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# Constitutional Law -- Discretionary Power of the Secretary of State to Deny Passports

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said, instead, that if additur was improper they would remand the case to the trial court for exercise of its discretion, and not for "judgment on the verdict"?

As indicated above it appears that the additur procedure denies the plaintiff his right to trial by jury; however, in light of the remittitur precedent in North Carolina, our court's decision rests on logical ground.

NICK J. MILLER

### Constitutional Law—Discretionary Power of the Secretary of State to Deny Passports

The power of the Secretary of State to deny passports for reasons other than those established by congressional legislation was rejected by the Supreme Court in the recent case of *Kent v. Dulles*.<sup>1</sup> To understand adequately the problem involved in that case it is necessary to review briefly the historical and legal background of the present passport laws.<sup>2</sup>

Originally, passports were issued by a multiplicity of federal, state, and local officers.<sup>3</sup> A statute<sup>4</sup> enacted in 1856 and, with minor amendments, codified in 1926 changed this practice. This statute remains the basis of the present passport laws. Its pertinent provision 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."

The Secretary assumed that under this statute and the executive order issued pursuant to it<sup>5</sup> he had the discretionary power to deny a passport. Until recently that power had never been questioned.<sup>6</sup>

<sup>1</sup> 357 U.S. 116 (1958).

<sup>2</sup> This Note will deal with the Secretary's power to deny passports and with the substantive grounds for such denial. It will consider only incidentally the related problem of procedural due process in the denial of passports.

<sup>3</sup> See 357 U.S. at 123.

<sup>4</sup> 11 STAT. 60 (1856) (later amended by 44 STAT. 887 (1926), 22 U.S.C. § 211a (1952)).

<sup>5</sup> Exec. Order No. 7856 (1938), 22 C.F.R. §§ 51.1-77 (1958). This order outlined certain procedural rules and in § 51.77 authorized the Secretary to promulgate additional regulations not inconsistent therewith.

<sup>6</sup> The first case mentioning passports in the Supreme Court was *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692 (1835), where the Court, in a frequently quoted dictum, described the passport as a political document whose issuance was in the sole discretion of the Secretary. Briefly stated, the basis of the viewpoint thus expressed was that the inherent power of the Chief Executive to exercise sole discretion in conducting foreign affairs encompassed the issuance of passports, because the traveler's activities abroad might conflict with our foreign policy and because the government was in some measure obligated to protect citizens abroad. For a good exposition of this point of view, see *Briehl v. Dulles*, 248 F.2d 561,

A passport has never been a prerequisite to travel in peacetime.<sup>7</sup> A 1918 statute,<sup>8</sup> making it unlawful for a person to leave or enter the United States without a passport while a presidential proclamation of war was in force, was so amended<sup>9</sup> early in 1941 that the President might invoke its provisions in the then-existing emergency. The statute, altered so that it could be invoked in *any* national emergency, was re-enacted in 1952.<sup>10</sup> The necessary proclamations were made so that continuously since 1941 a passport has been a legal prerequisite to exit from the United States.<sup>11</sup> In the light of this requirement, the power of the Secretary of State to deny passports has assumed a new importance and has been subjected to a critical re-examination.<sup>12</sup>

Beginning in the late 1940's the State Department began rejecting passport applications on the ground that issuance to the applicant in question would be "against the best interests" of the United States.<sup>13</sup> This practice was first challenged in *Bauer v. Acheson*<sup>14</sup> where the Federal District Court for the District of Columbia recognized the constitutional right of a citizen to travel<sup>15</sup> and held that the right could

566-68 (D.C. Cir. 1957). This, combined with the supposed statutory authority under the cited legislation, was generally thought to give the Secretary a two-fold basis for his actions.

<sup>7</sup> It is merely a convenience in international travel, its chief use being to establish the citizenship of the bearer. 357 U.S. at 121. Persons denied a passport have generally traveled without one.

<sup>8</sup> 40 STAT. 559 (1918).

<sup>9</sup> 55 STAT. 252 (1941).

<sup>10</sup> 66 STAT. 190 (1952), 8 U.S.C. § 1185(b) (1952).

<sup>11</sup> The statute was invoked in 1941 before the United States entered World War II. Proclamation No. 2523, 55 STAT. 1696 (1941). This period ended in 1952 by Proclamation No. 2974, 66 STAT. C31 (1952). But the provisions of the statute were extended several times, eventually to April 1, 1953. 66 STAT. 54, 57, 96, 137, 330, 333 (1952). The Korean crisis was declared by Proclamation No. 2914, 64 STAT. A454 (1950). This, however, did not invoke the statute, which at that time was restricted in its terms to the World War II emergency. The 1952 act, applying to *any* emergency, was invoked in January, 1953, prior to the expiration of the statutory extension of the World War II proclamation. Proclamation No. 3004, 67 STAT. C31 (1953). Thus the prohibition was continuously in effect from 1941.

<sup>12</sup> *Dayton v. Dulles*, 357 U.S. 144 (1958); *Kent v. Dulles*, 357 U.S. 116 (1958); *Kraus v. Dulles*, 235 F.2d 840 (D.C. Cir. 1956); *Robeson v. Dulles*, 235 F.2d 810 (D.C. Cir.), *cert. denied*, 352 U.S. 895 (1956); *Boudin v. Dulles*, 235 F.2d 532 (D.C. Cir. 1956); *Shachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955); *Dulles v. Nathan*, 225 F.2d 29 (D.C. Cir. 1955); *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952).

<sup>13</sup> From the nature of the transaction involved there is no public record of a number of such "best interests" denials. In most cases it appeared that the refusal was based on the applicant's membership in the Communist party or his affiliation with the Communist cause. See Comment, 61 *YALE L.J.* 171 (1952), for a documented collection of individual instances of such refusals prior to the first court test.

<sup>14</sup> 106 F. Supp. 445 (D.D.C. 1952) where plaintiff had her passport revoked without notice or hearing. The Secretary was ordered to restore it or accord the plaintiff a hearing.

<sup>15</sup> The existence of this right has not been disputed in any of the cases in this field, yet the courts have some difficulty in finding an authoritative basis for it. There is no clear historical evidence to rely on for its existence, and the framers of the Bill of Rights make no mention of it. The cases in general draw heavily

not be denied without according the citizen the procedural due process requirements of notice and hearing. Presumably, as a result of this decision the Secretary promulgated regulations listing membership in the Communist party or affiliation with the Communist movement as substantive grounds for denial and establishing administrative procedures for appeal of passport denials.<sup>16</sup>

The first court test of a substantive ground for denial of a passport was in *Shachtman v. Dulles*.<sup>17</sup> Here the applicant had been given a "best interests" denial because he was the president of an organization on the Attorney General's list of subversive organizations. The court found that the grounds for denial employed by the Secretary were not related to foreign affairs on that level which was beyond the power of the courts to review, generally termed the political level. Thus the Secretary could not rely solely on his discretion for such denial. Strengthened by the admission of the Secretary that the passport might have been granted but for the Attorney General's listing, the court held the denial arbitrary and thus invalid. It is to be noted that in this case the Secretary did not rely on any of his written regulations in denying the passport, so that they were not called into question. The importance of the case lies in the court's assertion of the right to review the substantive grounds of a denial and its invalidation of those grounds upon finding them to be arbitrary and to lie in an area where the Secretary could not exercise his discretion arbitrarily. This, by implication, acknowledged that in the area reasonably related to foreign affairs on the political level the Secretary has absolute discretion which is not reviewable.<sup>18</sup>

Other cases appealing passport denials were disposed of on procedural or other grounds that are not relevant here.<sup>19</sup>

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on an analogy to the right of interstate travel cited in *Williams v. Fears*, 179 U.S. 270 (1900). Until recently there was argument as to whether such a right should be based on the first or the fifth amendment. The Supreme Court in the instant case resolved the arguments by stating that such a right exists and that it is an element of "liberty" protected by the fifth amendment. 357 U.S. at 125-27.

<sup>16</sup> 22 C.F.R. §§ 51.135-142 (1958). Sections 51.135-136 establish the substantive grounds for denial. The following sections provide for administrative procedure, including the establishment of the Board of Passport Appeals. Section 51.142 provides that at any stage of the process of application or appeal the applicant may be required to execute under oath as part of the application a statement as to past and present membership in the Communist party. This requirement has figured prominently in several cases herein discussed.

<sup>17</sup> 225 F.2d 938 (D.C. Cir. 1955).

<sup>18</sup> In the similar case of *Kraus v. Dulles*, 235 F.2d 840 (D.C. Cir. 1956), the court held that denial of a passport to the applicant because he still owed the State Department for paying his way home previously and because he refused to show that he was in such financial condition that this would not happen again was held to be arbitrary, since it did not appear to be a test applied to all applicants. Note that here, as in *Shachtman*, the grounds relied on were not in the Secretary's written regulations.

<sup>19</sup> *Robeson v. Dulles*, 235 F.2d 810 (D.C. Cir.), *cert. denied*, 352 U.S. 895

*Kent v. Dulles*, presenting squarely for the first time the question of the Secretary's discretionary authority to deny passports, is the first passport case to reach the Supreme Court since World War II.<sup>20</sup> The cases of Rockwell Kent, the artist, and Walter Briehl, a psychiatrist, were combined for this appeal from the United States Court of Appeals for the District of Columbia.<sup>21</sup> The facts are identical in their important details. Petitioners applied for passports and were tentatively refused because of their Communist affiliations. Each refused to execute an affidavit concerning past or present membership in the Communist party. Each was accorded an informal hearing and was later informed that in view of his refusal to execute the affidavit the Board of Passport Appeals could not give further consideration to his appeal. Each brought suit, and in each suit summary judgment was awarded the Secretary of State. On appeal the court of appeals divided, the majority finding that the Secretary had the statutory authority to deny passports on the grounds stated and that denial on these grounds was constitutional.

The Supreme Court reversed this decision by a vote of five to four. It stated without too much discussion that the right to travel is an element of "liberty" protected by the fifth amendment, so that a citizen could not be deprived of it without due process of law. The Court found that the political function of the passport had become subordinate to that of control over exit so that issuance could no longer be argued to be within the sole discretion of the Chief Executive. Summarily dismissing the possibility that the regulation could be made under the war power at the present time, it concluded that Congress alone had the power to establish substantive grounds for denial of passports.

Finding no *specific* delegation of authority by Congress, the Court considered whether Congress, in legislating on passport regulations, had by implication made the administrative practice of denying passports to Communists part of the law. It found that at the time of the 1926 act grounds for denial had "jelled" into two categories, allegiance to the United States and participation in illegal conduct.<sup>22</sup> The Court found that the grounds in question fell into neither of these categories, and it

(1956); *Boudin v. Dulles*, 235 F.2d 532 (D.C. Cir. 1956); *Dulles v. Nathan*, 225 F.2d 29 (D.C. Cir. 1955).

<sup>20</sup> *Dayton v. Dulles*, 357 U.S. 144 (1958), decided on the same day as *Kent*, presented the question of the constitutionality of the use of confidential information by the Secretary in denying passports. It was disposed of on the grounds stated in *Kent*.

<sup>21</sup> *Kent v. Dulles*, 248 F.2d 600 (D.C. Cir. 1957); *Briehl v. Dulles*, 248 F.2d 561 (D.C. Cir. 1957).

<sup>22</sup> The first of these is based on a statute. 14 STAT. 54 (1866), as amended, 22 U.S.C. § 212 (1952). As authority for the second the Court cites 3 MOORE, DIGEST OF INTERNATIONAL LAW § 512 (1906); 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 268 (1942); and 2 HYDE, INTERNATIONAL LAW § 401 (2d rev. ed. 1945).

refused to impute to Congress in passing the 1952 act, making a passport necessary to travel, a purpose not already clearly established in administrative practice.<sup>23</sup> It therefore held that the Secretary did not have the power to deny passports in his sole discretion as he had claimed, either by the inherent power of the Chief Executive or by congressional delegation of the power.

The Court explicitly refused to treat the constitutional merits of the substantive grounds for denial the Secretary had employed, construing the statutes involved strictly so as to avoid the question. But the whole decision is written in a context that leaves little doubt but that it entertains grave misgivings about the constitutionality of these regulations. Its language categorizing the practice of the Secretary of State as a denial of the right to travel because of political beliefs and associations<sup>24</sup> admits of no other inference.

The minority argued<sup>25</sup> that the intent of Congress in passing the legislation making a passport a prerequisite to travel was to sanction just such practices as were challenged by the plaintiffs in this case. It questions the majority's summary dismissal of the applicability of the war power of the Chief Executive to the present situation. Indeed, it says that rather than being irrelevant, the war-time practice may be the only relevant one, since passports are a prerequisite for travel only during proclaimed periods of war or emergency. It would hold that the war power would sanction such regulation as is challenged by the plaintiff in this case. On these grounds the dissenters would affirm the Secretary's power to make such denials.

The logic of the minority seems to the writer sounder than that of the majority. Yet as a matter of law the result reached by the majority seems to be the better view under the circumstances. Delegation by Congress of the power to regulate individual rights should be explicit and unequivocal.<sup>26</sup> It should not be found in implied ratification of an administrative practice. In refusing to do so the majority was pursuing a sound policy.

<sup>23</sup> The Court relied somewhat on the fact that there was a statute on the books dealing with issuance of passports to Communists. Internal Security Act of 1950, 64 STAT. 987, 50 U.S.C. §§ 781-98 (1952). It felt that even though certain conditions precedent to its becoming operative had not yet been fulfilled, this statute, in the absence of any other specific legislation on the subject, pre-empted the field and negated the inference that Congress might have sanctioned any regulation under the statutes on which the Secretary relied. It would seem that in view of the fact that the Internal Security Act is a criminal statute, not yet effective, and not a delegation of restrictive power to the Secretary who issues passports, this argument is of doubtful validity.

<sup>24</sup> 357 U.S. at 130.

<sup>25</sup> *Ibid.*

<sup>26</sup> For three excellent examples of such a policy on the part of the Court, see *United States v. Rumely*, 345 U.S. 41, 46 (1953) (House of Representatives resolution); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156 (1946) (federal statute); *Ex parte Endo*, 323 U.S. 283, 301-02 (1944) (executive order).

The impact of the decision in *Kent* on the practical problem of regulating passports is unfortunate. It leaves the Secretary powerless to deny passports save on the limited grounds approved in that decision. There is a real and pressing necessity for such regulation.<sup>27</sup> The problem admits of no uncertainty in its solution, for it is vital to the interests of the nation as a whole.

The Communist party openly seeks as its ultimate goal world revolution; to attribute to it any lesser aim is to ignore the essence of its existence. We need cite no authority that its machinations are the greatest concern of our government today. Statements to the effect that denial of a passport on the basis of membership in the Communist party or adherence to its cause is denial merely on the basis of "political beliefs and associations" are open to serious question. It is hoped that the use of such language by the majority in *Kent* was inadvertent.

That the exigencies of the moment should be used as grounds for denial of constitutional rights is contrary to the basic principles of free government.<sup>28</sup> But, on the other hand, it must be recognized that there is a problem that touches on the well-being of the nation, and that there are citizens whose purposes in going abroad justify their being forced to forfeit their rights. The problem must be to find some way to determine, using substantive criteria established by congressional authority and standard procedures that protect the individual from arbitrary action, whether the individual in question deserves to forfeit his right to travel.

E. OSBORNE AYSCUE, JR.

### Constitutional Law—Little Rock School Litigation—Re-examination of North Carolina Laws

[T]he Constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."<sup>1</sup>

With these words, the Supreme Court in *Cooper v. Aaron*<sup>2</sup> emphati-

<sup>27</sup> This necessity is evidenced by the fact that several days after this decision was handed down the President sent a message to Congress urging legislation delegating the power to regulate to the Secretary. It read in part: "I wish to emphasize the urgency of the legislation I have recommended. Each day and week that passes without it exposes us to great danger." 104 CONG. REC. 11849 (1958). The Eighty-fifth Congress adjourned without having acted on this problem.

<sup>28</sup> *Ex parte Endo*, 393 U.S. 283 (1944).

<sup>1</sup> *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) quoting from *Smith v. Texas*, 311 U.S. 128, 132 (1940).

<sup>2</sup> 358 U.S. 1 (1958).