

CONNECTICUT LAW REVIEW

VOLUME 43

FEBRUARY 2011

NUMBER 3

Article

The Extraordinary Mrs. Shipley: How the United States Controlled International Travel Before the Age of Terrorism

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Ruth B. Shipley was one of the most powerful people in the federal government for almost thirty years, but she is virtually unknown today. As Chief of the State Department's Passport Division, she had the unreviewable discretion to determine who could leave the United States, for how long, and under what conditions. If, in the language of her day, she determined that travel was "not in the interest of the United States," that U.S. citizen stayed put. Mrs. Shipley denied passports to Paul Robeson, Arthur Miller, Linus Pauling, and many other Americans during the 1950s who were suspected of complicity in a world-wide Communist movement. Fear of communism then was the equivalent of fear of terrorism today.

This Article argues that current policies restricting travel through the use of terrorist watchlists owe their conceptual origins to Mrs. Shipley. The Article examines how she exercised her power through a detailed study of original documents obtained from the National Archives, many of which have not seen the light of day since Mrs. Shipley signed them. No such historical study has previously been done. The Article concludes by comparing Mrs. Shipley's regime to the current watchlisting procedures employed by the FBI's Terrorist Screening Center and the Transportation Security Administration, a component of the Department of Homeland Security. Today's so-called "No Fly List," used to deny boarding passes to suspect travelers, resonates with Mrs. Shipley's passport power, which was rightly scaled back by the courts and Congress as incompatible with our constitutional values.

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JEFFREY KAHN*

*What has been will be again,
what has been done will be done again;
there is nothing new under the sun.*¹

I. INTRODUCTION

At the height of her power, *Time* magazine pronounced Ruth Shipley “the most invulnerable, most unfirable, most feared and most admired career woman in Government.”² To Franklin Delano Roosevelt, she was a “wonderful ogre,” which he meant as high praise.³ She was also part of a very small cohort of women to rise at that time to such commanding heights in any part of the Federal Government. Odd, then, that today few people have the foggiest idea who this career civil servant was, how great was her power, and how few were the legal or political encumbrances placed on her judgment. Here she is, pictured with Secretary of State John Foster Dulles, who is presenting Mrs. Shipley with the Distinguished Service Medal⁴:

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¹ *Ecclesiastes* 1:9 (NIV).

² *Sorry, Mrs. Shipley*, TIME, Dec. 31, 1951, at 15. *Fortune* magazine had labeled her “redoubtable” six years earlier. *Basic Passports*, FORTUNE, Oct. 1945, at 123.

³ *Ogre*, NEWSWEEK, May 29, 1944, at 38; *Sorry, Mrs. Shipley*, *supra* note 2. Numerous secretaries of state echoed this praise with less loaded language. For instance, Dean Acheson stated, “I do not know any person in the service of the Government who brings to her work greater devotion, greater sense of public obligation and public duty, greater knowledge of the field, and greater skill than does Mrs. Shipley. I believe quite fortunately that view is widely held throughout the country.” *Explanation of Passport Procedures: Press Conference Remarks by Secretary Acheson*, 27 DEP’T ST. BULL., July 7, 1952, at 40, 40 [hereinafter *Remarks by Secretary Acheson*]. To Cordell Hull, Mrs. Shipley was among the “important and capable, experienced and dependable officials I found in high position in the State Department.” CORDELL HULL, 1 THE MEMOIRS OF CORDELL HULL 181 (1948).

⁴ Secretary of State John Foster Dulles presents the Distinguished Service Medal to Ruth B. Shipley, Diplomatic Reception Room, Department of State, April 28, 1955. Photograph by Herbert J. Meyle, 59-SO-288, # 7331, National Archives at College Park, Maryland (on file with the author).



Mrs. Shipley was the chief of the State Department's Passport Division from 1928 to 1955.⁵ This office was delegated the discretion to grant, deny, restrict, and revoke passports. Although equipped at its peak with a staff of 225 people, Mrs. Shipley personally reviewed each application.⁶ Her word was law since, prior to the Supreme Court's 1958 decision in *Kent v. Dulles*,⁷ the decisions of the Passport Division were not subject to judicial review.⁸ That is why Secretary of State Dean Acheson later referred to the Passport Division as Mrs. Shipley's "Queendom of Passports" and noted her service as chief of an office with "almost absolute power to decide who might leave and enter the country."⁹ In this capacity,

⁵ DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 246 (1978); ELMER PLISCHKE, *U.S. DEPARTMENT OF STATE: A REFERENCE HISTORY* 514 (1999); UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1954-55, at 75 (1954); Graham H. Stuart, *Safeguarding the State Through Passport Control*, 12 DEP'T ST. BULL. Jan. 7, 1945, at 1066, 1070; Harold B. Hinton, *Guardian of American Passports*, N.Y. TIMES, Apr. 27, 1941, at SM21; DEP'T OF STATE TELEPHONE DIRECTORY 58 (Feb. 1955); DEP'T OF STATE TELEPHONE DIRECTORY 3 (June 1928).

⁶ Hinton, *supra* note 5; Memorandum—Ruth B. Shipley: Background and Performance, *enclosed in* Memorandum to the President from Sec'y of State John Foster Dulles, Dec. 11, 1953, File 110.4 PD/12-953; Central Decimal File (CDF) 1950-54; General Records of the Department of State, Records Group 59 (RG 59); National Archives at College Park, Md. ("NACP") [hereinafter *Dulles Memorandum*]. Records obtained at the National Archives and Records Administration are cited according to GENERAL INFORMATION LEAFLET 17, *CITING RECORDS IN THE NATIONAL ARCHIVES OF THE UNITED STATES* (NARA: Washington D.C., 2007), *available at* <http://www.archives.gov/publications/general-info-leaflets/17-citing-records.html>.

⁷ 357 U.S. 116 (1958).

⁸ See Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171, 185 (1952) (discussing the generally held view that the Passport Division's discretion was exempt from judicial review under the Administrative Procedure Act).

⁹ DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* 15-16 (1969); see also *No Final Action Taken*, N.Y. TIMES, Jan. 6, 1948, at 14 ("As chief of the passport division, Mrs. Shipley has complete discretion to grant or reject his request."). Future famed Supreme Court advocate Eugene Gressman described Mrs. Shipley as possessing "limitless discretion." Eugene Gressman, *The Undue Process of Passports*, NEW REPUBLIC, Sept. 8, 1952, at 13, 14.

she excelled. As she neared retirement, John Foster Dulles recommended Mrs. Shipley for the Presidential Medal for Merit, the highest civilian honor awarded by the U.S. Government at that time.¹⁰ The citation prepared to accompany the award commended Mrs. Shipley, who “being alert to the dangers inherent in the travel abroad of communists and other subversives, initiated and steadfastly adhered to the policy of refusing passports to applicants whose prior actions indicated that the proposed travel would be inimical to the best interests of the United States.”¹¹

In many ways, Mrs. Shipley’s Passport Division was the paper-and-stamp precursor to today’s sophisticated, computerized systems for controlling the international travel of U.S. citizens. The Transportation Security Administration (“TSA”) now checks the name, gender, and date of birth of every ticketed air traveler against government databases.¹² If that person is deemed a threat either to civil aviation specifically or to national security generally, Congress has authorized the TSA to order the airline to deny the would-be traveler a boarding pass.¹³ As Mrs. Shipley did in her day, the TSA will not tell the traveler the specific reason for this decision.

Twenty-first century technology, however, has worked significant differences between the human Mrs. Shipley and the digitized one. Consider three differences:

- (1) Mrs. Shipley was the single source of a traveler’s passport woes, and her seemingly boundless discretion drew the ire of thwarted travelers ranging from members of the Communist Party USA to the Baptist Foreign Mission Board.¹⁴ Today, although airline officials sometimes assert with varying accuracy that a watchlist is the source of the trouble, TSA will neither confirm nor deny who is on the No

¹⁰ Dulles Memorandum, *supra* note 6. Mrs. Shipley was not awarded the medal but, as they often say in Hollywood, it was an honor to have been nominated.

¹¹ Citation to Accompany the Award of the Medal for Merit to Mrs. Ruth Bielaski Shipley, for Exceptionally Meritorious Conduct in the Performance of Outstanding Services to the United States During the War Emergency, *enclosed in Dulles Memorandum, supra* note 6.

¹² Congress ordered the use of computerized prescreening systems in legislation passed shortly after September 11, 2001. Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, § 136, 115 Stat. 597, 637 (2001). In 2004, Congress ordered the gradual assumption by the Federal Government of complete control over prescreening, which the airlines initially conducted for the Government. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 4012(a), 118 Stat. 3638, 3714–17 (2004) (codified at 49 U.S.C. § 44903(j)(2) (discussing domestic travel prescreening) and 49 U.S.C. § 44909(c)(6) (discussing international travel prescreening)). Travelers began to notice the effects of Secure Flight in August 2009. See Cam Simpson, *Airlines To Require More Passenger Data*, WALL ST. J., Aug. 13, 2009, at A4.

¹³ 49 U.S.C. § 114(h)(3)(A)–(B) (2006).

¹⁴ See *Embargoed Baptists?*, NEWSWEEK, May 29, 1944, at 78; *Purge by Passport*, NATION, Feb. 3, 1940, at 117.

Fly List.¹⁵ Decision-making authority over that list is diffused and layered among many analysts and officials in multiple agencies. Fifty years after Mrs. Shipley's watch, the basic question "Who did this to me?" is harder to answer.

(2) Mrs. Shipley made most of her decisions in the Winder Building located across the street from the White House.¹⁶ The Terrorist Screening Center, the multi-agency federal entity that manages the Government's consolidated terrorist database and compiles various watchlists—including the No Fly List—is in a secret, undisclosed location somewhere in Northern Virginia.¹⁷

(3) Mrs. Shipley personally heard and responded to all complaints.¹⁸ Today, the frustrated traveler may submit an electronic form through the Department of Homeland Security's website that is reviewed by anonymous officials whose criteria and methods of decision-making are classified.¹⁹ The form letter often sent in response employs a style of English that is part Orwell, part Kafka, but completely uninformative. (Judge for yourself: an example appears on page 886 of this Article.)

Who was Mrs. Shipley? How did she acquire such power? How did the passport come to be a force to prevent, rather than facilitate, travel? Was her system of unreviewable power better or worse than the present one, reviewable in theory but in practice secreted behind layers of anonymity and classified access? Does the history of Mrs. Shipley and her Passport Division offer any lessons for her conceptual descendants? This Article provides a brief history of travel restrictions in the United States. It

¹⁵ See 49 C.F.R. § 1542.305(f) (2009) ("Each airport operator that receives a Security Directive or an Information Circular . . . must [r]estrict the availability of the Security Directive or Information Circular, and information contained in either document, to those persons with an operational need-to-know [and] [r]efuse to release the Security Directive or Information Circular, and information contained in either document, to persons other than those who have an operational need to know without the prior written consent of TSA.").

¹⁶ Compare DEP'T OF STATE TELEPHONE DIRECTORY (June 1928), with DEP'T OF STATE TELEPHONE DIRECTORY (July 1943) (Dep't of State Building); DEP'T OF STATE TELEPHONE DIRECTORY (Aug. 1944) (Winder Building); DEP'T OF STATE TELEPHONE DIRECTORY (Nov. 1951) (Winder Building); and DEP'T OF STATE TELEPHONE DIRECTORY (Feb. 1955) (Winder Building).

¹⁷ See Dina Temple-Raston, *Inside the Terrorist Screening Center*, NPR (Aug. 30, 2007), <http://www.npr.org/templates/story/story.php?storyId=14040581> ("To visit the Terrorist Screening Center, you have to make some promises. The first is not to divulge where the center is—aside from saying it is in a secure location in Northern Virginia.").

¹⁸ See Hinton, *supra* note 5 ("Although she has ninety assistants in the passport division, Mrs. Shipley examines each application personally The door to her office is always open, and any applicant with a grievance can see that she is there and can walk right in").

¹⁹ *DHS Traveler Redress Inquiry Program*, DEP'T OF HOMELAND SEC., <https://trip.dhs.gov> (last visited Jan. 5, 2011).

then illustrates the effect of these laws through the professional life of Mrs. Shipley, whose time at the helm of the Passport Division straddled the rise, pinnacle, and gradual decline of passport-based controls on international travel. The Article concludes with a brief discussion of current travel restrictions to ask what has been learned, and what has been lost, in our digital age.

II. A BRIEF HISTORY OF TRAVEL CONTROLS FROM 1789 TO THE “QUEENDOM OF PASSPORTS”

To fully appreciate the power that Mrs. Shipley once held, one must understand the ever-sharper tool of control she wielded so authoritatively: the passport. From the moment of its creation, the U.S. Government issued passports.²⁰ Their early form and purpose, however, would not be recognized by today’s traveler.²¹ Gaillard Hunt, the U.S. Passport Clerk at the end of the nineteenth century, began his monograph on the American passport by noting that the word originally meant the very opposite of its current understanding. “Passport” came from the French *passer* and *port*, literally “to leave a port or harbor.”²² The term was intended to identify a document that granted a *foreigner* permission to pass into or out of a country’s ports.²³ Transit across the frontiers of many countries obliged the foreigner “to obtain a new passport at the boundaries of each nationality, and each national authority might subject him to an examination to ascertain his character and citizenship.”²⁴ To avoid such inconvenience, the practice emerged whereby one’s own country provided the passport in which to affix visas from the countries through which the traveler sought to pass. Such visas thus served an authenticating function, indicating that the passport to which they were affixed had been evaluated

²⁰ Stuart, *supra* note 5, at 1066; *see also* GAILLARD HUNT, THE AMERICAN PASSPORT: ITS HISTORY AND A DIGEST OF LAWS, RULINGS, AND REGULATIONS GOVERNING ITS ISSUANCE BY THE DEPARTMENT OF STATE 77 (1898) (reproducing the first recorded passport issued by the United States to a U.S. citizen, Francis Maria Barrere, dated July 8, 1796).

²¹ *See* Kenneth Diplock, *Passports and Protection in International Law*, 32 GROTIIUS SOC’Y 42, 44–46 (1946) (discussing the differing uses of the word “passport” beginning in the sixteenth century); Louis L. Jaffe, *The Right To Travel: The Passport Problem*, FOREIGN AFF., Oct. 1956, at 17, 17 (“The term ‘passport’ in its earliest usage was applied to a permission given, it might be, to an enemy alien or a departing foreign ambassador, to pass safely through the territory of the issuing Power.”).

²² HUNT, *supra* note 20, at 3.

²³ *See id.* at 5 (“Permissions to foreigners to pass through it are properly passports”); *see also* Memorandum for the Sec’y on Ordinary and Special Passports from State Dep’t Solicitor, W.E. Faison, *reprinted in* HUNT, *supra* note 20, at 26–31 (distinguishing passports under international law, which are “written permission given by a belligerent to subjects of the enemy whom he allows to travel without special restrictions in the territory belonging to him or under his control,” from passports for the sovereign’s own citizens in peacetime, which are “documents of an entirely different nature”).

²⁴ HUNT, *supra* note 20, at 5. Hunt cites Richard Henry Dana, Jr.’s notes to HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (1866). Wheaton is better known as a reporter of the U.S. Supreme Court’s decisions, 1816–1827. Dana was the U.S. Attorney for the District of Massachusetts during the Civil War. *See* Eugene Wambaugh, Book Review, 51 HARV. L. REV. 942, 945 (1938).

in advance to the satisfaction of a representative of the sovereign in whose name they were issued.²⁵

Initially, a passport was issued by the sovereign authority of the country the traveler sought to enter, not the traveler's own country. In times of war, this permission was sought by enemy aliens, not citizens: "In the strict nomenclature of international law, passports were classed with those documents known as safe conducts or letters of protection, by which the person of an enemy might be rendered safe and inviolable."²⁶ It was precisely this meaning that described General Washington's issuance of a passport to allow the ship *Amazon* to deliver supplies to British and German prisoners of war.²⁷ When the supplies were seized in Pennsylvania by "sundry persons"²⁸ enforcing a state licensing law, it set up a pre-constitutional debate about the proper breadth of the central government's powers.²⁹

Outside of wartime, early American border controls were extremely lax.³⁰ "In time of peace a law-abiding American citizen has always been free to leave the country without the permission of the Government; and, under the same conditions, foreigners have always been permitted to travel or sojourn within our boundaries without a permissive document."³¹ Indeed, at the start of the twentieth century, international travel was generally indistinguishable as a matter of law from any other travel. With only a few exceptions, passports were not required for entry into most foreign states.³² This may be due to the small number of people who

²⁵ See *id.* at 6 ("[T]he foreign government, instead of granting a passport, gives its assent to the bearer's passing through in the form of a visé upon the document itself. Each nation has its rules as to who may give and receive these passports; and compliance with them is expected to satisfy foreign governments, in respect to forms.").

²⁶ HUNT, *supra* note 20, at 3.

²⁷ Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 40 (2005); see also James Madison, *Notes of Debates (Jan. 24, 1783)*, in 19 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 608 (Paul H. Smith ed., 1976). Madison's letter describes the work of a committee established by the Continental Congress to resolve a dispute with Pennsylvania. Madison notes that the position of the committee was "that the power of granting passports for the purpose in question [was] inseparable from the general power of war delegated, to Congress, [and was] essential for conducting the war" *Id.* It appears that "the Indian Nation" was also considered a zone in which foreigners would require passports (but citizens merely a "licence" [sic]) to reside and trade with Native Americans. See 30 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 367-70 (John C. Fitzpatrick ed., June 28, 1786), available at <http://memory.loc.gov/ammem/amlaw/lwjcLink.html> (follow "Volume 30" hyperlink; then follow "page image" hyperlink).

²⁸ Madison, *supra* note 27, at 607.

²⁹ This debate is described with rich citation to primary sources in Johnson, *supra* note 27, at 40-42. Professor Johnson also provides citations for several examples of passports granted by the Continental Congress for the movement of people or goods through the war zone. *Id.* at 41-42 nn.54-55.

³⁰ *Present Passport Restrictions*, COMMERCE MONTHLY, Nov. 1919, at 12, 12.

³¹ HUNT, *supra* note 20, at 3-4. The author notes, without citation or statistics, that passports were required of citizens and foreigners alike to enter or leave the United States during the Civil War.

³² Daniel A. Farber, *National Security, the Right To Travel, and the Court*, 1981 SUP. CT. REV. 263, 265; see also Reginald Parker, *The Right To Go Abroad: To Have and To Hold A Passport*, 40

possessed the means to travel overseas; international travel was the province of only the elite and the desperate.³³ As Professor Zechariah Chafee observed:

To jump on a steamer in Boston and go to Liverpool was as easy as boarding the night-boat for New York. During the horse and buggy age, in which I was happily brought up, a passport was unknown except for Baedeker's remark that it might help you get permission to look at a private collection of paintings. The only country which required passports was Czarist Russia, and few Americans wanted to visit that despotic domain.³⁴

The U.S. Government even lacked monopoly control over the practice of issuing passports.³⁵ State and local officials as modestly ranked as a notary public issued them.³⁶ As one can imagine, recognition of these documents by foreign officials was spotty at best.³⁷ This tended to frustrate federal officials who feared for the authenticity and value of the passports they issued.³⁸ Only in 1856 did Congress respond to this chaos by passing the first statute authorizing the Secretary of State alone to issue passports.³⁹ The division of the State Department tasked to do this in 1856 employed only ten people and "most of the year time hung heavily on their hands."⁴⁰ It took ten more years to limit issuance of passports only to U.S.

VA. L. REV. 853, 863 (1954) ("In actual fact very few travelers bothered to obtain passports, which were entirely optional.").

³³ Brendan Mullan, *The Regulation of International Migration: The US and Western Europe in Historical Comparative Perspective*, in REGULATION OF MIGRATION: INTERNATIONAL EXPERIENCES 27, 28 (Anita Böcker et al. eds., 1998) ("Because of the limited state involvement in emigration, the endurance of free travel as a liberal ideal until the first third of the 20th century, and the relative youthfulness of today's nation states, economic considerations have outweighed political considerations in explaining the dynamics of international migration.").

³⁴ ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 193 (1956).

³⁵ *Zemel v. Rusk*, 381 U.S. 1, 31 (1965) (Goldberg, J., dissenting).

³⁶ REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL 5-6 (1958) [hereinafter FREEDOM TO TRAVEL].

³⁷ *See id.* at 6 ("[M]any foreign governments did not recognize the validity of passports issued by other than federal authority.").

³⁸ *See id.* (discussing Secretary of State William Marcy's recognition of the need to "guard against frauds as far as possible" for those interested in procuring passports).

³⁹ Act of August 18, 1856, ch. 127, § 23, 11 Stat. 52, 60-61. The original statute enacted in 1856 states that "the Secretary of State shall be authorized to grant and issue passports" *Id.* But the version in the Revised Statutes authorized by Congress in 1873 seems to have incorporated a slight change of wording: "The Secretary of State may grant and issue passports" U.S. REV. STAT. § 4075 (1878). The Commissioners appointed to create for re-enactment the Revised Statutes were charged only to "revise, simplify, arrange, and consolidate," Act of June 27, 1866, ch. 140, 14 Stat. 74-75, not to make substantive changes. It is unclear, therefore, what was meant by this change, which has been noted by other scholars. *See* FREEDOM TO TRAVEL, *supra* note 36, at 6-7.

⁴⁰ *Basic Passports*, *supra* note 2, at 123.

citizens.⁴¹

More than one Attorney General rendered the opinion that these statutes created no right to a passport should the state decline to issue one.⁴² But since few states required passports, few people cared. Only in times of war did the United States attempt to restrict foreign travel by its citizens.⁴³ Such restrictions were almost always imposed by act of Congress.⁴⁴ It is not surprising, therefore, that the Executive Branch “claimed unbridled discretion over the issuance of passports” during this time.⁴⁵ The need for regulation, after all, was minimal; few people traveled abroad and the passport itself was really nothing more than a rather formal note of introduction, occasionally a convenience, rarely a necessity. In this milieu, in which passports were not *required*, the passport could be considered a genuine instrument of foreign affairs issued by one government to request the assistance or protection of another government for its itinerant citizens abroad.

A. *World War I*

All that changed at the start of the “Short Twentieth Century.”⁴⁶

⁴¹ Act of May 30, 1866, ch. 102, 14 Stat. 54.

⁴² *E.g.*, Chinese Citizens of Hawaii—Passport, 23 Op. Att’y Gen. 509, 511 (1901) (“I know of no law which gives to the citizen a right to a passport.”); Citizenship—Passports, 13 Op. Att’y Gen. 89, 92 (1869) (“I do not understand that the granting of passports from your Department is obligatory in any case, but is only permitted where it is not prohibited by law.”).

⁴³ See FREEDOM TO TRAVEL, *supra* note 36, at 5 (describing how passports were largely unregulated in the 19th century, but were required to enter enemy territory during the War of 1812).

⁴⁴ *E.g.*, Act of Feb. 4, 1815, ch. 27, § 10, 3 Stat. 195, 199–200 (“[N]o citizen or person usually residing within the United States, shall be permitted to cross the frontier into any of the provinces or territory belonging to the enemy, or of which he may be possessed, without a passport first obtained from the Secretary of State, the Secretary of War, or other officer, civil or military, authorized by the President of the United States, to grant the same, or from the governor of a state or territory . . . [A]nd whosoever shall voluntarily offend against any of the prohibitions aforesaid, mentioned in this section, shall be considered guilty of a misdemeanor, and be liable to be fined in any sum not exceeding one thousand dollars, and to imprisonment for any term not exceeding three years.”). According to Hunt, “during the civil war persons traveling between points which were under military occupation by the United States Army were given passports signed by the Secretary of State which really partook of the nature of military passes.” HUNT, *supra* note 20, at 8, 21. Examples are reproduced by Hunt. *Id.* at 50–54.

⁴⁵ Farber, *supra* note 32, at 265.

⁴⁶ The term refers to “a coherent historical period”—the years from 1914–1991. ERIC HOBBSBAWM, THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914–1991, at 5 (1994); see also CHAFEE, *supra* note 34, at 193 (“The Czars are dead, but many of their security measures live on. Passports have become obligatory throughout the free world.”); Leo Lucassen, *The Great War and the Origins of Migration Control in Western Europe and the United States (1880–1920)*, in REGULATION OF MIGRATION: INTERNATIONAL EXPERIENCES, *supra* note 33, at 45, 45 (“Whereas *laissez faire* ruled during the long nineteenth century, for the movement of capital as well as for people, World War I put an end to this free flow of labour.”). Lucassen points to a variety of factors beyond war or the rise of the nation-state, to explain this change, but emphasizes the development of the welfare state as a motive to control migration. Lucassen, *supra*, at 45–46. Paul Minderhoud also discusses the rise of strict passport controls as the first world war broke out. Paul Minderhoud, *Regulation of Migration: Introduction*, in REGULATION OF MIGRATION: INTERNATIONAL EXPERIENCES, *supra* note 33, at 7, 8

Passports slowly became licenses for international travel. At first, the pressure was external: European countries engulfed in World War I demanded that foreigners present passports for travel through their war-readied ports and war-wearied provinces.⁴⁷ Foreshadowing events in the United States, these provisions started as temporary measures limited to areas affected by the outbreak of war but gradually became permanent requirements for all travel anywhere in the state.⁴⁸ Thus, although passports were not required for travel by American citizens under U.S. law, they became a requirement for travel due to the laws of an increasing number of destinations.

The *laissez faire* approach to travel before the war resulted in substantial problems for Americans without passports who found themselves trapped abroad at the outbreak of war. These travelers faced difficulties obtaining passports for travel through warring Europe back to their American homes. American officials worked under pressure to quickly repatriate their fellow citizens.⁴⁹ At the same time, these officials faced a rash of passport frauds perpetrated by enemy agents. The two problems were symbiotic. This may have accounted for the delay in imposing restrictions, which did not emerge until eighteen months into the war.⁵⁰

The Travel Control Act, as it was popularly known, authorized the President to limit the entry into and departure from the United States of both aliens and citizens alike.⁵¹ As one might expect, the President was given a relatively free hand to control the travel of aliens.⁵² Congress was more careful to limit Executive discretion when it came to citizens, even during wartime. First, the power was delegated by statute, which implied

("The shift towards stricter immigration controls in Europe accelerated at the outbreak of war in 1914, as marked by the widespread imposition of passport controls during the first year of conflict. By 1919, systematic immigration regulations and alien control measures were the norm, and the 'open world' of the nineteenth century had come to an end.").

⁴⁷ See JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* 111 (2000) (stating that as World War I broke out, governments viewed foreigners with suspicion and began to utilize "methods for restricting their movements" that would prove to be enduring).

⁴⁸ *Id.* at 116.

⁴⁹ See Kathleen McLaughlin, *Woman's Place Also in the Office, Finds Chief of the Nation's Passport Division*, N.Y. TIMES, Dec. 24, 1939, at 22 (describing the "hysterical days of 1914" when the State Department worked to "locate American citizens marooned abroad, whose relatives were frantic to get them back to safety").

⁵⁰ *Present Passport Restrictions*, *supra* note 30, at 12–13 ("The United States, however, did not impose restrictions until nearly a year and a half later, when, in consequence of several embarrassing cases of forged passports, the development of an effective system of supervision and regulation became imperative."). The United States declared war in April 1917. The Travel Control Act was passed in May 1918. The President issued orders under the Act in August 1918.

⁵¹ Act of May 22, 1918, ch. 81, 40 Stat. 559, *amended by* Act of June 21, 1941, ch. 210, 55 Stat. 252, *repealed by* Immigration and Naturalization Act of 1952, ch. 477, § 403(a)(15), 66 Stat. 163, 279.

⁵² Section 1(a) of the Act required only that the President's commands be "reasonable."

that Congress could revoke the power in the same way. Second, the power was delegated for use only when the United States was “at war.”⁵³ Third, even in the midst of war, the power could not be used until a presidential proclamation expressed the written finding that the public safety required exercise of such controls.⁵⁴ Only after such public proclamation did it become unlawful for any citizen to depart from or enter, or attempt to depart from or enter, the United States without a valid passport.⁵⁵

The statute worked just as intended. President Wilson issued a proclamation implementing these restrictions on August 8, 1918, in which he ordered that no citizen would receive a passport “entitling him to leave or enter the United States, unless it shall affirmatively appear that there are adequate reasons for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States.”⁵⁶ By Executive Order, the President established a system of travel controls over all persons seeking to enter or depart from the United States.⁵⁷ Unless and until the appropriate official was satisfied, *inter alia*, that the passport holder’s “departure or entry is not prejudicial to the interests of the United States,” the individual stayed put.⁵⁸ Satisfaction was achieved by interrogation. “If, as the result of such questioning and examinations, the Control Officer decides that the entry or departure of the holder of the passport or permit would be prejudicial to the interests of the United States, such person shall not be allowed to enter or depart.”⁵⁹

The statute privileged the foreign interests of the United States over the private interests of the citizen. That is hardly surprising, given the history of the passport. What was once merely an identity document of no legal value soon became “a certificate of citizenship, and . . . that person receiving it is certified to be entitled to such protection as the Government can give to its citizens in foreign countries.”⁶⁰ As such, it was a special privilege for which citizenship was a *sine qua non* (like a commission for government office), but not by any means viewed as a *right* of citizenship. If the passport entitled the bearer to the protection of his government when abroad, then the government had an interest in the careful issuance to

⁵³ Act of May 22, 1918, ch. 81, 40 Stat. 559.

⁵⁴ *Id.* §§ 1–2.

⁵⁵ *Id.* § 2.

⁵⁶ Proclamation of Woodrow Wilson, in 40 Stat. 1829, 1831 (Aug. 8, 1918).

⁵⁷ Exec. Order No. 2932, reprinted in 12 AM. J. INT’L L. 331–43 (Supp. 1918).

⁵⁸ *Id.* §§ 11, 13, 36–38. Although primary authority was delegated to the Secretary of State, which “control officer” the citizen actually met depended on whether entry or departure was via a seaport (in which case, customs officials of the Department of the Treasury), or land border (in which case, representatives of the Bureau of Immigration of the Department of Labor). *Id.* § 36.

⁵⁹ *Id.* § 36. Upon making that determination, the Control Officer was obliged to telegraph a full report (including a transcript of relevant testimony or information) to the Secretary of State within two days. *Id.*

⁶⁰ Citizenship—Passports, 13 Op. Att’y Gen. 89, 91 (1869).

travelers worthy of such protection to lands where such protection was possible. Notwithstanding this right/privilege distinction, Congress felt strongly enough about the importance of freedom of movement to heavily encumber the President's power to control it. While the urgency of war might necessitate its infringement, the public expression of responsibility was meant to safeguard this freedom in the long run. As Attorney General Knox observed:

Circumstances are conceivable which would make it most inexpedient for the public interests for this country to grant a passport to a citizen of the United States. For example, if one of the criminal class, an avowed anarchist for instance, were to make such application, the public interests might require that his application be denied.⁶¹

This was the first significant step in the conceptual move from the Travel Control Act of 1918 to the Internal Security Act of 1950, which finally changed travel restrictions from temporary controls in wartime to permanent controls in what amounted to a perpetual state of emergency in peacetime. The distance between these two concepts was shortened by the shift in thinking about the passport, from a diplomatic letter of introduction to a license to control mass travel. As will be seen, long after Congress rescinded the Internal Security Act, and the fears that motivated its passage have largely been forgotten, current travel restrictions are possible because of the lingering conceptual remnants that remain.

B. *Between the Wars*

The Travel Control Act and Wilson's implementing orders worked a sea-change on American travel. In 1917, the number of passports issued was 37,615.⁶² By 1920, that number had more than quadrupled, to 160,488.⁶³ More significantly, the State Department ultimately had to decide whether a traveler's reasons were "sufficiently adequate to warrant issuing his passport."⁶⁴ The war had indelibly grafted the passport to the idea of international travel. Regulation of the one was regulation of the other. This bureaucratic shift was noted by the American poet Ezra Pound, who recalled his wandering through a pre-war Europe that "still 'groaned under tyranny'" where he "went on foot into its by-ways for sixteen years with no 'papers,' that is to say with no brass checks, no government's petty officials' permission, nothing in fact, but . . . an unstamped membership

⁶¹ Chinese Citizens of Hawaii—Passport, 23 Op. Att'y Gen. 509, 511 (1901).

⁶² McLaughlin, *supra* note 49, at 22.

⁶³ *Id.*

⁶⁴ *Present Passport Restrictions*, *supra* note 30, at 13.

card to the Touring Club de France”⁶⁵ But those days were gone:

The war produced, if not a new ruling class, at least a new zealous bossiness.

I had my first meeting with the new civic order during the armistice. I was living in London. I was told that I “could not go to France unless I had business.” I naturally had business. I received a lot of other improbable information from the under-sub-vice-assistant. My wife could not possibly accompany me unless she were ill. I naturally produced doctors’ certificates. I could not move about in France; I must go to one place and stay there. At this point I was rescued by an elderly intelligent official from another department who took two hours off and swore to several contradictory statements in a manner showing great familiarity with the mind-ersatz of officialdom.⁶⁶

By November 1919, the American business press could advise its readers that “restrictions on travelers have been lightened bit by bit,” with passport applicants “no longer required to furnish documentary proof of the urgent necessity of the contemplated trip.”⁶⁷ Congress ultimately made use of the sunset provision it had placed on these controls, passing a Joint Resolution in 1921 declaring that the Act and its implementing materials should be “construed and administered as if such war . . . terminated on the date when this resolution becomes effective.”⁶⁸ The Executive Branch complied.⁶⁹

Between 1921 and 1941, a citizen did not require a passport for exit from the United States.⁷⁰ This did not, however, mean an end to passports

⁶⁵ Ezra Pound, *The Passport Nuisance*, 125 NATION 600, 600–01 (1927).

⁶⁶ *Id.* at 601. Although an influential modernist poet, Pound’s support for Italian fascism (not to mention his anti-Semitism) could easily have led an American official in Mrs. Shipley’s office to recommend denying him a passport for travel “not in the interests of the United States”—at least, had Pound sought one. It was only on the grounds of a suspicious insanity plea that he avoided conviction for treason. Upon his release in 1958 he returned to Italy, where he died. Had Mrs. Shipley then been in charge of a passport office yet not shorn of its powers under *Kent v. Dulles*, one wonders whether he would have received a passport. Herbert Mitgang, *Researchers Dispute Ezra Pound’s “Insanity,”* N.Y. TIMES, Oct. 31, 1981, at 16.

⁶⁷ *Present Passport Restrictions*, *supra* note 30, at 13.

⁶⁸ J. Cong. Res. of Mar. 3, 1921, ch. 136, 41 Stat. 1359, 1359–60. A subsequent statute, the Act of November 10, 1919, ch. 104, 41 Stat. 353, 353–54, contained many provisions similar to the Travel Control Act of 1918 except that its sunset provision was linked to a date certain rather than the cessation of war. *Id.* § 5 (“[T]his Act . . . shall continue in force and effect until and including the 4th day of March, 1921.”).

⁶⁹ Passports for American Citizens and Aliens, 32 Op. Att’y Gen. 493, 495 (1921) (“[I]t is clear that . . . [the Act] has been for the present rendered wholly inoperative by the Joint Resolution.”). The Attorney General concluded the same for the Act of November 10, 1919. *Id.* at 495–96 (“[I]t has . . . become defunct by expiration of its period of limitation . . .”).

⁷⁰ Jaffe, *supra* note 21, at 17.

or their regulation. In 1926, Congress passed the Passport Act, which repealed Section 4075 of the Revised Statutes and delegated exclusive authority to the Secretary of State to issue and validate passports “under such rules as the President shall designate and prescribe.”⁷¹ The default duration for a passport was two years, although the Secretary could limit this period within certain statutory bounds.⁷² This was not rollback enough for a free spirit like Ezra Pound, who was willing to concede that war and armistice left Europe

confessedly, in a mess, and errors might be exceptions. But what in heaven’s name has that temporary confusion to do with 1924, 1925, 1926, 1927? What has it to do with the unending boredom of waiting an hour, a half-hour, three hours, in countless bureaus, for countless useless visas, identities, folderols?⁷³

Pound was not alone: the editorial pages of the *New York Times*, *Boston Globe*, *Baltimore Sun*, and *Newark News* all called for the abolition of the passport.⁷⁴

It was not to be. In 1930, a high-water mark of 203,174 passports were issued.⁷⁵ In New York alone, there were over 51,000 applications for new or renewed passports.⁷⁶ Although that number dropped substantially to 106,991 passports issued in 1933, it rose to 168,016 passports in 1937 and fell to 134,737 in 1938.⁷⁷ With the war over, and with it the end of a mandatory passport regime, what explains the steady proliferation of passport applications? The system had taken on a life of its own, for even if the United States no longer required its citizens to carry passports to depart or return home, other countries required passports in which to stamp entry and exit visas to cross *their* borders. Europe, in particular, retained the passport rules adopted there during the Great War, tinkering at the margins to create passports for refugees abandoned by their homelands rather than to abolish controls no longer justified by war or famine.⁷⁸

⁷¹ An Act to Regulate the Issue and Validity of Passports, and for Other Purposes, ch. 772, 44 Stat. 887, 887–88 (1926) (codified at 22 U.S.C. § 211a).

⁷² *Id.* at 887.

⁷³ Pound, *supra* note 65, at 601.

⁷⁴ *Good News for Summer Travelers*, 101 LITERARY DIGEST 12, 12 (June 1, 1929) (reporting positions of these mastheads).

⁷⁵ McLaughlin, *supra* note 49, at 22.

⁷⁶ Letter from Ira F. Hoyt to J.H. Mackey, Bureau of the Budget (July 1, 1931), File 111.28 New York/71; CDF 1930–39; RG 59; NACP. Mr. Hoyt, the Passport Agent in New York, noted that his agency “is used by persons from all over the United States who come to New York to sail, the port from which about 95% of all departures occur.” *Id.*

⁷⁷ McLaughlin, *supra* note 49, at 22.

⁷⁸ Egidio Reale, *The Passport Question*, FOREIGN AFF., Apr. 1931, at 506, 506–07. The Nansen passport, created largely for Russians stripped of their citizenship by the Soviet regime, was the clearest example of this approach. *Id.* at 507. The Nansen passport facilitated travel and entry into another

States realized the power passport requirements gave to them over both foreigner and citizen alike, not to mention the revenue raised by visa and passport fees.⁷⁹ The international passport regime that war introduced, peace could not repeal.

President Roosevelt issued such rules by Executive Order only in 1938.⁸⁰ Only those owing allegiance to the United States (“whether citizens or not”) could be granted or issued a passport, which occurred only following the swearing of an oath of allegiance before an official lawfully able to hear it.⁸¹ Each citizen (whether native or naturalized) or a resident of an insular possession of the United States, was obliged to indicate on his passport application a detailed description of his proposed itinerary.⁸² This information included the port of departure, name, and sailing date of the outgoing vessel, the countries to be visited, and the object of each visit, subject to the Secretary’s discretion to demand “satisfactory documentary evidence” of this object, and the expected period of return to the United States.⁸³

Even if all this and other information were provided and the oath of allegiance sworn, the President authorized the Secretary of State

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.⁸⁴

Secretary of State Cordell Hull issued Departmental Order No. 749 the same day President Roosevelt issued his Executive Order.⁸⁵ The Departmental Order made extension of a passport that had been restricted for a period less than two years dependent upon the express authorization of the Department, and not its passport agents, diplomatic, consular, or other officers in the field.⁸⁶ Section VII.25 of the Order stated that “[a]n applicant for the renewal or extension of his passport may be required to submit satisfactory documentary evidence of the necessity and purpose of

state without creating a right to return to one’s country of origin (ordinarily the passport-issuing country). *Id.*

⁷⁹ *Id.* at 509 (stating that in some countries it was “customary to withhold passports from opponents of the régime in power, thus inflicting punishment on them for their political views” and that “[a]part from this use of it as a political weapon, the passport serves no real purpose except to raise money through the fees collected”).

⁸⁰ Exec. Order No. 7856, 3 C.F.R. 379, 390 (1938).

⁸¹ *Id.* at 380, 382.

⁸² *Id.* at 381–82, 384.

⁸³ *Id.* at 381–82.

⁸⁴ *Id.* at 389.

⁸⁵ Departmental Order No. 749, Order by the Sec’y of State Regarding Passports and Applications for Passports (Mar. 31, 1938), File 111.28/260; CDF 1930–39; RG 59; NACP.

⁸⁶ *Id.* § VII.16.

his journey abroad.”⁸⁷

Of course, one may ask just how onerous a burden or intrusion into the privacy of the traveler this really was if passports were not required by law for entry or departure other than in time of war and presidentially proclaimed emergency. In many cases, it was perhaps not much of a burden. But as war clouds gathered, the value of an American passport increased. The new understanding of the passport remained in place while these regulations sat dormant. Like Chekhov’s gun lying on the table, it was only a matter of time before they were put to their intended use.

War broke out across Europe on September 1, 1939, with the German invasion of Poland. Declarations of war by France and the United Kingdom against Germany soon followed. How could the United States protect its citizens abroad? What was to be done with those Americans who were abroad without passports who sought to return from or through belligerent countries? Should applications for passports to travel to places of present or perceived imminent danger be granted?

A prime concern for American policymakers was to preserve American neutrality, and this was reflected in the new passport rules.⁸⁸ Thus, travel aboard ships flagged to the belligerent nations was prohibited in much of the North Atlantic and other waters in or bordering Europe.⁸⁹ On September 4, one day before President Roosevelt issued a proclamation regarding U.S. neutrality,⁹⁰ Secretary of State Hull issued Departmental Order No. 811.⁹¹ The Order prohibited the use of any already issued passport for travel from the United States to Europe unless the passport was resubmitted to the State Department for validation. The likelihood of validation, which expired in six months or less, depended on the ability of the would-be traveler “to submit documentary evidence concerning the imperativeness of his proposed travel.”⁹² Both by the terms of the

⁸⁷ *Id.* § VII.25.

⁸⁸ See Regulations Concerning the Validation and Issuance of Passports for Use in European Countries, 4 Fed. Reg. 3892, 3892 (Sept. 13, 1939) (“Passports will not, as a rule, be validated or issued for travel in opposing belligerent countries.”).

⁸⁹ Regulations Under Section 9 of the Joint Resolution of Congress Approved May 1, 1937, 4 Fed. Reg. 3838, 3838–39 (Sept. 8, 1939). These regulations were promulgated by Secretary of State Hull under the authority provided by President Roosevelt’s Proclamation concerning export controls on arms and ammunition, 3 C.F.R. 109 (1939), and a Joint Resolution of Congress approved on May 1, 1937, J. Res., ch. 146, 50 Stat. 121 (1937). The new regulations forbade travel on French, German, Polish, British, Indian, Australian, and New Zealand vessels “on or over the north Atlantic Ocean, east of 30 degrees west and north of 30 degrees north or on or over other waters adjacent to Europe or over the continent of Europe or adjacent islands” Regulations Under Section 9 of Joint Resolution of Congress Approved May 1, 1937, 4 Fed. Reg. at 3838, 3839.

⁹⁰ Proclaiming the Neutrality of the United States in the War Between Germany and France; Poland; and the United Kingdom, India, Australia and New Zealand, 4 Fed. Reg. 3809, 3812 (Sept. 6, 1939).

⁹¹ Regulations Concerning the Validation and Issuance of Passports for Use in European Countries, 4 Fed. Reg. at 3892.

⁹² *Id.*

regulations and their actual implementation, the State Department was more receptive to business travelers than those wishing to engage in travel for other reasons.⁹³ The ability of women and children to travel on the passports of husbands and fathers, previously a relatively easy matter, now required special pleading.⁹⁴ The regulations warned of criminal penalties for false or misleading statements made to evade these regulations.⁹⁵ Those who evaded validation or disregarded limits placed on the validated passport were warned that “the protection of the United States may . . . be withheld from him while he is abroad” and prosecution may follow his return to the United States.⁹⁶ Other regulations required American citizens “to surrender their passports upon their arrival in the United States. The passports are sent direct by the immigration authorities to this Department, where they are filed pending a request for their return for further use.”⁹⁷

The Neutrality Act was a joint resolution of Congress approved on November 4, 1939. As the short title implied, and the full title categorically announced, the objective was to keep the United States out of war.⁹⁸ The failure to achieve that objective in 1917 was in no small part due to submarine warfare against American merchant fleets and passenger liners in the Atlantic Ocean.⁹⁹ Therefore, the Act generally prohibited American vessels to carry “any passengers or any articles or materials” to any states proclaimed by the President to be at war (with steep criminal penalties for any violation).¹⁰⁰ American citizens and vessels were also prohibited (with equivalent penalties) from proceeding into or through designated combat areas.¹⁰¹ Nor could Americans travel on vessels flagged

⁹³ Validation for business travel required a letter from one’s firm. Travel “for any purpose other than commercial business must satisfy the Department of State that it is imperative that he go, and he must submit satisfactory documentary evidence substantiating his statement concerning the imperativeness of his proposed trip.” *Id.* See *infra* Part II.C for the implementation by Mrs. Shipley and others.

⁹⁴ Regulations Concerning the Validation and Issuance of Passports for Use in European Countries, 4 Fed. Reg. at 3892 (“Women and children will not be included in passports issued to their husbands or fathers unless the urgent and imperative necessity of accompanying them is conclusively established.”).

⁹⁵ *Id.* (quoting 22 U.S.C. § 220 (1940)) (providing for a fine up to \$2,000 and five-year imprisonment).

⁹⁶ Regulations Concerning the Validation and Issuance of Passports for Use in European Countries, 4 Fed. Reg. at 3892.

⁹⁷ Instruction from Ruth Shipley to the American Consular Officer in Charge, Mexico (Oct. 11, 1939), File 138 Emergency Program/223; CDF 1930–39; RG 59; NACP.

⁹⁸ Sec. 20, Joint Resolution of Nov. 4, 1939, 76th Cong., ch. 2, 54 Stat. 4 (1939), ch. 2, 54 Stat. 4. The full title was “Joint Resolution to preserve the neutrality and the peace of the United States and to secure the safety of its citizens and their interests.”

⁹⁹ NORMAN DAVIES, *EUROPE: A HISTORY* 910 (1996).

¹⁰⁰ H.R.J. Res. 306, 76th Cong. § 2(a)–(b), 54 Stat. 4. Violation of this subsection or relevant regulations was punishable by up to a \$50,000 fine, five-year imprisonment, or both. *Id.* § 2(b).

¹⁰¹ *Id.* § 3(a)–(b). Violation of this subsection by an American vessel was similarly punishable by a \$50,000 fine, five-year imprisonment, or both. Citizen-passengers were subject to a \$10,000 or two-year imprisonment, or both. *Id.* § 3(b).

to designated belligerent states.¹⁰² The exceptions were sufficiently complicated and evanescent to render busy and powerful the body delegated the authority to issue restrictions, rules, and regulations.

That body was the Department of State, which was fully aware of its power. As described in a summary of Mrs. Shipley's office prepared in support of a recommendation that she receive the Medal for Merit, the Act transformed the Passport Division into "a travel control office."¹⁰³ After passage of the Neutrality Act:

[T]here were areas to which Americans generally could not go and routes by which they could not travel. The regulation of travel was enforced mainly through the withholding of passport facilities or the limitation of the passport as to time or countries and waters in or over which it was not valid for travel. But the law and regulations permitted certain exceptions and it was Mrs. Shipley's responsibility to ascertain when the travel fell within an exception and to document accordingly.¹⁰⁴

This power was augmented by the Nationality Act of 1940.¹⁰⁵ Under the Act, both native-born and naturalized American citizens (and persons seeking merely to be considered "nationals" but not citizens) lived under additional restraints on their travel and stays in foreign countries.¹⁰⁶ Mrs. Shipley was well-aware of these limitations.¹⁰⁷

¹⁰² *Id.* § 5(a).

¹⁰³ Memorandum—Ruth B. Shipley: Background and Performance, *enclosed in* Dulles Memorandum, *supra* note 6.

¹⁰⁴ *Id.*

¹⁰⁵ Act of Oct. 14, 1940, ch. 876, 54 Stat. 1137.

¹⁰⁶ Naturalized citizens faced a five-year ban on their permanent residence abroad, which was to be monitored by diplomatic and consular officials of the State Department. Violation of the restriction could lead to proceedings to revoke the person's certificate of naturalization and set aside court orders admitting the person to citizenship. Act of Oct. 14, 1940, ch. 876, § 338(c), 54 Stat. 1137. Nationals of the United States (which the Act defined as both U.S. citizens and those owing permanent allegiance to the United States) faced a rebuttable presumption of self-expatriation if they remained for more than six months in a country in which they or their parents had been nationals. *Id.* § 402. American nationality (whether acquired by birth or naturalization) could also be lost by (a) residing for two years in a country of which he was formerly a national or in which nationality would be conferred by such residency by operation of law; (b) continuous residence of at least three years in one's country of birth or of which he was formerly a national; or (c) continuous residence of at least five years in any foreign state. *Id.* § 404(a)–(c).

¹⁰⁷ *Rule on Naturalized Citizens*, N.Y. TIMES, Jan. 14, 1952, at 6 ("Mrs. Ruth B. Shipley, head of the Passport Division of the State Department, explained tonight that under the Nationals Act of 1940 naturalized Americans must limit visits to their native lands to three years, and stays in other countries to five years. Over-staying such stays cancels the person's citizenship, and the State Department, in administering this law, has no discretion in the matter."). A "precise record" of foreign residence was required of naturalized citizens seeking passports. Ruth B. Shipley, *Passport Office Rolls Up A Record*, N.Y. TIMES, June 20, 1954, at X17 ("[I]n the case of naturalized citizens, . . . prolonged foreign residency may, in many cases, endanger citizenship itself.").

C. World War II

Six months before Pearl Harbor, Congress took the next step toward peacetime travel control. The Travel Control Act of 1918 had required that there exist *both* a state of war *and* a presidential proclamation of the need to preserve public safety.¹⁰⁸ This conjunctive protection was weakened by changing it into a disjunctive statement. Now, *either* a state of war *or* the existence of a national emergency—which the President had already proclaimed the month before—would suffice to restrict a citizen's travel with passport controls.¹⁰⁹

President Roosevelt issued a proclamation and regulations under the amended act in mid-November 1941.¹¹⁰ The Secretary of State was delegated authority to act under the statute.¹¹¹ Ten days later, Secretary of State Cordell Hull issued a departmental order establishing regulations that limited travel by American citizens and nationals by itinerary, mode of transport, and purpose of travel.¹¹² Thus, travel without a passport was strictly prohibited to “any foreign country or territory in the Eastern Hemisphere.”¹¹³ Travel in the Western Hemisphere was somewhat more lenient, allowing travel without a passport to Canada, Mexico, and certain Caribbean islands, but retaining restrictions on travel in the North Atlantic established under the Neutrality Act.¹¹⁴ Merchant seamen and members of the military were specially excepted.¹¹⁵ Attempts by citizens or nationals to enter the United States without a valid passport would be met by immediate detention of the traveler.¹¹⁶

Besides limitations on where Americans could travel and for what purposes, there were also procedural checks established by the system of passport controls itself. Mere possession of a passport was sufficient to

¹⁰⁸ Act of May 22, 1918, ch. 81, 40 Stat. 559 (1918).

¹⁰⁹ Act of June 21, 1941, ch. 210, § 1, 55 Stat. 252, 252–53 (1941). The penalties for willful violation were reduced from a \$10,000 maximum fine or twenty years imprisonment, or both, in the 1918 Act, to a \$5,000 maximum fine and up to five years imprisonment, or both. *Id.* § 2. As with the 1918 Act, restrictions on aliens were not so carefully policed by Congress. Their departure and entry could be restricted by the President “whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require” such restrictions. *Id.* § 1.

¹¹⁰ Proclamation No. 2523, 6 Fed. Reg. 5821, 5821 (Nov. 18, 1941).

¹¹¹ *Id.*

¹¹² Departmental Order No. 1003, 6 Fed. Reg. 6067, 6069 (Nov. 28, 1941) (codified at 22 C.F.R. pt. 58 (Supp. 1941)). Regulations of aliens leaving or entering the United States were promulgated first, on November 22, 1941, with the concurrence of Attorney General Francis Biddle. *See* Control of Persons Entering and Leaving the United States Pursuant to the Act of May 22, 1918, 6 Fed. Reg. 5927, 5927–34 (Nov. 22, 1941) (codified at 22 C.F.R. pt. 58 (Supp. 1941)).

¹¹³ Departmental Order No. 1003, 6 Fed. Reg. at 6069.

¹¹⁴ *Id.*; *see also* Neutrality Act of 1939, ch. 2, § 2(g), 54 Stat. 4, 5–6 (1939) (outlining exceptions to travel restrictions for U.S. vessels).

¹¹⁵ Departmental Order No. 1003, 6 Fed. Reg. at 6070.

¹¹⁶ *Id.*

depart the United States.¹¹⁷ But to enter or return to the United States, the passport must have been “verified” by an American diplomatic or consular official in the foreign country from which the traveler last departed.¹¹⁸ Through foreign service officers stationed worldwide, the State Department had the power to “[v]erify, renew, amend, extend, and cancel” passports.¹¹⁹ Furthermore, the Order made clear that the Department retained the authority to refuse to permit the departure from or return to the United States by a citizen or person owing allegiance to the United States whose travel the Secretary or his representative considered prejudicial to the interests of the United States, even if a passport had already been issued to the person.¹²⁰ This was in keeping with the penultimate, elastic clause of the Order, preserving the Secretary’s discretion “to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.”¹²¹

This authority, in turn, was delegated to the chief of the Passport Division.¹²² As the State Department itself later characterized the purpose of the legislation, it was to “curb unnecessary travel and particularly to prevent the travel of irresponsible people, adventurers, saboteurs, criminals, and others who might harm the United States or its Allies, and to make the limited transportation facilities available only to persons whose reasons for travel were legitimate and important to the war effort.”¹²³

As the war continued, control of travel expanded. Mrs. Shipley thought that the “exigencies of the present international situation” made it desirable “to document all American citizens who travel between the United States and Mexico.”¹²⁴ In October 1943, acting Secretary of State Edward Stettinius issued Departmental Order No. 1207, which modified Order No. 1003, issued in November 1941. No longer would travel across the U.S.-Mexican border be uncontrolled. A valid “card of identification” was required of citizens desiring to make frequent crossings.¹²⁵ Cards remained valid for two years, unless the issuing officer had reason to limit

¹¹⁷ *Id.* at 6069.

¹¹⁸ *Id.*

¹¹⁹ Exec. Order. 8820, 22 C.F.R. § 121.2(c) (Supp. 1941).

¹²⁰ Departmental Order No. 1003, 6 Fed. Reg. at 6070.

¹²¹ *Id.*

¹²² Dulles Memorandum, *supra* note 6.

¹²³ *Id.*

¹²⁴ Letter from Ruth B. Shipley, Chief of Passport Div., U.S. Dep’t of State, to G. Howland Shaw, Assistant U.S. Sec’y of State (Jan. 15, 1943), File 111.28/279; CDF 1940–44; RG 59; NACP. Mrs. Shipley arranged for her deputy, John Scanlan, to travel to Mexico to “temper any possible feeling that the regulations will tend to discriminate against persons intending to cross the Mexican border and favor those intending to cross the Canadian border,” where no such regulation was adopted. *Id.*

¹²⁵ Card of Identification for Use on the Mexican Border, Departmental Order No. 1207, 1 (Oct. 23, 1943), File 111.017/700; CDF 1940–44; RG 59; NACP.

the card to a shorter period.¹²⁶

D. *The Cold War*

The conclusion of World War II and the gradual, ostensible return to the conduct of foreign affairs in peacetime resulted in only a superficial lifting of travel restrictions. On the one hand, the number of countries to which American citizens were now permitted to travel grew with the end of the war. On the other hand, the premise had been firmly implanted in the minds of both government officials and the traveling public that the United States had the authority to deny or permit travel based on the state's concerns about the nature of the traveler or his intended itinerary. In 1951, *Reader's Digest* published a glowing story about Mrs. Shipley that described without criticism—if it did not endorse—her power: “No American can go abroad without her authorization. She decides whether the applicant is entitled to a passport and also whether he would be a hazard to Uncle Sam’s security or create prejudice against the United States by unbecoming conduct.”¹²⁷

Thus, countries could be added or removed from the list of permitted destinations by government notice. Such government decisions were sometimes grounded in paternalism—the United States had determined that it was not “in a position to accord normal protection” to travelers in some country, for example, due to the absence of a diplomatic mission there.¹²⁸ Other times, the decision was based in a calculation of realpolitik or concern that rambunctious, naïve, or contrarian travelers could interfere with American foreign policy interests. In the metaphor of one court, such persons were dangerous matches who could be precluded by the state from the “international tinderbox.”¹²⁹

In the early 1950s, travel controls were broadened again in order to assist in the fight against the international communist conspiracy. Congress passed the Internal Security Act of 1950 over President Truman’s veto. The Act contained two titles, the Subversive Activities Control Act and the Emergency Detention Act.¹³⁰ Congress had concluded that

¹²⁶ *Id.* at 6.

¹²⁷ Andre Visson, *Ruth Shipley—The State Department’s Watchdog*, *READER’S DIG.*, Oct. 1951, at 73, 73 (condensed and reprinted from *INDEP. WOMAN* (Aug. 1951)) (noting that 299,655 passports were issued in 1950).

¹²⁸ *Passports No Longer Valid for Bulgaria or Hungary*, 22 DEP’T ST. BULL., Mar. 13, 1950, at 385, 399. Permission to travel to Hungary was taken away on December 20, 1949 on those grounds. *Id.* On May 1, 1951, permission was restored but without any official stated reason. *Removing Prohibition Against Travel in Hungary*, 24 DEP’T ST. BULL., 1951, at 761, 770.

¹²⁹ *Briehl v. Dulles*, 248 F.2d 561, 572 (D.C. Cir. 1957) (en banc), *rev’d on other grounds*, *Kent v. Dulles*, 357 U.S. 116 (1958).

¹³⁰ Emergency Detention Act of 1950, ch. 1024, §§ 1(a), 100, 64 Stat. 987, 987, 1019 (1950). This act authorized—for the duration of a presidentially proclaimed “Internal Security Emergency”—the preventive detention on grounds of future dangerousness of any person “as to whom there is

Communism was “a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.”¹³¹ Congress noted the evils of totalitarianism and the manifest success in “numerous foreign countries” of the Communist Party and “the most powerful existing Communist dictatorship” (i.e., the Union of Soviet Socialist Republics) in establishing “Communist totalitarian dictatorships, and threaten[ing] to establish similar dictatorships in still other countries.”¹³²

The Subversive Activities Control Act of 1950 required Communist organizations to register with a new entity known as the Subversive Activities Control Board.¹³³ Once the Board issued a final order to such an organization to register itself, it became unlawful for any member of the organization to apply for, renew, use, or attempt to use a passport.¹³⁴ If convicted, the penalty for violating this section was a fine of up to \$10,000 and/or up to five years imprisonment.¹³⁵ These prohibitions and penalties were necessary, Congress found, because of the unusual transnational nature of the Communist menace:

Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist

reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage.” *Id.* §§ 102(b), 104(a). The emergency detention envisioned by that act was circumscribed by numerous limitations, including a probable-cause warrant requirement, a multi-level administrative review process, and ultimate access via habeas to an Article III court. Unlike its sister act, travel restriction short of complete detention was not a primary focus of the act. However, if on the basis of additional information submitted by the detainee, the Attorney General concluded that such a reasonable ground of belief no longer existed, then the Attorney General could order the detainee’s release or “apply to such detainee such lesser restrictions in movement and activity as the Attorney General shall determine will serve the purposes of this title.” *Id.* § 104(e).

The Emergency Detention Act was revoked by the Non-Detention Act. Pub. L. No. 92-128, 85 Stat. 347 (1971) (codified at 18 U.S.C. § 4001(a) (Supp. V 1971)).

¹³¹ Subversive Activities Control Act of 1950, ch. 1024, § 2(1), 64 Stat. 987 (1950) (codified at 50 U.S.C. § 811(1) (1952)).

¹³² *Id.* § 2(10).

¹³³ *Id.* § 7.

¹³⁴ The statute required knowledge of the registration or final order to register as an element of the offense. *Id.* § 6.

¹³⁵ *Id.* § 15(c).

movement.¹³⁶

The Act, although draconian in its restriction and penalties, required no great leap from existing theory or practice in the administration of passports. Because Congress did not consider passports to be a *right* of citizenship, and because the passport was seen as obliging government protection of its holder, those whose travel was not only contrary to the interests of the United States but actually in defiance of them could expect no help from the state. The Act itself made this clear in its congressional findings:

In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.¹³⁷

From the perspective of the United States Government, if a passport was desired by a Communist, he or she was welcome to seek one from his or her de facto sponsor: the Union of Soviet Socialist Republics.

In 1952, the McCarran Act expanded the justification for travel controls to include either war or “*any* national emergency proclaimed by the President.”¹³⁸ It was now unlawful—during times of national emergency proclaimed by the President—for a citizen to depart from or enter, or attempt to depart from or enter, the United States without a valid passport.¹³⁹

It is not hyperbole to say that “[o]ne of the first casualties of the Cold War was freedom of travel.”¹⁴⁰ The United States’ rise to power in the second half of the twentieth century corresponded with an almost complete inversion of the original meaning of a passport. The passport was no longer merely a document that provided evidence of the bearer’s identity and a request from either the bearer’s government or, in the case of enemy

¹³⁶ *Id.* § 2(8).

¹³⁷ *Id.* § 2(9).

¹³⁸ Act of June 27, 1952 (McCarran Act), ch. 477, § 215(a), 66 Stat. 190, 190 (1952) (codified at 8 U.S.C. § 1185(a) (1952) (emphasis added)).

¹³⁹ *Id.* § 215(a)(1). By 1978, all conditional language on the imposition of travel controls was struck out. Neither a state of war nor a presidentially proclaimed national emergency were necessary to initiate temporary travel controls. The controls were permanently installed for all peacetime travel:

Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, 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.

Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. 95-426, § 707(b), 92 Stat. 963, 993 (1978) (codified at 8 U.S.C. § 1185(b) (1952)). With this act, Congress also struck out all penalties for violating the control. *See id.* § 707(d) (stating struck-out and redesignated legislation).

¹⁴⁰ Farber, *supra* note 32, at 263.

aliens or foreign diplomats, from a host government for safe passage *through* a sovereign jurisdiction. The passport became a license issued by a government permitting its own citizens to travel abroad. It ceased to be a document of identification and comity, and emerged as a device to restrict liberty to travel out of one's own country and to monitor one's citizens in foreign lands.¹⁴¹

III. THE RISE OF MRS. SHIPLEY

To describe Mrs. Shipley's career is to restate this statutory history in human terms. It is also to tell the story of a remarkably talented woman who rose to great power in male-dominated corridors of power.

Ruth Bielaski was born in Montgomery County, Maryland, in 1885, the daughter of a Methodist minister.¹⁴² She had a high school education and what was known at the time as "business training" before she took a competitive civil service exam at age eighteen to qualify for a position copying assignments of patent rights in the Patent Office.¹⁴³ She began work in the Patent Office in 1903, where she worked as a clerk until she married in 1909.¹⁴⁴ She spent several years in the Canal Zone, where her husband held a post in the Canal administration. His ill health returned them to Washington, but it was the ill wind blowing through Europe in August 1914 that landed her in the Passport Division.

Mrs. Shipley was appointed a clerk at the State Department on August 25, 1914, just as World War I was beginning in Europe.¹⁴⁵ Thus, Mrs. Shipley's career began just as modern travel controls did. She seems to have quickly become the protégé of Assistant Secretary of State A.A. Adey, whose portfolio at the time covered passports.¹⁴⁶ In time she became assistant chief of the Office of Coordination and Review.¹⁴⁷ In 1928, Mrs. Shipley was appointed chief of the "particularly prickly" Passport Division, which the *New York Times* further described as a job known in

¹⁴¹ *Aptheker v. Sec'y of State*, 378 U.S. 500, 507 (1964) ("The denial of a passport . . . is a severe restriction upon, and in effect a prohibition against, world-wide foreign travel.").

¹⁴² McLaughlin, *supra* note 49, at 22; *Passport Chief To End Career*, N.Y. TIMES, Feb. 25, 1955, at 15; *Ruth B. Shipley, Ex-Passport Head*, N.Y. TIMES, Nov. 5, 1966. The Bielaski family seems to have had government service in its blood. Mrs. Shipley's older brother, Alexander Bruce Bielaski, was the second director of the Federal Bureau of Investigation, serving from 1912 to 1919. *Bruce Bielaski, Justice Aide, Dies*, N.Y. TIMES, Feb. 20, 1964, at 29; see also *Alexander Bruce Bielaski*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/history/directors/bielaski> (last visited Jan. 5, 2011).

¹⁴³ Carson C. Hathaway, *Woman To Head Passport Bureau*, N.Y. TIMES, May 20, 1928, at 111; McLaughlin, *supra* note 49, at 22.

¹⁴⁴ *Passport Chief To End Career*, *supra* note 142, at 15 ("The custom then required that women quit work when they were married.").

¹⁴⁵ Dulles Memorandum, *supra* note 6.

¹⁴⁶ Hathaway, *supra* note 143, at 111. It may be that Mrs. Shipley focused on a State Department career as a result of her husband's death in 1919, the same year she became Adey's special assistant. Visson, *supra* note 127, at 74.

¹⁴⁷ *Woman Passport Chief*, N.Y. TIMES, Apr. 19, 1928, at 27.

Washington to be “full of responsibility, open to the constant critical attack of an impatient public, it was said to have killed one man who was formerly its chief.”¹⁴⁸ She held that position for twenty-eight years.¹⁴⁹

In describing this amazingly steep career trajectory, it is worth pausing to remember the added difficulties official Washington presented for women. Women in high office, considered at that time to be any civil service position salaried at over \$5,000, were such a rarity that Mrs. Shipley’s elevation was viewed as precedent-setting.¹⁵⁰ She became part of what was known as the “women’s cabinet”—the small cohort of other women in positions of power.¹⁵¹ Even after arriving as chief of the Division, Ruth Shipley had to contend with condescension unimaginable for her male counterparts. The *New York Times* described her as the “slender, dark-haired head” of the Passport Division in a Sunday feature on *The Women Who Man Our Ship of State* that marveled at the rise of career professionals sharing “a common sex which has aroused curiosity ever since Eden’s gates were shut.”¹⁵² Even after five years on the job, at least one congressman congratulated the Secretary of State on “the efficiency shown by the Chief of your Passport Division, Mr. R. B. Shipley.”¹⁵³ A woman in such an important position was hard for many men to fathom.

Notwithstanding these difficulties, Mrs. Shipley’s career was a glorious success, and not just within the confines of the Passport Division.¹⁵⁴

¹⁴⁸ Mildred Adams, *The Women Who Man Our Ship of State*, N.Y. TIMES, Oct. 13, 1929, at SM5.

¹⁴⁹ *Passport Chief To End Career*, *supra* note 142, at 15.

¹⁵⁰ Adams, *supra* note 148, at SM5.

¹⁵¹ *Id.*; Hathaway, *supra* note 143.

¹⁵² Adams, *supra* note 148. Even grey-eyed Athena would have raised an eyebrow at the muse who inspired this Homeric description of Mrs. Shipley. As it turned out, she had more in common with white-armed Hera than grey-eyed Athena, though at times she appeared more powerful than both goddesses combined.

¹⁵³ Letter from Representative D. Lane Powers to Cordell Hull, U.S. Sec’y of State (Sept. 7, 1933) (noting the courtesy and promptness with which “he” deals with official matters), File 112/1166; CDF 1930–39; RG 59; NACP. Secretary Hull thanked the Congressman, but without correcting his erroneous assumption about Mrs. Shipley. Letter from Cordell Hull, U.S. Sec’y of State, to Representative, D. Lane Powers (Sept. 12, 1933), File 112/1166; CDF 1930–39; RG 59; NACP. The mistake was common. See, e.g., Stanley I. Stuber, *Can Christians Obtain Passports?*, CHRISTIAN CENTURY, Sept. 14, 1932, at 1101, 1102 (referring to the Chief of the passport division, “Mr. R. B. Shipley”).

¹⁵⁴ In early 1930, Acting Secretary of State Cotton named her as a delegate to the International Conference for the Codification of International Law held at The Hague that spring. Letter from J.P. Cotton, Acting U.S. Sec’y of State, to Ruth B. Shipley (Feb. 27, 1930), File 504.418 A 2/173; CDF 1930–39; RG 59; NACP. Mrs. Shipley was the only female delegate from the United States. *Final Act, Conference for the Codification of International Law Held at The Hague in March–April, 1930*, 24 AM. J. INT’L L. 170 (1930). Although her work to resolve conflicts in nationality laws did not result in substantial reform or codification (like much of the rest of the products of the Conference), her efforts were hailed within the Department and in academic circles. Secretary of State Henry L. Stimson singled out her work at the conference in a letter of appreciation he sent her on his last full day in office. Letter from Henry L. Stimson, U.S. Sec’y of State, to Ruth B. Shipley (Mar. 3, 1933), File 111.28/232A; CDF 1930–39; RG 59; NACP. The distinguished American lawyer and scholar James Brown Scott singled Mrs. Shipley out for praise in an editorial comment on the work on nationality

A. *World War I*

When Ruth Shipley first joined the Passport Division, all hell was breaking loose. War in Europe trapped many Americans there. Since passports were not required for travel, few possessed them. Now they were desperate for documents that could return them home.¹⁵⁵ It was during the “hysterical days of 1914” that Mrs. Shipley was offered a job in the Passport Division to help “locate American citizens marooned abroad, whose relatives were frantic to get them back to safety.”¹⁵⁶

While many Americans lacked passports, putting great pressure on the State Department to provide them for safe voyages home, a mirror-image problem emerged in the form of passport frauds. The virtually unregulated passports of then neutral America were a tempting target for passport frauds by agents of belligerent nations, particularly Germany. By clothing German reserve officers in the neutral guise of American travelers, repatriation across an Atlantic Ocean patrolled by the British Fleet was considerably easier.¹⁵⁷ It was in this environment that Mrs. Shipley began to learn her craft. No doubt the difficulties presented in time of war by a largely unregulated travel system made a profound impression on her.

B. *Between the Wars*

By 1924, Mrs. Shipley had risen to the position of assistant chief in the Office of Coordination and Review, working under Miss Margaret M. Hanna.¹⁵⁸ There she worked essentially without supervision, developing a particular expertise enforcing the Immigration Act of 1924, for which she helped write regulations.¹⁵⁹ It seems that she was held in high enough regard that the Acting Secretary of State was willing to fight with the Personnel Classification Board to elevate her position to “a classification commensurate with the duties and responsibilities” she performed.¹⁶⁰ The appeal was granted.¹⁶¹

done at the conference. James Brown Scott, Editorial Comment, *Nationality*, 24 AM. J. INT'L L. 556, 557 (1930).

In spring 1953, Mrs. Shipley was designated to serve as “Chairman of the Department of State Loyalty Security Appeals Board.” Letter from Walter B. Smith, Acting U.S. Sec’y of State, to Ruth B. Shipley (May 13, 1953), File 110.4-LSB/5-1353; CDF 1950–54; RG 59; NACP. The Board was the penultimate step (before the Secretary himself) to termination of a State Department employee found to constitute a security risk.

¹⁵⁵ *Id.*; *Present Passport Restrictions*, *supra* note 30.

¹⁵⁶ McLaughlin, *supra* note 49, at 22.

¹⁵⁷ French Strother, *Fighting Germany’s Spies I: The Inside Story of the Passport Frauds and the First Glimpse of Werner Horn*, 35 WORLD’S WORK 513, 514 (1919).

¹⁵⁸ Letter from Joseph C. Grew, Acting U.S. Sec’y of State, to F.J. Bailey, Chairman of the Pers. Classification Bd. (Aug. 12, 1924), File 112/720a; CDF 1910–29; RG 59; NACP.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ A note from “ECW” stating “[t]his appeal was granted” was attached to the letter from Joseph C. Grew, *supra* note 158.

Mrs. Shipley became Chief of the Passport Division in 1928.¹⁶² At this time, the Passport Division had a staff of more than seventy.¹⁶³ Mrs. Shipley quickly realized, however, that she was woefully understaffed and quickly sought permission to employ passport writers on a piece work basis outside of the regular civil service. During the “rush season” of 1928, she complained, “passports were written on an hourly basis” at a rate paid on the expectation of twenty passports an hour.¹⁶⁴ Demand for passports grew and grew between the wars. Mrs. Shipley reported that 1930 was a banner year for passports, with 203,174 passports issued and renewed.¹⁶⁵

By her fifth year as Chief of the Passport Division, Mrs. Shipley had exceeded the salary of her former boss, Miss Hanna.¹⁶⁶ This undoubtedly reflected, in part, what Mrs. Shipley characterized in an internal memorandum as public service “exceedingly profitable to the Treasury.”¹⁶⁷ This was not puffery. During the fiscal year that ended in June 1933, passport fees collected at home and abroad totaled over \$1.2 million, the equivalent of almost \$20 million today.¹⁶⁸ The Passport Division maintained passport agencies in New York, Chicago, Boston, San Francisco, Seattle, and New Orleans; establishment of an agency in Los Angeles was in the works.¹⁶⁹ These operated as intake centers, not autonomous decision-makers, because all cases had to be cleared by Washington.¹⁷⁰ Mrs. Shipley quickly learned that part of overseeing her growing empire of passport agents required mastery of the art of bureaucratic turf fighting with other federal agencies. In this capacity, too,

¹⁶² Hathaway, *supra* note 143.

¹⁶³ *Id.*

¹⁶⁴ Memorandum from Ruth B. Shipley to the Solicitor’s Office, U.S. Dep’t of State (Aug. 16, 1930), File 111.28/214; CDF 1930–39; RG 59; NACP.

¹⁶⁵ *In the Field of Travel*, N.Y. TIMES, Feb. 1, 1948, at X15.

¹⁶⁶ Enclosure to Letter from E. Wilder Spaulding, Assistant Chief of Div. of Research and Publ’n, to Fletcher Cooper (Dec. 11, 1933), File 112/1171½; CDF 1930–39; RG 59; NACP. Miss Hanna, who remained Chief of the Office of Coordination and Review, earned \$600 less than Mrs. Shipley’s \$5,600 base salary. *Id.* This meant that by the end of 1933, Mrs. Shipley was the highest paid woman in the State Department. *See id.*

¹⁶⁷ Memorandum from Ruth B. Shipley to the Comm’n and Records Div., U.S. Dep’t of State (Dec. 1, 1933), File 111.28/233½; CDF 1930–39; RG 59; NACP.

¹⁶⁸ *Id.* This was accomplished, Mrs. Shipley complained, despite a 12% reduction in her staff from an average personnel of 78.8 in fiscal year 1932 to 66 in fiscal year 1933. For inflation adjustment, see *Inflation Calculator*, DOLLARTIMES, <http://www.dollartimes.com/calculators/inflation.htm>.

¹⁶⁹ Memorandum from Ruth B. Shipley to Wilber J. Carr, Assistant U.S. Sec’y of State (Jan. 22, 1932), File 111.28 Los Angeles/5; CDF 1930–39; RG 59; NACP. In locations lacking a passport agency, applications could be executed by clerks of federal or state courts that had naturalization authority. Letter from Ruth B. Shipley to James A. Davis (Sept. 28, 1937), File 111.28/255; CDF 1930–39; RG 59; NACP.

¹⁷⁰ Memorandum from Ruth B. Shipley to Wilber J. Carr, *supra* note 169; *see also* Attachment to Letter from Ruth B. Shipley to Wilber J. Carr, Assistant U.S. Sec’y of State (Feb. 23, 1937), File 111.28 Los Angeles/37; CDF 1930–39; RG 59; NACP.

Mrs. Shipley excelled.¹⁷¹ Nor was any decision too small for Washington—i.e., Mrs. Shipley—to address, right down to the hanging of pictures on the walls of passport agencies.¹⁷²

As she mastered her art, Mrs. Shipley grew ever busier and, perhaps surprisingly in cut-throat Washington, more popular.¹⁷³ She was also sufficiently established in the social scene to feel comfortable inviting Eleanor Roosevelt to address the annual meeting of a service organization of which Mrs. Shipley was president of the local chapter.¹⁷⁴ Two examples from Mrs. Shipley's early years colorfully illustrate influences on her practical education and her deft hand at creative problem-solving.

Excursus #1: The G-Man, the Kidnappers, and Mrs. Shipley

Did a terrifying event early in the professional life of Mrs. Shipley, when she was an assistant to Third Assistant Secretary Adey, affect her views of the risks presented by even the savviest of American travelers to United States interests abroad?

¹⁷¹ See, e.g., Letter from Robe Carl White, Assistant U.S. Sec'y of Labor, to Henry L. Stimson, U.S. Sec'y of State (Nov. 9, 1931), File 111.28/221; CDF 1930–39; RG 59; NACP. This letter evidences a battle she won against an overmatched assistant secretary at the Labor Department. Assistant Secretary White used concern about passport fraud as an excuse to write to Secretary of State Henry Stimson seeking to oblige passport agents to seek certificates of naturalization (for a fee payable to the Labor Department) in connection with passport applications. This would replace the status quo reliance on clerks of court (who often doubled as passport agents and therefore were under the influence of Mrs. Shipley) who could check court records regarding naturalization themselves. Mrs. Shipley saw no possibility of fraud. She deftly parried the bureaucratic move. "I should like not to tie our hands in this matter and yet have no wish to antagonize Labor," she wrote to her lieutenant, John Scanlon. Letter from Ruth B. Shipley to John Scanlon (Dec. 13, 1931), *attached to* Letter from Robe Carl White, *supra*. She proposed answering Labor

that passport agents will be requested to communicate with the commissioners of naturalization in the cities where they are stationed when they wish information contained in the local records regarding naturalization. We can then continue as we have done with the clerks of courts who are acting as our agents in passport matters and who are, as well, the custodian of court records regarding naturalization.

Id.

¹⁷² Internal note exchange between R.B. Shipley and Herbert C. Hengstler, (Aug. 11, 1931), *attached to* Letter from R.A. Proctor, Passport Agent, Chicago, to R.B. Shipley, (Aug. 6, 1931), File 111.28 Chicago/29; CDF 1930–39; RG 59; NACP. Mr. Proctor wrote in response to a letter from Mrs. Shipley earlier that month to describe the pictures of foreign cruise ships that had hung in the reception room at the Chicago Passport Agency and inform her that they had been taken down. *Id.*

¹⁷³ See, e.g., Letter from D.P. Aub, Dist. Manager, Am. Express Co., to Cordell Hull, U.S. Sec'y of State (Aug. 8, 1934), File 111.28/235; CDF 1930–39; RG 59; NACP (commending Mrs. Shipley and her office and, no doubt, hoping to stay in her good graces); see also Memorandum from George S. Messersmith, Assistant U.S. Sec'y of State (Dec. 8, 1937), File 113/777; CDF 1930–39; RG 59; NACP (reporting testimony of Assistant Secretary George Messersmith before a subcommittee of the House Appropriations Committee, praising Mrs. Shipley for her work preparing new codes concerning passport and citizenship laws).

¹⁷⁴ Letter from Ruth B. Shipley to George T. Summerlin, Captain, Chief of Protocol, U.S. Dep't of State (Dec. 10, 1937), File 811.0011 Roosevelt Family/170; CDF 1930–39; RG 59; NACP. Mrs. Roosevelt was unable to attend. Letter from J.M. Helm, Sec'y to Mrs. Roosevelt, to George T. Summerlin, Captain, Chief of Protocol, U.S. Dep't of State (Dec. 31, 1937), File 811.001 Roosevelt Family/172 HHC; CDF 1930–39; RG 59; NACP.

On June 25, 1922, Mrs. Shipley's brother was kidnapped in Morelos, a small state south of Mexico City.¹⁷⁵ Her brother had traveled to Mexico with his wife to defend his business interests in a property dispute with a Mexican oil company.¹⁷⁶ This would not necessarily have been newsworthy to those outside the family had her brother not been Alexander Bruce Bielaski, the former director of the FBI. That made it front page news. There was initial speculation in the media that the kidnappers may be linked to communist radicals who were "tired of inaction and were planning for this Fall a campaign of terror,"¹⁷⁷ but Bielaski later dismissed the theory as very unlikely.¹⁷⁸ It was enough, however, to lead Mexican President Alvaro Obregon to order the immediate arrest and deportation of a colony of American and Russian radicals in Cuernavaca, the capital of Morelos.¹⁷⁹ Bielaski orchestrated his own sensational nighttime escape after three days in captivity.¹⁸⁰

Ordinary tales of kidnapping would end there. But the case took an even more sensational turn a week later, when a judge in Cuernavaca ordered Bielaski's arrest pending judicial investigation of a charge that Bielaski had arranged his own abduction to embarrass the Mexican government.¹⁸¹ President Obregon traveled from Mexico City to personally oversee the investigation.¹⁸² A few weeks later, newspapers reported that the State Department was "losing patience in the Bielaski case" and had delivered a note to the Mexican authorities to wrap up the investigation.¹⁸³ By that point, conclusion of the Bielaski affair had turned anti-climactic. It was back-page news when the local court absolved him of all charges and cleared him of any complicity in his own kidnapping.¹⁸⁴ By the time Bielaski reached Brownsville, Texas, in mid-August, the affair

¹⁷⁵ *Bielaski Is Held, Companion Freed; Ransom Is Paid*, N.Y. TIMES, June 27, 1922, at 1.

¹⁷⁶ *Bielaski Company Loses*, N.Y. TIMES, July 18, 1922, at 7.

¹⁷⁷ *Bielaski Is Held, Companion Freed; Ransom Is Paid*, *supra* note 175; *see also A. Bruce Bielaski Kidnapped in Mexico and Held for \$10,000*, N.Y. TIMES, June 26, 1922, at 1.

¹⁷⁸ *Bielaski Lays Seizure to Amateur Bandits*, N.Y. TIMES, June 30, 1922, at 3.

¹⁷⁹ *Obregon To Deport a Group of Radicals: Acts To Clear the Region Where Bielaski Was Captured of Foreign Reds*, N.Y. TIMES, June 28, 1922, at 22. President Obregon was reported to have traveled to Cuernavaca to personally oversee the investigation. *Obregon in Morelos, Sifts Bielaski Case*, N.Y. TIMES, July 15, 1922, at 3.

¹⁸⁰ *Bielaski Escapes, Pays No Ransom; Flees Barefoot, Falls Over Cliff, Swims River, Safe in Mexico City*, N.Y. TIMES, June 29, 1922, at 1.

¹⁸¹ *Bielaski's Arrest Reported Ordered*, N.Y. TIMES, July 6, 1922, at 1. As arrests go, this one was fairly comfortable; Mr. and Mrs. Bielaski lived in a local hotel or as guests of the American chargé d'affaires and it may be that Mexican legal procedures were misreported by the American press. *Bielaski Is Cleared by Mexican Court*, N.Y. TIMES, Aug. 13, 1922, at 21; *Bielaski To See It Out*, N.Y. TIMES, July 29, 1922, at 12. The chauffeur, on the other hand, remained lodged in a Mexican provincial jail. *Bielaski Is Under Guard*, N.Y. TIMES, Aug. 3, 1922, at 20. Bielaski himself later made light of the situation and disputed some newspaper accounts of his detention. *Bielaski Explains Charges*, N.Y. TIMES, Aug. 22, 1922, at 23.

¹⁸² *Obregon in Morelos, Sifts Bielaski Case*, N.Y. TIMES, July 15, 1922, at 3.

¹⁸³ *Intervenes for Bielaski*, N.Y. TIMES, Aug. 12, 1922, at 6.

¹⁸⁴ *Bielaski Is Cleared by Mexican Court*, *supra* note 181.

was fully behind him.¹⁸⁵

The press never reported any suspicion that Ruth Shipley used her office to help her brother and, given her low position at the time, it is hardly likely that she could have done so if she had wanted to.¹⁸⁶ But did the episode, hitting so close to home, leave its mark on her? One wonders how the twists and turns of the affair affected her thinking years later, as head of the Passport Division. Clearly, even innocent travelers—not to mention anarchists, communists, and social undesirables—could find themselves suddenly mired in political scandal that had the potential to influence the course of foreign policy and international relations. Her brother's kidnapping, after all, resulted in protests at the highest levels of the American government, the personal involvement of the Mexican President, and then weeks of bizarre claims and counterclaims in the Mexican and American press.¹⁸⁷ Why risk dragging the United States into awkward circumstances that could have been avoided had permission to travel abroad been denied? Or, as an en banc panel of the Court of Appeals for the District of Columbia Circuit put it many years later, "[t]he Secretary [of State] may preclude potential matches from the international tinderbox."¹⁸⁸

Excursus #2: The Case of the Less Virtuous Ballerina

Mrs. Shipley could exercise her power with a delicate touch when she chose to do so. This delicacy, however, could not obscure the essential paternalism of her decision-making. One example is found in her solution to a problem described with evident frustration by the American Consul General in Valparaiso, Chile, to the Secretary of State. The Consul complained in a cable to Washington that yet another "American ballet and revue company" was planning to descend on his outpost with predictable results:

During the writer's nine years tour of duty as Consul

¹⁸⁵ *Bielaski Reaches Texas*, N.Y. TIMES, Aug. 20, 1922, at 2.

¹⁸⁶ There seems to have been a friendship between Ruth Shipley's mentor, Alvey Adey, and her brother. Years earlier, Adey had given Bielaski "a small, pearl-handled revolver . . . insisting that Bielaski carry it" for safety's sake given his livelihood. *Bielaski a Fighter, But Quiet About It*, N.Y. TIMES, June 30, 1922, at 3.

¹⁸⁷ It also may have triggered other kidnappings. While Bielaski was still in captivity, a "rebel," Mexican General Gorozave, seized an oil company and forty Americans near Tampico. *40 Americans Held by Tampico Rebels; Bielaski Not Freed*, N.Y. TIMES, June 28, 1922, at 1. Secretary of State Charles Evans Hughes called the seizure an "outrage" and demanded "vigorous" measures in a telegram to the American Vice Consul at Tampico. *Id.*

¹⁸⁸ *Briehl v. Dulles*, 248 F.2d 561, 572 (D.C. Cir. 1957) (en banc), *rev'd on other grounds*, *Kent v. Dulles*, 357 U.S. 116, 130 (1958). Speculation filled the American and Mexican press about both the Bielaski affair and the Tampico "outrage," sometimes labeling them hoaxes and speculating about intrigues and special interests seeking to disrupt Mexican-American relations. *Drop Bielaski Accusation*, N.Y. TIMES, July 2, 1922, at 10; *Mexican Press Tries To Discredit Bielaski*, N.Y. TIMES, July 1, 1922, at 3.

General in Valparaiso he has been called upon so many times to assist stranded American theatrical companies to obtain return passage to the United States that he is thoroughly convinced that if Mr. Austin goes through with his announced intention of bringing a ballet and revue company to Chile he is merely courting serious financial reverses and the entire venture will end up in the company being stranded in some West Coast port.

As the Department is aware, American theatrical companies stranded in Latin American ports are anything but desirable emissaries [sic] of the United States, and particularly so when the company is largely made up of single girls. It is always a difficult task, as this Consulate General knows from a great deal of experience, to repatriate the female members of such troupes, and oftentimes before this becomes possible some of the less virtuous of them are likely to become public nuisances.¹⁸⁹

Although the consul readily conceded that there was no way to stop the company from touring Chile, “nor are there any reasons why the Department should endeavor to do so,” he suggested that the Department refuse to issue passports to the company unless some sort of bond was posted to cover its predicted need for return passage.¹⁹⁰

The consul was right: passports were not required to visit Chile in 1929. And there was no regulation in place that expressly authorized the refusal of a passport on the grounds of predicted penury.¹⁹¹ On the other hand, the economic and social costs of ill-planned ventures seemed to weigh as heavily on the United States as on even the “less virtuous” youthful ballerinas who appeared—at least to the American consul and Mrs. Shipley—to be in need of protection.

Mrs. Shipley’s solution was delicate but effective. She directed her passport agent in New York to refer passport applicants in this category to the Actors Equity Association before processing their requests for passports. Actors Equity was to be relied upon to educate aspiring artists “whether the employer is a reputable person and can be relied upon to keep them employed and provide them with return transportation.”¹⁹² Each

¹⁸⁹ Despatch No. 1569 from American Consul General C.F. Deichman to the Secretary of State, (Aug. 9, 1929), File 032 Austin, C.J./1; CDF 1910–29; RG 59; NACP.

¹⁹⁰ *Id.*

¹⁹¹ Indeed, no rules were promulgated other than the brief 1926 Passport Act until 1938. See Exec. Order No. 7856, 3 Fed. Reg. 681 (Apr. 2, 1938). The 1926 Act repealed the preceding statute, section 4075 of the Revised Statutes, leaving the United States without any rules for twelve years. Act of July 3, 1926, ch. 772, § 4, 44 Stat. 887, 888.

¹⁹² File copy of despatch from R.B. Shipley to the Am. Consul General, Valparaiso, Chile, (Sept. 13, 1929), File 032 Austin, C.J./4; CDF 1910–29; RG 59; NACP. A handwritten note from “R.S.”

applicant would then “be advised to ascertain the financial responsibility of her employer and . . . further advised not to accept such a position unless favorable advice is received from the Actors Equity Association.”¹⁹³ Notwithstanding her faith in the marketplace, Mrs. Shipley took no chances: she directed a special agent in New York to make informal inquiries about this particular theatrical venture.¹⁹⁴ Mr. Austin’s troupe never left port.¹⁹⁵

* * *

Mrs. Shipley acquired a well-deserved reputation for toughness. A municipal judge in California wrote to complain that clerks of court doubling as passport officials in Los Angeles were “rude, uncivil and so officious that you leave the department division in disgust and shame.”¹⁹⁶ He described the treatment he witnessed of a teacher who was refused service after driving twenty-five miles to make a passport application but reaching the office a few minutes after the four o’clock closing time, necessitating a return visit for an application that took just a few minutes to handle.¹⁹⁷ The Judge wrote:

Why on earth those men feel so secure and independent and discourteous is beyond me? They should realize that it isn’t everyone who can stop work at 4 o’clock in the afternoon, and it certainly would not be going out of the way to help a citizen when that citizen is a public servant and must travel 50 miles in order to have the attention of a Passport clerk for three minutes.¹⁹⁸

In reply to his letter, Mrs. Shipley conceded nothing, noting that “your

dated September 11 and appended to the file copy of this despatch states: “I think this is as far as we should go in the matter and it should safeguard any unsuspecting victims.” *Id.*

¹⁹³ Letter from Ira F. Hoyt, Passport Agent, U.S. Dep’t of State, to Ruth B. Shipley (Sept. 16, 1929), File 032 Austin, C.J./8; CDF 1910–29; RG 59; NACP.

¹⁹⁴ File Copy of Letter to R.C. Bannerman, Chief Special Agent, Dep’t of State, N.Y.C., from R.B. Shipley, (Sept. 11, 1929), File 032 Austin, C.J./2; CDF 1910–29; RG 59; NACP; File Copy of Letter to Ira Hoyt, Passport Agent, N.Y.C., from R.B. Shipley, (Sept. 11, 1929), File 032 Austin, C.J./3; CDF 1910–29; RG 59; NACP.

¹⁹⁵ Letter from R. Burr, Special Agent in Charge, N.Y., to R.C. Bannerman, Chief Special Agent, U.S. Dep’t of State (Sept. 18, 1929), File 032 Austin, C.J./6; CDF 1910–29; RG 59; NACP. This letter reported a reply from Austin himself, which gave assurances that “no tour with a ballet company or any other group will take place for the time being” due to unspecified unsatisfactory conditions in Latin America, and that any future venture would only be considered if producers in those countries were willing to “furnish a bond and deposit the money” in an American bank. *Id.* In other words, exactly what the consul general had suggested.

¹⁹⁶ Letter from Judge Martin DeVries to Cordell Hull, U.S. Sec’y of State (July 14, 1938), File 111.28 Los Angeles/39; CDF 1930–39; RG 59; NACP.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

letter is the first one of its kind that we have received.”¹⁹⁹ Mrs. Shipley then confronted the Judge’s criticism head on: “I do not think that I need to assure you that the hours of official work in the Clerk of Court’s office extend beyond four o’clock.”²⁰⁰ Mrs. Shipley asserted that clerical and other work would consume another hour, and ignored the details of the unhappy applicant.²⁰¹ It was only an incidental suggestion of the Judge to improve the efficiency of paying passport fees that attracted her attention. Mrs. Shipley thanked him for it and wrote to the offending clerk the same day, forwarding the Judge’s letter.²⁰² Mrs. Shipley let his primary complaints speak for themselves, choosing only to highlight the opportunity for greater efficiency.²⁰³

Mrs. Shipley took no guff on the eastern seaboard either. Responding to a husband’s complaint that a clerk in the New York Passport Agency treated his wife “as a criminal endeavoring to get into the country by unfair means rather than as an American citizen merely asking a courtesy of her own Government,”²⁰⁴ Mrs. Shipley riposted that “[t]he Agency at New York transacts an enormous amount of business with some of the most important people in the country and probably some of the most difficult and a complaint of discourtesy in that office is very rare indeed.”²⁰⁵ In any event, as Mrs. Shipley concluded her letter, no harm was done. The New York Agency was able and willing to process the application on July 15 “in ample time for your sailing on the 17th.”²⁰⁶ This was no idle claim. A year later, the Passport Agent in New York, Ira Hoyt, boasted in a letter to secure a larger budget that “[w]e have a record of having prepared an

¹⁹⁹ Letter from Ruth B. Shipley to Judge Martin DeVries (July 22, 1938), File 111.28 Los Angeles/40; CDF 1930–39; RG 59; NACP. This was not entirely true. Mrs. Shipley had known for years that the Los Angeles office drew “many complaints from our best people . . . [The deputy clerk] does not have the time to be as courteous as he would like to be.” Letter from W.A. Newcome, Passport Agent, U.S. Dep’t of State, to Ruth B. Shipley (Feb. 18, 1931), File 111.28 Los Angeles/24; CDF 1930–39; RG 59; NACP. In another letter to Mrs. Shipley, Newcome confessed that:

Los Angeles has always had exceedingly unsatisfactory facilities for making applications for passports. I refer to the inadequate office space and inadequate staff to properly handle applications in a business-like, courteous and efficient manner. From the complaints which have reached me from transportation people and applicants, the situation in this regard has been most unsatisfactory. Such people would relish being served by trained and courteous passport workers and in offices adapted to their needs.

Letter from W.A. Newcome, Passport Agent, U.S. Dep’t of State, to Ruth B. Shipley (Feb. 16, 1931), File 111.28 Los Angeles/23; CDF 1930–39; RG 59; NACP.

²⁰⁰ Letter from Ruth B. Shipley to Judge DeVries, *supra* note 199.

²⁰¹ *Id.*

²⁰² Letter from Ruth B. Shipley to R.S. Zimmerman, Clerk, U.S. Dist. Court, L.A. (July 22, 1938), File 111.28 Los Angeles/41; CDF 1930–39; RG 59; NACP.

²⁰³ *Id.*

²⁰⁴ Letter from S. Stanwood Menken to Henry L. Stimson, U.S. Sec’y of State (July 23, 1930), File 111.28 New York/63; CDF 1930–39; RG 59; NACP.

²⁰⁵ Letter from Ruth B. Shipley to S. Stanwood Menken (Aug. 2, 1930), File 111.28 New York/63; CDF 1930–39; RG 59; NACP.

²⁰⁶ *Id.*

application for passport, prepared the passport itself, and obtained telephonic authorization from the Department, all in ten minutes time.”²⁰⁷

The passport was important, combating fraud was a serious matter, and the books were filling up with statutes and rules for the acquisition and use of these travel documents. But they were not required by United States law for the departure or return of citizens to the country. Nor were they initially viewed as the unalloyed, super-secret tools of national security that they later became.²⁰⁸ At least they do not appear to have been viewed that way by the Chief of the Passport Division. Mrs. Shipley records her willingness to provide a visiting counselor from the Chinese Embassy copies of cancelled blank passports and the loan of her personal copy of the organization plan of her division, which described “the duties of the various sections and desks of the Division.”²⁰⁹ This must have seemed eminently reasonable to Mrs. Shipley, who also invited him to call on the Commissioner of Immigration and Naturalization, then at the Department of Labor, to quench his thirst for knowledge about American practices.²¹⁰

Further evidence of Mrs. Shipley’s capacity for tolerance can be found in the interpretation she gave to the oath requirement for receipt of passports. In a series of naturalization cases, later overruled, the Supreme Court had held that conscientious objectors who refused on religious grounds to swear an oath to defend the Constitution and laws of the United States “against all enemies, foreign and domestic,” could be denied citizenship. The Supreme Court interpreted this phrase to require an oath-bound obligation to take up arms if called to do so.²¹¹ Because the respondents in these cases refused to swear to such a duty, their naturalization petitions were declined. Some feared that these cases would lead to passport denials on the same grounds; after all, the passport had

²⁰⁷ Letter from Ira F. Hoyt, Passport Agent, U.S. Dep’t of State, to J.H. Mackey, Bureau of the Budget, U.S. Dep’t of Treasury (July 1, 1931), File 111.28 New York/71; CDF 1930–39; RG 59; NACP.

²⁰⁸ That is not to say that these regulations could not be put to such purpose, as demonstrated by the conviction of Earl Browder, head of the Communist Party of the United States from 1934 to 1945 and, by some scholarly accounts, a spymaster without equal for the Soviet Union. James G. Ryan, *Socialist Triumph as a Family Value: Earl Browder and Soviet Espionage*, 1 AM. COMMUNIST HIST. 125, 126 (2002). Browder had obtained passports in the past under various aliases but a charge of fraudulent procurement was time-barred. Browder was, therefore, convicted of *using* the fraudulently obtained passport. Browder unsuccessfully challenged the statutory interpretation of “use” since his conviction was for using his passport to prove his citizenship upon reentry to the United States, a use that was permitted but not required under the passport law at that time and, therefore, not the kind of use the statute was intended to reach. *Browder v. United States*, 312 U.S. 335, 337–38 (1941). This was seen by some as the equivalent of convicting Al Capone for tax evasion. *See Purge by Passport*, NATION, Feb. 3, 1940, at 117.

²⁰⁹ Memorandum to File from Ruth B. Shipley (July 13, 1936), File 111.28/247; CDF 1930–39; RG 59; NACP.

²¹⁰ *Id.*

²¹¹ *United States v. Bland*, 283 U.S. 636 (1931); *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Schwimmer*, 279 U.S. 644 (1929). The interpretation upheld in these cases was overturned in *Girouard v. United States*, 328 U.S. 61 (1946).

acquired its importance through war. Thus, when the executive secretary of the Women's International League, Dorothy Detzer, sought a passport to attend her organization's congress in Prague, she felt compelled to include with her application an admission that "I cannot, without a very distinct mental reservation, swear to support and defend the [C]onstitution if by the word 'defend' the bearing of arms is implied, or the support of war."²¹²

Mrs. Shipley appears to have used her discretion in peacetime, however, to follow department precedent that preceded these Supreme Court cases and allow modification of the oath. Responding to Miss Detzer, Mrs. Shipley wrote: "The department will consider the matter of issuing a passport to you upon your swearing to the statements contained in your application for a passport and taking the same oath of allegiance as was taken by Roger N. Baldwin in 1926."²¹³ This was a reference to the then-chairman of the ACLU, who was issued a passport after taking a modified oath in which he declared that he would "support the [C]onstitution of the United States and will, as far as my conscience will allow, defend it against all enemies, foreign and domestic."²¹⁴

Was Mrs. Shipley motivated by her own personal views as the daughter of a Methodist minister? Would she have used her discretion in the same way for adherents to minority or disfavored religious and political movements? Those questions were soon to be answered.

C. *World War II*

The winds of war were felt by Mrs. Shipley and her superiors, who prepared for its outbreak. It was not difficult to foresee that, as escape from Europe became more difficult, American passports would become more valuable and more prone to fabrication.²¹⁵ If the Passport Division was too liberal in issuing passports, trust that their holders were truly American citizens might diminish, as would their power to extricate Americans from dangerous places. In a memorandum to the Passport Division and the Division of European Affairs just days before the

²¹² Stanley I. Stuber, *Can Christians Obtain Passports?*, 49 CHRISTIAN CENTURY 1101, 1102 (1932).

²¹³ *Id.* It may be that Mrs. Shipley was not going out on much of a limb in this case. According to this periodical, her decision was defended by Assistant Secretary of State Wilbur Carr against an attack by H. Ralph Burton, a rising star in official Washington. Carr is reported to have responded to Burton by noting that the oath for a passport is not fixed by law, as was the case for the oath required for naturalization. *Id.*

²¹⁴ *Id.* at 1101.

²¹⁵ As in World War I, American passports were subject to fraud. See, e.g., Herbert Solow, *Stalin's American Passport Mill*, 47 AM. MERCURY 302, 303 (1939) ("In spy lingo passports are 'boots,' and American boots are especially valuable. The fact that we have a polyglot population makes it possible for spies of almost any nationality to pass as Americans throughout the world without exciting suspicion. The United States, with mild competition from Canada, is therefore bootmaker to international spydom.").

outbreak of war, Assistant Secretary of State George Messersmith warned:

Should hostilities break out, or even should these disturbed conditions continue further without the actual outbreak of hostilities, it is all the more important that the value of the American passport should be safeguarded in every possible way so that it may serve its purpose for bona fide American citizens and that our passport may not be abused.²¹⁶

This was, in his words, “no time for this Government in any way to relax its procedure here or in our establishments abroad with respect to the issue of passports.”²¹⁷

As described in a summary of Mrs. Shipley’s office prepared in support of a recommendation that she receive the Medal for Merit:

Prior to entry of the United States into World War II, Mrs. Shipley directed all outstanding passports be voided and be replaced on a world-wide basis with a new type of passport which was infinitely more difficult to alter or counterfeit. The safeguards surrounding the issuance of these replacement passports insured their being issued to bona fide American citizens who were the rightful holders of old-type passports.²¹⁸

Mrs. Shipley’s redesigned passports were quite successful at reducing the rate of counterfeiting, which Mrs. Shipley put at less than one-half of one percent in 1939.²¹⁹ In her words, these passports were “duplicated successfully only about as often as money is, and the rate of convictions for such offenses is gratifyingly high.”²²⁰ One solution was the distribution to each diplomatic mission and consular office of equipment to take fingerprints. This early use of biometrics, however, was not to take the fingerprints of travelers for verification by the Department, but to place the

²¹⁶ Memorandum from G.S. Messersmith, Assistant U.S. Sec’y of State, to J.P. Moffat and J.J. Scanlan (Aug. 28, 1939), File 138 Emergency Program/9; CDF 1930–39; RG 59; NACP. Messersmith warned in particular of

many thousands of persons in Europe, particularly in Poland and in the states of Southeastern Europe, who have a tenuous claim to American citizenship. . . . It is, I believe, not going too far to say that the great majority of those who will be applying for passports are persons who have not been carrying out any of the responsibilities of citizenship in this country, have had no intention of doing so and who would only be endeavoring to come to this country for purely selfish reasons.

Id. Expecting that the “presumption of expatriation” would ultimately be raised against these desperate people, Messersmith expressed his view that the United States “would not be particularly concerned in making available transportation facilities for them.” *Id.*

²¹⁷ *Id.*

²¹⁸ Dulles Memorandum, *supra* note 6.

²¹⁹ McLaughlin, *supra* note 49.

²²⁰ *Id.*

thumb or fingerprint of a Foreign Service officer on each validated passport!²²¹

The series of proclamations and regulations promulgated in the first few days of September 1939 created what became known at the State Department as the “Emergency Program.” The regulations prohibited travel on vessels flagged to belligerent nations and, more expansively, required passports intended for use in Europe to be validated by the Department. When citizens returned to the United States, their passports were surrendered to immigration authorities for return to the State Department. No exception to these regulations for its own diplomatic and special passports, at least officially, was tolerated by the Department.²²²

Pressure from business interests led the Department to use a light touch in validating passports for business travelers.²²³ In a telegram dated September 14, 1939, Joseph Kennedy, Ambassador to the United Kingdom, warned of the “[c]onsiderable uncertainty” of American businessmen in Britain who “complain that their situation is being considered like that of the casual traveller [sic].”²²⁴ Secretary Hull replied by telegram the next day:

Department has no desire or intention to hamper legitimate American business with European countries but encourages it. New regulations merely require commercial travellers [sic] to submit documentary evidence showing necessity of traveling in European country for substantial business

²²¹ Memorandum from G.S. Messersmith, Assistant U.S. Sec’y of State, to Am. Diplomatic and Consular Officers in Europe (Oct. 6, 1939), File 138/4085 A; CDF 1930–39; RG 59; NACP; Memorandum from G.S. Messersmith, Assistant U.S. Sec’y of State, to Am. Diplomatic and Consular Officers in Europe (Nov. 30, 1939), File 120.3/523B; CDF 1930–39; RG 59; NACP.

²²² In a telegram reply to inquiries from the U.S. Embassy in Sweden (which appears to have been signed by Secretary Hull and initialed by Ruth Shipley), the American Consul in Stockholm was told: “Diplomatic and special passports must be limited and may be validated for travel in European countries where reasonably required for official purposes. They should, however, conform in this latter respect to general practice with respect other passports.” Telegram from U.S. Dep’t of State to Am. Consul in Stockholm, Sweden (Dec. 8, 1939), File 138 Emergency Program/404 MM; Passport Office Decimal File 1910–49; RG 59; NACP. Mrs. Shipley sent a similar reply to inquiries from the American Consul in Mexico concerning border crossings by government officials. Letter from Ruth B. Shipley to George Shaw, Am. Consular Officer in Charge, Mexico (Oct. 11, 1939), File 138 Emergency Program/223; Passport Office Decimal File 1910–49; RG 59; NACP (“[Y]ou should advise all officers and employees who have diplomatic or special passports that they should surrender such documents to the immigration authorities upon their arrival in this country and that, when communicating with this Department regarding the return of such documents, they should furnish complete information regarding their proposed travel. The Department assumes that officers and employees of the Consulates along the border, who reside in the United States and cross the border daily to their offices, do not need to exhibit their passports as evidence of citizenship and identification.”).

²²³ Telegram from Joseph Kennedy, Ambassador to the U.K., to Cordell Hull, U.S. Sec’y of State (Sept. 14, 1939), File 138 Emergency Program/98; Passport Office Decimal File 1910–49; RG 59; NACP.

²²⁴ *Id.*

purpose. Since issue of new regulations passports have been issued promptly for this purpose. Department, of course, does not wish to encourage unnecessary travel on the high seas. Regulations with regard commercial travellers [sic] similar those in effect during our neutrality last war. You may assure American business men, principally those who are assigned permanently to Great Britain, that statement that their situation is considered by Department like that of the casual traveller [sic] is incorrect.²²⁵

Others were not so lucky. The same day that the Department received the anxious telegram from the American Embassy in London, Mrs. Shipley responded to a telegram received from a representative of parents of about five hundred medical students unable “to return to Scotland to finish their studies,” in some cases in their final year of training.²²⁶ The parents complained that their sons had been refused passports “and though educated will be thrown on a country already glutted with unskilled labor.”²²⁷ Mrs. Shipley was unmoved: “The Department has given very careful and sympathetic consideration to this matter but has concluded that the situation is so grave and the hazards involved so great as to render it inadvisable for the students to go abroad at this time.”²²⁸

When the Department paused to assess its work over the course of the previous two hectic months, Mrs. Shipley expressed overall satisfaction: “I think the Department has handled an extremely difficult situation very well and the pressure from certain individuals for special treatment is just one of those things that is bound to occur as long as Americans are what they are.”²²⁹ All this work naturally augmented the importance of the Passport Division. By Christmas 1939, the Passport Division had a staff of eighty-two individuals.²³⁰

This assessment, however, exposed the opposing forces operating on the Passport Division. The Emergency Program was just that—an operation quickly established to deal with a genuine emergency. The State Department had no desire to see American neutrality undone by harm to Americans living and working in Europe. The *Lusitania* was a fresh

²²⁵ Telegram from Cordell Hull, U.S. Sec’y of State, to Joseph Kennedy, Ambassador to the U.K. (Sept. 15, 1939), File 138 Emergency Program/98; Passport Office Decimal File 1910–49; RG 59; NACP.

²²⁶ Letter from Ruth B. Shipley to Dr. Harry Gilbert (Sept. 14, 1939), File 138 Emergency Program/77 MM; Passport Office Decimal File 1910–49; RG 59; NACP.

²²⁷ Telegram from Dr. Harry Gilbert to Cordell Hull, U.S. Sec’y of State (Sept. 13, 1939), File 138 Emergency Program/77 MM; Passport Office Decimal File 1910–49; RG 59; NACP.

²²⁸ Letter from Ruth B. Shipley to Dr. Harry Gilbert, *supra* note 226.

²²⁹ Memorandum from Ruth B. Shipley to George Messersmith, Assistant U.S. Sec’y of State (Nov. 22, 1939), File 138 E.P./364; Passport Office Decimal File 1910–49; RG 59; NACP.

²³⁰ McLaughlin, *supra* note 49.

memory. But if the Department prohibited travel completely, it would feel the backlash of American business interests in Europe. Assistant Secretary of State George Messersmith noted in a memorandum to Mrs. Shipley the razor's edge on which the Emergency Program operated:

It is quite obvious that we must continue to validate, for instance, the passports of American citizens who desire to proceed even to belligerent countries on important business or for residence there in connection with their business. I do not see any reason for changing our present practice of not permitting the wife of such a businessman who is now in this country to proceed with him on a trip which he is making. . . .

On the other hand, there are American businessmen who have been established abroad for a number of years and whose residence abroad is necessary for the firms which they represent or for the business which they conduct on their own account. It seems to me that the wife of such an American businessman should be permitted to leave with him and, if in this country, to proceed there even though it may be in belligerent territory. She would, of course, have to be informed on the validation of the passport that she would be proceeding on her own risk, that we might not be able to accord certain protection under given circumstances, and that we could not assume any responsibility for evacuation, et cetera. I know that such a declaration would not entirely relieve this Government of its obligations, but, on the other hand, I believe that if it were known in this country that such persons had proceeded at their own risk this Department would be absolved of any blame or responsibility should harm come to them.²³¹

The situation was even more dire for American women married to citizens of belligerent countries. Responding to an inquiry from the American consul in Calcutta, Secretary Hull ordered that the passports of such women not be endorsed for travel into combat areas "except in cases of imperative necessity such as critical illness or other impelling cause," and that American women who traveled to such areas on foreign passports rendered themselves liable under the Neutrality Act.²³²

With the passage of the 1941 amendments to the Travel Control Act, Mrs. Shipley's office acquired still more power. The purpose of the

²³¹ Memorandum from George S. Messersmith, Assistant U.S. Sec'y of State, to Ruth B. Shipley (Nov. 21, 1939), File 138 E.P./364 LS; Passport Office Decimal File 1910-49; RG 59; NACP.

²³² Confidential Cable from Cordell Hull, U.S. Sec'y of State, to Am. Consul in Calcutta, India (Nov. 27, 1939), File 138 Emergency Program/368 MM; CDF 1930-39; RG 59; NACP.

amendments was to limit travel to essential persons only, as determined by the State Department. As an internal memorandum prepared to recommend her for the Medal for Merit made clear, much of this power remained unshared in the person of Mrs. Shipley herself:

This placed tremendous responsibility on the Chief of the Division. While many applications could be refused immediately on the ground that the purpose of the travel was not urgent or essential, a goodly proportion of the applicants had to be cleared both as to security and as to purpose. . . . The direct contacts with representatives of the agencies, branches of the Armed Services, and foreign missions, which were necessary in order to develop procedures, policy, reconcile differences and exchange confidential information, were made by Mrs. Shipley with consummate skill, tact and diplomacy. She also personally passed upon a great many borderline cases daily. . . . She handled personally the cases in which great pressure was brought to bear upon the Department by influential persons or organizations on behalf of person who desired to travel abroad for personal reasons and who had been able to convince their sponsors of the validity of pseudo claims that their travel would be in the interests of the United States or some other country.²³³

By the end of 1942, Mrs. Shipley not only controlled the issue of passports but was also vested with authority to take action connected with official and private requests for assistance in obtaining visas on their passports.²³⁴

Administrative records from this period show how closely involved Mrs. Shipley was in the work of her office, from the most extraordinary to the most routine tasks. In March 1944, Mrs. Shipley was dispatched to New York to welcome into port the *S.S. Gripsholm* and repatriate American citizens returning home as part of an inter-governmental exchange of nationals with Nazi Germany.²³⁵ In April, an American Catholic priest, Stanislaus Orlemanski, caused a national scandal by traveling to Moscow for an unprecedented private meeting with Joseph

²³³ Dulles Memorandum, *supra* note 6.

²³⁴ State Dep't Order No. 1118, U.S. Dep't of State, Dec. 17, 1942, File 111.28/279 (cross-reference file note); CDF 1940-44; RG 59; NACP. A State Department reorganization at the end of 1943 created the Office of Controls, which was composed of Mrs. Shipley's Passport Division as well as the Visa Division, Special War Problems Division, and Division of Foreign Activity Correlation. This appeared to reflect recognition for what these units did, rather than to shift any power away from Mrs. Shipley. Organization of the Department of State, State Dep't Order No. 1218, U.S. Dep't of State, Jan. 15, 1944, File 111.017/711; CDF 1940-44; RG 59; NACP.

²³⁵ Travel Order No. 4-2575 from G. Howland Shaw, Assistant U.S. Sec'y of State, to Ruth B. Shipley (Mar. 10, 1944), File 111.661/IC; CDF 1940-44; RG 59; NACP.

Stalin to plead for a free and democratic postwar Poland.²³⁶ President Roosevelt was forced to defend the decision to issue Orlemanski an American passport at a press conference. His defense was Mrs. Shipley. President Roosevelt “implied that the action was taken in ordinary course after proper consideration solely by Mrs. Ruth B. Shipley, chief of the Passport Division of the State Department.”²³⁷ According to the *New York Times* coverage of the press conference:

Mr. Roosevelt made this point by remarking that Mrs. Shipley, veteran chief of the division, has long been known for the care with which she has had applications investigated and for issuing passports only when there were good and sufficient reasons. When anyone has got by Mrs. Shipley, the President emphasized, one can be sure the law has been lived up to. This means, he added, that in this case she must have been satisfied with the reasons the Father Orlemanski gave for requesting a passport.²³⁸

During the summer and fall of 1944, the Passport Division hovered between 200 and 235 personnel. A memorandum sent to the Acting Chief of the Division of Departmental Personnel, Robert Ward, noted the high level of attrition at the Passport Division with frustration: “I went directly to Mrs. Shipley in PD and told her that, in view of the existing shortage of qualified personnel, it would never be possible for us to fill her positions if this separation rate continued as it had in the past three months.”²³⁹ Whether the workload was oppressive or there were other reasons for resignations, the rate was declared “inexcusable.”²⁴⁰ Mrs. Shipley worked as hard as anyone on her staff. Records for a one-month period in 1944 tally over \$1,000 in long-distance calls between the Passport Division and customs collectors at various ports to verify that seamen had applied for passports yet issued and were, therefore, authorized to sail under new

²³⁶ *U.S. Polish Groups Protest to Hull*, N.Y. TIMES, May 6, 1944, at 7.

²³⁷ *President Clarifies Priest's Passport*, N.Y. TIMES, May 10, 1944, at 7. *Newsweek* later reported that the President had been less than candid:

Last month Premier Stalin sent a personal letter to President Roosevelt requesting that passports for a visit to Russia be issued to Father Orlemanski and Prof. Oscar Lange of the University of Chicago. . . . After lengthy discussions within the State Department and with the White House, it was finally agreed to grant Stalin's request but to inform him at the same time that should any publicity be given to the visit by the Russians, the American Government would be forced to declare that the men involved were acting in a private capacity and were in no way connected with the government.

Father Orlemanski: The Inside Story, NEWSWEEK, May 22, 1944, at 30.

²³⁸ *President Clarifies Priest's Passport*, *supra* note 237.

²³⁹ Office Memorandum from Mr. Nidiffer, Div. of Departmental Pers., to Robert Ward, Acting Chief of Div. of Departmental Pers. (Dec. 22, 1944), File FW 111.661/11-2344 CS/V; CDF 1940-44; RG 59; NACP.

²⁴⁰ *Id.*

security regulations.²⁴¹ In 2009 dollars, that was a one-month telephone bill exceeding \$13,000.²⁴² In the vast majority of these calls, Mrs. Shipley held the telephone receiver.²⁴³

The Emergency Program aimed to protect and return citizens trapped in Europe at the start of the war and to prevent the unnecessary travel of citizens to or through belligerent countries. Wartime acts of Congress augmented and regularized that emergency authority. The end of the war brought little respite from Mrs. Shipley's iron control. Even the powerful Eleanor Dulles, whose personal accomplishments and family connections made her a force to be reckoned with in diplomatic Washington, was denied passports for her family to join her in post-war Austria to work for the U.S. military delegation there in 1945. Mrs. Shipley felt that post-war Europe was no place for children. As Leonard Mosley reports the exchange that followed:

The formidable Mrs. Shipley looked at her as if she was mad and said: "Nothing doing, Mrs. Dulles. You can't take the children with you."

"I'm not going without my children," Eleanor said.

"Then you're not going," said Mrs. Shipley.²⁴⁴

It took three months of pressure by the powerful Dulles clan, and the personal offers of both the British and Swiss ambassadors to provide visas on their official stationery (Mrs. Shipley had confiscated Mrs. Dulles's passport), before Mrs. Shipley accepted the inevitable.²⁴⁵ This was one of few recorded instances of successful opposition to Mrs. Shipley. More often, the hapless traveler found Mrs. Shipley "completely immovable . . . once a decision ha[d] been reached . . . [W]hen she has once said 'no,' the disappointed applicant might as well save himself further conversation."²⁴⁶

D. *The Cold War*

Demand for passports began to rise with the end of the war. In 1947, the Passport Division issued 202,424 passports, second only to a pre-war

²⁴¹ Memorandum from Passport Div., to Div. of Admin. Mgmt. (Nov. 23, 1944), File 111.661/11-2344; CDF 1940-44; RG 59; NACP.

²⁴² This figure is calculated using the Consumer Price Index and an average annual inflation rate. See *Inflation Calculator*, DOLLARTIMES, <http://dollartimes.com/calculators/inflation.htm>.

²⁴³ Dep't of State Record and Certification of Long Distance Calls Made, Passport Div., Aug. 11-Sept. 10, 1944, *attached to* Memorandum from Passport Div., *supra* note 241.

²⁴⁴ LEONARD MOSLEY, *DULLES: A BIOGRAPHY OF ELEANOR, ALLEN, AND JOHN FOSTER DULLES AND THEIR FAMILY NETWORK* 205 (1978). Eleanor Dulles did not mince words about her encounter with Mrs. Shipley: "'She was a tartar and a despot. It was a harrowing experience.'" *Id.*

²⁴⁵ *Id.*

²⁴⁶ Hinton, *supra* note 5.

peak in 1930.²⁴⁷ Still, Mrs. Shipley maintained her control over travel. In an article in the *New York Times* about her office, in which she was the only person quoted or referenced by name, a delicate version of her office's power was publicized:

Difficulty is experienced by those who seek to visit the Old World. Some hopefuls tell Mrs. Ruth B. Shipley, chief of the Passport Division, who has controlled American civilian world travel during the war, that they'd like to go to Europe to "see what it looks like." They are gently discouraged and are warned not to head in that direction unless it is necessary.²⁴⁸

About six weeks prior to this article, the *New York Times* had reported a starker statement of travel controls:

[T]he Passport Division is still working under the regularly provided wartime system of controls, with limited travel allowed only in the instances which will contribute to the national interests of the United States or the country visited and under certain conditions for business persons whose presence in the country to which they are going will contribute to the restoration of trade.²⁴⁹

Although the war's end released this pent-up demand, the fear of communism that surged through the United States in the 1950s dramatically affected international travel. A population used to wartime restrictions on travel was slow to react to new controls that had the same effect on travel, if based on a very different perception of threat and differently applied legal premises. A few examples suggest a pattern.

In June 1950, the State Department issued a "stop notice" at all U.S. ports to prevent the international travel of the entertainer and civil rights activist Paul Robeson.²⁵⁰ He was denied a new passport on the ground that his foreign travel would not be "in the best interests" of the United States.²⁵¹ The Department of State later elaborated that "if Robeson spoke abroad against colonialism he would be a meddler in matters within the exclusive jurisdiction of the Secretary of State."²⁵² When Robeson, having

²⁴⁷ *In the Field of Travel*, *supra* note 165.

²⁴⁸ George H. Copeland, *Passport Demand Is Growing*, N.Y. TIMES, Oct. 14, 1945, at X8.

²⁴⁹ *Passport Curbs Will Stay a While*, N.Y. TIMES, Aug. 25, 1945, at 11 (reporting some exceptions for hardship cases).

²⁵⁰ MARTIN BAUML DUBERMAN, PAUL ROBESON 388 (1988).

²⁵¹ Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171, 177 (1952); *Robeson Loses Passport Suit*, N.Y. TIMES, Apr. 13, 1951, at 12.

²⁵² Leon Hurwitz, *Judicial Control over Passport Policy*, 20 CLEV. ST. L. REV. 271, 274 (1971). That explanation was in response to Robeson's lawsuit to obtain a new passport. See DUBERMAN, *supra* note 250, at 389. The complaint was dismissed. *Robeson v. Acheson*, 198 F.2d 985, 987 (1952).

refused to sign an affidavit that he was not a Communist, challenged the denial of his passport in federal court, the United States Attorney detailed the government's evidence to prohibit Robeson under the Internal Security Act from traveling abroad, including Robeson's opposition to anti-subversive legislation, criticism of racial segregation, his penchant for singing Communist anthems, and that

in April, 1949—see if this sounds like a loyal American citizen—he delivered a speech before the Communist-sponsored World Peace Congress in Paris in which he stated that the American Negroes would never fight against the Soviet Union. A cruel, criminal libel against the members of his own race.²⁵³

In 1952, the eminent chemist Linus Pauling was denied a passport to attend scientific meetings at the Royal Society of London and receive an honorary degree in Toulouse.²⁵⁴ The State Department rejected his application, stating only that the “proposed travel would not be in the best interests of the United States.”²⁵⁵ Permission to travel was granted only following an angry speech by Senator Wayne Morse, international media coverage, and Pauling's agreement to sign a statement that he was not and never had been a Communist.²⁵⁶ This routine continued for two more years, with passports granted—if at all—at the last minute, validated only for limited travel for limited time periods and only after Pauling signed repeat affidavits that he was not a Communist.²⁵⁷ After dozens of letters, affidavits, and personal visits, Mrs. Shipley advised Pauling that his applications were denied because the Department had concluded, based on evidence never shared with Pauling, that he was “a concealed member of the Communist Party.”²⁵⁸ Only after Pauling won the 1954 Nobel Prize for Chemistry did the State Department grant a normal, unrestricted

Professor Alan Rogers attributes a very similar quotation to Mrs. Shipley herself. Alan Rogers, *Passports and Politics: The Courts and the Cold War*, 47 *HISTORIAN* 497, 499 (1985) (“Shipley told Paul Robeson that when he spoke against colonialism, he was ‘meddling in matters within the exclusive jurisdiction of the secretary of state.’”).

²⁵³ *Case of Paul Robeson—Why Some Americans Can't Get Passports*, U.S. NEWS & WORLD REP., Aug. 26, 1955, at 79, 79 (reprinting extracts from oral argument before the U.S. District Court for the District of Columbia at an August 16, 1955 hearing on Robeson's motion seeking injunctive relief in the form of an order compelling issuance of a passport).

²⁵⁴ Dr. Pauling described his efforts to obtain a passport on this and subsequent occasions in a 1977 interview for the PBS television program NOVA. See *Linus Pauling and the Race for DNA: A Documentary History*, OR. STATE UNIV. (1977), <http://osulibrary.oregonstate.edu/specialcollections/coll/pauling/dna/audio/1977v.66.html>.

²⁵⁵ Linus Pauling, *My Efforts to Obtain a Passport*, BULL. ATOMIC SCIENTISTS, Oct. 1952, at 253, 253. The denial preceded Pauling's Nobel Prizes in Chemistry (1954) and Peace (1962).

²⁵⁶ *Id.* at 254.

²⁵⁷ Richard L. Strout, *Win a Prize—Get a Passport*, NEW REPUBLIC, Nov. 28, 1955, at 11, 11–12.

²⁵⁸ *Id.* at 13.

passport.²⁵⁹

In 1954, the playwright Arthur Miller was denied a passport to attend the Brussels opening of *The Crucible* because such travel “would not be in the national interest.”²⁶⁰ Another passport application, pending while Miller was called to testify before the House Un-American Affairs Committee in 1956, was held up by “derogatory information” leading the State Department to request “an affidavit concerning past or present membership in the Communist party.”²⁶¹ Miller was later convicted of contempt of Congress during this hearing ostensibly called to examine “the fraudulent procurement and misuse of American passports by persons in the service of the Communist conspiracy.”²⁶²

To these vignettes could be added the travel stories of many other prominent and unknown Americans alike. The well-known Protestant pacifist J. Henry Carpenter was denied a passport to Japan in 1952 because, according to Mrs. Shipley, “his presence in the Far East is considered undesirable at this time.”²⁶³ The international communist conspiracy against the West quickly emerged as the cause of the decade. Travel controls continued to be seen as an essential weapon in the fight against this conspiracy. In the fall of 1959, Assistant Secretary of State William Macomber wrote to Senator John McClellan, Chairman of the Committee on Government Operations, that the State Department still believed “that the most critical problem in the passport field is the lack of legislative authority in the Secretary of State to deny passports to dangerous participants in the international Communist conspiracy.”²⁶⁴

Mrs. Shipley was perceived to be far ahead of the curve—she did not wait for legislative permission to transform her wartime powers into Cold War controls. As an internal memorandum prepared to support a recommendation that she receive the Medal for Merit summarized her views:

²⁵⁹ *Id.*

²⁶⁰ MARTIN GOTTFRIED, ARTHUR MILLER: HIS LIFE AND WORK 236 (2003); *Playwright Arthur Miller Refused Visa for a Visit to Brussels To See His Play*, N.Y. TIMES, Mar. 31, 1954, at 16. “When the Belgian audience cried out ‘author, author!’” on opening night, it was the American Ambassador who appeared onstage. ENOCH BRATER, ARTHUR MILLER: A PLAYWRIGHT’S LIFE AND WORKS 66–67 (2005).

²⁶¹ Allen Drury, *Arthur Miller Admits Helping Communist-Front Groups in ‘40’s*, N.Y. TIMES, June 22, 1956, at 1. The link between application and testimony may have been quite direct. Martin Gottfried argues that Miller’s application “provided HUAC with an excuse to summon him to hearings. These were designed just for him and a few select others on ‘The Unauthorized Use of United States Passports.’” GOTTFRIED, *supra* note 260, at 286.

²⁶² *Investigation of the Unauthorized Use of United States Passports—Part 1: Hearing Before the H. Comm. on Un-Am. Activities*, 84th Cong. 4303 (1956) (statement of Rep. Francis E. Walter, Chairman). Miller’s conviction was later unanimously reversed on procedural grounds. *United States v. Miller*, 152 F. Supp. 781 (D.D.C. 1957), *rev’d en banc*, 259 F.2d 187 (D.C. Cir. 1958).

²⁶³ Editorial, *Presbytery Discusses Passport Denial*, 69 CHRISTIAN CENTURY 867, 869 (1952).

²⁶⁴ Letter from William B. Macomber, Jr., Assistant Sec’y of State, to Sen. John L. McClellan (Aug. 21, 1959), File 110.4-PPT/6-859; CDF 1955–59; RG 59; NACP.

Long before the top Communists in the United States were convicted of conspiracy in the trial before Judge Medina and the enactment of the Internal Security Act of 1950, Mrs. Shipley was alert to the dangers inherent in the travel abroad of Communists and other subversives and steadfastly adhered to the policy of refusing a passport when evidence and information respecting prior actions of the applicant indicated that the proposed travel would be inimical to the best interests of the United States. She has never deviated from this position and after the convictions in the New York trial were sustained by the Court of Appeals, and the Congress set forth its findings concerning the Communist organization in the United States in the Internal Security Act of 1950, she gained acceptance of her view that, in keeping with the spirit of the Act, passports should be refused to Communists as such.²⁶⁵

The Passport Division was located at this time in the Winder Building, across the street from the Old Executive Office Building and the White House.²⁶⁶ Mrs. Shipley kept close watch on passport activities abroad and her office was well-staffed to confront all of these issues at home. Autumn 1950 opened with Mrs. Shipley on a seven-nation European tour of fifteen American diplomatic and consular offices to “review and seek advice on citizenship and passport problems.”²⁶⁷ By 1951, her office occupied all six floors of the Winder Building.²⁶⁸ By 1953, she administered an office in Washington, D.C. that employed approximately 225 people.²⁶⁹ In addition, satellite offices in the form of passport agencies had been established in New York, San Francisco, Chicago, Boston, and New Orleans and almost 300 foreign service posts worldwide completed a finely wrought web of travel controls on the center of which sat Mrs. Shipley.²⁷⁰ Some members of Congress complained that, at the apparent direction of Mrs. Shipley, Passport Division clerks refused to give their names to Capitol Hill staffers

²⁶⁵ Dulles Memorandum, *supra* note 6. The memorandum refers to the case brought against American communists under the Smith Act, which made it unlawful to knowingly teach the duty of violently overthrowing the United States Government. The case was tried by Judge Harold Medina and the defendants were convicted of engaging in a conspiracy to advocate such views. The convictions were ultimately affirmed by the Supreme Court in *Dennis v. United States*, 341 U.S. 494 (1951).

²⁶⁶ Copeland, *supra* note 248.

²⁶⁷ Outgoing Airgram from Dean Acheson, U.S. Sec’y of State, to Certain Am. Diplomatic and Consular Officers (Aug. 16, 1950), File 110.4-PD/8-1650; CDF 1950–54; RG 59; NACP.

²⁶⁸ Visson, *supra* note 127, at 74.

²⁶⁹ Dulles Memorandum, *supra* note 6.

²⁷⁰ *Id.*

who telephoned for passport information for constituents.²⁷¹ Much more common than criticism, however, were the letters of praise that flowed into Foggy Bottom from Capitol Hill.²⁷² Mrs. Shipley had powerful supporters, although one suspects that this may have derived as much from fear as from love.²⁷³

A blanket refusal to issue a passport was not the only arrow in Mrs. Shipley's quiver.²⁷⁴ Passport restrictions could also be used in a more nuanced way. As one contemporary State Department official observed: "The passport is an ideal device for the control of the movements of American citizens."²⁷⁵ On the basis of the Passport Act of 1926, the Secretary of State imposed travel restrictions in conformity with American foreign policy.²⁷⁶ The act limited the validity of a passport to two years, with a shorter period possible at the Secretary's discretion.²⁷⁷ Alternatively, limits could be placed on the use of the passport in particular

²⁷¹ Memorandum from Thurston B. Morton, Assistant Sec'y for Cong. Relations, to Donald B. Lorie, Undersec'y of State for Admin. (Apr. 9, 1953), File 110.4 PD/4-953; CDF 1950-54; RG 59; NACP.

²⁷² Personal Letter from Rep. John McCormack to John Foster Dulles, U.S. Sec'y of State (Dec. 28, 1954), File 110.4-PD/1-455 CS/S; CDF 1950-54; RG 59; NACP (original letter at File 110.4-PD/12-2854 CS/S; CDF 1955-59; RG 59; NACP). Rep. McCormack, the Democratic Whip, wrote:

All I can say, Mr. Secretary, is that during my many years in Washington I have contacted Mrs. Shipley on many occasions. She is one of the most courteous ladies I have ever talked to, and she is one of the most cooperative Government officials I have ever contacted during my service in the Congress.

Id.

²⁷³ Congressman McCormack's personal letter was sent in order to forward a copy of a letter that Secretary Dulles had already received, from a friend of the congressman, Lawrence Valenstein, the President of Grey Advertising in New York City. *Id.* That letter seems truly to have been penned out of love, not fear. It begins by asking the Secretary to "[p]ermit me to tell you a beautiful Thanksgiving Day story" in which Mrs. Shipley played the starring role in clearing bureaucratic hurdles to issue travel documents for a doctor to reach a sick relative in the Philippines. Copy of Letter from Lawrence Valenstein to John Foster Dulles, U.S. Sec'y of State (Dec. 1, 1954), File 110.4-PD/12-154; CDF 1950-54; RG 59; NACP. "One day, I hope to be able to say hello to Mrs. Shipley. I just want to say, 'Thank you.' She probably is not even interested in the mildest form of appreciation. She was commanded by her inner fine instincts." *Id.*

²⁷⁴ Mrs. Shipley was quite aware of her power, as she ominously suggested in a sharp, public exchange with Senator McCarran:

The bulk of the American traveling public are reputable, law-abiding citizens and are probably above the average in education, intelligence, and stability. The Department does not feel in view of its experience over many years that it is warranted in treating this large group of citizens as potentially subversive by establishing *at this time* procedures which would delay and hinder *bona fide* travelers in an effort to detect cases such as those mentioned by the Subcommittee.

Answer to Attack on Passport Operations, 26 DEP'T ST. BULL., 1952, at 110, 111 (first emphasis added).

²⁷⁵ Stuart, *supra* note 5, at 1067.

²⁷⁶ Memorandum from Mr. Yingling to Jack B. Tate, Deputy Legal Advisor (July 24, 1951) [hereinafter Yingling Memorandum], File 110.4 PD/7-2451; CDF 1950-54; RG 59; NACP; *see also* *Zemel v. Rusk*, 381 U.S. 1, 8 (1965) (pointing out that in the decade prior to the passage of the Passport Act, the Executive had imposed both peacetime and wartime travel restrictions).

²⁷⁷ Act of July 3, 1926, ch. 772, § 2, 44 Stat. 887 (1926); *see also* Stuart, *supra* note 5, at 1069. Short time limits were a further control "to channelize the travel of persons proceeding abroad and to review their cases at regular intervals." *Id.*

places or for particular itineraries.²⁷⁸ Beginning in 1938, President Roosevelt issued an executive order expanding the discretion of the Secretary of State to impose area restrictions and expressly granting the power to cancel or withdraw passports used in defiance of those restrictions.²⁷⁹ The executive regulations derived from that statutory authorization were broad in scope:

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.²⁸⁰

In 1952, the State Department began stamping all passports as not valid for travel in countries behind the Iron Curtain, rendering them useless for such a purpose unless specifically endorsed by the Department.²⁸¹ Travel to some countries quite literally required the government's imprimatur.

This was no small power, particularly as it concerned Americans who wished to live abroad.²⁸² Mrs. Shipley did not hesitate to use it. She tolerated no opposition when she felt that her resolution of a complaint or issue was satisfactory. A clergyman from Detroit wrote an angry letter to Under Secretary of State Herbert Hoover, Jr. to complain that the Passport Division, "supposedly directed by Mrs. R. B. Shipley," had ignored his written requests for a copy of an old passport application, in his view "MOST ABOMINABLE [sic] treatment to give any respected American citizen."²⁸³ Threatening to take the matter up the chain of command to President Eisenhower himself, if necessary, the complainant asked for action.

Mrs. Shipley was satisfied that her office had accomplished the task as expeditiously as possible considering that the search for older records required additional time. In an internal memorandum to which she attached her correspondence with the man of the cloth, Mrs. Shipley summarized her view of the matter: "Dr. Gordon has received excellent service and I think for a clergyman, and I say it as a daughter and

²⁷⁸ Stuart, *supra* note 5, at 1069 (describing wartime restrictions on passports "for use to specific countries through which the bearer would travel en route to his ultimate destination").

²⁷⁹ Exec. Order No. 7856, 3 Fed. Reg. 681, 687 (Mar. 31, 1938) *codified in* 22 C.F.R. § 51.75 (1949).

²⁸⁰ *Id.*; see also Yingling Memorandum, *supra* note 276 (quoting 22 C.F.R. § 51.75).

²⁸¹ *Procedure for Travel in Iron Curtain Countries*, 26 DEP'T ST. BULL., 1952, at 736, 736.

²⁸² Visson, *supra* note 127, at 73 ("In addition to issuing or renewing passports—a record of 299,665 in 1950—she has under her jurisdiction some 430,000 Americans residing abroad.").

²⁸³ Letter from Dr. H. Truman Gordon to Herbert Hoover, Jr., Undersec'y, U.S. Dep't of State (Oct. 20, 1954), File 110.4-PD/10-2054 CS/W; CDF 1950-54; RG 59; NACP.

granddaughter of clergymen, he shows very little Christian spirit.”²⁸⁴

Oddly enough, the State Department initially kept “[n]o particular record . . . as to how often, or on how many different grounds, passports have been refused to citizens who met all the usual requirements.”²⁸⁵ But a memorandum responding to a request for information from the State Department’s Deputy Legal Adviser summarized the practice:

It may be stated generally, however, that from time to time passports are refused under the discretionary authority of the Secretary of State to persons in the following categories: persons whose past actions raise doubts as to their loyalty; persons suspected of an intention to commit a crime or otherwise to bring grave discredit upon the United States as, for example, international swindlers and gamblers; persons engaged in the white slave traffic; opium smugglers; confidence men; international spies; and other persons whose habitual practices are such as to bring discredit upon the United States and things American; evaders of justice, including persons “jumping bail” or quitting the country to escape the payment of alimony, or the jurisdiction of a court, or in violation of a writ of *ne exeat*; and political adventurers, which would include persons desiring to go abroad to take part in the political or military affairs of a foreign country in ways which would be contrary to the policy or inimical to the welfare, of the United States.²⁸⁶

It is striking that, as the Cold War heated up, the primary concern appears to have been with “political adventurers” and those whose past actions “raise doubts as to their loyalty” or who would “bring grave discredit upon the United States” and things American rather than more quantifiable national security anxieties such as those possessing state secrets or more concrete powers of malefaction.²⁸⁷ It is also striking that the State Department felt competent to prejudge the future dangerousness and propensity to commit crimes of individuals under no restrictions from the criminal justice system.

This memorandum was written after the Subversive Activities Control Board had been organized, but before it had issued any final orders, which became the source of the next major restriction on passports and one of the few that was ultimately prohibited as unconstitutional by the Supreme Court: restriction on the basis of membership in a communist organization.

²⁸⁴ Memorandum from Ruth B. Shipley to W.K. Scott, Director, Executive Secretariat (Oct. 26, 1954), File 110.4-PD/10-2054 CS/W; CDF 1950–54; RG 59; NACP.

²⁸⁵ Yingling Memorandum, *supra* note 276.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

In 1950, the McCarran Act (the Internal Security Act) made it unlawful for members of organizations ordered to register with the Subversive Activities Control Board to apply for or attempt to use passports.²⁸⁸

Only in the last years of Mrs. Shipley's reign did the winds begin to shift against her unreviewable discretion. The issue was cast in its starkest light by Eugene Gressman, the future distinguished Supreme Court scholar and litigator, who asked "whether the 700,000 Americans who travel abroad each year do so by right or by the grace of the Secretary of State."²⁸⁹ In late August 1952, the State Department issued new regulations on passports that established a process by which disappointed applicants could seek a more formal review of their cases than supplication before Mrs. Shipley.²⁹⁰ This was, at best, a modest procedural reform. Although the new rules required the Passport Division to notify the applicant in writing of the reasons for refusing to issue a passport, these reasons needed only to be stated "as specifically as within the judgment of the Department of State security limitations permit."²⁹¹

The new regulations also created a Board of Passport Appeals.²⁹² This reform gave applicants the right to appeal an adverse decision at a hearing where the applicant could be represented by counsel.²⁹³ The Board would decide appeals based on the preponderance of the evidence, as in a civil trial.²⁹⁴ But the new regulations took away at least as much as they gave. They began with a statement of purpose:

In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to [p]ersons who are members of the Communist Party or who . . . continue to act in furtherance of the interests and under the discipline of the Communist Party; [p]ersons . . . who engage in activities which support the Communist movement . . . as a result of direction, domination, or control exercised over them by the Communist movement; [and

²⁸⁸ Subversive Activities Control Act of 1950, ch. 1024, § 6(a)(1), (2), 64 Stat. 987, 993 (1950) (codified at 50 U.S.C. § 785(a)(1), (2) (1951) (Supp. IV 1946 ed.)). The Act required knowledge of registration or a final order to register as an element of the offense. *Id.*

²⁸⁹ Eugene Gressman, *Have You the Right To Travel Abroad?*, 127 NEW REPUBLIC 14, 14 (Sept. 15, 1952).

²⁹⁰ *New Passport Regulations Issued*, 27 DEP'T ST. BULL., 1952, at 417, 417–18 (printing text of new regulations 22 C.F.R. §§ 51.135–.143 (1957)).

²⁹¹ 22 C.F.R. § 51.137 (1957).

²⁹² *Id.* § 51.139.

²⁹³ *Id.*

²⁹⁴ *Id.* § 51.141(a).

p]ersons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe . . . are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement.²⁹⁵

The appellant was not permitted access to any part of his passport file or other files on which the Board would make its decision, for which restrictions imposed by the Board for other evidence were waived, with the exception of the copy of his initial application and other submissions.²⁹⁶ A finding by the Board of “[c]onsistent and prolonged adherence to the Communist Party line” was declared to be prima facie evidence of unfitness on those grounds to receive a passport.²⁹⁷ If any doubt remained at any stage of its proceedings, the Board could require the applicant to declare under oath or affirmation his affiliation to the Communist Party. “If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.”²⁹⁸ The combination of these provisions effectively denied review by the Board to anyone unwilling to execute a sworn affidavit concerning his or her Party membership.²⁹⁹ These provisions fit Mrs. Shipley’s view of the world, and she was unfazed by their creation: “I intend to stay and fight for what I believe in. One of the things I believe in is refusing passports to Communists.”³⁰⁰ In any event, the Board seemed a dead letter: ten months after it was invented, it still had not met for want of appeals.³⁰¹

A catch-all regulation was also promulgated to deny passports to individuals on grounds of suspicion of future unlawful activity. The regulation only required a “reason to believe, on the balance of all the evidence” that such a future prospect could happen.³⁰² This regulation was

²⁹⁵ *Id.* § 51.135.

²⁹⁶ *Id.* § 51.163. The Board “shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the creditability of confidential informants.” *Id.* § 51.170.

²⁹⁷ *Id.* § 51.141(b).

²⁹⁸ *Id.* § 51.142.

²⁹⁹ Leonard B. Boudin, *The Right To Travel: A Significant Victory*, NATION, July 30, 1955, at 95, 96.

³⁰⁰ Helen Worden Erksine, *You Don’t Go, If She Says No*, COLLIER, July 11, 1953, at 62, 63.

³⁰¹ *Id.* (reporting at the nine month mark); see also Boudin, *supra* note 299, at 96 (reporting personal communication from Mrs. Shipley averring to no appeals at the ten month mark). Roughly eighteen months later, a total of twenty-two appeals had been filed (out of twenty-eight passport refusals since Jan. 19, 1954). Paul J.C. Friedlander, ‘Due Process’ for Passports, N.Y. TIMES, July 3, 1955, at X13. By mid-1957, twenty cases had been accepted and heard by the Board, including Otto Nathan’s case, see *infra* note 314, which was handled ex parte at the request of the Secretary. Memorandum from John W. Sipes to John M. Raymond (June 19, 1957), File 110.4-PPT/6-1957; CDF 1955–59; RG 59; NACP.

³⁰² Limitations on Issuance of Passports; Notification and Appeal, 17 Fed. Reg. 8013, 8013 (Sept. 4, 1952) (“[N]o passport . . . shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would

amended in 1956 to make its application even broader. The previous standard for refusal of passport facilities was lowered to instances “when it appears to the satisfaction of the Secretary of State” that a person’s activities abroad would “[v]iolate the laws of the United States.”³⁰³ Two even broader grounds expanded this power further. Passports could also be denied if the Secretary of State was satisfied that the person’s activities abroad would either “be prejudicial to the orderly conduct of foreign relations” or “otherwise be prejudicial to the interests of the United States.”³⁰⁴ Neither ground was new, nor was the bar for the determination of those grounds lowered in 1956 from what it had been before. The only change was to formally promulgate the description of what Mrs. Shipley had been doing since 1928 and “infiltrate the passport procedure with all the inanities and unfairness of the federal employee loyalty program.”³⁰⁵

Two factors explain the sudden promulgation of rules that cosmetically formalized procedures while keeping the substance of Mrs. Shipley’s work intact.³⁰⁶ First was the denial of a passport to Presidential Medal for Merit winner Linus Pauling to travel to London and France for scientific purposes. As noted above, this decision brought the wrath of Senator Morse to bear on the State Department. Mrs. Shipley’s unvarnished record of implacability suggests that this alone would not have been enough—Pauling, after all, never received his passport. But shortly after the harsh press from the Pauling spectacle, a three-judge panel on the United States District Court for the District of Columbia held that a final order denying a passport without a hearing violated due process of law.³⁰⁷

Louis Jaffe summarized the Cold War policy in terms that resonate today:

Nearly every passport denial has been a decision to keep the citizen here within the high walled fortress where he can be isolated, neutralized, kept, let us say, to his accustomed and observable routines of malefaction. It has been simply one facet of our tactic of domestic security, and only incidentally a matter of foreign policy.³⁰⁸

violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States.”); 22 C.F.R. § 51.135(c) (1957).

³⁰³ 22 C.F.R. § 51.136 (1957).

³⁰⁴ *Id.*

³⁰⁵ Gressman, *supra* note 9, at 15.

³⁰⁶ *Id.* at 14.

³⁰⁷ *Bauer v. Acheson*, 106 F. Supp. 445, 452 (D.D.C. 1952). Because the court was otherwise quite deferential to the executive’s asserted power to withhold passports from those “whose activities abroad might be in conflict with its foreign policy,” it may be that the State Department preferred to accommodate the relatively modest procedural concerns of the court (which the court felt could be addressed “under the existing statute and regulations”). That would explain why the Department did not appeal the court’s decision. *Id.*

³⁰⁸ Jaffe, *supra* note 21, at 18.

At the start of the Cold War, as now in the so-called “War on Terror,” travel restrictions were deemed necessary in “this age of crisis,” a response by America and its allies “to a world in fear of atomic war and planned insurrection.”³⁰⁹

IV. DÉNOUEMENT: AFTER MRS. SHIPLEY

Mrs. Shipley retired on April 30, 1955 after forty-seven years of government service.³¹⁰ Twenty-eight of those years had been spent as the chief of the Passport Division.³¹¹ To celebrate her retirement, Mrs. Shipley announced that she would take a long European vacation.³¹²

In many ways, Mrs. Shipley left government just in time. Her successor, Miss Frances Knight, was plagued with increasing scrutiny of passport policy from Capitol Hill, litigation assaults against the Internal Security Act and other sources of the Passport Division’s power, the investigations of private bodies (most notably the Association of the Bar of the City of New York),³¹³ and the emergence of the Warren Court. Knight presided over a Passport Division of ever-diminishing power. An era had ended with the departure of Ruth Shipley.

The most important case concerning passports up to that time was one that began under Mrs. Shipley but ended—badly for the Department—under Miss Knight. Otto Nathan sought a passport in December 1952 to travel to Switzerland as the sole executor of the estate of Albert Einstein. His application was denied in July 1954, “[a]fter several months of informal interrogation and correspondence.”³¹⁴ Nathan filed suit the following month and won a near-unprecedented order from Judge Schweinhaut to the State Department to hold a hearing that conformed to

³⁰⁹ Charles E. Wyzanski, Jr., *Freedom To Travel*, ATLANTIC, Oct. 1952, at 66, 66–67.

³¹⁰ *Passport Chief To End Career*, *supra* note 142. It appears that Mrs. Shipley may have stepped down because she reached the mandatory retirement age. Obituary, *Ruth B. Shipley, Ex-Passport Head*, N.Y. TIMES, Nov. 5, 1966, at 31. On the other hand, an article published weeks before her retirement stated that “Secretary of State Dulles in a letter dated March 14 urged her to stay on.” *Passport Head Named*, N.Y. TIMES, Apr. 1, 1955, at 8. Characteristically, “Mrs. Shipley refused to change her mind.” *Id.*

³¹¹ *Passport Chief To End Career*, *supra* note 142. Characteristically, Mrs. Shipley intended to pick her heir: “Yes, my successor has been chosen—by me. We have a good ship. Don’t you think that after twenty-eight years I should know what’s needed?” *Id.* As it turned out, however, her successor came from outside the Passport Division: Frances G. Knight of the Bureau of Inspection, Security and Consular Affairs. *Id.* A few weeks after her departure, Mrs. Shipley claimed that she had chosen Miss Knight. *Mrs. Shipley Cited by Anti-Red Group*, N.Y. TIMES, May 11, 1955, at 22.

³¹² *Passport Chief To End Career*, *supra* note 142.

³¹³ Letter from Fifeld Workum, Chairman, Special Comm. to Study Passport Procedures of the Assoc. of the Bar of the City of N.Y., to John Foster Dulles, U.S. Sec’y of State (May 17, 1957), File 110.4 PPT/5-1757; CDF 1955–59; RG 59; NACP. The findings and recommendations of this distinguished committee (the membership of which included Adrian S. Fisher, former legal advisor to the Secretary of State) presented a damning indictment of the principles and practices that characterized Mrs. Shipley’s era. *FREEDOM TO TRAVEL*, *supra* note 36, at 39–48.

³¹⁴ *Nathan v. Dulles*, 129 F. Supp. 951, 952 (D.D.C. 1955).

what “the law contemplates and guarantees.”³¹⁵ In response to the Government’s argument that Nathan failed to exhaust his administrative remedies, to wit, the Board of Passport Appeals, the judge concluded that this was unnecessary since, “I think as a matter of practical fact he had none.”³¹⁶

The Passport Division delayed its compliance with the judge’s order. On the Ides of March in 1955, forty-five days before Mrs. Shipley’s retirement, Judge Schweinhaut ordered the Secretary of State to “promptly afford plaintiff an appropriate hearing.”³¹⁷ Two and a half months later, Mrs. Shipley had retired and the hearing still had not occurred. Judge Schweinhaut then ordered the Secretary of State to issue Dr. Nathan a passport of standard form and duration.³¹⁸ The Department appealed the order to the Court of Appeals for the District of Columbia Circuit the same day. An affidavit from the Assistant Director of the Passport Division averred that “it would be contrary to the best interests of the United States” to issue Dr. Nathan a passport.³¹⁹ In response, the Circuit Court ordered the Department to comply with the District Court’s order and hold a “quasi judicial hearing” within four days, adding additional reporting requirements to both the court and appellee Nathan.³²⁰ The day before that deadline, rather than comply with those unprecedented requirements, the Department issued the passport after a further ex parte review by its Passport Board of Appeals.³²¹ As the Circuit Court described this unexpected reversal, the Department did not

say what the Board reported or recommended, or why. It does not suggest that the Board had new information. It does not say what the Board thought about information referred to in the affidavit of the Assistant Director of the Passport Division. However, since the Department of State has issued the passport, it must be assumed that its issuance was not

³¹⁵ *Id.* Judge Schweinhaut did not believe the 1952 regulations satisfied this condition. The same day that he issued his opinion and order concerning Dr. Nathan’s case, the judge decided *Clark v. Dulles*, 129 F. Supp. 950, 951 (D.D.C. 1955), concerning the denial of a passport to federal judge William Clark. He dismissed the Government’s contention that the law had been satisfied:

It is urged by the government that the plaintiff had a “hearing” in that he personally talked to and corresponded with the then Under Secretary of State. I do not believe that that was a hearing in the sense that the law has in mind. I think, therefore, that the plaintiff should have a hearing in the State Department but I do not suggest or direct the manner in which the hearing should be conducted.

Id. at 951; *see also* Parker, *supra* note 32, at 859.

³¹⁶ *Nathan*, 129 F. Supp. at 952.

³¹⁷ *Dulles v. Nathan*, 225 F.2d 29, 30 (D.C. Cir. 1955).

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* at 30–31.

³²¹ *Id.* at 31.

“contrary to the best interests of the United States.”³²²

It is likely that the State Department weighed the “best interests of the United States” and determined that issuing a passport to Dr. Nathan was a lesser evil than establishing further precedent for judicial review of State Department passport decisions. Mooting the appeal was, therefore, a strategic decision.

The very same day that the D.C. Circuit decided the *Nathan* case, it held that the Department’s stated reason for denying a passport in a different case worked a violation of substantive due process beyond the procedural violations identified in *Nathan*.³²³ The Court held that Max Shachtman’s passport application had been denied because he was chairman of an organization that the Attorney General had listed as subversive without giving Shachtman meaningful opportunity to contest that listing despite his repeated attempts to do so.³²⁴ The State Department’s reliance on that conclusion was therefore arbitrary and unconnected to the otherwise non-justiciable conduct of foreign affairs. As in *Nathan*, the court remanded the case to the district court for further proceedings. In the end, as with Otto Nathan, the Department issued Shachtman a passport rather than risk solidifying precedent.³²⁵

The *Nathan* and *Shachtman* cases were followed in short order by a rain of judicial blows to the Passport Division, blows that had not landed in Mrs. Shipley’s day. Five months later, a federal court held that Leonard Boudin (the lawyer who had represented Otto Nathan and was developing a niche practice in passport cases) was entitled to an opportunity to refute a written record that included all evidence on which the Department based its decision.³²⁶ Seven months later, the Court of Appeals affirmed the lower court’s ruling and ordered the Secretary to “state whether his findings are based on the evidence openly produced, or (in whole or in

³²² *Id.*

³²³ *Shachtman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955).

³²⁴ *Id.*

³²⁵ Letter from Robert Murphy, Undersec’y of State, U.S. Dep’t of State, to Sen. Theodore Francis Green, Chairman, U.S. Senate Comm. on Foreign Relations (May 22, 1957), File 110.4 PPT/5-2257; CDF 1955–59; RG 59; NACP. Although this file copy was cleared for release by the initials of five relevant office heads, it is unclear whether it was ultimately sent to Senator Green.

³²⁶ *Boudin v. Dulles*, 136 F. Supp. 218, 222 (D.D.C. 1955). Judge Youngdahl expressed evident frustration with the secret methods of the State Department:

How can an applicant refute charges which arise from sources, or are based upon evidence, which is closed to him? What good does it do him to be apprised that a passport is denied him due to associations or activities disclosed or inferred from State Department files even if he is told of the associations or activities disclosed or inferred from State Department files even if he is told of the associations and activities in a general way? What files? What evidence? Who made the inferences? From what materials were those inferences made?

Id. at 221.

material part) on secret information not disclosed to the applicant.”³²⁷ If the latter, the Court intimated that it would have the power to evaluate that judgment. Rather than reveal information from its confidential files, or risk a precedent firmly establishing the power of the courts to determine whether the Department could rely on secret evidence not included in the record, the Department issued a passport.³²⁸

These cases emboldened others. Paul Robeson, who had repeatedly been denied passports and had repeatedly refused to sign an affidavit disavowing communist ties, now sued to compel issuance of a passport without filing such an affidavit.³²⁹ At the oral argument over the motion, the U.S. Attorney painted the government’s picture of an un-American loose cannon whose speeches and appearances abroad were detrimental to U.S. foreign policy. The U.S. Attorney dismissively summarized the other side:

We have listened to an argument here that, in effect, says because of the *Nathan* case and the *Shachtman* case, the law of the land is that all you have to do is to walk in the Passport Office, fill out an application and get your passport—go where you want to go, do as you please, the Secretary has no control over you.

Now, of course, that is not so”³³⁰

Judicial challenges to the Passport Division’s authority, growing in number and severity, began to attract the unwanted attention of Congress. Only months after Mrs. Shipley’s retirement, the State Department in general, and the Passport Division in particular, was the subject of Senator Thomas Henning’s ire as the chairman of the Senate Judiciary Committee’s Subcommittee on Constitutional Rights.³³¹ The targets of the Senator’s attack were the security programs, of which travel controls were only a small part. The testimony of Scott McLeod in November 1955 before the “Henning Committee” was the subject of particular consternation at the highest levels of the State Department. The fear was that Senator Henning would demand to know who precisely was responsible for various, and increasingly publicized, cases of passport

³²⁷ *Boudin v. Dulles*, 235 F.2d 532, 536 (D.C. Cir. 1956). The same conclusion was also reached, citing *Boudin*, a few months later in *Dayton v. Dulles*, 237 F.2d 43, 45 (D.C. Cir. 1956).

³²⁸ Letter from Robert Murphy, *supra* note 325.

³²⁹ *Robeson v. Dulles*, 235 F.2d 810, 811 (1956), *cert. denied* 352 U.S. 895 (1956) (describing Robeson’s pre-litigation correspondence with the Passport Office, “declining to execute an affidavit concerning present or past membership in the Communist Party, which affidavit he understood to be one of the prerequisites, under the regulations, to informal hearing in the Passport Office.”).

³³⁰ *Case of Paul Robeson*, *supra* note 253, at 80 (case names not italicized in original).

³³¹ DONALD J. KEMPER, *DECADE OF FEAR: SENATOR HENNINGS AND CIVIL LIBERTIES* 119–20, 159–64 (1965).

denials. In other words, the Senator struck at the very essence of the Passport Division: the unreviewable discretion of one person, such as Mrs. Shipley, or perhaps a small committee, to decide that the national interest outweighed the individual interest in travel. What the State Department considered an inherently executive prerogative grounded in the conduct of foreign policy, Senator Henning perceived to be an assault on the individual rights of citizens by calloused bureaucrats. Congress presented a danger to the Secretary's decisional autonomy that the Department had thus far avoided in the courts: lawsuits could be mooted by the tactical issuance of passports to successful plaintiffs. Congress, on the other hand, might not be so easily mollified.³³²

The Supreme Court issued *Kent v. Dulles*, its first opinion on the right to travel abroad on June 16, 1958.³³³ The Court held that Congress had not delegated the Secretary the authority he purported to exercise in denying passports to the petitioners due to their alleged Communist sympathies and affiliations—Rockwell Kent, an artist and author, and Walter Briehl, a psychiatrist, had separately refused to complete affidavits concerning their membership in the Communist Party.³³⁴ The Court found only delegated power to deny passports on the grounds of questions about the traveler's citizenship, allegiance, or unlawful conduct at home or abroad.³³⁵ Justice Douglas, therefore, concluded that Congress did not intend to give the Secretary of State "unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose."³³⁶ Given Mrs. Shipley's extraordinarily long record of having done just that for almost

³³² Loy Henderson, the Deputy Undersecretary for Administration, articulated the danger in a memorandum to the Acting Secretary:

It is quite possible that when a name is given the Committee will call the person named before it in order to request that he explain why he took the decision. This person will then have the difficulty of disclosing the records or of refusing to answer questions put to him. . . . The precedent which would be established in naming the persons responsible for making decisions could have far-reaching consequences. . . . This is so important that I hope we can take a new look at the matter before Mr. McLeod commits himself too far today.

Confidential Memorandum from Loy W. Henderson, Deputy Undersec'y for Admin., U.S. Dep't of State, to Acting Sec'y of State (Nov. 16, 1955), File 110.4 PPT/11-1655 CS/HHH; CDF 1955-59; RG 59; NACP. A note dated the same day and pinned to the memorandum carried the scent of relief about it: "Mr. McLeod's office reports the hearings are over on the Hill; that Mr. McLeod was not asked any pertinent questions, and the hearing went very smoothly." *Id.*

³³³ 357 U.S. 116, 117 (1958).

³³⁴ *Id.* at 119. Although, as the Court noted, the Subversive Activity Control Board created by the Internal Security Act of 1950 had the power to prohibit members of registered organizations from applying for passports, the Board had not issued any such final orders to organizations requiring registration at the relevant time in the *Kent* case. See Comments on S. 2095, *attached to* Letter from William B. Macomber, Jr., Assistant U.S. Sec'y of State, to Sen. John L. McClellan, Chairman, Comm. on Gov't Operations (August 21, 1959), File 110.4-PPT/6-859; CDF 1955-59; RG 59 (noting that "no organization is registered or has been finally ordered to register by the Subversive Activities Control Board").

³³⁵ *Kent*, 357 U.S. at 128.

³³⁶ *Id.*

thirty years, Justice Douglas seems to have made a veiled and not entirely accurate reference to her work: “One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern.”³³⁷ Finding international travel to be part of the liberty protected by the Fifth Amendment, the Court refused to see the question as a political one for the discretion of the Executive Branch. The passport’s diplomatic function was “subordinate” to its “crucial function today . . . over exit.”³³⁸

The *Kent* case was a shocking blow to the State Department which considered the affidavits sworn under oath that these cases invalidated to be “most effective in administering a passport control program.”³³⁹ The Department sought to introduce an oath requirement into draft legislation under consideration in Congress in 1959, a targeted effort to respond to the holding in *Kent*, one that would “strengthen the Government’s defense of the requirement by giving a clear expression of Congressional intent.”³⁴⁰ The Department also sought to add to draft legislation the power to deny passports when these would “seriously impair the conduct of the foreign relations of the United States; or be inimical to the security of the United States.”³⁴¹ After *Kent*, and in light of activity on the Hill that it feared could inadvertently cabin power that the Department always assumed that it possessed, the Department was taking no chances.

The same day that *Kent* was decided, the Supreme Court also handed down a decision in *Dayton v. Dulles*.³⁴² If *Kent* was a death blow to the unreviewable discretion of the Department to decide passport questions, *Dayton* was the first strike on the final nail in the coffin. Weldon Dayton, a physicist, sought permission to travel to India to conduct research. His passport application originated in 1954, during Mrs. Shipley’s reign. She had denied it because “it would be contrary to the best interest of the United States to provide [Dayton] passport facilities at this time.”³⁴³ Dayton, unlike *Kent* or *Briehl*, was willing to swear an affidavit that he was not a communist, but to no avail.³⁴⁴ Justice Douglas described at

³³⁷ *Id.*

³³⁸ *Id.* at 129.

³³⁹ Comments on S. 2095, *supra* note 334, at 3.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 5. These comments noted with favor the then recent D.C. Circuit opinion *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959), that upheld this power.

³⁴² 357 U.S. 144 (1958).

³⁴³ *Id.* at 145.

³⁴⁴ Although Mrs. Shipley would not provide specifics, she informed Dayton’s lawyer that “the determining factor in the case was Mr. Dayton’s association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government” five years prior to his application. *Id.* at 146.

length the use by the Department of confidential material to deny the application and then remanded the case for consideration in light of his opinion in *Kent*.³⁴⁵ Since the issue in *Kent* was the breadth of a statutory delegation of power by Congress, not the constitutional question of using confidential evidence to deny a passport, this lengthy digression could only be interpreted as a warning.

In due time that warning would be partially fulfilled.³⁴⁶ The State Department continued to enjoy considerable deference to set restrictions on passports for foreign policy reasons. But the passport cases and legislative activity of the late 1950s made clear that the Passport Division was unlikely ever again to enjoy the unlimited, unreviewable discretion that Mrs. Shipley had exercised for almost thirty years.³⁴⁷ This is not to say that open records and judicial-style hearings became the norm. Quite to the contrary, the due process protections that emerged from these cases gradually evolved into a balancing test that inevitably accepted a heavy thumb on the side of government interests in foreign affairs and national security against individual interests in travel.³⁴⁸ As the next section demonstrates, the result has been to replace Mrs. Shipley with automated processes that would satisfy only the most formalistic appreciation of due process of law.

It is worth noting in conclusion the irony that the opinions in both *Kent* and *Dayton* were written by Justice Douglas who, in 1959, was obliged to write to ask Deputy Undersecretary of State Robert Murphy to give his “personal consideration and if necessary to discuss . . . with Secretary [of State] Herter and President Eisenhower” the Department’s decision not to validate his passport for travel to China.³⁴⁹

³⁴⁵ *Id.* at 145, 151–54.

³⁴⁶ See *Aptheker v. Sec’y of State*, 378 U.S. 500, 514 (1964) (holding Section 6 of the Subversive Activities Control Act to be a facially unconstitutional infringement on the right to travel by criminalizing the application for, or use of, a passport by a member of a registered Communist organization). But see *Regan v. Wald*, 468 U.S. 222, 224–25 (1984) (upholding Treasury regulations restricting travel to Cuba in support of an economic embargo); *Haig v. Agee*, 453 U.S. 280, 309–10 (1981) (upholding revocation of rogue former CIA agent’s passport without a prerevocation hearing); *Zemel v. Rusk*, 381 U.S. 1, 3 (1965) (upholding blanket area restriction on travel to Cuba); *Worthy*, 270 F.2d at 913 (upholding area restrictions on, and ultimate denial of, journalist’s passport).

³⁴⁷ Indeed, President Eisenhower sent an urgent message to Congress in the aftermath of *Kent v. Dulles* conceding that, “[a]ny limitations on the right to travel can only be tolerated in terms of overriding requirements of our national security, and must be subject to substantive and procedural guarantees.” President Dwight D. Eisenhower, Special Message to the Congress on the Need for Additional Passport Control Legislation (July 7, 1958), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=11120&st=passport&st1=control>.

³⁴⁸ Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271, 305–10 (2008).

³⁴⁹ WILLIAM O. DOUGLAS, *Letter to Robert Daniel Murphy*, in THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 270, 270–71 (Melvin I. Urofsky ed., 1987).

V. "APRÈS MOI, LE DELUGE": DIGITIZING MRS. SHIPLEY

In 1925, the State Department's Division of Passport Control accomplished its work with an index card system.³⁵⁰ By 1953, Mrs. Shipley's office maintained 1,250 filing cabinets of data on twelve million people.³⁵¹ Ironically, her efficiency sometimes made government travel controls appear to be a beneficial public service.³⁵² In the end, however, restricting the freedom of citizens to enter and exit the United States because of her unreviewable national security judgments came to be seen as the infringement on liberty that it was.³⁵³ Just as passport controls reached the peak of their perfection under Mrs. Shipley's "Queendom of Passports," the courts and Congress sought to restore greater balance between national security and individual liberty. Passport decisions were made subject to judicial review, albeit with a heavy thumb remaining on the scale for national security.

Today many different agencies may submit nominations to add individuals to the federal government's consolidated terrorist watchlist (the "Terrorist Screening Database" or "TSDB").³⁵⁴ These names are vetted by the Terrorist Screening Center, itself a multi-agency entity administered by the FBI.³⁵⁵ The TSDB is intended to hold in one place "information about individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism."³⁵⁶ The TSDB now lists approximately 400,000 people.³⁵⁷ The No Fly List is a "downstream watchlist" derived from the larger TSDB for

³⁵⁰ Letter from Charles E. Hughes, U.S. Sec'y of State, to H.M. Lord, Dir. of the Bureau of the Budget (Jan. 20, 1925), File 112/721a; CDF 1910-29; RG 59; NACP.

³⁵¹ Erksine, *supra* note 300, at 64.

³⁵² E.g., Letter from Charles Maylon, Former Legislative Assistant to President Truman, to U.S. Sec'y of State (June 20, 1952), File 110.4 PD/6-2052; CDF 1950-54; RG 59; NACP ("Due to extenuating circumstances it was necessary to procure the passport without delay. Mrs. Shipley issued her passport in less than twenty-four hours. That is indeed service to the people.").

³⁵³ For a broader examination of international travel, see generally Kahn, *supra* note 348.

³⁵⁴ U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES 8 (May 2009) [hereinafter *OIG 2009 REPORT*], available at <http://www.justice.gov/oig/reports/FBI/a0925/final.pdf>; U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE TERRORIST SCREENING CENTER 24 (June 2005) [hereinafter *OIG 2005 REPORT*], available at <http://www.justice.gov/oig/reports/FBI/a0527/final.pdf>.

³⁵⁵ See *Terrorist Screening Center*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/nsb/tsc/tsc_mission (last visited Jan. 5, 2011).

³⁵⁶ Homeland Security Presidential Directive/HSPD-6, 2 PUB. PAPERS 1174, 1174 (Sept. 16, 2003) [hereinafter *HSDP-6*], available at http://www.dhs.gov/xabout/laws/gc_1214594853475.shtm#1. This is a sensitive but unclassified list that is not intended to replace other watchlists and databases maintained in classified form by other agencies. *OIG 2005 REPORT*, *supra* note 354, at 12. Its purpose is consolidation of enough information to permit inter-agency coordination, a recommendation of the 9/11 Commission Joint Inquiry Committee. *Id.* at 11.

³⁵⁷ *Five Years After the Intelligence Reform and Terrorism Prevention Act: Stopping Terrorist Travel: Hearing Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 111th Cong. 2 (2009) [hereinafter *Stopping Terrorist Travel*] (statement of Timothy J. Healy, Dir., Terrorist Screening Ctr.); *OIG 2009 REPORT*, *supra* note 354, at 1 n.40.

daily use by the Transportation Security Administration to screen prospective passengers on every commercial flight within, entering, or departing U.S. airspace.³⁵⁸ If a government official concludes that information about a traveler is a close enough match to the No Fly List, that person is not allowed to board the plane.³⁵⁹

The No Fly List is the digital version of Mrs. Shipley. Consider first how the purpose of the No Fly List has changed over time, in much the same way as the passport changed from facilitating travel to licensing it. The No Fly List was developed from a modest system by which the Federal Aviation Administration used to warn commercial airlines of threats to civil aviation, which had been a growing concern at least since the hijackings and bombings of Pan Am 103 and TWA 867.³⁶⁰ These “security directives,” as they were called, were relatively few in number; twenty or thirty might be circulated to airlines each year.³⁶¹ The standard for issuing them was focused narrowly on identifying a “direct and credible threat” to civil aviation.³⁶² This phrase had a particular meaning. It was understood in the intelligence community to mean an actual threat to a particular aircraft or flight path.³⁶³

The No Fly List has expanded far beyond those bounds. Now, the No Fly List prevents the travel of “known or suspected terrorist[s]” who “present a threat to civil aviation or national security.”³⁶⁴ The criteria to determine whether a person is known or suspected of being a terrorist are classified, but as noted above, sufficiently broad to include those who are or have been “engaged in conduct constituting, in preparation for, in aid of, or related to terrorism.”³⁶⁵ Note the disjunctive clause separating civil aviation *or* national security: the No Fly List is not a system limited anymore to protecting the physical security of commercial airlines. A person who presents no known threat to civil aviation, but who is considered a threat to broader national security interests, is a candidate for the No Fly List. The nature of the No Fly List—like the paper passport it digitizes—makes its limitation an exercise in self-policing. And, like the pressures operating on Mrs. Shipley, those who compile and manage the

³⁵⁸ OIG 2009 REPORT, *supra* note 354, at 5 n.49, 70.

³⁵⁹ *Id.* at 12 n.59.

³⁶⁰ See Memorandum for the Record, 9/11 Comm., Interview with Claudio Manno 2, 8 (Oct. 1, 2003) [hereinafter Memorandum for the Record], available at <http://arcweb.archives.gov/arc/action/ExternalIdSearch?id=2610294> (describing the purpose and operation of the Civil Aviation Intelligence, and its interaction with the intelligence community); Author’s Interview with Claudio Manno, Acting Assistant Adm’r for Sec. & Hazardous Materials, FAA, in Wash., D.C. (Oct. 20, 2009) [hereinafter Manno Interview] (on file with author).

³⁶¹ Manno Interview, *supra* note 360.

³⁶² Memorandum for the Record, *supra* note 360, at 8.

³⁶³ Manno Interview, *supra* note 360.

³⁶⁴ *Stopping Terrorist Travel*, *supra* note 357, at 2.

³⁶⁵ HSDP-6, *supra* note 356, at 1174.

No Fly List operate under constant pressure to expand its coverage.³⁶⁶

To decrease the number of false-positive hits against the No Fly List caused by the similarity between the names of the watchlisted and the unsuspected traveler, the TSA created the “Secure Flight” prescreening system.³⁶⁷ TSA now obtains an electronic record of the full name, date of birth, and gender of every passenger at the time a ticket is purchased and compares that information to the relevant watchlists, including the No Fly List.³⁶⁸ Remarkably, if almost certainly unintentionally, this “Secure Flight” system is little more than a computerized version of Mrs. Shipley’s “red card” system, which she used to flag suspect passport applicants:

Red cards list identifying information, such as the date and place of birth, to keep the innocent from being tagged with a guilty record through similarity of names. Each card carries a code to a full file. The file contains all available information—whether the person concerned is a Communist, a dope addict, a criminal, or just has views that might embarrass policy makers if he expressed them in a foreign land.³⁶⁹

The technology has changed, but the result is just the same. As in Mrs. Shipley’s day, a traveler is only allowed to proceed on his itinerary once the state has satisfied itself as to his intentions and his identifying information is thoroughly vetted by the state.

Not only is the technique the same, so are the defenses offered for it. First is the defense that only a small number of people are affected. Dean Acheson offered a statistical defense of Mrs. Shipley’s war on communism: out of 325,000 passports issued in her heyday between July 1951 and June 1952, only 190 passports were denied or recalled because of membership in a subversive organization or evidence of some other subversive intent by the passport holder.³⁷⁰ Timothy Healy, the Director of

³⁶⁶ Interview with C. Stewart Verdery, Jr., former Assistant Sec’y for Policy and Planning, Border and Transp. Sec. Directorate, Dep’t of Homeland Sec., in Wash., D.C. (July 20, 2009) (on file with author) (“[E]ssentially the theory was, okay after 9/11 everyone was like, not going to happen to us again, we’re going to throw you, any plausible problem is going in, and then you know for every name you throw in you’re creating lots of problems for other people who have similar names. And there were all these cases of, you know, of the FBI throwing in Russian criminals from the ‘50s and, you know, IRA people from the ‘70s, not to mention you have the current crop of problems.”).

³⁶⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-292, AVIATION SECURITY: TSA HAS COMPLETED KEY ACTIVITIES ASSOCIATED WITH IMPLEMENTING SECURE FLIGHT, BUT ADDITIONAL ACTIONS ARE NEEDED TO MITIGATE RISKS 4–5 (May 2009), available at <http://www.gao.gov/products/GAO-09-292>.

³⁶⁸ *Id.* at 4–8.

³⁶⁹ *Leaving America Is Easy—for Most*, U.S. NEWS & WORLD REP., July 4, 1952, at 28, 29.

³⁷⁰ *Remarks by Secretary Acheson*, *supra* note 3, at 41. A few years later, Roderic O’Connor, Head of the Bureau of Security and Consular Affairs at the State Department, began a public defense of passport procedures with the same argument of minimalism: “Out of more than half a million passport applications made to the State Department last year, only about 450 were denied on substantive

the Terrorist Screening Center, urged a congressional committee to dismiss concerns about the effect of this list on Americans by emphasizing the small number of Americans on the list:

Most of the individuals on the Terrorist Watchlist are not U.S. citizens, but are terrorists living and operating overseas. The Terrorist Watchlist is made up of approximately 400,000 people. . . . [T]he “No Fly” list is a very small subset of the Terrorist Watchlist currently containing approximately 3,400 people, of those approximately 170 are U.S. persons.³⁷¹

The second common defense is the emphasis on standards and evidence. The Passport Division kept files on individuals whose travel would concern the United States enough to consider denying or restricting a passport. The information in these files came from the FBI, the foreign service, the intelligence services and other agencies.³⁷² Secretary Acheson fended off criticism of the secretive nature of his subordinates’ decision-making by describing the legal standard to determine whether a passport application should be denied:

When an application is received for a passport at the Passport Division, the files of the Department are examined, and if there is nothing in those files to raise any questions regarding the person concerned, the passport is issued immediately, as a matter of routine.

Then we come to the second step. If there is adverse information, this information is reviewed at a higher level in the Passport Division, and if the information is not such as to provide reasonable grounds for belief that the passport should be denied—and the reasons for denial I have already mentioned to you [fugitive status, mental illness, travel adverse to the national interest]—if there are not reasonable grounds from the totality of its evidence to indicate the applicant does not fall within any of the categories mentioned, then the passport is issued.³⁷³

The Terrorist Screening Center (“TSC”) receives nominations from agencies throughout the federal government to place individuals in its Terrorist Screening Database, the main terrorist watchlist from which subsidiary lists are created for particular uses by different agencies, such as

grounds. Only thirteen final denials were turn-downs on the ground of Communist activities.” Roderic L. O’Connor, *The State Department Defends*, SATURDAY REV., Jan. 11, 1958, at 11, 11.

³⁷¹ *Stopping Terrorist Travel*, *supra* note 357, at 2.

³⁷² *Leaving America Is Easy—for Most*, *supra* note 369, at 29.

³⁷³ *Remarks by Secretary Acheson*, *supra* note 3, at 40–41.

the No-Fly List that is used by the TSA. The TSC's director, Timothy Healy, described the legal standard his organization uses to add a name to that watchlist:

[T]he facts and circumstances pertaining to the nomination must meet the "reasonable suspicion" standard of review established by terrorist screening Presidential Directives. Reasonable suspicion requires "articulable" facts which, taken together with rational inferences, reasonably warrant a determination that an individual is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of or related to terrorism and terrorist activities, and is based on the totality of the circumstances.³⁷⁴

Note the similarity in the chosen legal standard. Only a reasonable basis in evidence was required to deny a passport. Only a reasonable ground based on articulable facts is required to add a name to the watchlist.³⁷⁵ Neither standard rises to the higher level of "probable cause" that is required for an arrest—ordinarily the basis for government restriction of liberty that extends over any substantial period of time. Neither standard is applied by a court—the State Department fought hard to avoid judicial review of its determinations, and lost. The Terrorist Screening Center currently fights for the same autonomy. But the reason is the same: "State Department lawyers feel that, if they are compelled to open up security files to the public and reveal confidential sources of information, the whole antisubversive operation will be crippled."³⁷⁶

³⁷⁴ *Stopping Terrorist Travel*, *supra* note 357, at 2. This standard appears to be derived from the standard for a police "stop-and-frisk" absent probable cause set forth in the Supreme Court's opinion in *Terry v. Ohio*, 392 U.S. 1, 21 (1968). In his congressional testimony, Director Healy stated that "[t]he 'No Fly' list has its own minimum substantive derogatory criteria requirements which are considerably more stringent than the Terrorist Watchlist's reasonable suspicion standard. In order to be placed on the 'No Fly' list, a known or suspected terrorist must present a threat to civil aviation or national security." *Id.* Mr. Healy appears to conflate the existence of "more stringent" criteria with the standard used to review those criteria. He does not indicate what standard of review is applied to determine whether those criteria are present to a degree sufficient to warrant watchlisting. It seems unlikely that a standard of review higher than "reasonable suspicion" would be used for that evaluation.

³⁷⁵ At least in summer 2005, it is questionable how rigorously this standard was applied. The then Director of the TSC, Donna Bucella, implied to auditors from the Justice Department that an even lower standard might be the norm:

She informed us that, to err on the side of caution, individuals with any degree of a terrorism nexus were included in the TSDB, as long as minimum criteria was met (at least part of the person's name was known plus one other identifying piece of information, such as date of birth).

OIG 2005 REPORT, *supra* note 354, at 30.

³⁷⁶ *Is There a "Freedom To Travel"?*, U.S. NEWS & WORLD REP., Sept. 9, 1955, at 39, 39. The *Saturday Evening Post* editorialized in similar tones that resonate today:

Undoubtedly there is a problem—for security officers, judges and ordinary citizens in their thinking—how to square our traditional American jealousy of infringements on human freedom and our distrust of "informers" with the necessity to protect this country from an active conspiracy to destroy every freedom. But

Although both officials in both eras emphasized the careful vetting and professional judgment used in their departments, the answer boils down to the same two words: trust us.

Alas, not everything is the same as in Mrs. Shipley's day. Consider two aspects of our current system of travel restrictions that the digital age has made worse than Mrs. Shipley's version. Mrs. Shipley was a hero to some and a tyrant to others. But at least she was the *identifiable* source of a traveler's frustrations. From whom should the thwarted traveler seek redress today? Nominations to the TSDB can come from many different agencies and field offices.³⁷⁷ There is no requirement that the person be the subject of an open FBI investigation.³⁷⁸ The nominations are vetted at different stages by the Terrorist Screening Center, which then exports portions of the TSDB to "customer" agencies such as the TSA for use as the No Fly List.³⁷⁹ When there appears to be a match between passenger ticketing information and the No Fly List, TSA and TSC officials work in coordination—sometimes including officials from the original nominating agency—to determine whether the match is sufficiently close to forbid travel.³⁸⁰ When a commercial airline is instructed not to allow a person to board an aircraft, that person is not supposed to be told the reason. In fact, the DHS specifically states: "The U.S. government does not reveal whether a particular person is on the terrorist watch list, which is administered by the Terrorist Screening Center."³⁸¹

If the traveler wishes to file a grievance, there is no way to complain directly to the Terrorist Screening Center, or even to the Transportation

surely "freedom to travel" is not compromised by regulations necessary for national safety—any more than freedom to drive a car down Main Street is violated by regulations which attempt to keep automobiles out of the hands of morons and homicidal maniacs.

Editorial, "*Freedom of Travel*" *Isn't for Red Agents*, SATURDAY EVENING POST, Jan. 14, 1956, at 10, 10.

³⁷⁷ See OIG 2009 REPORT, *supra* note 354, at 4–6, 8, 8 n.53 (describing the nomination process and its coverage of more than 200 countries); OIG 2005 REPORT, *supra* note 354, at 24 ("[I]nformation regarding international terrorism from consular offices, Interpol, the intelligence community, the FBI, state and local law enforcement, and foreign governments is now funneled through NCTC for inclusion in the consolidated watch list.").

³⁷⁸ OIG 2009 REPORT, *supra* note 354, at 8.

³⁷⁹ See *id.* at vii, 13 (illustrating the FBI watchlist nomination process with flowcharts).

³⁸⁰ U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE TERRORIST SCREENING CENTER'S EFFORTS TO SUPPORT THE SECURE FLIGHT PROGRAM 5 (August 2005). In FOIA and other litigation, the TSA has successfully argued that it is statutorily exempt from disclosing information from watchlists, even those originating with other agencies, that it uses in security screening. See *Barnard v. Dep't of Homeland Sec.*, 531 F. Supp. 2d 131 (D.D.C. 2008) (upholding TSA withholding of TECS watchlist information); *Tooley v. Bush*, No. 06-306-CKK, 2006 WL 3783142, at *20 (D.D.C. Dec. 21, 2006); *Gordon v. Fed. Bureau of Investigation*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005).

³⁸¹ *Step 1: Should I Use DHS TRIP?*, DEP'T OF HOMELAND SECURITY, http://www.dhs.gov/files/programs/gc_1169699418061.shtm (last visited Jan. 19, 2011) (follow link marked "More About Screening and Watchlists").

Security Administration.³⁸² The traveler's only option is to complete an online form at the Department of Homeland Security's website for its "Traveler Redress Inquiry Program."³⁸³ That webpage does not indicate who will review the inquiry, by what standards, or even in which agency the inquiry will be reviewed. In fact, pursuant to an inter-agency memorandum of understanding, more than one agency is involved.³⁸⁴ Director Healy told Congress that "the complaint is reviewed by the agency that received it, and referred to the TSC Redress Unit after it has been determined that there is a connection to the Terrorist Watchlist."³⁸⁵ But who decides? According to the TSC: "Upon the conclusion of our [TSC] review, we advise DHS TRIP representatives of the outcome so they can directly respond to the complainant."³⁸⁶ That TSC review, in turn, is completed by working "with the nominating or originating agency to determine if the complainant's watchlisted status should be modified."³⁸⁷ The end result is a "final agency decision" letter that obscures this alphabet soup of participating agencies just as it evades any clear statement of the decision. Read one for yourself:

³⁸² *Redress Procedures*, TERRORIST SCREENING CENTER, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/nsb/tsc/tsc_redress ("The TSC does not accept redress inquiries directly from the public."); see also U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE TERRORIST SCREENING CENTER'S EFFORTS TO SUPPORT THE SECURE FLIGHT PROGRAM (Aug. 2005), available at <http://www.justice.gov/oig/reports/FBI/a0534/chapter2.htm> ("According to the TSA, the TSC will play a supporting role in the redress process and will not have direct contact with the public about these issues."). Although TSA operates a "blog" on which "Blogger Bob" and other anonymous TSA employees seek to give a human face to the agency, see THE TSA BLOG, <http://www.tsa.gov/blog/> (last visited Jan. 5, 2011), questions concerning the No Fly List are either redirected to the DHS TRIP website or to another web portal at which the individual may submit an electronic message to an unspecified unit of TSA. See *Contact the Transportation Security Administration*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/contact/index.shtml> (last visited Jan. 5, 2011).


³⁸³ *DHS Traveler Redress Inquiry Program*, HOMELAND SEC., <https://trip.dhs.gov/> (last visited Jan. 5, 2011).

³⁸⁴ *Memorandum of Understanding on Terrorist Watchlist Redress Procedures*, Sept. 28, 2007 (signed by the heads of six departments or agencies) (copy on file with author).

³⁸⁵ *Stopping Terrorist Travel*, *supra* note 357, at 5.

³⁸⁶ *Id.*

³⁸⁷ *Id.* In fact, the DHS specifically states: "The U.S. government does not reveal whether a particular person is on or not on a watchlist" and points to the TSC website for more information. *Step 1: Should I Use DHS TRIP?*, HOMELAND SEC., http://www.dhs.gov/files/programs/gc_1169699418061.shtml (last visited Jan. 5, 2011) (under "More About Screening and Watchlists").

February 8, 2006	U.S. Department of Homeland Security Office of Transportation Security Redress Arlington, VA 22202
GP- [Redacted]	 Transportation Security Administration
Dear [Redacted]:	
<p>The Transportation Security Administration (TSA) has received your Passenger Identity Verification Form (PIVF) and identity documentation. In response to your request dated, [Redacted] we have conducted a review of any applicable records in consultation with other federal agencies, as appropriate. Where it has been determined that a correction to records is warranted, these records have been modified to address any delay or denial of boarding that you may have experienced as a result of the watch list screening process.</p>	
<p>TSA cannot ensure that your travel will always be delay free as this redress process does not affect other standard screening procedures in place at the security checkpoint. For example, an individual may be selected by TSA for enhanced screening in order to resolve a walk-through metal detector alarm, because of random selection, or based on certain non-identity based factors reflected in reservation information. Additionally this process may not eliminate the need to go to the ticket counter in order to obtain a boarding pass. For instance, an airline might still require a brief period of time to comply with identity verification requirements prior to issuing a boarding pass.</p>	
<p>This letter constitutes TSA's final agency decision, which is reviewable by a United States Court of Appeals under 49 U.S.C. § 46110.</p>	
<p>If you have any further questions, please call the TSA Contact Center Office of Transportation Security Redress (OTSR) toll-free at (866) 289-9673 or locally at (571) 227-2900, send an E-mail to TSA-ContactCenter@dhs.gov, or . it. to the following address:</p>	
<p>Transportation Security Administration TSA-901 601 South 12th Street Arlington, VA 22202-4220</p>	
<p>Sincerely, Office of Transportation Security Redress</p>	

This ambiguity about the source of a traveler's woes is inextricably linked with another problem in seeking redress that did not afflict the traveler in Mrs. Shipley's day. Because the passport was a tangible document in the possession of the traveler, it was immediately clear whether travel was permitted. Even when the Passport Division occasionally dragged its heels in acting on an application, the traveler knew that no travel was permitted without a passport. You either possessed one or you did not.

Today that certainty is gone. No amount of unimpeded travel in the past is an assurance that the next trip will be permitted. No notice is possible until the moment a boarding pass is sought for imminent travel. Even then, the denial of a boarding pass is not certain evidence that the traveler has been watchlisted. This means that judicial review of the determination is much more difficult to obtain. Despite its Orwellian language, the form letter spit out of the DHS TRIP system is considered final agency action. This is despite the government's description of its

meaning as

either that Plaintiffs are on the No Fly or Selectee List, and thus subject to travel restrictions and/or enhanced screening with consequent travel delays, or not included on the No Fly or Selectee List. In either event, the letters reflect the fact that a final determination has been made that fixes some legal relationship.³⁸⁸

The problem, of course, is that the determination letter is so impenetrably opaque as to make it impossible to decipher which final agency action has been taken. What legal relationship has been fixed? How does one respond? Where is Mrs. Shipley?

VI. CONCLUSION

Ruth Shipley's successors were unable to retain the unbounded discretion she exercised so powerfully. When that executive authority was breached by Supreme Court decisions that opened the way to judicial oversight, the passport ceased to be the singularly useful tool of national security that it had been in the day when it could be withheld or restricted from those whose travel was "not in the interests of the United States." In other words, the United States lost the power to use the passport to restrict its citizens in the way that it used the visa to restrict the movement of foreigners.

That defeat of the most extreme use of the passport turned out to be a pyrrhic victory for those who believe in the right of citizens in a democratic republic to freely enter and leave their own country. Mrs. Shipley has been resurrected in digital form. Her authority has been diffused among intelligence analysts in multiple agencies who now compile watchlists of people deemed too dangerous to travel. This diffusion of authority means the disappearance of responsibility. Thus, the stranded passenger can no longer appeal to Mrs. Shipley's descendants—they are anonymous, remote, and inaccessible. Although judicial review is now possible, the agency action to be evaluated is shielded by the traditional deference accorded to national security and the sometimes secret processes by which that government interest is secured. When this combines with the anonymity and diffusion of decision-making across multiple agencies and their databases, the practical effect is sometimes hard to distinguish from the results in Mrs. Shipley's day.

The No Fly List is the digitized perfection of Mrs. Shipley's essential

³⁸⁸ *Scherfen v. U.S. Dep't of Homeland Sec.*, No. 3:CV-08-1554, 2010 WL 456784, at *11 (M.D. Pa. Feb. 2, 2010) (internal quotation marks omitted).

purpose: to prevent free travel to those whose views, activities, or interests abroad she deemed contrary to the interests of the United States. Its utility as one of many layers of security used to protect civil aviation from terrorist attacks does not salvage the premise on which it rests, which is so destructive to our most basic American values and sense of individual liberty. That premise is that the state may decide which citizens it will permit to enter and which it will permit to leave, and that the state may undertake that decision in a manner that essentially forecloses public scrutiny or judicial review. In a world in which air travel is no longer the province of the elite, the power to create such a No Fly List is the power to destroy business and private interests that rely on twenty-first century transportation.

We have not traveled far in our methods of restricting travel. Although Mrs. Shipley's office and the passport cases it catalyzed have faded into obscurity, Mrs. Shipley's system of travel controls remains with us today, both in the premises that undergird its operation and the processes through which it operates. None should doubt the identity between Mrs. Shipley as she lived and worked in the first half of the twentieth century and her digital reincarnation today. As a simple test, reader, ask yourself whether this quotation from a well-known American periodical describes Mrs. Shipley's world or yours: "In short, several officials gather secretly behind closed doors, peruse secret intelligence reports and purport to arrive at a fair judgment affecting not only the citizen's right to travel but also his reputation and possibly his livelihood and financial well-being."³⁸⁹

³⁸⁹ Gressman, *supra* note 9, at 14.