

Constitutional Law—Refusal to Renew Appellant's Passport to Travel in Certain Areas Held Immune from Judicial Review (Worthy v. Herter, 270 F.2d 905 (D.C. Cir. 1959))

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clearly defined, but it is apparent that the application of isolated act statutes to impose jurisdiction over a foreign corporation on the basis of a single contract to be performed within the state satisfies due process if there has been "substantial minimum contact" between the defendant and the forum, and defending the action is not an unreasonable burden.

Although the holding of the principal case is predicated upon a cause of action arising out of the performance of a single contract within the state, the Minnesota Court took into consideration additional corporate activities related to that contract before concluding the requirements of due process had been satisfied. The minimal contacts of defendant with the forum represent a degree of activity barely sufficient to fall within the limitations prescribed by the Supreme Court as the present scope of state jurisdiction over foreign corporations.



CONSTITUTIONAL LAW — REFUSAL TO RENEW APPELLANT'S PASSPORT TO TRAVEL IN CERTAIN AREAS HELD IMMUNE FROM JUDICIAL REVIEW.—Appellant newspaper correspondent applied for renewal of his passport which contained a restriction against travel to certain areas with which the United States does not have diplomatic relations. Appellant had violated this restriction on his original passport and refused to commit himself to abide by it in the future. The Secretary of State refused to issue the passport. The United States Court of Appeals, in affirming the judgment of the District Court, *held*, the designation of certain areas in the world as "trouble spots" and the concomitant restriction upon American travel therein is a part of the President's conduct of foreign affairs as delegated to the Secretary. The basis of the restriction is military, political, and geographical, not personal, and the President's discretion in such affairs is immune from judicial review. *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959).

In English law, man's natural right to travel has been virtually unquestioned for centuries. The Magna Carta in 1215 asserted this right of free men against the right of the monarch to restrict them to the kingdom¹ and, by the time of Blackstone little, if any, thought was given to the notion that one of His Majesty's subjects would have any restrictions placed upon his travel—within or without the kingdom.² The American colonists undoubtedly shared this view and article four of the Articles of Confederation stated it expressly.³

¹ MAGNA CARTA ch. 42 (1215).

² 1 BLACKSTONE, COMMENTARIES *134.

³ See CHAFFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION 162-213 (1956).

Despite the fact that the right to freedom of locomotion was not expressly incorporated into the Constitution (as were the freedoms of speech, press and religion), it played a vital role in the early growth and development of the United States.⁴ When the question of freedom of movement between the states was encountered by the Supreme Court in 1941,⁵ it was held to be a right guaranteed by the "commerce clause" of the Constitution.

The passport, in its earliest international usage, was granted as a safe-conduct guarantee to foreign ambassadors or alien enemies.⁶ United States passports were, at first, merely political documents identifying the bearer as an American citizen and requesting his safe passage through foreign countries.⁷ In contrast to their present mandatory character, passports were originally devised solely as aids to the traveler. They were issued, prior to 1856,⁸ by cities, states and notaries public as well as the federal government,⁹ as mere courtesies and conveniences and were not required¹⁰ for travel abroad until World War I in 1918.¹¹ At that time it was made unlawful to enter or leave the country without a passport during time of war.¹² The Secretary of State was authorized to issue them in his discretion in accordance with rules prescribed by the President.¹³

The State Department codified¹⁴ its passport regulations and the President affirmed them.¹⁵ The importance of the passport increased greatly in 1941 when it was declared a necessity for foreign travel, not only during war, but also in time of national emergency proclaimed by the President.¹⁶ This is of particular import since the country has been in constant state of war or national emergency since that time.¹⁷ The statutory history of the passport ends with the Act of 1952 which enabled the Chief Executive to place whatever other restrictions on passports as he should find the "interests of the

⁴ *Ibid.*

⁵ *Edwards v. California*, 314 U.S. 160 (1941); *accord*, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) (concurring opinion).

⁶ Jaffe, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFFAIRS 17 (1956).

⁷ *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835).

⁸ 11 Stat. 60 (1856) "[T]he Secretary of State *shall* be authorized to grant and issue passports . . ." (Emphasis added.) (amended by 44 Stat. 887, 22 U.S.C. § 211a (1958)).

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

¹⁰ For the few exceptions see THE REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL 7-8 (1958).

¹¹ 40 Stat. 559 (now 66 Stat. 190, 8 U.S.C. § 1185) (1918).

¹² *Ibid.*

¹³ 44 Stat. 887, 22 U.S.C. § 211a (1958): "The Secretary of State *may* grant and issue passports . . ." (Emphasis added.)

¹⁴ 22 C.F.R. §§ 51.1-51.170 (1958).

¹⁵ Exec. Order No. 7856, 3 Fed. Reg. 681 (1938).

¹⁶ 55 Stat. 252 (1941) (now 66 Stat. 190, 8 U.S.C. § 1185 (1958)).

¹⁷ Pres. Proc. No. 3004, 18 Fed. Reg. 489 (1953).

United States" require.¹⁸ The authority granted under this legislation was promptly delegated to the Secretary of State.¹⁹

Unquestionably the nature of the passport, at least to the mind of the State Department, had changed from a merely ancillary document to an effective means of controlling exit from the United States.²⁰ The heightening of the "cold war" prompted an exercise of the Secretary's discretion and an attempt on his part to deny passports to several persons, particularly those who were allegedly members of, or associated with, the Communist Party.²¹ The particular desirability of concealing the sources of information and the identity of informers, made these denials almost summary, leaving the applicants with little or no chance of attacking the decision or even determining the precise grounds for refusal.²²

In *Bauer v. Acheson*,²³ the court rejected the government's contention that the right to deny a passport was a purely foreign affair (and thus a non-justiciable question). Although stating that the right to travel was a substantive right, the court did not pass on the constitutionality of the broad discretion vested in the President in withholding passports²⁴ but decided on the issue that the applicant was entitled to a hearing as a matter of procedural due process.²⁵ Again in *Nathan v. Dulles*,²⁶ the time consuming and procedurally doubtful method the State Department had established for granting hearings and appeals was held to be other than that which the law "contemplates and guarantees."²⁷ The Department's awareness of the uncertain ground upon which it was treading at this time was evidenced by the apparent fact that usually one had only to apply for a passport, go through the appeal procedure, and, upon denial, commence suit in the federal court—whereupon the Department promptly issued the document.²⁸

All this time, the courts, while not denying the Secretary's right to refuse the passport,²⁹ were prevented by procedural or technical questions from passing on the constitutionality of the issue. In the *Schachtman v. Dulles* case,³⁰ the court recognized the right to travel as a natural right subject to the protections of liberty guar-

¹⁸ 66 Stat. 190, 8 U.S.C. § 1185 (1958).

¹⁹ Pres. Proc. No. 3004, 18 Fed. Reg. 489 (1953).

²⁰ See *Briehl v. Dulles*, 248 F.2d 561, 568 (D.C. Cir. 1957).

²¹ Comment, 61 YALE L.J. 171, 193 (1952).

²² Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47, 66-72 (1956).

²³ 106 F. Supp. 445 (D.D.C. 1952).

²⁴ 66 Stat. 190, 8 U.S.C. § 1185 (1958).

²⁵ *Bauer v. Acheson*, 106 F. Supp. 445, 452 (D.D.C. 1952).

²⁶ 129 F. Supp. 951 (D.D.C. 1955).

²⁷ *Id.* at 952.

²⁸ Boudin, *supra* note 22, at 72.

²⁹ See, e.g., *Bauer v. Acheson*, 106 F. Supp. 445, 451 (D.D.C. 1952).

³⁰ 225 F.2d 938 (D.C. Cir. 1955).

anted by the Fifth Amendment. But the court gave only the ruling sought—that the Secretary's reasons were legally insufficient.

The Act of 1952 was placed squarely before the court in *Kent v. Dulles* and *Briehl v. Dulles*, decided in the same opinion,³¹ but again its constitutionality was not questioned. The court declared that the "discretion" given the Secretary by the Acts of 1856 and 1926, though broadly stated, had in fact been narrowly applied to two general situations—determination of United States citizenship and allegiance, and participation in illegal conduct. Therefore Congress did not intend by the "interests of the United States" clause to authorize an unbridled discretion to grant or withhold a passport for any substantive reason the Secretary may choose. Clearly the right to travel can not, at the present time, be restricted because of one's personal beliefs and associations.

It should be noted that the grounds for denial in the instant case were totally different from those asserted in the previous litigations. "The basis of the restriction is *not personal* but is the military and political situation in the designated areas."³² Nor is this concept of area restrictions unique. As far back as the War of 1812 travel to and from enemy zones without a passport was deemed a crime.³³ In the early part of World War I passports were stamped invalid for use in the belligerent countries of Europe.³⁴ And again in the decade preceding the Second World War such restrictions were placed respectively on Ethiopia, Spain and China.³⁵ Even after these blanket restrictions were laid down, however, exemptions were granted to certain groups of individuals.³⁶ Once the Court accepted the claim that such designations and restrictions were foreign affairs the issue was resolved, for it has long been held that the discretion of the Executive in the conduct of foreign affairs is purely a political question involving absolute discretionary powers.³⁷

The present laws affecting the issuance of passports are greatly in need of clarification—both legislative and judicial. At present there is no provision for restricting the travel of a particular individual

³¹ *Kent v. Dulles*, 357 U.S. 116 (1957); *Briehl v. Dulles*, 248 F.2d 561 (1957) (Briehl joined with Kent as appellant in the Supreme Court action).

³² *Worthy v. Herter*, 270 F.2d 905, 913 (D.C. Cir. 1959). (Emphasis added.)

³³ 3 Stat. 199 (1815).

³⁴ III HACKWORTH, *DICTIONARY OF INTERNATIONAL LAW* 526 (1942).

³⁵ *Id.* at 531-33. Although the restrictions here prevented one from obtaining a passport, they did not prevent egress from the country.

³⁶ *Id.* at 531. *But cf.* THE REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *FREEDOM TO TRAVEL* 57, wherein it is stated that too many such exceptions if granted today might amount to discrimination against those denied a passport.

³⁷ *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *accord*, *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818); *Coleman v. Miller*, 307 U.S. 433 (1939) (*dictum*).

whose exit might be seriously detrimental to the national security. More specifically, a question arises where the disclosure of the reasons for denying an individual's passport or the government's confidential sources of information might be equally deleterious to the country's welfare. It seems that some specific legislation could be passed which would both relieve the government of this dilemma and still effectively safeguard the right of the individual. Nonetheless, until further specific legislation is passed, the Secretary's discretionary power is limited to the areas in which it had been generally exercised since 1856 and the regulations hinging upon the "interests of the United States" clause have been substantially invalidated.³⁸ Just how specific such legislation must be is presently a divided question.³⁹ The *Worthy* case has affirmed the Secretary's right to place *area* restrictions upon travel for *all* Americans. Whether, and to what extent, an *individual* can be so restricted, are the still unanswered questions which now await further legislation before the court has an opportunity to consider them.



CONTRACTS—ECONOMIC DURESS—THREAT TO SELL PROPERTY TO AN "UNDESIRABLE PARTY" HELD SUFFICIENT TO CONSTITUTE DURESS.—Defendant-builder and plaintiffs-purchasers entered into an agreement calling for the construction of a house in the defendant's housing development. The contract provided for the making of a cash down payment. The plaintiffs, after making the down payment, desired to be released from the contract and recover the purchase money paid. Upon defendant's refusal to release them, plaintiffs allegedly threatened to resell the house to an "undesirable person" for the purpose of damaging the builder's business unless he acceded to the plaintiffs' terms. Defendant agreed but thereafter refused to return the money. Plaintiffs sued on the release agreement. The lower court held for the plaintiffs. On appeal, the Court reversed, *holding* that if the threats were in fact made and the builder actually believed they would be carried out and his will was thereby overcome, he was justified in treating the original contract as breached and was entitled to recover whatever damages resulted therefrom. *Wolf v. Marlton Corp.*, 57 N.J. Super. 278, 154 A.2d 625 (1959).

³⁸ *Kent v. Dulles*, 357 U.S. 116 (1957); *accord*, *Dayton v. Dulles*, 357 U.S. 144 (1957).

³⁹ See, *e.g.*, THE REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL 81-86 (1958); Jaffe, *The Right to Travel; The Passport Problem*, 35 FOREIGN AFFAIRS 17, 27-28 (1956); Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47, 72-77 (1956); Comment, 61 YALE L.J. 171, 198-201 (1952).