

The Vanishing Right to Travel

By [Ezekiel Jones](#)

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The freedom to travel has joined habeas corpus and freedom from unwarranted searches on America's endangered rights list. Over the last 10 years, a combination of federal legislation, court decisions and new federal regulations have greatly reduced the rights of U.S. citizens to travel internationally and domestically.

As old as the Magna Carta

The right to go where one wishes is among the most fundamental and ancient of freedoms in the Anglo-Saxon legal tradition. Article 42 of the Magna Carta provided:

"It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above."

Despite its long tradition, the right to travel has been under attack at other times in American history. During the Red-baiting '50s, Congress enacted a law requiring that American citizens possess passports in order to leave or enter the country and delegated the authority to the secretary of state to determine the criteria for issuing passports. Shortly thereafter, Secretary of State John Foster Dulles denied a passport to Rockwell Kent on grounds that he was a Communist. Kent challenged the refusal in court, and the case eventually reached the U. S. Supreme Court. Justice William O. Douglas wrote the opinion for the majority that ordered the State Department to issue the passport:

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Three Human Rights in the Constitution of 1787 shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. 'Our nation,' wrote Chafee, 'has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.' (citations omitted)

Whatever happened to love it or leave it?

Unfortunately, William O. Douglas is no longer on the Supreme Court.

American jurisprudence has always recognized two, somewhat distinguishable, aspects of the right to travel. The Kent case dealt with a citizen's freedom to leave the U. S. and return. Since 9/11, that right has been severely restricted. Prior to January 1, 2007, the U.S. had reciprocal agreements with Mexico, Canada and several Caribbean nations that allowed U.S. citizens to come and go from these countries with nothing more than a picture ID, like a driver's license, or a birth certificate, citizenship papers or a permanent residency card.

This year, however, Homeland Security issued [new regulations](#) requiring Americans to show a passport in order to return by air from these countries. The result was a huge rush for passport applications that swamped the State Department and forced many to [cancel their vacations](#) when their new passports [did not arrive](#) in the usual six weeks' processing time.

Next year, these requirements will apply to all travel outside the United States, whether by plane, boat or land.

A right has become a privilege

The U. S. government has also breached the ancient Magna Carta principal that all citizens are free to travel abroad unless they have been convicted of a crime. Under "welfare reform" passed by the Republican Congress and signed by Bill Clinton (newspeak name-Personal Responsibility and Work Opportunity Reconciliation Act), the State Department's [Passport Denial Program](#) began to refuse passports to American citizens based upon a report that they owed back child support.

Have the federal courts shown up again to slap down the State Department and protect the right to travel? Hardly. Eudene Eunique, a non-custodial parent who had been denied a passport because she allegedly owed \$20,000 in back child support, challenged the law and the case reached the Ninth Circuit Court of Appeals. The three-judge panel ruled in favor of the State Department. Writing for the majority in the [2-1 decision](#), Judge Fernandez distinguished the Kent case by claiming that Eunique might be violating federal law if she left the U.S. to evade child support payments. There was no allegation that her purpose was to effect such an evasion nor any hearing on the issue of her motivation. Suffice it to say that the court's ruling, Justice Douglas' opinion in Kent were shown scant respect.

Dissenting Judge Kleinfeld was frank about it: "In this case, unlike those in which the Supreme Court has upheld restrictions on travel, the government has not offered a foreign policy or national security justification for the restriction, the government has not narrowly tailored the restriction to its purpose, and the apparent purpose of the restriction is to penalize past misconduct rather than to restrict travel as such. Thus the travel ban in this case is unconstitutional under controlling Supreme Court precedent. That Court can revise its approach if it so decides, but we can't."

The initial trigger was set at \$5,000, but it was recently reduced to \$2,500, and the State Department recently issued a [press release](#) bragging about how much cash they had collected from passport applicants.

While it may be hard to feel much sympathy for deadbeat parents, the Magna Carta principle that citizens have the right to travel internationally unless they stand accused or convicted of a crime has been abrogated. What's next? Passport refusals on the grounds that one's student loan payments are delinquent? Denials of passports because of mortgage defaults? It's a bit ironic that a nation which historically has been a refuge for the destitute

seeking a new start could become one big debtors' prison with the combination of provisions like the Passport Denial Program, oppressive bankruptcy laws and a failing economy.

See the USA in your Toyota (as long as you carry your passport)

Homeland Security Secretary Michael Chertoff is unhappy. It seems there are several states that are resisting the federal effort to make them upgrade their state-issued drivers' licenses to meet the standards for a new national personal ID card.

His response? [Issue threats](#) that residents of those states that don't go along with the national ID will be required to show U.S. passports to enter federal buildings, national parks and monuments, even board an airplane for a domestic flight.

"This is not a mandate. A state doesn't have to do this," he said. "But we've been very clear and the law is very clear, if the state doesn't have at the end of the day, the end of the deadline, Real ID compliant licenses, then that state cannot expect that those licenses will be accepted for federal purposes."

The systematic destruction of a precious right

Middle-aged Americans remember how our leaders, parents and teachers distinguished our country from the Soviet Union and its Warsaw Pact allies by pointing to the pictures and films of desperate East Germans and Hungarians who were forced to risk their lives just to move to a new country. In those days, there were people like William O. Douglas who had both the inclination and the power to defend Americans' right to travel, but today, with so many fundamental liberties under assault at once, the more subtle attack on freedom of movement has received little attention. It would be tragic if some Americans finally come to the conclusion there is no option but to leave their repressive homeland only to find that they have already lost the right to do so without risking a dangerous, illegal run across a border.

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