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The Right to Travel

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THE RIGHT TO TRAVEL

As early as 1835 a question was raised as to the admissibility in evidence of a passport given by the Secretary of State, to prove the citizenship of the particular applicant. At the time there was no law of the United States that regulated the issuance of passports or declared their legal effect. It was understood, as a matter of practice, that some evidence of citizenship was required by the Secretary of State before issuing a passport. It was said that the passport is

a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request that the bearer of it may pass safely and freely, and is to be considered rather in the character of a political document, by which the bearer is recognized in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.¹

Later definitions of passports have been surprisingly similar to the early 1835 definition. The only extension of the definition has been an emphasis on the protection that is to be afforded the bearer of the document.

In 1940, the Circuit Court of Appeals said that a "passport" certifies that the person therein described is a citizen of the United States and requests for him while abroad permission to come and go as well as lawful aid and protection.² In 1954, it was held that a "passport" is addressed to foreign governments and indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and requests the foreign governments to permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection.³

Although for many years there were no Federal laws regulating the issuance of passports to citizens and subjects of the United States, their issuance is now regulated by acts of Congress.⁴ There are statutes making it unlawful for a member of a Communist organization to be issued a passport.⁵

During the early days passports were granted by the Secretary of State in the exercise of his proper functions although documents designed to accomplish the same results were issued by governors of the states and other local authorities, and even by notaries public. United States consuls also, had been in the habit of granting passports or certificates of citizenship upon their own responsibility. A passport was actually not essential for exit at this early date.⁶

1. *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692 (1835).

2. *United States v. Browder*, 113 F.2d 97 (2d Cir. 1940).

3. *Communist Party of the United States v. Subversive Activities Control Bd.*, 223 F.2d 531 (D.C. Cir. 1954).

4. 22 U.S.C. §§ 211(a)-218.

5. Internal Security Act of 1950, 64 Stat. 987, 993, 50 U.S.C. § 781, 785 (1950).

6. 40 Am. Jur. Passports § 1 (1942).

Today, the Secretary of State has the authority to grant or deny the issuance of a passport. This authority is "discretionary".⁷ The Secretary of State has long claimed an almost unlimited discretion to deny passports on the grounds that the Executive has inherent power to act independently in foreign affairs and that passport regulation is a legitimate exercise of the foreign affairs power.⁸ In denying passports the State Department has given reasons such as lack of citizenship, attempt to avoid legal sanctions, or inability of the United States government to protect the applicant abroad. An increasing number of refusals have been left unexplained. Since the Passport Division generally does not make any public announcement when it refuses a passport, the exact reasons are not known on the record. However, it is common knowledge that the great majority of these decisions have centered on the individual's political extremism and its possible detriment to the best interests of the United States.⁹

Suddenly in 1952, the Secretary's discretionary power of issuing passports became somewhat restricted. The Secretary denied a passport without a hearing and the United States District Court of the District of Columbia held that a passport could not be denied or revoked without such a hearing.¹⁰ Again in 1955 it was held that an applicant had a right to a hearing¹¹ and in 1956 it was said that the Secretary had to openly produce evidence upon which a denial of a passport could be based.¹² These decisions were concerned primarily with the procedural aspects of the Secretary's right to deny passports. In 1955, the Secretary's substantive power as to passports received a severe setback. The United States Court of Appeals stated the discretionary power of the Secretary was subject to close judicial scrutiny. It was said that the passport could no longer be considered merely in the character of a political document but was now, in addition, a document essential to the lawful departure of an American citizen for Europe. The denial of a passport therefore caused a deprivation of liberty that one otherwise could have. The court said what was involved now was substantive due process; that is, whether the Secretary's refusal to issue a passport was arbitrary. Discretionary power is not arbitrary power. In this situation the applicant was Chairman of the Independent Socialist League which had no connection with Communist International. It was said that the denial of his passport was in the "best interests" of the United States since his organization was on the "Attorney General's List" as a subversive organization. The court held the denial to be an arbitrary one since the applicant denied the listing of the organization and this was not challenged by the Secretary of State.¹³ The Court of Appeals reiterated its stand in the following year stating that

7. Act of July 3, 1926, ch. 772, § 1, 44 Stat. 887, 22 U.S.C. § 211(a)(1926).

8. 106 U.Pa. L. Rev. 454.

9. 61 Yale L.J. 171.

10. *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952).

11. *Nathan v. Dulles*, 129 F. Supp. 951 (D.D.C. 1955).

12. *Boudin v. Dulles*, 235 F.2d 532 (D.C. Cir. 1956).

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

the Secretary cannot exercise any decisions as to passports if it is an arbitrary or capricious one.¹⁴

This program of denying passports when the individual's travel was not deemed to be in the best interests of the United States, received a severe jolt by the Supreme Court in *Kent v. Dulles*.¹⁵ Rockwell Kent, the artist, was denied a passport when he refused to tell the Passport Division whether or not he had ever been a Communist. The Supreme Court construed the existing passport laws as not giving any authorization to deny passports on the basis of beliefs, associations, or ideological matters. The Court said the discretionary power of the Secretary of State brought about a connotation that this included a very broad area but the Secretary has always exercised the power in a narrow way. Although the Secretary has supposedly had unlimited discretion in this area as was argued by the dissent, his power has never been used to cover a wide range. The discretion has been limited to the following two grounds. First, questions relating to the citizenship of the applicant and his allegiance to the United States have to be resolved by the Secretary, for Congress stated that "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."¹⁶ The second ground for refusal of passports has been whether or not the applicant was participating in illegal conduct such as trying to avoid any obligations imposed by the laws of the United States. The Court has therefore clamped down upon the Secretary's discretion by holding that the Secretary has not been authorized to deny a passport to a Communist whose exit and travel abroad would endanger our national security. Immediately following the *Kent* case, a belief that a certain citizen was going abroad to engage in the furtherance of Communistic ideals was held an insufficient reason for refusing to issue a passport.¹⁷ This leaves the Secretary essentially no discretion for refusal of passports except those grounds relating to citizenship or criminal or unlawful conduct. The individual's right has been placed above that of national security. Although the individual was allegedly associating with people advocating Communist beliefs, it was never said that this was in direct conflict with the duty of allegiance to one's country. This caused President Eisenhower to deliver a message to Congress in which he asked them to pass a bill returning the Secretary's discretionary power in regard to issuing passports.¹⁸ The House Bill received approval in 1958 but the Senate Bill failed to grant the requested authority.

In 1959 another puzzling fact was added to this problem. The Secretary refused to renew an applicant's passport because he would not agree to abide by certain restrictions against travel in certain countries under

14. *Kraus v. Dulles*, 235 F.2d 840 (D.C. Cir. 1956).

15. 357 U.S. 116 (1958).

16. Act of June 14, 1902, 22 U.S.C. § 212 (1902).

17. *Dayton v. Dulles*, 357 U.S. 144 (1958).

18. U.S. Code Cong. & Ad. News, 85th Cong. 2d Sess., 5465 (1958).

Communist control. The basis for the decision was for the individual's and for the government's own protection. The ban many times was to induce the release of certain Americans held by the Communists. The ban tended to be more of a political move by the United States. This denial of a passport was upheld on the ground that the Secretary had authority to deny since this was within the power of the Executive to conduct foreign affairs.¹⁹ Certiorari was denied by the Supreme Court.²⁰ Although this case is distinguished from *Kent* in that the discretion allowed here is related to area control, it has partially closed the gap created by *Kent*. It has somewhat emasculated the *Kent* decision and has tended to narrow the gap as to the Secretary's full discretion being restored to him.

The problem now comes down to the question of what will serve the best interests of the United States. If the *Kent* decision remains unchanged, free travel of United States citizens will be unhampered. If the trend follows in the direction of area control and gradually reverts back as it was before 1958, Communist undersirables will be denied passports. Although area control will not directly accomplish this, it might be a step toward the restoration of the Secretary's discretionary power.

How much Communist undesirables injure the United States, abroad cannot be measured with any accuracy. But an individual's freedom can be hampered greatly with arbitrary and discriminatory restrictions put upon his right to travel. The United States protests when a foreign government does not allow their citizens complete freedom of travel. The Supreme Court in *Kent* has attempted to keep this freedom alive for the American people. The Court was correct in stating that the right to travel is a part of the liberty of which a citizen cannot be deprived without due process of law under the Fifth Amendment. Freedom of movement across frontiers was a part of our heritage. Scientists, scholars, correspondents, and many others gain greatly from consultations with colleagues in other countries. Free travel of United States citizens has long been considered and should remain an integral part of freedom.

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19. *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959).

20. 361 U.S. 918 (1959).