

Legal Sidebar

(No) Papers, Please: No Passports for U.S. "Foreign Fighters"

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In addition to [expatriation proposals](#), some Members of Congress have [advocated](#) and/or [sponsored bills](#) to deny or revoke passports for [U.S. citizens fighting or planning to fight abroad for foreign terrorist groups](#) such as the Islamic State in Iraq and Syria (ISIS). [These Members are concerned](#) about the possibility that such citizens may return to the United States to perpetrate terrorist acts on U.S. soil or may flout U.S. foreign policy by continuing to fight abroad for such groups. The latter is particularly a concern since [President Obama's announcement of a plan for U.S. involvement](#) in combating ISIS abroad, the [enactment of congressional authorization for aid to Syrian rebels opposed to ISIS](#), and [potential congressional debate and authorization for further U.S. military action against ISIS](#). Denial or revocation of a passport for a person in the U.S. would prevent a U.S. citizen from leaving the country lawfully because [statute](#) and [regulations](#) generally require a U.S. citizen to present a U.S. passport when departing or entering the U.S. Advocates of revoking a passport for a U.S. citizen outside the U.S. believe that this would not only prevent U.S. "foreign fighters" from traveling freely outside the U.S., but would also prevent their reentry into the U.S. to engage in terrorism in U.S. territory. [Federal courts have](#), however, recognized a citizen's right to enter the U.S., [even without a passport](#).

The Secretary of State has the power to deny and revoke passports for various reasons, including protection of national security and foreign policy interests. The U.S. Supreme Court in [Haig v Agee](#) found that, although the [Passport Act](#) does not expressly authorize the Secretary of State to revoke or deny a passport, the Act also does not expressly limit such powers. The Court further found that it is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the federal statutes and, if the Secretary may deny a passport application for a certain reason, he may also revoke a passport for the same reason. Although the Passport Act does not expressly authorize revocations, the Immigration and Nationality Act grants the Secretary of State the power to cancel passports obtained illegally, fraudulently, or erroneously, which does not cover all the regulatory bases broadly authorized under the Passport Act.

The current passport regulations authorize [denial](#) or [revocation](#) if the Secretary of State "determines that the applicant's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." An earlier version of this regulation was the reason for revoking the former CIA agent's passport in [Haig v. Agee](#). Agee was traveling abroad for the avowed purpose of undermining CIA operations abroad by exposing them. He was outside the country when his passport was revoked, but the State Department provided him with travel documents enabling him to return home if he chose. The U.S. Supreme Court upheld the revocation of Agee's passport as constitutional. The Court found that the revocation was not an impermissible burden on his right to travel or a violation of his First Amendment rights to criticize U.S. policies and practices. The freedom to travel abroad with a passport is subordinate to national security and foreign policy considerations and is subject to reasonable governmental regulation. The passport revocation prevented his activities, not his speech. Also, the absence of a pre-revocation hearing did not violate his Fifth Amendment due process rights. Constitutional due process was satisfied by the statement of reasons and opportunity for a prompt post-revocation hearing given to Agee. The Court noted,

The history is clear that there have been few situations involving substantial likelihood of serious damage to the national security or foreign policy of the United States as a result of a passport holder's activities abroad, and that in the cases which have arisen, the Secretary has consistently exercised his power to withhold passports. Perhaps the most notable example of enforcement of the administrative

policy, which surely could not have escaped the attention of Congress, was the 1948 denial of a passport to a Member of Congress who sought to go abroad to support a movement in Greece to overthrow the existing government. Another example was the 1954 revocation of a passport held by a man who was supplying arms to groups abroad whose interests were contrary to positions taken by the United States.

The Court held that the policy of denying or revoking passports to prevent serious damage to national security and foreign policy was sufficiently substantial and consistent to conclude that Congress implicitly approved it.

In contrast with the Court's upholding of revocation due to Agee's actions, the Court, in [Kent v. Dulles](#), found that the Passport Act and immigration laws did not authorize the Secretary of State to withhold passports because of beliefs and associations and if a federal law purported to do so, it would raise significant constitutional issues. The plaintiffs had been denied passports because of their alleged Communist Party membership and refusal to file affidavits regarding present or past Communist Party membership. Similarly, in [Aptheker v. Secretary of State](#), the Court held that a statute restricting passports for member of registered Communist organizations was unconstitutionally vague and overbroad because it indiscriminately infringed on First Amendment rights and applied to all Communists regardless of actual purposes or activities for international travel. The Passport Act was amended in 1991 [to affirm](#) that a passport could not be denied, revoked, or otherwise restricted for speech, activity, belief, affiliation or membership abroad or in the U.S. that would be protected by the First Amendment if conducted in the U.S.

The Passport Act currently prohibits restricting use of a passport for travel to specific countries except to a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travelers. The current [regulations](#) are consistent with these requirements. Earlier language in the Passport Act did not expressly contain these restrictions and the regulations more broadly permitted restricting passports for travel to specific countries. In [Zemel v. Rusk](#), the U.S. Supreme Court examined the earlier language and held that, in light of apparent congressional adoption of prior State Department policy and practice, the Passport Act authorized the Secretary of State to refuse to validate a passport for travel to certain geographic areas, in this case, Cuba, and that this exercise of authority was constitutionally permissible because the right to travel could be restricted due to the national security interest in protecting citizens. The Court noted that the Cuban missile crisis occurred less than two months before Zemel filed his lawsuit.

State Department [regulations](#) provide for an opportunity for an administrative post-revocation hearing within 60 days of the passport applicant or holder's receipt of a notice of denial or revocation. A hearing is available for a denial or revocation of a passport for activities causing or likely to cause serious damage to national security or foreign policy. A hearing is not available for certain reasons, such as non-citizenship of the applicant or holder or the denial of a discretionary exemption from otherwise applicable geographic restrictions, *e.g.*, the restriction on travel to Cuba at issue in *Zemel*.

Contrary to a popular misconception, the denial or revocation of a passport is not equivalent to, nor does it result in the loss of U.S. citizenship. A passport is a travel document [that identifies a person as a U.S. citizen](#) entitled to the protection of the United State; [it does not per se change or affect a person's actual status as a U.S. citizen](#). The loss of U.S. nationality, however, would be grounds for [denying](#) or [revoking](#) a U.S. passport.

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