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Constitutional Law--Subversive Activities Control Act--Section 6 Held Invalid as Infringement of Fifth Amendment Guarantee of Right to Travel (Aptheker v. Secretary of State, 378 U.S. 500 (1964))

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the joint venture will now be less able to provide large scale industry with a means to effect the concentration of large amounts of capital and the concurrent reduction of competition. Since it might no longer be possible to concentrate capital to the degree that was hitherto permissible, the joint venture will now be less able to reduce financial risk and aid in the achievement of economies of scale.³⁵ And since prior to this decision this type of enterprise was subject only to the restrictions of Section 1 of the Sherman Act, the joint venture will now be less able to minimize the risk of governmental interference with anti-competitive activities. Now, although different in form and organization, the merger and the joint venture will be subject to similar control. Hence, a corporation will undoubtedly prefer to merge with an already established corporation, rather than to form an entirely new one via a joint venture.

Moreover, it appears that this decision will have a restrictive effect upon *all* types of business combinations regardless of whether they were formerly subject to section 7. By stating that "the test of the section is the effect of the acquisition," the Court appears to be requiring only an anti-competitive potential in order to apply the restrictions of the Clayton Act. Thus, the *Penn-Olin* decision apparently tolls the death knell for any combination that might restrict competition, irrespective of the organizational attributes of the enterprise.



CONSTITUTIONAL LAW — SUBVERSIVE ACTIVITIES CONTROL ACT — SECTION 6 HELD INVALID AS INFRINGEMENT OF FIFTH AMENDMENT GUARANTEE OF RIGHT TO TRAVEL. — Appellants' passports were revoked by the Department of State because it was believed that their use of the passports would violate Section 6 of the Subversive Activities Control Act.¹

This statute makes it unlawful for a member of any organization required to register with the Subversive Activities Control Board to (1) make application for a passport or the renewal

³⁵ Economies of scale are found in industries where technical conditions may lead to increasing returns to scale, *i.e.*, where output is expanded average costs of production fall. The reasons for this situation are (1) the advantage of increased specialization, *e.g.*, assembly line technique, and (2) technical indivisibility of input, *e.g.*, feasibility of making large scale capital investment only where there is a large scale capacity. SNIDER, *ECONOMICS, PRINCIPLES AND ISSUES* 409-14 (1962).

¹ 64 Stat. 993 (1950), as amended, 68 Stat. 778, 50 U.S.C. § 785 (1954).

thereof, or (2) use or attempt to use any such passport. Appellants filed separate complaints in the United States District Court for the District of Columbia for declaratory and injunctive relief, alleging a violation of their constitutional rights. On direct appeal the Supreme Court reversed the district court and *held* that section 6 was an unconstitutional restriction of the appellants' right to travel as guaranteed by the fifth amendment. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

The first legal expression of the right to travel was contained in the Magna Carta.² Subsequently, individuals traveled freely merely using a passport as a letter of introduction to foreign nationals.³ This right to travel freely was incorporated into the United States Constitution as part of the fifth and fourteenth amendments.⁴ In the early nineteenth century a passport assumed its traditional role as a mere letter of introduction identifying the traveler as a United States citizen. At this time any governmental executive could issue such letters, since they were not required for purposes of entry or exit. However, in order to centralize and make more uniform the issuance of passports, Congress, in 1856, vested the power of issuance solely in the Secretary of State.⁵ The passport, however, still remained informative in nature and, therefore, the State Department was liberal in its issuance.⁶

The United States Supreme Court first upheld the right of free travel in 1867 in the case of *Crandall v. Nevada*.⁷ The Court prohibited a state tax on government troops crossing Nevada territory and declared that the right of free travel applied not only to the Government but also to the individual as well. The individual's right remained unrestricted until the outbreak of world hostilities in 1918, when Congress recognized the need to restrict travel for security purposes. Under its war powers it enacted a statute which enabled the President to prohibit exit from the United States without a valid passport.⁸ Thus, the enabling statute marked the initial transition of a passport from a merely informative document to an actual license to travel. With the return to normalcy, however, Congress amended the prior peacetime statute, thereby reaffirming the discretionary powers that

² Magna Carta, ch. 42 (1215).

³ Comment, *Passport Refusal for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171 (1952).

⁴ *Edwards v. California*, 314 U.S. 160, 163 (1941).

⁵ 11 Stat. 60 (1856), as amended, 44 Stat. 887, 22 U.S.C. § 211(a) (1926).

⁶ 3 MOORE, INTERNATIONAL LAW DIGEST § 493, at 862 (1906).

⁷ 73 U.S. (6 Wall.) 35, 44 (1867).

⁸ 40 Stat. 559, 22 U.S.C. § 223 (1918). The enabling statute was invoked by presidential proclamation in 1918 and subsequently revoked in 1921.

had been exercised by the Secretary of State with regard to the issuance of passports.⁹ Traditionally, the usual grounds for denying issuance of a passport were non-citizenship or illegal conduct.¹⁰ The discretionary power was upheld in 1939 when the Supreme Court refused to issue a declaratory judgment or a writ of mandamus interfering with the Secretary of State's discretion concerning the issuance of passports.¹¹

A new national emergency in 1941 necessitated a re-enactment of the 1918 statute allowing the President to prohibit exit from the United States without a valid passport. This presidential power remains in force at present.¹² In 1950 Congress enacted the Internal Security Act,¹³ designed to prevent communists from traveling abroad for the purpose of fostering subversive activities in the United States.¹⁴ Unlike the statute allowing the President to restrict exit of the entire citizenry in general, this act was aimed at restricting a particular group of citizens. The act defined a "communist organization" to mean any communist action or front organization which is substantially controlled by a foreign government and operates primarily to advance the objectives of the world communist movement.¹⁵ The determination of whether an organization is subversive is to be made by the Subversive Activities Control Board, upon application by the Attorney General.¹⁶ Once the organization is determined to be "communist" it is required to register with the Attorney General, thereby precluding any member of such organization from applying for or using a passport.¹⁷

The first major attack upon the power of the Secretary of State to restrict a communist's travel was, however, not directed at the Internal Security Act, but rather at the powers granted to him under the Immigration and Nationality Act of 1952¹⁸ and the Passport Act of 1926.¹⁹ In *Kent v. Dulles*,²⁰ an American citizen was denied a passport because he was a communist who

⁹ 44 Stat. 887, 22 U.S.C. § 211(a) (1926).

¹⁰ *Kent v. Dulles*, 357 U.S. 116, 127 (1958).

¹¹ *Perkins v. Elg*, 307 U.S. 325 (1939). Miss Elg, born in the United States of Swedish parents, had her passport revoked by the State Department on the ground that she was not an American citizen. The Court declared her a citizen but refused to compel the Secretary of State to issue the passport.

¹² 66 Stat. 163, 8 U.S.C. § 1185 (1952).

¹³ 64 Stat. 993 (1950), as amended, 68 Stat. 778, 50 U.S.C. § 785 (1954).

¹⁴ 1 U.S. CODE CONG. SERV. 984-86 (1950).

¹⁵ 2 U.S. CODE CONG. SERV. 3893 (1950).

¹⁶ *Ibid.*

¹⁷ *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

¹⁸ 64 Stat. 993 (1950), as amended, 68 Stat. 778, 50 U.S.C. § 785 (1954).

¹⁹ 44 Stat. 887, 22 U.S.C. § 211(a) (1926).

²⁰ 357 U.S. 116 (1958).

urged adherence to the Communist Party line. He was informed by the State Department that before a passport would issue he would be required to submit an affidavit declaring whether he had ever been a communist. This he refused to do. The Court held that Congress had given no power to the Secretary of State to compel such a declaration under either of the above-mentioned acts. The Court noted that absent an express provision allowing the Secretary to deny a passport, he must issue one. However, the Court in *Kent* was concerned only with interpreting the express powers granted by Congress and not with the extent of Congress' constitutional powers to restrict travel.

In *Aptheker v. Secretary of State*²¹ the Court was directly confronted with the question of the constitutional limits of travel restrictions necessitated by reasons of national security.²² In the opinion of the majority, as expressed by Mr. Justice Goldberg, Section 6 of the Subversive Activities Control Act, making it illegal for all members of registered communist organizations to use or attempt to use a passport, restricted too broadly a citizen's constitutional right to travel freely. The Court indicated that the desired ends of section 6 could be accomplished by "less drastic" means.²³ By a blanket restriction on all members of registered communist organizations the Internal Security Act in effect denies passports solely on the basis of political beliefs. In addition, the statute provides that mere membership in a communist organization is sufficient to preclude any *legal* use of a passport, thereby creating a forfeiture of the constitutional right to travel freely.²⁴ The purpose of the act should be to restrict only those who have already forfeited their right by actual subversive activities, and not to impose a forfeiture on the basis of mere membership.²⁵

The majority opinion sets forth four basic requirements which must be considered in order to produce a constitutional statute. The first is *knowledge*. A person must have some knowledge of the illegality of his activity before he should undergo a forfeiture of his rights. For example, in *Weiman v. Updegraff*²⁶ the Court struck down a state statute which enjoined payment of salaries to state employees who refused to subscribe to a loyalty

²¹ 378 U.S. 500 (1964).

²² *Id.* at 505.

²³ *Id.* at 512-13. The Court did not specifically indicate what would constitute "less drastic" means, but did refer to the case of *American Communications Ass'n v. Douds*, 337 U.S. 382 (1949), wherein "less drastic" means were used to prevent election of communist officers, without at the same time affecting basic individual rights in regard to labor union membership and the right to work.

²⁴ Comment, *supra* note 3.

²⁵ *Schenck v. United States*, 249 U.S. 47 (1919).

²⁶ 344 U.S. 183, 191 (1952).

oath, reasoning that the indiscriminate classification of innocent activity with knowing activity was an assertion of arbitrary power. In *American Communications Ass'n v. Douds*²⁷ the Court upheld a labor act which required officers of labor organizations to file a "non-communist" affidavit. In a separate opinion Mr. Justice Jackson indicated that not only must there be knowledge of the nature of one's acts, but there must also be sufficient evidence of association to imply the conspiracy required for one to forfeit his constitutional rights.

Next, it is necessary to consider the types of *activity* engaged in by each party member. In *Yates v. United States*²⁸ the Court reversed the convictions of two party members who allegedly conspired to violate the Smith Act.²⁹ This act makes it illegal to advocate the overthrow of the United States Government by force or violence. In reversing, the Court noted the distinction between the passive acceptance of the philosophy or ideology of communism and active participation in the communist conspiracy, the latter being necessary to sustain a conviction.³⁰ A similar distinction was recognized in *Sachtman v. United States*.³¹ The Court stated that it was an abuse of discretion for the Secretary of State to deny a passport solely on the ground that the petitioner was a member of a group on the Attorney General's list of subversive organizations.³²

The third area of consideration is the *commitment* of the member to the communist conspiracy. The fact that some members of a group have evil or illegal purposes does not necessarily mean that such is true of all.³³ Furthermore, the degree of allegiance men give to an organization is not usually unqualified and unequivocal.³⁴

The last consideration is the *purpose* and *place* of travel. It would seem that Congress would be justified in concluding that if subversives are allowed to travel freely to certain countries, for unlawful purposes, the communist conspiracy would be advanced.³⁵

In not taking into consideration the above factors in the formulation of section 6, Congress in effect authorized the State Department to refuse passports solely on the ground of political affiliation. It was this authority that the Supreme Court declared

²⁷ 339 U.S. 382, 422-25 (1950).

²⁸ 354 U.S. 298 (1957).

²⁹ 18 U.S.C. § 2385 (1940).

³⁰ *Yates v. United States*, 354 U.S. 298, 312-27 (1957).

³¹ 225 F.2d 938 (D.C. Cir. 1950).

³² *Id.* at 940-44.

³³ *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 246 (1957).

³⁴ *Schneiderman v. United States*, 320 U.S. 118, 136 (1943).

³⁵ Comment, *Passport Refusal for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171, 196 (1952).

unconstitutional, for in restricting a person merely on these considerations the State Department would be treating the issuance of a passport as a privilege granted by the Government rather than as a right of every American citizen.³⁶

In order to constitutionally restrict a particular group of individuals we must follow the criteria set down in *Aptheker*. In restricting those individuals who possess the requisite knowledge, activity, commitment and purpose, we would in effect be restricting only those individuals who are already restricted as a result of the Alien Registration Act of 1940.³⁷ Furthermore, an act based on these criteria would serve little purpose since (1) the United States already has the right to restrict the movements of criminals,³⁸ and (2) the act would be so detailed that it would be easy for subversives to escape the restrictions of its provisions.³⁹

As it is now impossible to restrict any one particular group's right to travel, it would seem that the State Department would be limited to passport and travel restrictions based on geographical factors.⁴⁰ Two recent district court cases have held this test up for judicial scrutiny. In *Zemel v. Rusk*,⁴¹ the plaintiff wished to have his passport validated for travel to Cuba. The State Department refused his request stating that only those individuals whose travel might be in the best interest of the United States, such as newsmen, would be permitted to travel to Cuba. The district court upheld the Secretary's determination, reasoning that the President has the power to restrict passports in national emergencies as part of his power to conduct our foreign relations. The Executive has the right to take all steps necessary, except war, to protect the rights of American citizens in foreign countries.⁴² In *MacEwan v. Rusk*,⁴³ the plaintiffs sought an injunction restraining the Secretary of State from refusing to endorse their passports for travel to Cuba. The district court upheld the Government's right to impose geographic restrictions upon travel under the executive authority to conduct foreign affairs.

These cases are factually distinguishable from both *Kent* and *Aptheker*. Also the controlling legal issues are of a different nature.

Both *Kent* and *Aptheker* concerned restrictions placed on individuals or groups because of their political beliefs or associations.

³⁶ S. Doc. No. 126, 85th Cong., 2d Sess. 1 (1958).

³⁷ 2 U.S. CODE CONG. SERV. 3887 (1950).

³⁸ 3 MOORE, INTERNATIONAL LAW DIGEST § 512, at 920 (1906).

³⁹ See 2 U.S. CODE CONG. SERV. 3887 (1950); 1 U.S. CODE CONG. SERV. 1392 (1950).

⁴⁰ Boudin, *The Constitutional Right To Travel*, 56 COLUM. L. REV. 47, 74 (1956).

⁴¹ 228 F. Supp. 65 (D. Conn.), cert. granted, — U.S. — (1964).

⁴² Rev. Stat. § 2001 (1875), 22 U.S.C. § 1732 (1958).

⁴³ 228 F. Supp. 306 (E.D. Pa. 1964).

In *Zemel* the entire citizenry is restricted in the exercise of their right to travel. The prohibition does not depend on either beliefs or associations; rather it depends on geography.

The *Kent* case concerned the discretion of the Secretary of State and *Aptheker* concerned the powers of Congress to restrict foreign travel. However, in *Zemel* the court was primarily concerned with the inherent power of the President to restrict travel as a necessary part of his constitutional duty to control foreign relations.

In considering whether such a determination by the President is valid, the Court must consider two main questions.

First, is this a "political question," and therefore not a justiciable issue? A "political question" has been defined as one which has

a textually demonstrable [*sic*] constitutional commitment of an issue to a coordinate political department; or a lack of a judicially discoverable and manageable standard for resolving it . . . or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁴⁴

It would seem that this may well be within this definition. If it is so held then the restrictions based on geographical restrictions will be allowed to stand.

Secondly, if it is determined that the validity of this order of the President is not a "political question" and therefore subject to judicial review, the Court will then determine its reasonableness. In cases involving personal liberties the Court has the power to insure that neither the executive nor the legislature act arbitrarily.⁴⁵

In testing the reasonableness of a geographic restriction applying to all the people the Court will have to weigh the nation's right to news with the immediacy of the threat to our national security created by unrestricted foreign travel.

Even though the restriction under discussion in *Zemel* does not apply to all newspapermen, it would seem there is some danger in allowing the President to pick the reporters he considers reputable or worthy of this privilege. Notwithstanding that there is a precedent for such privilege-granting,⁴⁶ this power in the

⁴⁴ *Baker v. Carr*, 369 U.S. 186, 217 (1961).

⁴⁵ *Perez v. Brownell*, 356 U.S. 44, 58-59 (1958). Mr. Chief Justice Warren feels that this is an affirmative duty. *Id.* at 78 (dissenting opinion). Mr. Justice Black and Mr. Justice Douglas feel that the first amendment freedoms are absolute and not subject to any restrictions. *Id.* at 84 (dissenting opinion).

⁴⁶ *Worthy v. Herder*, 270 F.2d 905 (D.C. Cir. 1959). Thirty-one representatives of the news gathering agencies were granted passports for Red

hands of one man, even the President, is very close to governmental censorship of the news and may well be an unconstitutional limitation on the freedoms of speech and press.

On the other hand, the present state of our relations with Cuba is so delicate that it may be in the national interest that such a restriction be sustained, especially since provision is made for at least a few exceptions and is, hopefully, a temporary measure.



CRIMINAL LAW—NEW YORK PROCEDURE TO DETERMINE VOLUNTARINESS OF A CONFESSION RULED INVALID.—Petitioner was convicted of murder in the first degree in a trial during which the judge submitted to the same jury both the questions of guilt and the voluntariness of his confession in accordance with New York procedure. The conviction was affirmed by the New York Court of Appeals and thereafter Jackson filed a petition for habeas corpus in the federal district court, alleging the unconstitutionality of the New York procedure. After both the district court and the court of appeals affirmed the conviction, the United States Supreme Court reversed and remanded, *holding* that the New York procedure violated the due process clause of the fourteenth amendment by denying defendant's right to a fair and separate determination of the voluntariness of his confession. *Jackson v. Denno*, 378 U.S. 368 (1964).

Under common law a confession, when "not the product of any meaningful act of volition"¹ on the part of the accused, was held inadmissible as evidence in criminal trials since there was a judicial belief in its probable falsity.² This rule of evidence, sometimes enacted into state law,³ caused some state courts to exclude coerced confessions without relying on the constitutional principles of due process of law.

Although the passage of the fourteenth amendment in 1868 applied the concept of due process to the states, no case involving a state conviction based on an allegedly involuntary confession reached the United States Supreme Court until 1936 in *Brown*

China. N.Y. Times, Dec. 8, 1959, p. 29, col. 1. It would seem that since Mr. Worthy was not among these representatives his travel to Cuba would be "unsafe."

¹ *Blackburn v. Alabama*, 361 U.S. 199, 211 (1960).

² 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

³ See, e.g., N.Y. CODE CRIM. PROC. § 395; TEX. CODE CRIM. PROC. art. 727 (1907).