

357 U.S. 116

Kent v. Dulles

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 481 Argued: April 10, 1958 --- Decided: June 16, 1958

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case concerns two applications for passports, denied by the Secretary of State. One was by Rockwell Kent, who desired to visit England and attend a meeting of an organization known as the "World Council of Peace" in Helsinki, Finland. The Director of the Passport Office informed Kent that issuance of a passport was precluded by § 51.135 of the Regulations promulgated by the Secretary of State on two grounds:^[n1] (1) that he was a [p118] Communist and (2) that he had had "a consistent and prolonged adherence to the Communist Party line." The letter of denial specified in some detail the facts on which those conclusions were based. Kent was also advised of his right to an informal hearing under § 51.137 of the Regulations. But he was also told that, whether or not a hearing was requested, it would be necessary, before a passport would be issued, to submit an affidavit as to whether he was then or ever had been a Communist.^[n2] Kent did not ask for a hearing, but filed a new passport application listing several European countries he desired to visit. When advised that a hearing was still available to him, his attorney replied that Kent took the position [p119] that the requirement of an affidavit concerning Communist Party membership "is unlawful, and that, for that reason and as a matter of conscience," he would not supply one. He did, however, have a hearing at which the principal evidence against him was from his book *It's Me O Lord*, which Kent agreed was accurate. He again refused to submit the affidavit, maintaining that any matters unrelated to the question of his citizenship were irrelevant to the Department's consideration of his application. The Department advised him that no further consideration of his application would be given until he satisfied the requirements of the Regulations.

Thereupon, Kent sued in the District Court for declaratory relief. The District Court granted summary judgment for respondent. On appeal, the case of Kent was heard with that of Dr. Walter Briehl, a psychiatrist. When Briehl applied for a passport, the Director of the Passport Office asked him to supply the affidavit covering membership in the Communist Party. Briehl, like Kent, refused. The Director then tentatively disapproved the application on the following grounds:

In your case, it has been alleged that you were a Communist. Specifically, it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that, in 1936 and 1941, you contributed articles to the Communist Publication "Social Work Today"; that, in 1939, 1940, and 1941, you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that [p120] you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the Freedom Stage, Incorporated.

The Director advised Briehl of his right to a hearing, but stated that, whether or not a hearing was held, an affidavit concerning membership in the Communist Party would be necessary. Briehl asked for a hearing, and one was held. At that hearing, he raised three objections: (1) that his "political affiliations" were irrelevant to his right to a passport; (2) that "every American citizen has the right to travel regardless of politics", and (3) that the burden was on the Department to prove illegal activities by Briehl. Briehl persisted in his refusal to supply the affidavit. Because of that refusal, Briehl was advised that the Board of Passport Appeals could not, under the Regulations, entertain an appeal.

Briehl filed his complaint in the District Court, which held that his case was indistinguishable from Kent's, and dismissed the complaint.

The Court of Appeals heard the two cases en banc, and affirmed the District Court by a divided vote. 101 U.S.App.D.C. 278, 239, 248 F.2d 600, 561. The cases are here on writ of certiorari. [355 U.S. 881](#).

The Court first noted the function that the passport performed in American law in the case of *Urtetiqui v. D'Arbel*, 9 Pet. 692, 699, decided in 1835:

There is no law of the United States in any manner regulating the issuing of passports or directing upon what evidence it may be done or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required by the secretary of state before issuing a passport. This, however, is entirely discretionary [p121] with him. No inquiry is instituted by him to ascertain the fact of citizenship, or any proceedings had, that will in any manner bear the character of a judicial inquiry. It 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.

A passport not only is of great value -- indeed necessary -- abroad; it is also an aid in establishing citizenship for purposes of reentry into the United States. See *Browder v. United States*, [312 U.S. 335](#), 339; 3 Moore, Digest of International Law (1906), § 512. But throughout most of our history -- until indeed quite recently -- a passport, though a great convenience in foreign travel,

was not a legal requirement for leaving or entering the United States. *See* Jaffe, *The Right to Travel: The Passport Problem*, 35 *Foreign Affairs* 17. Apart from minor exceptions to be noted, it was first^[n3] made a requirement by § 215 of the Act of June 27, 1952, 66 Stat. 190, [8 U.S.C. § 1185](#) which states that, after a prescribed proclamation by the President, it is

unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United **[p122]** States unless he bears a valid passport.^[n4]

And the Proclamation necessary to make the restrictions of this Act applicable and in force has been made.^[n5]

Prior to 1952, there were numerous laws enacted by Congress regulating passports, and many decisions, rulings, and regulations by the Executive Department concerning them. Thus, in 1803, Congress made it unlawful for an official knowingly to issue a passport to an alien certifying that he is a citizen. 2 Stat. 205. In 1815, just prior to the termination of the War of 1812, it made it illegal for a citizen to "cross the frontier" into enemy **[p123]** territory, to board vessels of the enemy on waters of the United States or to visit any of his camps within the limits of the United States, "without a passport first obtained" from the Secretary of State or other designated official. 3 Stat. 199-200. The Secretary of State took similar steps during the Civil War. *See* Dept. of State, *The American Passport* (1898), 50. In 1850 Congress ratified a treaty with Switzerland requiring passports from citizens of the two nations. 11 Stat. 587, 589-590. Finally, in 1856, Congress enacted what remains today as our basic passport statute. Prior to that time, various federal officials, state and local officials, and notaries public had undertaken to issue either certificates of citizenship or other documents in the nature of letters of introduction to foreign officials requesting treatment according to the usages of international law. By the Act of August 18, 1856, 11 Stat. 52, 60-61, [22 U.S.C. § 211a](#) Congress put an end to those practices.^[n6] This provision, as codified by the Act of July 3, 1926, 44 Stat., Part 2, 887, reads.

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.

Thus, for most of our history, a passport was not a condition to entry or exit.

It is true that, at intervals, a passport has been required for travel. Mention has already been made of the restrictions imposed during the War of 1812 and during the Civil War. A like restriction, which was the forerunner of that contained in the 1952 Act, was imposed by Congress in 1918. **[p124]**

The Act of May 22, 1918, 40 Stat. 559, made it unlawful, while a Presidential Proclamation was in force, for a citizen to leave or enter the United States "unless he bears a valid passport." *See* H.R.Rep. No. 485, 65th Cong., 2d Sess. That statute was invoked by Presidential Proclamation No. 1473 on August 8, 1918, 40 Stat. 1829, which continued in effect until March 3, 1921. 41 Stat. 1359.

The 1918 Act was effective only in wartime. It was amended in 1941 so that it could be invoked in the then-existing emergency. 55 Stat. 252. *See* S.Rep. No. 444, 77th Cong., 1st Sess. It was invoked by Presidential Proclamation No. 2523, November 14, 1941, 55 Stat. 1696. That emergency continued until April 28, 1952. Proc. No. 2974, 66 Stat. C31. Congress extended the statutory provisions until April 1, 1953. 66 Stat. 54, 57, 96, 137, 330, 333. It was during this extension period that the Secretary of State issued the Regulations here complained of.^[n7]

Under the 1926 Act and its predecessor, a large body of precedents grew up which repeat over and over again that the issuance of passports is "a discretionary act" on the part of the Secretary of State. The scholars,^[n8] the courts,^[n9] the Chief Executive,^[n10] and the Attorneys General^[n11] all [p125] so said. This long-continued executive construction should be enough, it is said, to warrant the inference that Congress had adopted it. *See Allen v. Grand Central Aircraft Co.*, [347 U.S. 535](#), 544-545; *United States v. Allen-Bradley Co.*, [352 U.S. 306](#), 310. But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion.

The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the [Fifth Amendment](#). So much is conceded by the Solicitor General. In Anglo-Saxon law, that right was emerging at least as early as the Magna Carta.^[n12] Chafee, [p126] *Three Human Rights in the Constitution of 1787* (1956), 171-181, 187 *et seq.*, shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. *See Crandall v. Nevada*, 6 Wall. 35, 44; *Williams v. Fears*, [179 U.S. 270](#), 274; *Edwards v. California*, [314 U.S. 160](#). "Our nation," wrote Chafee,

has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.

Id. at 197.

Freedom of movement also has large social values. As Chafee put it:

Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities.^[n13] Then there are reasons close to the core of personal life -- marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe, and helps them to be well informed [p127] on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways, direct contact with other countries contributes to sounder decisions at home.

Id. at 195-196. *And see* Vestal, Freedom of Movement, 41 Iowa L.Rev. 6, 13-14.

Freedom to travel is, indeed, an important aspect of the citizen's "liberty." We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment.

The difficulty is that, while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly. So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary, for the command of Congress was 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.

32 Stat. 386, [22 U.S.C. § 212](#). Second was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States. *See* 3 Moore, Digest of International Law (1906), § 512; 3 Hackworth, Digest of International Law (1942), 268; 2 Hyde, International Law (2d rev. ed.), § 401. [p128]

The grounds for refusal asserted here do not relate to citizenship or allegiance, on the one hand, or to criminal or unlawful conduct, on the other. Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice. One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But, as respects Communists, these are scattered rulings, and not consistently of one pattern. We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned. We therefore hesitate to impute to Congress, when, in 1952, it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.

More restrictive regulations were applied in 1918 and in 1941 as war measures. We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, [343 U.S. 579](#).

In a case of comparable magnitude, *Korematsu v. United States*, [323 U.S. 214](#), 218, we allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of "the gravest imminent danger to the public safety." There, the Congress and the Chief Executive moved in coordinated action; and, as we said, the Nation was then at war. No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen, has been made here. [p129]

Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution, we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than "request all whom it may concern to permit safely and freely to pass, and, in case of need, to give all lawful aid and protection" to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word "liberty" as used in the [Fifth Amendment](#). If that "liberty" is to be regulated, it must be pursuant to the lawmaking functions of the Congress. *Youngstown Sheet & Tube Co. v. Sawyer, supra*. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. *See Panama Refining Co. v. Ryan, 293 U.S. 388*, 420-430. *Cf. Cantwell v. Connecticut, 310 U.S. 296*, 307; *Niemotko v. Maryland, 340 U.S. 268*, 271. Where activities or enjoyment natural and often necessary to the wellbeing of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. *See Ex parte Endo, 323 U.S. 283*, 301-302. *Cf. Hannegan v. Esquire, Inc., 327 U.S. 146*, 156; *United States v. Rumely, 345 U.S. 41*, 46. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.

Thus, we do not reach the question of constitutionality. We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here. [p130] We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations. They do not seek to escape the law, nor to violate it. They may or may not be Communists. But, assuming they are, the only law which Congress has passed expressly curtailing the movement of Communists across our borders has not yet become effective. ^[in14] It would therefore be strange to infer that, pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive, power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations.

To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress, by § 1185 and § 211a, had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms, and, absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.

Reversed.

1. 22 CFR § 51.135 provides:

In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of

United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion -- not otherwise rebutted by the evidence -- that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion -- not otherwise rebutted by the evidence -- that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement.

2. Section 51.142 of the regulations provides:

At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

3. Sections 2 and 6 of the Act of September 23, 1950, known as the Internal Security Act of 1950, 64 Stat. 987, 993, 50 U.S.C. §§ 781 785, provide that it shall be unlawful, when a Communist organization is registered under the Act or when "there is in effect a final order of the Board requiring an organization to register," for any member having knowledge of such registry and order to apply for a passport or for any official to issue him one. But the conditions precedent have not yet materialized.

4. That section provides in relevant part:

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful --

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

* * * *

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

* * * *

(b) After such proclamation as is provided for in subsection (a) has been made and published, and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, 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.

5. Proc. No. 3004, 67 Stat. C31.

6. See 9 Op.Atty.Gen. 350, 352.

7. Dept. Reg. No. 108.16, effective August 28, 1952, 17 Fed.Reg. 8013.

8. See 2 Hyde, International Law (2d rev. ed.1945), § 399; 3 Hackworth, Digest of International Law (1942), § 268.

9. See Perkins v. Elg, 307 U.S. 325, 350.

10. Exec.Order No. 654, June 13, 1907; id. No. 2119-A, Jan. 12, 1915; id. No. 2286-A, Dec. 17, 1915; id. No. 2362-A, Apr. 17, 1916; id. No. 2519-A, Jan. 24, 1917; id. No. 4382-A, Feb. 12, 1926; id. No. 4800, Jan. 31, 1928; id. No. 5860, June 22, 1932; id. No. 7856, Mar. 31, 1938, 3 Fed.Reg. 681, 22 CFR § 51.75. The present provision is that last listed and reads in part as follows:

The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

The Department, however, did not feel that the Secretary of State could exercise his discretion willfully without cause. Acting Secretary Wilson wrote on April 27, 1907,

The issuance of passports is a discretionary act on the part of the Secretary of State, and he may, for reasons deemed by him to be sufficient, direct the refusal of a passport to an American citizen; but a passport is not to be refused to an American citizen, even if his character is doubtful, unless there is reason to believe that he will put the passports to an improper or unlawful use.

Foreign Relations of the United States, Pt. II (1910), 1083. *See* 3 Moore, Digest of International Law (1906), § 512. Freund, Administrative Powers over Persons and Property (1928), 97, states,

. . . in practice, it is clear that the Department of State acts upon the theory that it must grant the passport unless there is some circumstance making it a duty to refuse it. Any other attitude would indeed be intolerable; it would mean an executive power of a political character over individuals quite out of harmony with traditional American legislative practice.

11. 13 Op.Atty.Gen. 89, 92; 23 Op.Atty.Gen. 509, 511.

12. Article 42 reads as follows:

It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above.

And see Jaffe, *op. cit. supra*, 19-20; Sibley, The Passport System, 7 J.Soc.Comp.Leg. (N.S.) 26, 32-33; 1 Blackstone Commentaries 134-135.

13. The use of foreign travel to promote educational interests is reviewed by Francis J. Colligan in 30 Dept.State Bull. 663.

14. See note 3, *supra*.

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