived without due process under the Fifth Amendment."¹⁵ Six years later in *Aptheker v. Secretary of State*,¹⁶ the Court declared section 6 of the Subversive Activities and Control Act of 1950¹⁷ unconstitutional. The statute in question made unlawful the application for or use of a passport by members of a Communist organization with knowledge or notice of the statutory provisions. In 1965, the Court decided in *Zemel v. Rusk*¹⁸ that the Secretary of State may properly restrict travel by refusing to validate passports to certain countries where restrictions on travel to those areas would be in the interest of national security. Although the *Zemel* Court was asked to decide whether section 215(b) could be applied to those who travel in violation of an area restriction, it chose to defer its answer until a more concrete factual

under the Act of June 15, 1917, ch. 30, 40 Stat. 227, when such statements are used for purposes of establishing his identity and citizenship and consequent right to re-enter this country from abroad. *Browder v. United States*, 312 U.S. 335 (1941); *accord*, *Warszower v. United States*, 312 U.S. 342 (1941) (companion case).

The lower court in *Laub* noted that appellees could have been indicted by a grand jury under a similar statute, 18 U.S.C. § 1542 (1964), which makes unlawful the knowledgeable making of false statements in application for passports. 253 F. Supp. at 435.

¹⁴ 357 U.S. 116 (1958). Prior to *Kent* several lower courts had concluded the existence of a "right" to travel of which a citizen could not be deprived because of his political beliefs or associations without due process under the fifth amendment. *See Briehl v. Dulles*, 248 F.2d 561 (D.C. Cir. 1957), *rev'd sub nom. Kent v. Dulles, supra*; *see also Shachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955); *Dayton v. Dulles*, 146 F. Supp. 876 (D.D.C. 1956), *aff'd*, 254 F.2d 71 (D.C. Cir. 1957), *rev'd*, 357 U.S. 144 (1958); *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952); *cf. Boudin v. Dulles*, 136 F. Supp. 218 (D.D.C. 1955), *aff'd*, 235 F.2d 532 (D.C. Cir. 1956).

¹⁵ 357 U.S. at 125.

¹⁶ 378 U.S. 500 (1964). The reasoning followed by the *Aptheker* court is criticized in *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 192 (1964). A number of lower court decisions were reversed by *Aptheker*. *See e.g., Copeland v. Secretary of State*, 226 F. Supp. 20 (S.D.N.Y.), *vacated and remanded*, 378 U.S. 588 (1964); *Mayer v. Rusk*, 224 F. Supp. 929 (D.D.C. 1963), *vacated and remanded*, 378 U.S. 579 (1964); *Flynn v. Rusk*, 219 F. Supp. 709 (D.D.C. 1963), *rev'd sub nom. Aptheker v. Secretary of State, supra*.

¹⁷ 64 Stat. 993, 50 U.S.C. § 785 (1964).

¹⁸ 381 U.S. 1 (1965). *Noted in The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 123 (1965). *Criticized in Note*, 1966 DUKE L.J. 233 and Note, 13 U.C.L.A.L. REV. 470 (1966).

Earlier lower court cases had determined that section 215(b) granted power to refuse validation of passports to restricted areas. *See Porter v. Herter*, 278 F.2d 280 (D.C. Cir.) (per curiam), *cert. denied*, 364 U.S. 837 (1960); *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959); *Frank v. Herter*, 269 F.2d 245 (D.C. Cir.) (per curiam), *cert. denied*, 361 U.S. 918 (1959). *Worthy* and *Frank* are noted and criticized in Note, 73 HARV. L. REV. 1610 (1960). *See also MacEwan v. Rusk*, 228 F. Supp. 306 (E.D. Pa. 1964), *aff'd per curiam*, 344 F.2d 963 (3d Cir. 1965).

situation presented itself.¹⁹ This year *Laub* has answered in the negative the question which the *Zemel* Court refused to decide.

In *Laub* the Court resolved the question exclusively by statutory construction. The two relevant statutes were the Passport Act of 1926²⁰ and section 215(b) of the Immigration and Nationality Act of 1952.²¹ The Passport Act of 1926 is non-penal in nature and simply announces that the power to issue and grant passports rests in the Secretary of State "under such rules as the President shall designate and prescribe for and on behalf of the United States . . ."²² The *Zemel* Court described the effect of this act in the following language:

We think that the [Passport Act] embodies a grant of authority to the Executive to refuse to validate passports of United States citizens for travel to Cuba. . . . [I]ts language is surely broad enough to authorize area restrictions, and there is no legislative history indicating an intent to exclude such restrictions from the grant or authority . . .²³

Unlike the Passport Act of 1926, section 215(b)²⁴ is criminal in nature and authorizes punishment for entry into or departure from the United States without a *valid* passport. In construing this section, the Court considered, *inter alia*, evidence given during congressional hearings²⁵ including explanations of customary practices of the State

¹⁹ *But cf.* United States v. Healy, 376 U.S. 75, 82 n.7 (1964) (dictum). "However, it may be observed that a trip to Cuba would have been lawful only if appellees had had passports specifically endorsed for travel to Cuba."

²⁰ 22 U.S.C. § 211(a) (1964).

[T]he 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 . . .

²¹ 8 U.S.C. § 1185(b) (1964).

²² 22 U.S.C. § 211(a) (1964).

²³ 381 U.S. at 7-8.

²⁴ A concise history of the derivation of section 215(b) is presented by the *Laub* district court. 253 F. Supp. at 443. Section 215(b) is derived from Act of May 22, 1918, ch. 81, 40 Stat. 559 and Act of June 21, 1941, ch. 210, 55 Stat. 252.

²⁵ *E.g.*, *Hearings Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 43 (1966); *Hearings Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm. on the Right to Travel*, 85th Cong., 1st Sess., pt. 2, at 86 (1957); *Hearings Before the Senate Foreign Relations Comm. on Department of State Passport Policies*, 85th Cong., 1st Sess. 59 (1957).

In addition, the district court considered Committee Reports and Congressional Debates as to the predecessors of section 215(b) and concluded:

[T]he reports and debates surrounding the predecessors of section 215(b) clearly indicate that the Congress and the President, in those years [1918 and 1941] respectively, were concerned with the uncontrolled departure and entry of citizens of the United States, who, it was believed, were acting in further-

Department. Typical of the evidence offered at the congressional hearings was the following exchange cited by the Court:

What does it mean when a passport is stamped "not valid to go to country X"? . . . [It] 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 violating the criminal law.*²⁶

The import of the above exchange may be inferred from a State Department press release²⁷ announcing the area restriction on Cuba. The reason given in the press release for such restriction was "the Department's *normal practice* of limiting travel to those countries with which the United States does not maintain diplomatic relations" and "the U.S. Government's inability . . . to extend normal protective services to Americans visiting Cuba . . ."²⁸ The Court found that throughout the State Department's history, this "normal practice" had not included criminal sanctions. Furthermore, the press release made no mention of any criminal penalties which might attach should one travel in violation of such ban. As another aid, the Court pointed to unsuccessful congressional efforts to enact legislation making it a criminal offense for any citizen to travel to a restricted country.²⁹ Such attempts evidence the non-existence of criminal sanctions for those travelling in violation of area restrictions.³⁰ Properly construed, section 215(b), while criminal in nature, was not criminal as applied to the appellees who possessed valid passports although not specifically validated for travel to Cuba.

One criticism which may be made of *Laub* is the Court's failure to reconsider the important constitutional question—whether the legislature may properly delegate its functions relative to the making of

ance of the war efforts of foreign powers and to the detriment of the interests of the United States. A system of border control was necessary. The manner settled upon to control ingress and egress was to require all American citizens to bear passports upon departure from and entry into the United States. So, in 1918 and then again in 1941, Congress enacted statutes which made unlawful the departure and entry of American citizens without passports . . . (footnotes omitted).

253 F. Supp. at 457.

²⁶ *Hearings Before the Senate Foreign Relations Comm. on Department of State Passport Policies*, 85th Cong., 1st Sess. 59 (1957). 385 U.S. at 484-85.

²⁷ State Department Press Release No. 24, January 16, 1961, 44 DEP'T STATE BULL. 178. 385 U.S. at 487-88 (appendix to opinion of Court).

²⁸ *Id.*

²⁹ H.R. 9069, 86th Cong., 1st Sess. (1959); H.R. 388, 87th Cong., 1st Sess. (1961); H.R. 9045, 88th Cong., 1st Sess. (1963); H.R. 11621, 88th Cong., 2d Sess. (1964); H.R. 11603, 89th Cong., 1st Sess. (1964); S. 806, 86th Cong., 1st Sess. (1959). 385 U.S. at 486.

³⁰ 385 U.S. at 486.

passport laws³¹ under the Passport Act of 1926.³² Mr. Justice Black, dissenting in *Zemel*, quoted from article I, section 1 of the Constitution which provides that "All legislative Powers herein granted shall be vested in a Congress of the United States."³³ He continued by arguing that "if the Constitution is to control . . . the President is completely devoid of power to make laws regulating passports or anything else."³⁴ Citing *Youngstown Sheet & Tube Co. v. Sawyer*,³⁵ Justice Black argued that "regulation of passports, just like regulation of steel companies, is a law-making—not an executive, law-enforcing—function."³⁶ Nevertheless, the *Laub* Court rested its decision on statutory construction, thereby avoiding the constitutional question.

Another criticism directed at the *Laub* Court's construction of section 215(b) has been suggested by one writer in response to the district court opinion.³⁷ He argues that since Congress gave the Secretary of State power to control departure from or travel to the United States by means of passport validation, one purpose of section 215(b) was to prohibit absolutely the departure of one who *intended* to travel to specifically restricted countries.³⁸ Prompted by the argument

³¹ The question has been decided in the affirmative. *Zemel v. Rusk*, 381 U.S. at 7-8. Among the possible reasons for the *Laub* Court's avoiding the question are those outlined by Mr. Justice Brandeis in *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (concurring opinion):

. . . .
2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it. . . . It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

. . . .
4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction . . . the Court will decide only the latter.

. . . .
7. When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided (footnotes omitted).

Another reason is that appellees were not questioning the constitutional validity of the Passport Act of 1926. Rather, they were contesting the validity of section 215(b) as it applied to their situation. Note, however, that for the Secretary to have the power to restrict travel to certain areas under section 215(b), he must first be delegated that power under the Passport Act of 1926.

³² 22 U.S.C. § 211(a) (1964).

³³ 381 U.S. at 20.

³⁴ *Id.*

³⁵ 343 U.S. 579 (1952).

³⁶ 381 U.S. at 21.

³⁷ Ehrlich, *Passports*, 19 STAN. L. REV. 129 (1966).

³⁸ *Id.* at 146 n.79.

that no reference was made in the State Department press release to criminal sanctions,³⁹ he argues that failure to mention criminal sanctions would not seem to preclude use of the provision as an enforcement mechanism. "That there were subsequent unsuccessful legislative efforts to clarify the power has little to do with whether it was granted in 1952."⁴⁰

However imaginative, the writer's criticism neglects to consider the "void-for-vagueness" concept.⁴¹ If section 215(b) were given its apparent meaning, it would simply require a valid (unexpired and unrevoked) passport for departure from or entry into the United States. If, on the other hand, section 215(b) were construed by a court to include an absolute prohibition on departure with intent to travel to specifically restricted countries, then it would appear to be unconstitutional for vagueness. On its face, section 215(b) does not proscribe that activity which the latter construction seeks to make criminal. As the *Laub* Court stated, "criminal sanctions are not supportable if they are to be imposed under 'vague and undefined commands'"⁴²

Despite these criticisms, *Laub* may be praised for narrowing the effect of *Zemel* which held that the Secretary of State may properly restrict areas of foreign travel to United States citizens.⁴³ *Laub* limits *Zemel* by holding that no present criminal sanction will attach to one's travel in violation of an area restriction.⁴⁴ For those who find themselves in the "unrestricted-right-to-travel" camp, *Laub* may be termed a minor victory⁴⁵ toward a goal similar to that expressed in article 13(2) of the United Nations' Declaration of Human Rights which states: "[E]veryone has the right to leave any country, including his own, and to return to his own country."

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³⁹ 44 DEP'T STATE BULL. 178 (1961).

⁴⁰ Ehrlich, *supra* note 37, at 146 n.79. *But cf.* United States v. Laub, 253 F. Supp. at 454-56.

⁴¹ *See, e.g.,* Jordan v. DeGeorge, 341 U.S. 223, 230-32 (1951), where the Court said:

The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct. . . . This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law. . . . Impossible standards of specificity are not required. . . . The test is whether the language conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices (footnotes omitted).

⁴² 385 U.S. 487, *citing* Raley v. Ohio, 360 U.S. 423, 438 (1959).

⁴³ *See* material cited note 18 *supra*.

⁴⁴ *Cf.* Ehrlich, *supra* note 37, at 146.

⁴⁵ *Cf.* Comment, *The Future of American Passports as Restrictions on Travel*, 60 Nw. U.L. REV. 511, 528 (1965).