

With respect to the civil liability, the rule in *Ex Parte Garland* is not quite clear. However, Article 36 of the Revised Penal Code expressly provides that "a pardon shall in no case exempt a culprit from the payment of the civil indemnity imposed upon him by the sentence." Thus, while a pardon ordinarily releases the punishment and blots out of existence the guilt of the offender, it "does not extinguish the private right of the offended party to enforce the civil liability against the convict."⁹¹ This rule finds support in the ancient maxim, *non poterit rex gratiam facere cum injuria et damno aliorum* — the King may not use his grace to the injury or detriment of others!⁹² Premises considered, it is clear that Ang was, by virtue of the pardon, not relieved of his civil liability to the heirs of the deceased pilot.

CONCLUSION.

Any claim to absolute power of pardon under a republican system of government is dangerous to the popular rights of the sovereign people. The pardoning power, in place of remaining a matter of high public responsibility, would degenerate into a routine award of political gifts. And indeed, an abuse or excessive use of the pardoning power in conspiracy with the doctrine of absolutes would certainly embarrass our impartial courts and would stifle coercive measures to enforce a suitor's right and the deterrent influence of criminal laws. Deplorable instances like these would, of course, suggest a resort to impeachment⁹³ but experience has shown that this Constitutional remedy has almost become a practical impossibility.

It ultimately rests upon any President of the Philippines to realize that under the Constitutional scheme, he is a mere instrument of the law that emanates from the sovereign people and that "the flowers of the Crown of England did not ornament his head."⁹⁴

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⁹¹ PADILLA, REV. PENAL CODE ANN. 375 (1957).

⁹² 4 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 398 (1879), CORWIN, *op. cit. supra*, note 2 at 457, (1957).

⁹³ PHIL. CONST. Art IX, Sec. 1 provides: "The President... shall be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, or other high crimes." See *Ex Parte Grossman*, 267 U.S. 87 (1924), at note 92.

⁹⁴ *Ex Parte Wells*, 274 U.S. 480 (1927) (Justice McLean, dissenting).

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THE PAPER CURTAIN: THE RIGHT TO TRAVEL AND ITS RESTRICTIONS

Men are free when they are in a living homeland, not when they are escaping to some wild west. The most unfree souls shout of freedom. Men are freest when they are most unconscious of freedom. The shout is the rattling of chains, always was. — *D. H. Lawrence*

I. Introduction

Two important developments in our time have greatly affected the right to travel. The first is the ever-increasing role of science in the development of the methods of transportation. When men began to systematically mine the

accumulated capital of basic scientific knowledge and applied it to transportation, the world shrunk and people could easily travel from one continent to another. But while science has facilitated travel, the battle for men's minds has restricted it. Science did make the world smaller, but ideologies have divided it into two. The result is that national barriers were set up, and travel is regulated by their respective governments. Today it is usual for us to refer to Russia as the "Iron Curtain" and to Red China as the "Bamboo Curtain" due to the strict limitation on travel. The Philippines and other democratic countries are not, however, without restrictions, and we might as well refer to them as the "Paper Curtain."

The right to travel consists of three different aspects, namely, (1) the right to travel inside the country; (2) freedom to leave; and (3) freedom to come into it. Mobility inside the country is virtually unrestricted, and a citizen can go to almost any part of the country without registering at some police outpost, unlike in some European countries. As for the freedom to enter the country by aliens, it is settled in our jurisdiction that every sovereign nation has the right to exclude non-citizens from its territory.¹ No one has a right to enter a country not one's own.² It is only with respect to the second aspect that some controversial points have been raised. In this article, we shall therefore delve into the problem with a view to crystallizing the issues involved.

II. The Issuance of Passports: Historical Background

To leave the country, one must secure a passport from the government. Passport has been defined as "a document issued in the name of the sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a subject in foreign countries."³ It is a government's request that the bearer of it may pass safely and freely.⁴ Fitz-Herbert defines it simply as "a license to leave."⁵

Passports are not new in our age. In continental Europe before the turn of the nineteenth century, a passport was required for a trip abroad. This was the Metternich era when a police state was created in Europe.⁶ However, Metternich and his kind and passports disappeared around 1860 or remained mere documents of identification.⁷ In France, the declaration of the Rights of Man and the Citizen in the French Constitution of December 14, 1791 speaks of the natural right of every person to live his life abroad, irrespective of national boundaries. However, this was cut short on January 24, 1792, when the French Assembly passed a law prohibiting the departure of Frenchmen from the kingdom without a passport.⁸

¹ *Lao Tang Bun v. Fabre*, 81 Phil. 682, 691 (1948).

² Article 14 of the UNIVERSAL DECLARATION OF HUMAN RIGHTS holds a little hope — "Everyone has the right to seek and to enjoy asylum in other countries from persecution". However, this is not binding on member countries of the United Nations.

³ *Rex v. Brailsford*, 2 K.B. 780, 745 (1905), cited in Parker, *The Right to Go Abroad: To Have and To Hold a Passport*, 40 VIRGINIA L. REV., 853.

⁴ *Urtegui v. D'Arbel*, 9 Pet. 692, 698 (1835), cited in Parker, *supra*.

⁵ FITZ-HERBERT, *THE NEW NATURA BREVIVM*, 83.

⁶ Parker, *op cit.*, *supra*, note 4.

⁷ *Ibid.*

⁸ Doman, *A Comparative Analysis: Do Citizens Have the Right to Travel?*, 43 A.B.A.J. 307, (1937).

Prior to World War I, few countries required visitors to have passports. In 1897, only travel to Persia, Roumania, Russia, and Serbia would have been impossible without a passport, while travel to Germany and the Dominican Republic would have been possible but not practical.⁹ In England, in contrast to the Continent, Englishmen had always been allowed free egress from their country. This right is grounded in the Magna Carta, which grants to *omnes mercatores* free exit from England. In 1610, Hakewill successfully argued that the law must apply to all Englishmen alike, whether or not they were merchants. Except for the *Ne Exeat Regno*, used by some kings for political reasons, but which ceased to be law after the Magna Carta, English law has, to this day, allowed any Englishman free to leave England if he so desires.¹⁰

In the United States, passports were issued as early as 1796, but they were merely used for identification. The basic passport law of the United States was passed in 1856, but as early as 1803 the U. S. Congress enacted legislation which took cognizance of the fact that the Secretary of State issued passports under his authority to conduct foreign relations.¹¹ On May 22, 1918, Congress made it unlawful for an American citizen "to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport."¹² On July 3, 1926, it was provided that the Secretary or his representative may grant and issue passports under such rules as the President shall designate for and on behalf of the United States.¹³ In 1929, passport laws became more strict, and the United States warned its nationals that travel abroad without a passport would be difficult or even impossible because of restrictions imposed by other nations.¹⁴ Before 1940, however, there was little concern expressed over denial of passports, for except in some countries, passports were not really necessary for travel abroad. The State Department issued passports as a matter of course to any citizen unless he was a fugitive from justice or is negligent in following the application procedure. It was not until the outbreak of the war in 1941 that passports were required for travel outside the United States.¹⁵ In 1950, the McCarran Act was passed which forbids the issuance of passports to members of a Communist organization.¹⁶ And under the Passport Act of 1954, the Secretary of State in his discretion may refuse to issue a passport.¹⁷ The provisions of this law have been the subject of judicial interpretation by the Federal Supreme Court last year.

Passports were unknown in the Philippines before the American occupation. During the Spanish regime, it was only until the middle of the nineteenth century that Filipinos were allowed to travel outside the country. Before this, from the seventeenth to the early nineteenth century, the Philippines was isolated from the rest of the world, the only possible contact with the outside world being the Manila-Acapulco galleon trade.¹⁸ Freedom of movement be-

⁹ *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61, YALE L.J. 172 (1952).

¹⁰ Parker, *op. cit.* *supra* note 8.

¹¹ Speech of Undersecretary Robert Murphy before the U.S. Senate Foreign Relations Committee April 2, 1957, U.S. News and World Report, April 12, 1957, p. 54.

¹² *Ibid.*

¹³ SEIFE, *LAW FOR THE TOURIST*, 8 (1956).

¹⁴ *Ibid.*

¹⁵ 8 HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 498.

¹⁶ CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION*, 104 (1956).

¹⁷ Seife, *op. cit.*, *supra*, note 13.

¹⁸ PABELLA, *READINGS IN PHILIPPINE NATIONALISM*, 66 (1957).

tween the colonies was allowed only to Spaniards, and a permission had to be granted by the viceroy.¹⁹ The issuance of passports during the American occupation and the Commonwealth was governed by laws passed by the United States Congress and extended to the Philippines. When the country was granted its independence in 1946, President Manuel Roxas promulgated Executive Order No. 1, prescribing rules for the granting of passports.

III. The Right to Travel

The right to travel is one of the most restricted rights of a citizen today even under the democratic system of government. These restrictions are justified under the specious doctrine that this right is subsumed under foreign affairs, and the executive branch of the government conducts foreign relations. It is contended by proponents of this doctrine that under this power, the President or his representative may not allow a citizen to leave the country.

In a survey conducted by the Yale Law Journal in 1952, it was found that out of 37 countries replying to the questionnaires, only 10 allow their national to leave the country without any passport. These are: Australia, Belgium, Great Britain, Burma, Canada, Cuba, Greece, Mexico, New Zealand, and Norway. Only five countries do not require aliens attempting to enter to have passports — Argentina, Burma, Mexico, Venezuela, and Yugoslavia. While the member-nations of the United Nations are votaries of free travel, they do not always practice what they preach. Article 13 of the Universal Declaration of Human Rights reads:

"1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country."

In pursuance of this article, the United Nations has prepared a draft Covenant to implement the provisions of the Declaration and be legally binding on those nations signing it. Article 11 of the draft reads,

"Any person who is not subject to any lawful deprivation of liberty or to any outstanding obligations with regard to national service shall be free to leave any country including his own."²¹

and Article 8 of a revision of this draft proposed by the United Nations Commission of Human Rights is as follows:

"Subject to any general law consistent with the rights recognized in this covenant, everyone shall be free to leave any country including his own... (and) be free to enter the country of which he is a national."²²

At its 23rd meeting held from April 6 to May 2, 1957, the Economic and Social Council, discussing the development of international travel and its present increasing volume asked governments and the appropriate non-governmental organizations in the field to take action towards the simplification, reduction

¹⁹ Chafee, *supra*.

²⁰ Passport Refusals for Political Reasons, *supra*.

²¹ U.N. ECONOMIC AND SOCIAL COUNCIL OFFICIAL RECORDS, 3rd Year, 6th Section, 1C, cited in 61 Yale L.J., note 0.

²² *Ibid*.

and unification of the issuance of passports and of frontier formalities.²³ All such steps are silver linings in the international travel horizon.

In the Philippines, the Constitution is explicit: "The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired,"²⁴ and the Supreme Court has decreed that the right to liberty includes the liberty of going when and where (we) please.²⁵ This provision was borrowed substantially from the Malolos Constitution, although the idea had been deeply embedded in the jurisprudence of both the United States and the Philippines.²⁶

The freedom to travel took a step forward in the United States when the Supreme Court ruled that the right to travel is part of a citizen's liberty guaranteed in the Fifth Amendment, and it ruled out the power of the Secretary of State to refuse passport applications on the grounds of the applicant's political beliefs and associations.²⁷ The precedent-setting decision threw the administration off-guard, and within three weeks, the President asked Congress to approve new laws giving the government "clear statutory authority" to refuse to issue passports to known Communists and those subject to Communist Party discipline, domination or control. This move was vigorously opposed by the American Civil Liberties Union, saying that certain sections "would play havoc with the constitutional right to travel, far beyond any justification on security or foreign policy grounds."²⁸ Due to the strong opposition mounted in the Senate, the bill was not passed in that session.

Perhaps it would be more fair if we see the whole picture of the passport situation, and look at the restrictions in our country in the cumulative significance of travel laws of countries in the Soviet bloc. In Russia, even the passports are made collective. A "collective" passport is made for several persons, probably for the safe control of the citizen abroad. Such citizens as are permitted to attend conferences outside the country travel on "collective" passports and only few government officials can be granted individual passports.²⁹ And in Poland, the law makes it a crime for a citizen to leave the country without a valid passport.³⁰

IV. Restrictions on the Right to Travel

During the first year of the Republic, passports were valid for travel in certain countries only. This policy has been changed and now passports are valid for travel in all countries unless otherwise specified.³¹ Countries where travel is banned by the Philippine Government is indicated in the passport. The countries listed there include Communist countries and their satellites.

23 YEARBOOK OF THE UNITED NATIONS, 101 (1958).

24 PHIL. CONST., Article III (Section 1 (4).)

25 Villavicencio v. Lukban, 89 Phil. 778, 790-791 (1919)

26 1 ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION, 100.

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

28 The Past is Prologue, 88TH ANNUAL REPORT OF THE A.C.L.U., 83 (1953)

29 Domag, *op. cit.*, *supra*, note 8.

30 *Ibid.* (In the Philippines, there is no such law. When the five Filipino businessmen who went to Communist China without any valid passports were sought to be prosecuted, the case was dropped for lack of cause of action).

31 Calingo. So You Are Going Abroad, Manila Times Midweek Review, August 4, 1948, p. 11.

The procedure for securing a passport is as cumbrous as any other bureaucratic procedure. An applicant has to present his birth certificate to establish citizenship, a tax clearance from the Collector of Internal Revenue, and a clearance either from the National Bureau of Investigation or from the Division of Intelligence of the Department of Foreign Affairs. Applications for passports shall not be considered without a certificate from the Central Bank. If the desired trip is for business, satisfactory showing must be made that the applicant has confirmed legitimate business connections abroad, and that the trip is both necessary and urgent. A student shall not be issued a passport for post graduate study abroad unless it can be satisfactorily shown that he has high scholastic ratings or that such study cannot be proficiently undertaken in the Philippines. In either case, he shall be required to obtain a certificate from the Department of Education.³²

A passport may be denied on the following grounds:³³

1. If there is an administrative, civil or criminal case pending against the applicant in any government agency, national or local, or court of justice in the Philippines;

2. If there is a decision or judgment ensuing or which has ensued from any said agency or court of justice in the Philippines against the applicant or his property;

3. If the applicant is a Communist or a member of any organization or society whose purpose is to overthrow the Philippine Government or its instrumentalities;

4. If the applicant has pending or outstanding cash advances or obligations due to pay any agency of the Philippine government;

5. If he has any derogatory record in any office, bureau or agency of the Philippine government;

6. If he will go to countries where travel of Filipinos is banned by the government; and

7. If in connection with his travel, the applicant shall attend any Communist or Communist-sponsored conference, convention or meeting, the purpose of which is to overthrow the Philippine government or any of its instrumentalities.

While no law or executive order specifies these as grounds for the denial of passports, the sworn statement which must be signed by the applicant that a violation of the above declaration will subject the passport to cancellation or confiscation and the traveler shall be liable to repatriation at his own expense and to such other action which Philippine authorities may take. Generally, the grounds for refusal of passports recognized in most nations, including the Philippines, are:

1. Those cases in which the Department is certain that the applicant's purpose is to commit espionage or other acts inimical to the interest and security of the country;

³² Department Order No. 234 of the Department of Foreign Affairs, (January 6, 1953)

³³ These are taken from declarations of the applicant in the sworn statement to be accomplished by him before he is issued a passport. The statement was required to be filed since 1957, when it was required to be filed with the Passports Division in lieu of several clearances to be obtained by the applicant.

2. Cases where the applicant is a fugitive from justice;
3. Denials based on non-citizenship;
4. Where the applicant has outstanding obligations to the government; and
5. Denials based on indigence.

International conditions justify the first ground in an effort of the state to preserve its security. As for the second and third grounds, it is a fact that passports have always been denied to criminals and to those who do not owe allegiance to the sovereign.³⁴ The same holds true for the fourth basis. As for denials based on indigence, the country has to prevent the travel of citizens who might be a charge to the government once they are abroad. The right to travel, therefore, must be subject to reasonable regulations, and Section 28 of the Executive Order authorizes the Secretary of Foreign Affairs to promulgate rules for the issuance and denial of passports.

V. Cases of Passport Denials for Security Reasons

The denial of passports, however, is justifiable only on the ground that a legitimate government objective is secured thereby. The question boils down to the task of balancing the liberty of the citizen to travel and the power of the state to regulate it in the name of national security.

The first reported case of passport denial on the ground of security is that of Francisco Nemenzo Jr. According to his testimony, it appears that Nemenzo was recommended by the Board of Regents of the University of the Philippines as a guarantee of the Ford Foundation. He was supposed to go to the United States to pursue higher courses in public administration. He was cleared by the National Intelligence Coordinating Agency, but at the last minute, his visa was cancelled by the American embassy. Subsequently, when he was preparing to go to England, the Intelligence Division of the Department of Foreign Affairs informed him without giving him any hearing that he had a "record" in the division, and his passport was also withdrawn. He was cleared months later, but by that time his scholarship and travel grants had already expired.

The most recent case which hit the headlines of the metropolitan newspaper is that of several students from various colleges and universities in the Philippines who were scheduled to attend the Seventh World Youth and Student Festival which was held at Vienna, Austria, from July 26 to August 4 this year. Before anyone could apply for passports, the Secretary of Foreign Affairs announced that the government would not allow Filipino students to attend the festival and he would deny all passport applications for Vienna. This decision was arrived at following receipt of definite reports from intelligence agencies of the government that the festival was Communist-sponsored, and the Secretary adopted the following procedure in "screening" suspected delegates to the meet: (1) Students applying for pass-

³⁴ 3 Hackworth, *supra*.

³⁵ The Manila Chronicle, February 17, 1959, p. 1.

ports and categorically stating that they intend to attend the Vienna meet will be denied passports summarily; and (2) In cases of students applying for passports other than Vienna, the applications will be held under advisement to determine whether the applicant has intentions of going to Vienna. Later, the Secretary extended the festival ruling to include professionals as well as the students in the prohibition. Fourteen student leaders were also put on the watch-list of the department.³⁶ Due to these restrictions, not one Filipino student was able to attend the Vienna festival.³⁷

Ever since the controversy over the participation of Filipino students in the Vienna meet, some quarters have seriously questioned the authority of the Secretary of Foreign Affairs to deny the issuance of passports in the interest of the security of the country. The recent decisions of the U.S. Supreme Court were put up as arguments against the authority of the Secretary. On the other hand, the Department of Foreign Affairs remained adamant and instead inserted a clause in the sworn statement to be signed by the applicant to the effect that he "shall not attend any Communist or Communist-sponsored conference, convocation or meeting the purpose of which is to overthrow the Philippine Government and any of its instrumentalities, and that in case of doubt as to the nature and purpose of such conference, convention or meeting, (he) shall not attend or be present thereat without previous consultation with the nearest Philippine diplomatic post abroad."

VI. The Power of the Secretary to Restrict Travel on Grounds of Security

We shall now proceed to resolve the question as to what extent the Secretary of Foreign Affairs can regulate travel on grounds of security. As we have previously stated, the right to travel is a constitutionally-protected right by virtue of two provisions: (1) Article III, Section 1 (4) which provides that "the liberty of abode and of changing the same within the limits prescribed by law shall not be impaired"; and (2) Section 1 (1) of the same article which solemnly declares that "no person shall be deprived of life, liberty or property without due process of law". According to the Supreme Court, the chief elements of the guaranty of liberty are "the right to contract, the right to choose one's employment, the right to labor, and the right to locomotion".³⁸ Personal freedom includes "the freedom of movement, freedom to transfer from one place to another, and the freedom to choose one's residence".³⁹ In a case decided by the U.S. Supreme Court, it was ruled:

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law of the Fifth Amendment. x x x Freedom of movement across the frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individ-

36 The Manila Chronicle, February 21, 1959, p. 1.

37 The Daily Mirror, July 30, 1959, p. 14.

38 *Rubi v. Provincial Board*, 89 Phil. 600, 603.

39 *Caunca v. Salazar*, G.R. L-2690, promulgated Jan. 1, 1940

ual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."⁴⁰

Since the freedom to travel is embraced within the term "liberty" as used in our Constitution, can the Department of Foreign Affairs regulate such right without any enabling statute passed by Congress?

While under our system of government the conduct of foreign relations is an executive function, the authority to regulate it is diffused between the executive and the legislative branches of government. Indeed, at times, the U.S. Supreme Court has appeared to accept the doctrine of Congressional inherent power in foreign relations.⁴¹ In the Philippines, authority over the conduct of foreign relations is divided between the two governmental bodies.⁴² The Constitution provides that in the making of treaties, the concurrence of two-thirds of the Members of the Senate is required;⁴³ the President cannot appoint ambassadors and other public ministers without the consent of the Commission on Appointments;⁴⁴ and Congress shall, with the concurrence of two-thirds of all the Members of each House, have the sole power to declare war.⁴⁵

In the conduct of foreign affairs, one of the corollary duties of the President is to protect the person and property of Filipino citizens abroad, and he carries out this duty through our diplomatic and consular representatives abroad. It is from this duty where the Executive derives his corresponding power to regulate the travel of citizens to other countries.

But the grant of passports does not involve the power of the Executive to conduct foreign relations alone. It also involves the freedom of movement of the citizen, a constitutional right which cannot be restrained at the discretion of any one official without sufficient authority from the law-making body. In the Philippines, unlike in the United States, there is no law vesting authority on the President or his Secretary to deny passports or prescribing the standards which must be followed in the refusal of applications for passports. It is only Executive Order No. 1 which authorizes the Secretary to deny passports. The pertinent sections follow:

"Sec. 25. The Secretary of Foreign Affairs as well as any diplomatic or consular officer duly authorized by him, is authorized, in his discretion, to refuse to issue a passport, to restrict a passport

40 *Kent and Briehl v. 857 U.S. 116 (1958)* (This case concerns two applications for passports, denied by the Secretary of State. One was that of artist Rookwell Kent, who desired to visit England and to attend a meeting of the "World Council for Peace" in Helsinki, Finland. The Director of the Passport Office denied issuance of his passport on two grounds: (1) that he was a Communist and (2) that he had a consistent and prolonged adherence to the Communist Party line. When he was advised of an informal hearing and was requested to submit an affidavit as to whether or not he was then or ever a Communist, Kent took the position that the affidavit is "unlawful and that for that reason and as a matter of conscience" he would not supply one.

The other application was filed by a psychiatrist, Dr. Walter Briehl who, like Kent, refused to file the affidavit contending that his political affiliations were irrelevant to his right to travel regardless of politics. The Court upheld their contentions.)

41 *RIVERA, THE LAW OF PUBLIC ADMINISTRATION*, 272 (1953).

42 *Id.* at 282

43 *PHIL. CONST.*, Art. VII, Sec. 10 (7).

44 *PHIL. CONST.*, Art. VII, Sec. 10 (7).

45 *PHIL. CONST.*, Art. VI, Sec. 23.

for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

Sec. 28. The Secretary of Foreign Affairs is authorized to prescribe regulations on the subject of issuing, renewing, extending, amending, restricting or withdrawing a passport, additional to and not inconsistent with these rules."

This provision, it is submitted, is constitutionally suspect where the regulation would be tantamount to a curtailment of the right to travel. While under the power of the Executive to conduct foreign affairs he may have the power to acquire territory by discovery and occupation, the power to expel undesirable aliens, and the power to make such international agreements as do not constitute treaties in the constitutional sense,⁴⁶ and may exercise "far more general discretion than that which has always been considered requisite with regard to domestic affairs",⁴⁷ he may not, without any sufficient authorization from Congress, restrict civil rights which incidentally fall under the scope of his power over foreign affairs. In the field of civil liberties, the delicate task of regulating them should be left to Congress for it to lay down criteria to be followed in such regulations. As declared by the U.S. Supreme Court:

"Since we start with an exercise by an American citizen of an activity included in the constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than 'request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection' to this citizen of the United States. Its crucial function today is control over exit. And, as we have seen, the right to exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. *If that liberty is to be regulated, it must be pursuant to the the law-making functions of Congress.* And if that power is delegated, the standards must be adequate to pass scrutiny by accepted tests.⁴⁸ (Italics ours).

The point here is that if liberty is to be regulated, it has to be regulated by the police power of the State,⁴⁹ which can be exercised by executive branches of the government only if delegated by Congress. The executive power does not include absolute discretion which may encroach on the individual's constitutional rights, or that Congress has power to confer such absolute discretion.⁵⁰

⁴⁶ *Jones v. U.S.*, 137 U.S. 202.

⁴⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 323 (1936)

⁴⁸ *Kent v. Dulles*, *supra*, note 40.

⁴⁹ *Rubi v. Provincial Board*, *supra*, note 38.

⁵⁰ *Hauer v. Acheson*, 106 F. Supp. 443 (1957)

Let us now proceed to examine the legality of the exercise of discretion by the Secretary in the light of the due process clause of the Constitution. In a recent case,⁵¹ our Supreme Court has decided that the discretion granted to the Secretary to withdraw or cancel a passport already issued may not be exercised at whim, and that hearing is proper and necessary if the reason for the withdrawal or cancellation of the passport is not clear but doubtful. The court also drew a line between this case and the cases of *Bauer v. Acheson*,⁵² *Nathan v. Dulles*,⁵³ and *Schachtman v. Dulles*,⁵⁴ saying that in those cases, the revocation of a passport already issued or refusal to issue a passport applied for was on the vague reason that the continued possession or the issuance thereof would be contrary to the best interests of the United States. In effect, our Supreme Court follows the decision of the District Court of Appeals repudiating the "best interests of the United States" theory in refusing a passport on grounds of political beliefs and associations.⁵⁵

However, the applicability of such a doctrine in the Philippines is doubtful due to the passage of the Anti-Subversion Law which penalizes membership in the Communist Party or any other subversive organization with knowledge of the organization's criminal purposes. It is submitted that if the applicant is indictable under the law, then the Secretary may deny him a passport, for then he would be a fugitive from justice, although he may not have been accused of subversion yet. The only question here would be in the denial of a passport to a suspected subversive. Such a question would arise because, first, the Secretary is guided by no standards in the exercise of discretion, and, second, passport denial in such cases is consistently founded on confidential information.

The exercise of unlimited discretion by the Secretary in this regard is legally suspect. Our Supreme Court has always frowned upon the exercise of discretion without any accompanying standards if private rights are concerned.⁵⁶ If what is granted is a "roving commission" which enables boards to exercise arbitrary discretion, such delegation would be tantamount to a virtual surrender of legislative power.⁵⁷ The line has to be drawn between the delegation of power to make law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. According to the court, the first cannot be done; to the latter no valid objection can be made.⁵⁸ In the issuance or denial of passports, there is no express legislative delegation by statute, and there are no standards laid down by Congress. Under Executive Order No. 1, the Secretary may deny passports "at his discretion", and the law ends there. No standards are prescribed. The Secretary may as well deny a passport on any ground, and there are only the courts to restrain him, but the courts are passive bodies and con-

51 *Suntay v. People*, 54 O.G. 1706 (1949).

52 *Supra*, note 50.

53 129 F. Supp. 931 (1957).

54 No. 12408, promulgated June 28, 1955.

55 This decision was reiterated by the U.S. Supreme Court in *Dayton v. Dulles*, 357 U.S. 144 (1958).

56 *U.S. v. Ang Tang Ho*, 48 Phil. 1 (1922).

57 *People v. Vera*, 65 Phil. 58, 117 (1937).

58 *Ibid*.

siderable delay is incurred before redress can be had. This is diametrically opposed to the doctrine that under our laws, discretion may not be vested in a manner so unqualified and absolute.⁵⁹

From the sworn statement to be filed by the applicant, it is explicit that passports will be denied "Communists" or "any member of any organization or society whose purpose is to overthrow the Philippine Government or its instrumentalities", or to anyone who intends to "attend any Communist or Communist-sponsored conference". But these words and phrases are vague and can hardly be held up as criteria. The term "Communist" may refer either to doctrinaire Communists or to card-bearing members of the Communist Party, and it can also be made elastic so as to include honest radicals, hard-core liberals, or to mere suspects who are victims of misinformation. As for the second ground that the applicant might attend a Communist-sponsored conference, this is based on future conduct which may either be contingent upon some event or the suspicion about the intention of the applicant may be unjustified.

For the proper exercise of executive discretion, standards must be laid down to meet the reasonable certainty of the due process clause, that is, they must furnish a meaningful guide for a citizen who wishes to maintain his liberty to travel and afford a basis for intelligent review by the courts.⁶⁰ If a law "forbids or requires the doing of an act in terms so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential of due process of law".⁶¹

As aptly stated by Professors McNamara and Mitchell:

"The fact that this is not a criminal statute is immaterial since where a fundamental liberty is involved, ambiguous criteria are still constitutionally objectionable. The specific purpose of Congress in establishing administrative, as opposed to penal, control of foreign travel must be borne in mind. Where the quantum of proof, though persuasive, does not meet the stringent standards for criminal convictions; or where the evidence may not, consistent with the national interest, be placed in an open record; or where the problem is future conduct rather than past conduct, the travel control power, as distinguished from the power to punish for past unusual activity, would perform its function. It would make possible the imposition of restraints upon the individual which, while they could be imposed by the government under standards less stringent than those of criminal prosecutions, would be at the same time qualitatively less severe than the restraints which result from criminal conviction."⁶²

The next problem that crops up is the use of confidential information as the basis for refusing the issuance of passports. Under the regulations promulgated by the Passports Division of the Department of Foreign Affairs, the

⁵⁹ *Ibid.*

⁶⁰ McNamara and Mitchell, *Beliefs, Associations and Passports: Recent and Proposed Legislation*,

27 GEORGE WASHINGTON L. REV. 89.

⁶¹ *Connally v. General Construction Co.*, 209 U.S. 383, 391 (1926).

⁶² McNamara and Mitchell, *supra*.

applicant has to secure a clearance either from the National Bureau of Investigation or the Intelligence Division of the Department. There are also other intelligence agencies which may volunteer information against the applicant, like the National Intelligence Coordinating Agency (NICA), the Army G-2 (Intelligence), the police department, the informers of the Department of National Defense, and those of the Committee on Anti-Filipino Activities (CAFA). The applicant has to cope with all these agencies and get a clean bill if he has to have a passport.

The use of secret information seems to be justified by a ruling of the U.S. Supreme Court to the effect that "the President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences".⁶³ However, this pronouncement should not be taken out of the context of facts under which it was decided. While this case involved only the power of the Executive to regulate commerce, a passport hearing involves more than the conduct of foreign affairs — it strikes deep across the heart of our civil liberties. And "commerce is more readily subject to regulation than are the inherent rights of individuals".⁶⁴ It is also significant to note that in 1957, the U.S. Supreme Court modified its position regarding the use of confidential information and ruled that in a criminal case, a defendant is entitled to an order directing the Government to produce the prosecution witness' testimony made to the Federal of Investigation concerning events about which the witness is testifying at the trial.⁶⁵

The most compelling reason is that investigative sources tend to become unavailable once it is known that the identities of undercover agents and other informers will be disclosed in an open hearing.⁶⁶ But this method infringes on the right of the citizen to cross-examine and defend himself from the charges against him. The argument that this right pertains only to defendants in criminal actions is not tenable. The guarantee does not preclude the reasoning that cross-examination itself is "implicit in the concept of ordered liberty".⁶⁷ Due process has been viewed as requiring that a party to an administrative hearing where an interest of sufficient magnitude is at stake be apprised of the evidence against him and be given an opportunity to rebut it.⁶⁸ And what greater stake is there than the liberty of the individual? The guarantee to the accused of the right of cross-examination and the corollary right to attack the credibility of adverse witnesses does not, therefore, indicate that the more basic right to examine the perceiver of facts when he is physically available is beyond the scope of due process.⁶⁹ Furthermore, the analogy of passport proceedings to criminal cases does not hold, for the acts charged in criminal actions is easier to prove than those in passport hear-

63 *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

64 *Dayton v. Dulles*, 337 U.S. 144 (1958).

65 *Jencks v. U.S.*, 338 U.S. 657 (1957).

66 Richardson, *The Federal Employee Loyalty Program*, 51 COLUMBIA L. REV. 546, 550 (1951).

67 *Falko v. Committee*, 302 U.S. 319, 324 (1937).

68 *Gonzales v. U.S.*, 348 U.S. 407, 412 (1955).

69 Appraisal, Confrontation and the Passport Applicant, 8 STANFORD L. REV., 932.

ings, where the government is seeking a judgment based on prediction of future conduct which in turn is based on inference from a whole pattern of past conduct and some matters which can not be classified at all.⁷⁰ Furthermore, the use of secret information provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected".⁷¹

VI. Conclusion

The right to travel is one of the more important constitutional rights we have. Travel itself plays an important role in the life of every citizen, for it is the best form of education for minds encrusted with prejudice. If the right is to be regulated, it has to be reasonable and within the bounds of the Constitution. Cloudy claims for security should not foreclose the exercise by a citizen of his freedom of movement, otherwise we will undermine a basic tenet in our democratic system. It is our declared policy to contain Communism, but let us not sacrifice our civil rights in the process. As our own Supreme Court declared, "individual liberty is too basic, too transcendental and vital in a republican state, like ours, to be denied upon mere general principles and abstract considerations of public policy".⁷²

PACIFICO AGABIN *

⁷⁰ Ibid.

⁷¹ Justice Jackson, dissenting in *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551.

⁷² *People v. Hernandez*, G.R. L-8025-26, promulgated July 18, 1956.

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PUBLIC POLICY: AN "UNRULY HORSE" IN REGALA CASE?

"I, for one, protest... against arguing too strongly upon public policy; — it is a very unruly horse and when once you get astride it you never know where it will carry you. It may lead you from the sound law."

— Justice Burrough

Much public interest has been stirred by the decision of the Supreme Court in the case of *Sy Guan and Price Inc. v. Regala*, promulgated on June 30, 1959.¹

The case touches on the validity of the so-called "ten percent contracts" which can be simply described as agreements in which one party binds himself to procure for another contracts, concessions, licenses, allocations, etc. from the government in consideration of a contingent fee usually based on the value of the contract, allocation, etc. obtained. In the history of this kind of contract, the standard fee has been said to be 10%; hence, the reason for the common denomination. The sudden popularity of these contracts in this country must have resulted from the strict controls imposed by the government in the granting of import and dollar allocations.

The facts of the *Regala* case in a nutshell are as follows: Petitioner Sy Guan, then president and general manager of his co-defendant Price Inc., executed in favor of respondent Atty. Pablo Regala a special power of attorney authorizing the latter to prosecute the former's applications for im-

¹ G.R. No. L-9500, June 30, 1959.