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PASSPORT DENIAL AND THE FREEDOM TO TRAVEL

"Everyone has a right to leave any country, including his own, and return to his country[1]."

I.

BACKGROUND

The right of the citizen to travel abroad has existed since Roman times. Chapter II of the Magna Carta gave every free man the right to leave the realm in times of peace thus preventing the king from placing his enemies in national confinement. The king by his royal perogrative may issue out his writ *ne exeat regnum* (let him not leave the kingdom), and prohibit any of his subjects from traveling into foreign parts without a license[2]. The French Constitution of 1791 recognized the right of every citizen to live his life abroad in its declaration of the rights of the man and citizen[3]. Following the Napoleonic Wars, the right to travel abroad was generally recognized, with the notable exception of Russia, where republican reform had not yet taken place.

In the United States, the authority of the Secretary of State to issue passports was made exclusive by the Act of Congress, August 18, 1856[4]. This was the first legislative enactment relative to passports in the United States. The use of the term "may grant" in this Act is a basis for the historic position of the Attorney General of the United States that the authority of the Secretary of State is to be exercised entirely at his discretion[5]. During World War I most international boundaries

[1] *The Universal Declaration of Human Rights,* 19 Dept. State Bull. 753 (1948).

[2] 1 Bl. Comm. 137.

[3] The declaration of the rights of the man and citizen in the French Constitution of Dec. 14, 1791, the effectiveness of which was cancelled by a law, passed in 1792, prohibiting citizens leaving the country without a passport.

[4] 11 Stat. 60 (1856).

[5] 13 Ops. Att'y General, 89, 92 (1862); 23 Ops. Att'y General 509, 511 (1901).

were closed and after the entry of the United States into the War, Congress passed an Act, still in force, giving the President authority to issue a proclamation closing our borders to citizens and aliens without a passport[6]. This Act was amended in 1941 to extend the Presidential power to include times of national emergency and aliens of waring states.

Until the recent cases of *Kent* v. *Dulles* and *Dayton* v. *Dulles*[7], the State Department found authorization for the regulation of passport issuance[8] in an Act of Congress of 1952 invoked by Presidential proclamation, January 17, 1953[9], under which the Secretary of State issued regulations forbidding the issuance of passports to members of the Communist Party and further requiring passport applicants to answer under oath questions in respect to past or present membership in the Communist Party. Either an admission of present membership or refusal to take the oath resulted in automatic denial of a passport. The decisions in the *Dayton* and *Kent* cases are far from conclusive even under present legislation since Congress has established future standards for passport denial under the Internal Security Act[10]. These standards have not yet been utilized. The importance of the basis upon which a passport may be denied is emphasized by the fact that under present law it is illegal, as long as a declared emergency continues, for a United States citizen to leave the country unless he has a previously issued passport. A heavy fine may be imposed for violation of the statute.

While the Department of State has continued to rely on its historical discretionary powers established at a time when a passport was not a requirement for international travel, the courts have, during the last decade, been increasingly critical of the unrestricted use of this power. The definition of liberty found in *Allgeyer* v. *Louisiana,* is clearly broad enough to in-

6 40 Stat. 559 (1918); 22 U.S.C. §§223-26 (1946).

7 357 U.S. 116 (1958).

8 22 C.F.R. §§51.101-170 (Supp. 1958).

9 66 Stat. 190, 8 U.S.C., § 1185.

10 64 Stat. 987-993 (1950).

clude the right of egress across national boundaries[11]. The decisions in *Crandall* v. *Nevada*[12], *Edwards* v. *California*[13], and *Williams* v. *Fears*[14], although concerned with interstate travel, reflect a philosophy of basic rights readily applicable to travel abroad despite the fact of its omission in the Federal Constitution. Nevertheless federal courts have upheld the Secretary of State's discretionary powers where the grounds of denial was lack of citizenship[15].

The right[16] of the Secretary of State to deny passports to each of the plaintiffs because of their refusal to file an affidavit concerning their membership in the Communist Party was successfully challenged in two recent cases[17]. In reversing the Court of Appeals[18] for the District of Columbia Circuit, the United States Supreme Court held that the Secretary of State was without authority under the applicable statutes to withhold passports on such grounds[19].

Mr. Justice Douglas, speaking for the majority of five, avoided the question of constitutionality of passport denial under legislation such as now before Congress[20], based the decision on the inadequacy of the present statutory authorization. Nevertheless the decision gave the first legal recognition to the right to travel outside the United States as a civil liberty of increasing importance to the ordinary citizen. In the instant

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[11] 165 U.S. 528 (1897).

[12] 73 U.S. 35 (1867).

[13] 314 U.S. 160 (1941).

[14] 179 U.S. 270 (1900).

[15] Perkins v. Elg., 307 U.S. 325 (1939).

[16] Kent v. Dulles, 357 U.S. 116 (1958); Dayton v. Dulles, 357 U.S. 144 (1958).

[17] 22 C.F.R. §51.142 (1952), an applicant may be required to subscribe under oath, to a statement of his membership, past or present, in the Communist Party.

[18] The Court of Appeals' opinion is reported in 248 F.2d 600 (1957).

[19] Section 215 of the Immigration and Naturalization Act (1952); Sec. 1 of the Act of Congress, July 3, 1926.

[20] Section 4110, H.R. 13318, 85th Congress, 2nd Session (1958).

case the court held that the right to travel abroad is protected by the Fifth Amendment[21] and that presently effective Presidential enactments have not authorized the Secretary of State to make Communist membership or association grounds for the denial of a passport. Therefore petitioner could not be required to submit a non-communist affidavit as a condition precedent to his obtaining a passport. The area of permissible denial was limited to the well established grounds of illegal conduct or non-allegiance[22]. Although delegation of the executive plenary power to conduct foreign affairs without a standard is permissible[23], an appropriate standard is required where, as here, a citizen's liberty is restricted, due to his political belief or associations[24]. The majority of the court in basing the decision on the lack of statutory authorization have failed to resolve the constitutional issues under the First Amendment, which will arise when the passport control provision of the Internal Security Act of 1950[25] specifically authorizing such control becomes effective.

The dissenters argued that the Secretary had authority under the Immigration and Naturalization Act of 1952[26] to deny passports to those considered security risks. Congress assumed, they reasoned, that the executive would exercise its historical discretion where possible detriment to the United States was involved. They asserted that it is the war time use of the Secretary's discretion which must be considered, since the statute in question is operative only in time of national emergency[27] or war[28]. The minority disagreed that there were only two Congressionally approved grounds on which passports could be

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

22 32 Stat. 386 (1902), 22 U.S.C. §212 (1952).

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

24 American Communications Ass'n. v. Douds, 339 U.S. 382 (1950).

25 64 Stat. 987 (1950), 50 U.S.C. §§ 781, 785 (1952). After the Communist Party has been required to register this Act makes it unlawful for a member to receive a passport.

26 66 Stat. 190 (1952), 8 U.S.C. §1185 (1952).

27 Proc. No. 2914, 15 Fed. Reg. 9029 (1950).

28 66 Stat. 190 (1952), 8 U.S.C. §1185 (1952).

denied, pointing out that the Secretary of State had exercised broad discretion for over a century[29].

In light of the fact that passports had been denied for security reasons prior to the Act of 1952[30], which made passports requisite as a war time or emergency measure, it would seem that Congress intended that the Secretary's discretion should be invoked on such grounds[31].

The effect of these cases is to recognize the right to travel as a Fifth Amendment "liberty" which cannot be denied except through "due process of law[32]." The extent to which this liberty may be restricted remains uncertain since the Fifth Amendment merely requires that any restriction be "by due process of law." Had the court chosen to consider the right to travel as one aspect of the freedom of expression under the First Amendment, such tests as "a clear and present danger" or the well established prohibition on prior restraints of freedom of expression could serve as guide posts for future legislative authorization of restraints in this area. As the court previously suggested[33], even these rights may be restricted when the interests to be protected are as important as security considerations. The appropriate criteria[34] may well be one distinguishing persons who have engaged in illegal, revolutionary activity from those who have passively accepted "the party line."

Ultimately the court will be called upon to balance our interests in national security against those in the freedom to travel abroad. A possible standard was suggested in the *Shachtman*[35] case: "Does the ground for denial bear a reasonable re-

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[29] 3 Moore, *International Law Digest;* 3 Hackworth, *International* Law, 493 (1942).

[30] State Department Memorandum, May 29, 1956.

[31] As to legislative intent, see, 96 Cong. Rec. 15631.

[32] Comment, 23 Univ. Chi. L. Rev. 260 (1956).

[33] Dennis v. United States, 341 U.S. 494 (1951).

[34] American Communications Ass'n. v. Douds, *supra,* note 18.

[35] Spachtman v. Dulles, 225 F.2d 938 (App. D.C. 1955).

lation to the conduct of foreign affairs?" The instant case, by relying on the due process clause of the Fifth Amendment have enabled the court to avoid this task for the present.

II.

IS THERE A RIGHT TO TRAVEL?

In recent years the threat of communism, the increasing number of countries requiring a passport for entry, and finally, statutes enacted in 1952[36] requiring a passport in order to leave the United States, have created the need for re-evaluation of the broad authority assumed by the Secretary of State to determine the grounds on which the passports may be denied.

In passing it is interesting to note that the average Soviet citizen is effectively restrained within the boundaries of his country except in cases of exceptional political privilege. The General Assembly of the United Nations has adopted the universal declaration of human rights which includes the right to travel, but unfortunately the theory of this declaration has not found practical application in the policies of the member states.

In the *Shachtman* case, the language of the court seemed to denote recognition of freedom to travel as a natural right. It is of course necessary to judicial recognition that this freedom be found in specific constitutional provisions. The question as to whether the right existed at common law has been a matter of disagreement among legal historians; certainly the writ of *ne exeat regnum* was effective to restrain this right as late as the early part of the 18th century. In any case there is no evidence as to whether the founding fathers intended to make a constitutional provision for such a freedom.

Restrictions on travel abroad may be denials of First Amendment freedom if viewed as one aspect of freedom of expression and communication. If the denial of the passport is for the purpose of preventing the expression by the American citizen of his views while abroad, it may be clearly a violation of the First

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[36] See note 22, *supra.*

Amendment as a prior restraint on freedom of speech. Even if it were granted that the Bill of Rights is not effective outside the United States, it is still arguable that denial of passports based on prior activity of the applicant is effective as a restraint on activities within the United States.

In respect to the due process clause of the Fifth Amendment, a federal circuit court has said:

> The protection of procedural due process did not disappear because the substantive right effected is not a full grown vested right like that in one's castle at common law[37].

However the previous basic premise has been that due process applies only to those things which can be clearly brought within life, liberty, or property. Rather than be limited to specific, fundamental rights which existed at the time the Fifth Amendment was adopted, the protection of due process should be extended to all normal activities of man. This proposition was impliedly recognized by the Supreme Court in *Bratton* v. *Chandler*[38]. On the other hand, the concept long accepted by most courts[39] is one distinguishing between rights and privileges in determining whether an activity is protected by the due process clause of the Fifth Amendment.

From consideration of these holdings it would seem that as to the Fifth Amendment free travel is in itself included as a liberty which cannot be denied without due process of law; while on the other hand, with respect to the First Amendment, freedom to travel is not included as one of the guarantees but may be indirectly involved since the denial of free travel may result in the denial of free speech. Any effective test, however,

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37 Rutledge, Justice, in N.B.C. v. V.F.C.C., 132 F.2d 545 (D.C., Cir., 1942).

38 260 U.S. 110 (1922).

39 Abrams v. Daugherty, 60 Cal. App. 297, 212 P. 942 (1st Dist. 1922).

should result in consideration of both the First and Fifth Amendment requirements.

III.

Conclusion

From the foregoing discussion it seems clear that there is a constitutional right to free travel abroad which the courts are willing to recognize. On the other hand, it seems equally clear that, at this time of unparallelled international tension, the abuse of this freedom could have a detrimental effect on national security and the effectiveness of foreign policy, outweighing its benefit to the individual.

As in the other areas of conflict between the individual and society, an effective test for balancing the interests involved must be found. To the individual whose business involves foreign trade, the right to travel abroad is an important property right; to the student or teacher in some fields it may be a virtual necessity for the completion of their professional training; to the tourist or a person with family connections abroad, the right to travel is a substantial part of his right to "the pursuit of happiness." In each of these instances the right of the individual is ordinarily exercised for the benefit of the group. The economic development fostered by the business man, the knowledge acquired by the student or teacher, and the increased understanding between the peoples fostered by the tourist must be considered by any test and balanced against our interest in national security.

In this "cold war" era in which the battle for men's minds may well be the determinative factor, the value of a liberal passport policy as a demonstration of the practical application of democratic principles of personal liberty may be even more important in furthering national security than a restrictive policy of questionable effectiveness. That national security is more important than the right of the individual to travel abroad is unquestioned but it does not follow therefrom that the freedom to travel may be restricted, unless there is a demonstrable relation between the restrictive policy and national security. Will restrictive regulations aimed primarily at persons who have publicly adopted "the party line" be effective in preventing

professional spies and saboteurs from entering and leaving the country as their missions require? It would seem that spies would be unlikely to do, say, or join any thing which would link them with radical activity. Assuming such regulations would be effective to restrict to some degree the movement of such persons in and out of the country by normal means, the ease with which a person may enter or leave the United States across our long inland borders is notorious.

If passport denial under regulations such as those suggested by the Secretary of State cannot be shown to be effective and necessary adjunct to national security, they are unreasonable abridgements of the constitutional rights citizens possess under the Fifth Amendment.

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