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4 Control of travel of United States citizens to Cuba

This is in response to your informal request for my consideration of the problem discussed by Walter Yaagley in his memorandum of April 2, 1963 to the Attorney General. That memorandum describes the difficulties being encountered in the enforcement of 8 U.S.C. 1185(b) in respect of U. S. citizens who travel to Cuba without permission of the State Department -- i.e., without a passport valid for such travel.

I shall also present my views herein on a proposed State Department regulation sent to us for comment which would remove the present restrictions on the travel of U. S. citizens abroad, with the sole exception of travel to Cuba. The effect of the regulation would be to eliminate the current prohibitions on travel to Albania and the Communist-controlled areas of China, Korea and Viet Nam.

#### 10 Enforcement of 8 U.S.C. 1185(b)

4 Provisions of the statute and regulations. 8 U.S.C. 1185, which was first enacted during World War I (Act of May 22, 1918, 40 Stat. 559), provides in subsection (a) that certain restrictions on, or connected with, the movement of aliens in and out of the United States may become effective during the existence of any national emergency proclaimed by the President. The restrictions come into effect only if the President makes a separate public proclamation finding that the interests of the United States require that they be imposed.

Subsection (b) of section 1185 provides that during the period a proclamation issued under subsection (a) is in force,

10 "It shall, except as otherwise provided by the  
7 President, and subject to such limitations and  
exceptions as the President may authorize and  
prescribe, be unlawful for any citizen of the  
United States to depart from or enter, or at-  
tempt to depart from or enter, the United States  
unless he bears a valid passport." (Emphasis  
added.)

4 Subsection (c) of section 1185 authorizes criminal sanc-  
tions against anyone who willfully violates any of the pro-  
visions of the section, or of any permit, rule or regulation  
issued thereunder.

4 Proclamation 3004 of January 17, 1953 (18 F.R. 489) was  
issued under section 1185(a) after the commencement of the  
present period of national emergency proclaimed by the Presi-  
dent on December 16, 1950 (Proc. No. 2914, 15 F.R. 9029).  
Among other things Proclamation 3004, which is still in force,  
delegated the administration of the controls under section 1185  
to the Secretary of State. /1/ The related State Department  
regulation grants the following exemption from the prohibition  
of section 1185 against a citizen's entry or departure without  
a valid passport (22 CFR 53.3):

10 "No valid passport shall be required of a  
7 citizen of the United States or of a person who  
owes allegiance to the United States:

\* \* \*

10 "(b) When traveling between the United  
States and any country, territory or island ad-  
7 jacent thereto in North, Central or South America,  
excluding Cuba: Provided, That this exception

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1/ The Secretary of State had previously administered the  
controls authorized by section 1185 during the existence of  
the national emergency proclaimed on May 27, 1941 in connec-  
tion with World War II (Proc. No. 2487, 6 F.R. 2617).

7 shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: . . . ."

4 As to countries in the Western Hemisphere other than Cuba, it appears that this regulation itself serves as a "valid passport" for the purposes of 8 U.S.C. 1185(b). For travel by a citizen to or from Cuba or a country outside the Western Hemisphere, the regulation of course requires a passport valid for the country visited. If a passport holder travels without authority to Cuba, or another proscribed country, via a country for which his passport is valid, it would seem that he is punishable under section 1185 for departure from the United States without a valid passport only if he had the intent to go to the forbidden country at the time of departure. However, regardless of his intention at departure, his visit to such country might violate 18 U.S.C. 1544, which makes it a crime to misuse a passport. Section 1185 may therefore not be needed in that situation.

Since 18 U.S.C. 1544 cannot be invoked in cases where a passport has not been issued, it is ineffective in the situation where a citizen travels to a country for which no passport is required (e.g., Mexico or Canada), and thereafter, contrary to the State Department's regulation, goes to Cuba, ultimately returning to the United States via the same route. It is this situation which is discussed in Mr. Yeagley's memorandum to the Attorney General. Again, the citizen's departure from the United States would seem to be improper under the State Department's regulation and section 1185(b) only if he has the intent to go to Cuba at the time of departure. Although his return to the United States would be in violation of the proviso to the regulation regardless of his intent at departure and section 1185(b) might be construed not to require any showing of intent in cases of return, it is perhaps problematical whether a conviction for entry without a valid passport could be obtained where the traveler could not be convicted for having left without a passport in the first place.



It will be seen from the foregoing that the essence of an offense under section 1185(b) is an improper departure from or entry into the United States and that the statute does not by its terms prohibit, or authorize the prohibition of, an entry by a citizen into a foreign territory which is not at the same time a departure from the United States.

Venue. As stated in United States v. Johnson, 323 U.S. 273 (1944), at p. 276:

10 "Questions of venue in criminal cases . . . are not  
7 merely matters of formal legal procedure. They raise  
7 deep issues of public policy. . . ."

Article III, section 2, clause 3 of the Constitution requires that the trial of crimes

10 "shall be held in the State where . . . committed;  
7 but not when committed within any State, the trial  
7 shall be at such place or places as the Congress  
may by law have directed."

4 The Sixth Amendment covers much the same ground by providing that in all criminal prosecutions the accused shall have the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed."

4 Although Article III and the Sixth Amendment determine the venue of trial, they do not contain standards for determining the place where a crime has occurred. "That place is determined by the acts of the accused that violate a statute." Johnston v. United States, 351 U.S. 215, 220 (1956). In the instant situation the act of violation is clearly specified in the statute and consists of a departure or entry. The boundary point at which the unlawful entry or departure occurs therefore determines the venue. Venue, unless properly waived, is an essential part of the Government's case in a criminal prosecution and must be established by adequate proof, the burden of which is on the Government. Holdridge v. United States, 232 F.2d 302, 305 (C.A. 8, 1956). Mr. Yeagley states in his memorandum that evidence to establish the points of departure and entry in the cases of suspected violators of section 1185(b) who have gone to Cuba is generally difficult to obtain because

most of them have traveled by way of Mexico or Canada, and the United States makes no record of the exit and return of its citizens who go to those countries. As he points out, the lack of such evidence prevents not only the fixing of venue but the establishment of the crime.

Element of willfulness in violations. The sanctions of section 1185 are applicable to any person who shall willfully violate its provisions or those of the related regulations (subsection (c)). In general, there is no formula for distinguishing between crimes that require a criminal intent or guilty knowledge and those, sometimes called "public welfare offenses," which do not. Morissette v. United States, 342 U.S. 246 (1952). Cf. United States v. Behrman, 258 U.S. 280 (1922); Lambert v. California, 355 U.S. 225 (1957), reh. den. 355 U.S. 937; Burks v. United States, 287 F.2d 117 (C.A. 9, 1961), cert. den. 369 U.S. 841. And the use of the word "willful" or "willfully" is not necessarily determinative. "Willful" has been described as "a word of many meanings, its construction often being influenced by its context." Spies v. United States, 317 U.S. 492, 497 (1943). At times it may be used to require no more than an intention or willingness to do the prohibited act, Armour Packing Co. v. United States, 209 U.S. 56, 85 (1908), but frequently it is used to connote more than the mere doing of the act proscribed and to refer to an "act done with a bad purpose." United States v. Murdock, 290 U.S. 389, 394 (1933). See also Scraps v. United States, 325 U.S. 91, 101 (1945); Chow Bing Kew v. United States, 248 F.2d 466 (C.A. 9, 1957); Finn v. United States, 256 F.2d 304 (C.A. 4, 1958).

It would be of little use to attempt here to predict what a court would hold with respect to the word "willfully" in section 1185(c). The holding would no doubt be affected by the circumstances of the accused. If he were someone professing ignorance of the need for a passport who proved that he had gone to Cuba for reasons related to the welfare of his family, a court might well find that he had not acted "willfully." But if he were someone shown by the prosecution to have visited Cuba for political purposes, a contrary result might be reached despite the lack of an affirmative showing by the prosecution that he was aware of the regulation. In sum, although I am not sure that the lack of evidence to prove a defendant's knowledge of

the ban on travel to Cuba would necessarily be fatal to his conviction under section 1185, I have no doubt that it would generally be a troublesome factor in a prosecution.

Recommended amendments to the statute. Section 1185(b) is not adequate to the needs of the Government when, as at present, it wishes to maintain a "non-passport" policy as to certain countries, a requirement of passports as to others and general prohibitions of travel to some of the latter. As appears above, the current difficulties of prosecution in respect of travel by citizens to Cuba are caused principally by the effect of the "non-passport" policy on the enforcement of the existing prohibition against travel to that country.

It seems to me that the simplest way to resolve the difficulties is to amend section 1185(b) to add an outright prohibition against an American citizen's traveling to, entering or traveling in any foreign territory which the Government has put off limits, subject to exceptions made pursuant to regulations. An act made unlawful by an amendment of this kind would be one which, in the language of Article III of the Constitution, is "not committed within any State," and the trial therefore may be "at such place or places as the Congress may by law have directed." 18 U.S.C. 3233 provides that the trial of offenses committed out of the jurisdiction of any particular State or district shall be in the district where the offender is found, or into which he is first brought. Thus, the present venue problem in connection with section 1185(b) would be avoided, since once an entry or stay by a citizen in forbidden territory were established, it would not be necessary for a prosecutor to obtain evidence as to the point of his departure from or entry into the United States. I should add that there can be no question that the United States has the power to impose the suggested statutory controls over the travel of its citizens, Worthy v. Herter, 270 F.2d 903 (C.A.D.C. 1959), cert. den. 361 U.S. 918, and the power to impose criminal sanctions for violations of the Statute, even though occurring abroad. United States v. Bowman, 260 U.S. 94 (1922); Blackmer v. United States, 284 U.S. 421 (1932).

I believe it would also be helpful to amend section 1185(c) by deleting the word "willfully." This amendment, accompanied



by a legislative history making it plain that Congress intends to prevent any entry or travel in a forbidden area which is not of an involuntary or accidental nature, would eliminate the present evidentiary problems as to intent or knowledge on the part of citizens traveling to Cuba. It seems to me that in the light of a clear congressional expression along this line and of the national interest involved in keeping citizens out of "trouble spots" abroad, Worthy v. Herter, supra, at pp. 910-911, the courts will not be inclined to find that mens rea or scienter is required for a conviction.

Congressman Walter has introduced a bill, H.R. 5683, which would add a provision to section 1185(b) making it unlawful for any citizen to travel to any territory, or to depart from the United States with the intention of traveling to any territory, to which travel by citizens has been prohibited by regulation "as contrary to the national interest." I believe the provision as to departure with a wrongful intention is of little use, in view of the venue problem and the difficulty of proving such intention. In addition, it may be of dubious validity since in essence it would prescribe punishment merely for a wrongful state of mind -- that is, prescribe punishment without the commission of a criminal act. Finally, Congressman Walter's "national interest" standard is an unnecessary and perhaps complicating safeguard.

Despite these objections to H.R. 5683, I believe it may be a useful vehicle for the amendment of section 1185(b). Accordingly, I recommend that instead of proposing a new bill to carry out the suggestions I have made above, this Department, joined by the State Department, support the enactment of Congressman Walter's bill with modifications to arrive at the same result.

#### 10 Proposed State Department Regulation

Abraham Chayes and Abba Schwartz have drafted, for submission to the Secretary of State, a proposed State Department travel control regulation on which they desire our views. The draft regulation has two purposes: (1) it would rescind all existing geographic restrictions on the foreign travel of U.S. citizens except travel to Cuba; and (2) it would pull into one place the substance of the scattered State Department rules, releases and notices which presently lay down such restrictions.

It appears that Governor Harriman and Edward R. Murrow participated in the review of current regulations and practices which led to the draft, but it does not appear whether they have approved it.

If adopted, the regulation would lift the present prohibitions on travel to Albania and the Communist-controlled areas of China, Korea and North Viet Nam. It is the view of Messrs. Chayes and Schwartz that "restrictions on travel should be imposed only when such travel constitutes a serious threat to our foreign policy or other national interest." While recognizing the need for a prohibition in respect of travel to Cuba, they think that it might be valuable for American students, writers, scholars and others to make contact with "decent elements in China" and that the United States would stand to gain from the information newsmen and other travellers could bring back from all the areas which the new regulation would open to them.

I am in agreement with the reasons Chayes and Schwartz give for relaxing the current travel controls. And I doubt whether there would be any significant criticism of such action with regard to travel in Albania, North Korea or North Viet Nam. But permitting entry into Communist China might produce considerable objection in and out of Congress based, among other things, on the argument that it is a step in the direction of recognition of the Communist regime in China.

Messrs. Chayes and Schwartz recognize the likelihood of criticism of the regulation "in certain quarters," but think it would be balanced by "appreciation in others, including bar associations, foreign affairs groups and the public generally." Whether they are correct in their assessment, I am not in a position to judge. And in any event, I do not mean to suggest that in itself the likelihood of congressional and other criticism makes the issuance of the regulation undesirable. However, the possible side effects of the issuance, particularly in Congress, must certainly be considered carefully.

The proposed regulation would not change anything in the present regulation from which the language on pages 2-3, supra,



is quoted, but would add to it a section containing a specific prohibition against a citizen's traveling to, in or through designated countries or areas (Cuba) without authorization from the Secretary of State. Travel by a passport holder in violation of the prohibition would be grounds for revocation or cancellation of, or refusal to renew, his passport. The new regulation would also provide that such travel "shall also be travel in violation of" 8 U.S.C. 1185 and 18 U.S.C. 1544. In my opinion the reference to 8 U.S.C. 1185 in that provision is incorrect since, in general, as noted above, the conduct violative of that statute is a departure from or entry into the United States rather than travel in a forbidden area. <sup>2/</sup> However, if section 1185 were to be amended as I have proposed above, the statement would of course be accurate.

The new regulation would authorize travel in a forbidden area, upon application, by persons in any of four classes: newsmen, representatives of the American Red Cross, relatives of persons who are critically ill or in custody in such areas and such other persons as are approved by the Secretary of State "in light of the national interest." I believe these categories to be reasonable.

I recommend that the draft regulation be expanded to include a provision that immigration officers may be appointed "departure-control officers" to prevent a citizen's departure from the United States when such action is justified. 8 CFR 53.6 recognizes the right of the Secretary of State "or his representative at a port in the United States" temporarily to prevent a citizen from departing but does not authorize the designation of immigration officers as his representatives for this purpose.

Part 46 of 8 CFR provides for the appointment of immigration officers as departure-control officers to prevent the departure of aliens in specified circumstances and provides for

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2/ "The power vested in the President [by section 1185(b)] is broad and comprehensive. Nevertheless the bill itself defines all the infringements of its terms which may be criminal. It is only possible for the President, by prescribing limitations and exceptions, to diminish the number of crimes or the variety of circumstances under which a criminal act may take place. In other words, the bill places a maximum limit beyond which its penal provisions may not be carried." H. Rept. 485, 65th Cong., 2d sess., p. 3.

hearings when requested. It seems to me that it would be helpful to have a parallel regulation authorizing the utilization of immigration officers to prevent citizens from departing for purposes harmful to the national interest. Accordingly, I recommend that we propose to the State Department that a regulation similar to 8 CFR Part 46 be put into effect with regard to citizens.

### 13 Conclusion

If you approve my suggestion for amending section 1185, I shall take steps to enlist the State Department in the submission of a joint recommendation to support an amended version of Congressman Walter's bill.

Upon your informing me of your views as to the proposed State Department regulation -- and, in particular, the relaxation of the ban on travel to Albania, Communist China, North Viet Nam and North Korea -- I shall prepare comments for transmittal to that Department.