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Constitutional Law - Right to Travel - Authority of Secretary of State to Deny Passports

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CONSTITUTIONAL LAW—RIGHT TO TRAVEL—AUTHORITY OF SECRETARY OF STATE TO DENY PASSPORTS—Petitioner's application for a passport was denied under §51.135 of the Passport Regulations¹ promulgated by the Secretary of State on the grounds that he was a Communist and that he had a record of consistent and prolonged adherence to the Communist Party line.² The letter of denial stated that before a passport would be issued, a non-communist affidavit as provided for in the Regulations³ would be required. Following petitioner's refusal to file the affidavit the State Department informed him that until one was filed his application would receive no further consideration. Petitioner thereupon brought an action for declaratory relief in the district court, but the court granted summary judgment for respondent. The court of appeals affirmed.⁴ On certiorari to the United States Supreme Court, *held*, reversed, four justices dissenting.⁵

¹ 22 C.F.R. §§51.1 to 51.170 (1958).

² 22 C.F.R. §51.135 (1958) provides that passports shall not issue to those who are Communists, are under control of the Communist movement, or are going abroad to advance the Communist movement. 22 C.F.R. §51.141 (1958) provides that consistent and prolonged adherence to the Party line prima facie supports a finding that the applicant is under control of the Party.

³ 22 C.F.R. §51.142 (1958).

⁴ *Kent v. Dulles*, (D.C. Cir. 1957) 248 F. (2d) 600. *Briehl v. Dulles*, (D.C. Cir. 1957) 248 F. (2d) 561, was a case in which Dr. Walter Briehl brought an action similar to petitioner's, with the same result. The cases were consolidated on certiorari to the Supreme Court, 355 U.S. 881 (1957).

⁵ Justice Clark was joined in his dissent by Justices Burton, Harlan and Whittaker.

The right to travel is a "liberty" protected by the Constitution and Congress has not authorized its curtailment by the Secretary of State on the grounds set forth in §51.135 of the Regulations.⁶ Therefore, respondent could not require a non-communist affidavit from petitioner. *Kent v. Dulles*, 357 U.S. 116 (1958).

Traditionally there has been some recognition of a right to international travel,⁷ but nowhere in the Constitution is that right given specific protection. It has long been held, however, that a right to travel among the states exists as a privilege or immunity of national citizenship.⁸ In a concurring opinion in *Edwards v. California*,⁹ Justice Douglas indicated that such a right to travel was even more basic than a necessary incidence of our form of government, the traditional test applied in finding such a privilege or immunity.¹⁰ And now, relying in part on a historical basis,¹¹ and in part on dictum appearing in *Williams v. Fears*,¹² the Court has established that a right to international travel does exist as a personal "liberty" protected by the Fifth Amendment.¹³ A problem remains as to the proper test to use in determining the extent to which the right to travel may be limited. The right to travel could be treated as a facet of free expression and communication under the First Amendment, the threat of passport denial for political reasons being treated as a prior restraint on free speech.¹⁴ Such an analysis, while more difficult to reach than the Fifth Amendment approach actually adopted, would make possible use of the "clear and present danger" rule as an overriding limitation. Under the analysis chosen there are no established guideposts since the Fifth Amendment merely requires that due

⁶ In a case decided the same day, and for the reasons given in the principal case, the Court held that Weldon Bruce Dayton, who had signed the required affidavit, could not be denied a passport on the basis of §51.135. *Dayton v. Dulles*, 357 U.S. 144 (1958).

⁷ 41 GEO. L. J. 63 (1952). See generally Boudin, "The Constitutional Right to Travel," 56 COL. L. REV. 47 (1956); Chafee, "Three Human Rights in the Constitution of 1787" (University of Kansas Press, 1956).

⁸ *Crandall v. Nevada*, 73 U.S. 35 (1867); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Edwards v. California*, 314 U.S. 160 at 181 (1941), concurring opinion of Justice Jackson. See also *United States v. Wheeler*, 254 U.S. 281 (1920). See generally Vestal, "Freedom of Movement," 41 IOWA L. REV. 6 (1955).

⁹ 314 U.S. 160 at 177 (1941); but see *United States v. Wheeler*, note 8 supra.

¹⁰ E.g., *Twining v. New Jersey*, note 8 supra.

¹¹ Principal case at 125, 126.

¹² 179 U.S. 270 at 274 (1900). "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."

¹³ Cf. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). Several lower courts had previously used the analysis of the right to travel adopted by the Court. E.g., *Bauer v. Acheson*, (D.C. D.C. 1952) 106 F. Supp. 445; *Shachtman v. Dulles*, (D.C. Cir. 1955) 225 F. (2d) 938, noted 41 CORN. L. Q. 282 (1956).

¹⁴ See Wyzanski, "Freedom to Travel," *ATLANTIC MONTHLY*, Oct. 1952, p. 66; and see 23 UNIV. CHI. L. REV. 260 (1956).

process be accorded.¹⁵ This problem will undoubtedly cause the Court some vexation in the future.

At present, obtaining a passport is a prerequisite to leaving and entering this country.¹⁶ Therefore, since a right to travel exists, there must also exist a right to obtain a passport when a passport is required. The issue as framed by the Court in the principal case was whether Congress authorized the Secretary of State, in the exercise of his apparently broad discretion in issuing passports,¹⁷ to deny this right on security grounds. Whenever possible, the Court will construe a statute to avoid the constitutional question.¹⁸ Where the statute appears to violate personal rights it is construed narrowly,¹⁹ and a power that impinges on personal rights is upheld only reluctantly.²⁰ However, weight should be given to any long continued interpretation by the agency charged with administering the given statute,²¹ particularly when construction of a subsequent re-enactment is involved. The majority found that until 1926, when the original statute granting the Secretary of State broad discretion to deny passports²² was re-enacted,²³ the Secretary's discretion to deny passports had been exercised in but two general areas,²⁴ and it therefore held that in 1926, and again in 1952 when passports were made requisite, Congress intended to limit his discretion to those areas. It further said that security denials during wartime should not be considered in determining congressional intent in times of peace. Although prior to 1948 passport denials for security reasons were not as frequent as denials on other grounds, such denials were made.²⁵ Furthermore, in enact-

¹⁵ See 23 UNIV. CHI. L. REV. 260 (1956).

¹⁶ 66 Stat. 190 (1952), 8 U.S.C. (1952) §1185; 67 Stat. C31 (1953), Proc. No. 3004. The statute states in part that 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."

¹⁷ 44 Stat. 887 (1926), 22 U.S.C. (1952) §211a. "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

¹⁸ *United States v. Rumley*, 345 U.S. 41 (1953).

¹⁹ *Ex parte Endo*, 323 U.S. 283 (1944). In this way there is a better chance of upholding the statute and, at the same time, protecting personal rights.

²⁰ *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946).

²¹ *United States v. Hermanos y Compania*, 209 U.S. 337 (1908). See also *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *United States v. Allen-Bradley Co.*, 352 U.S. 306 (1957).

²² 11 Stat. 60 (1856).

²³ 44 Stat. 887 (1926), 22 U.S.C. (1952) §211a, note 17 supra.

²⁴ These were denials for (1) lack of allegiance, and (2) illegal conduct. See 3 HACKWORTH, INTERNATIONAL LAW §268 (1942); 2 HYDE, INTERNATIONAL LAW, 2d rev. ed., §401 (1945); 3 MOORE, INTERNATIONAL LAW §514 (1906).

²⁵ Refusal of passports to Communists, State Department memorandum, May 29, 1956, pp. 1, 2, quoted in Report of the Commission on Government Security, S. Doc. No. 64 of the 85th Cong., 471 (1957); Mr. Seward, Sec. of State, circular, May 6, 1861, MS. Circulars, I.179, quoted in 3 MOORE, INTERNATIONAL LAW, 2d rev. ed., 920 (1906); M.S. Dept. of State, file 130H7223 (1921), quoted in 3 HACKWORTH, INTERNATIONAL LAW 493

ing the wartime and emergency statutes that required passports,²⁶ Congress clearly intended that the Secretary, by denial of passports, should act as a security agency during periods of wartime and national emergency.²⁷ Therefore, regardless of congressional intent in 1926, it would appear that when passports were made requisite by the 1952 statute²⁸ Congress intended that the Secretary should exercise his discretion in the security area during any period where that statute was invoked. On this basis, since we have been in a declared state of emergency since 1941,²⁹ the Court might better have found that Congress did intend the Secretary to deny passports for security reasons. As a result of the grounds upon which the Court based its decision, we are still left with serious questions of how far and for what reasons the right to travel may be limited, and to what extent procedural due process in passport cases will be required.³⁰ By avoiding these questions, the Court has failed to solve our basic passport problem—the conflict between national security and the personal right to travel.

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(1942); Sec. of State Instruction of April 27, 1907 to Minister in Buenos Aires, quoted in 3 HACKWORTH, INTERNATIONAL LAW 500 (1942); Under Secretary of State, Memorandum Re Applicants for Passports Who Are Bolsheviks or Who Are Connected with Bolshevik Government, Code 5000 (1920), quoted in principal case at 135, dissenting opinion.

²⁶ 3 Stat. 199 (1815); 40 Stat. 559 (1918); 55 Stat. 252 (1941); 66 Stat. 190 (1952), 8 U.S.C. (1952) §1185.

²⁷ See to this effect 56 CONG. REC. 6029, 6030, 6065, 6192 (1918); 87 CONG. REC. 5048-5053, 5386-5388 (1941); 96 CONG. REC. 15631 (1950); S. Rep. 444, 77th Cong., 1st sess., p. 1 (1941); S. Rep. 2369, Part 2, 81st Cong., 2d sess., p. 10 (1950); H. Rep. 485, 65th Cong., 2d sess., p. 2 (1918).

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

²⁹ 55 Stat. 1696 (1941), Proc. No. 2523; 64 Stat. A 454 (1950), Proc. No. 2914; 66 Stat. C31 (1952), Proc. No. 2974; 67 Stat. C31 (1953), Proc. No. 3004.

³⁰ See also *Dayton v. Dulles*, note 6 *supra*.