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Freedom of Movement--A Modern Challenge

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Freedom of Movement—A Modern Challenge

During the summer of 1957, over three-quarters of a million Americans visited Europe. It is expected that some 15,000 Americans will travel around the globe this year. Every year, in increasing droves, people depart from the United States to explore all parts of the world. Historically the American population has always been transitory, having originally migrated to this continent from Europe and later westward with the growth and development of the nation. At the present time, due to efficient and rapid transportational facilities, and as a result of the overall increase in leisure time, it does not seem unnatural that Americans have more and more turned to exploring other lands. Americans travel more while vacationing than any other group of people. The right to move about freely is one which is taken for granted. Unrestricted transit is tacitly assumed to be an inalienable right of a freedom loving society, and it is not until times of strain and duress that the exact nature of such right is examined. It is during such times that a problem of academic interest is transformed into one of fundamental concern.

In recent years a number of persons have been denied the right to leave this country. It is the purpose of this note to describe the manner in which a basic right, the right of freedom of movement, has been qualified and restricted as to the freedom of an individual to leave the confines of the United States. A serious constitutional problem is presented when a governmental agency attempts to prevent a person from leaving the country because of his political views. Such restriction might be constitutionally upheld either by designating the action as justifiable sovereign interference with a fundamental right, or it might be declared that freedom of movement across our national borders is no more than a privilege.

By permitting such restrictions, either because an individual might freely communicate with communists outside the U. S. or because one might voice opinions contrary to those endorsed by the government, the courts would show approval of the same methods employed by totalitarian governments. Yet, if there is truly a danger involved, such restriction must be allowed in the interest of national survival. The courts are, therefore, faced with the problem of determining the nature and extent to which freedom of movement may be limited without undermining the basic principles of a democratic society.

Development of the Right of Freedom of Movement

Nowhere in the Constitution of the United States is there to be found any mention of the right of freedom of movement. There was reference

to a right of freedom of transit between states in the Articles of Confederation[1] but historically the recognition of the right of movement under the Constitution has been the result of judicial interpretation. The courts have acknowledged the existence of a right of mobility as being implicit in various clauses of the Constitution.

During the first half of the 19th century the United States Supreme Court invoked the commerce clause several times in striking down state statutes which impeded free passage between the states.[2] In 1868, in *Crandall v. Nevada*[3] the court recognized, as a right of natural citizenship, the freedom of individuals to pass and repass through states of the nation without interference. The following year the Supreme Court stated that the privileges and immunities clause of Article IV, section 2, conferred upon citizens the right of free ingress and egress to and from sister states.[4] In 1873, in the *Slaughter House* cases,[5] the privileges and immunities section of the fourteenth amendment was declared to have conferred upon a citizen the right to become a resident of any state in the union.

After the turn of the century the Supreme Court more clearly defined freedom of movement in terms of a fundamental right. For example, in *Williams v. Fears*[6] the Supreme Court said:

> Undoubtedly the right of free locomotion, the right to remove from one place to another according to inclination is an attribute of personal liberty, and the right ordinarily, of free transit from or through the territory of any state is a right secured by the fourteenth amendment and by other provisions of the Constitution.

This concept was made more explicit in *United States v. Wheeler*:

> In all the states from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in the citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom. . . .[7]

The right to leave the confines of the United States and to move elsewhere in the world has also been assumed to be an inherent civil right.

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[1] Article IV states in part that: "The better to secure and perpetrate mutual friendship and intercourse among peoples of different states in the union . . . the people of each shall have free ingress and egress to and from any other state. . . ."

[2] Passenger Cases, 48 U.S. (7 How.) 283 (1849); Elkinson v. Deliesseline, 8 Fed. Cas. 493, No. 4366 (C.C.S.C. 1823).

[3] 73 U.S. (7 Wall.) 35 (1867).

[4] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).

[5] 83 U.S. (16 Wall.) 36 (1872).

[6] 179 U.S. 270, 274 (1900); see Twining v. New Jersey 211 U.S. 78 (1908).

[7] 254 U.S. 281, 293 (1920). For an analysis of the right to move freely within the United States see Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6 (1955).

For instance, the right of choice of nationality was recognized almost a century ago. This was expressed in the Expatriation Act of 1868:

> Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness . . . any declaration, instruction, opinion, order or decision . . . which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.[8]

The position of the United States regarding expatriation was reasserted in 1930 at the Conference for the Codification of International Law.[9]

The right of freedom of movement has in recent years been regarded as deserving the status of an international human right. Article 13 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948; states:

> (1) Every one has the right to freedom of movement and residence within the borders of each state.
>
> (2) Everyone has the right to leave any country, including his own, and to return to his country.[10]

It is also interesting to note that lately there has been a tendency on the part of some free nations to insert provisions in their constitutions which assure citizens of the right of freedom of movement.[11]

Although passports allowing sojourn outside of the United States were issued at an early date, possession of one was never, in times of peace, a necessary condition precedent to departure from the country.[12] However,

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[8] 66 STAT. 267 (1868), 8 U.S.C. § 1481 (1952). For a discussion of expatriation see 3 HACKWORTH, INTERNATIONAL LAW 161-217 (1942); 5 HACKWORTH, INTERNATIONAL LAW 821-822 (1943).

[9] 3 HACKWORTH, INTERNATIONAL LAW 161, 162 (1941); JESSUP, A MODERN LAW OF NATIONS 75, 76, 78 (1948). Closely allied to the right of expatriation is another right bearing upon the right of an individual to leave his sovereign territory. This is the right of emigration or the right to remove one's self and one's property to another country. A general denial of the right of emigration would effectively deny the right of expatriation. There are no statutes in this country specifically related to emigration.

[10] UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948). This is not a legal document and has no binding force. For a thorough discussion of the status of international human rights see LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950).

[11] For an index to various national constitutions which include such clauses see 3 PEASLEE, CONSTITUTIONS OF NATIONS 556 (1950). A typical example is to be found in the constitution of Italy adopted in 1947. Article 16 reads, "Every citizen may move and reside freely in any part of the national territory within the general limits established by law for reasons of public health or security. In no case shall a restriction be established for political reasons. Every citizen has the right to leave the territory of the republic and to re-enter it, provided the obligations of law are respected."

[12] Passports were issued as early as 1796. DEPT. OF STATE, THE AMERICAN PASSPORT 77 (1898).

during times of war, restraints were imposed upon freedom of movement and passports were employed as a means of regulating travel. In this manner restrictions on movement were imposed during the war of 1812,[13] during the Civil War,[14] during World War I,[15] and World War II.[16] It would seem axiomatic that a nation may impose travel restrictions during time of war, for at such times considerations of sovereign preservation outweigh the right of citizens to move about as they wish.[17]

The nature of the right of freedom of movement within the United States is well defined. In general, persons may travel freely throughout the nation and are at liberty to choose their domicile. The states may not unjustly interfere with the national right of citizens of the United States to move unhindered from state to state.[18] However, today there is a much litigated constitutional problem concerning the right of freedom of movement across our national borders.

THE PRESENT CONSTITUTIONAL PROBLEM

In 1856, Congress vested in the Secretary of State complete and exclusive control over the issuance of passports.[19] Although this act gave the Secretary of State full discretion, it in no way curtailed the right of free transit. The purpose of the passport was merely to aid the American traveler and give him the privilege of receiving protection and other assistance offered by American diplomats and consular offices.[20]

Since World War II, however, wartime restrictions pertaining to the dispensation of passports have been continued. No one has been allowed to enter or leave the United States without possessing a valid passport.[21] In addition, the Secretary of State has exclusive authority to grant and control the issuance of passports.[22] American citizens discovered that

[13] 3 STAT. 199 (1815).

[14] DEPT. OF STATE, THE AMERICAN PASSPORT 4 (1898).

[15] 40 STAT. 559 (1918).

[16] 55 STAT. 252 (1941), 22 U.S.C. §§ 223-226 (1946).

[17] *Ex parte* Endo, 323 U.S. 283 (1944); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayshi v. United States, 320 U.S. 81 (1943).

[18] Edwards v. California, 314 U.S. 160 (1941).

[19] 11 STAT. 60 (1856); thereafter amended in minor respects, and now appearing in 44 STAT. 887 (1926), 22 U.S.C. § 211 (a) (1952).

[20] For a discussion of passports in general see 3 HACKWORTH, INTERNATIONAL LAW 435, 436 (1941).

[21] 66 STAT. 190, 8 U.S.C. § 1185 (a), (b) (1952). By presidential proclamation an emergency continues to exist thereby outhorizing invoking of this statute. PROC. No. 3004, 67 STAT. c 31, 43 U.S.C. § 1312 (1953). See 22 C.F.R. § 51.1 (Supp. 1956) and the regulation promulgated by the Secretary of State which makes it illegal to leave and re-enter the country without a valid passport. 22 C.F.R. § 53.1 (Supp. 1956).

[22] 44 STAT. 887 (1926), 22 U.S.C. § 211 (a) (1952).

they could be confined to the United States at the discretion of the Secretary of State and were told their trips were "not in the best interests of the United States." The ultimate question presented by such action involved the constitutional limits upon restrictions on movement during the "cold war." During the last six years the courts have been resolving the problem with the result that the boundaries of lawful State Department control have been at least vaguely drawn.

In 1951, in the first case to attract attention, Paul Robeson unsuccessfully attempted to attack the constitutionality of the discretion exercised by the State Department.[23] A motion to dismiss was granted on the ground that Robeson had not exhausted his administrative remedies and no constitutional issue was presented to the court. The first case of real significance was *Bauer v. Acheson*.[24] The plaintiff, without notice or hearing, had her passport revoked while living abroad. She attacked the exercise of discretion of the Secretary of State as being in violation of the due process clause of the fifth amendment. The court found that freedom to travel was an inalienable right included within such amendment. In arriving at this decision the court pointed to *Williams v. Fears*[25] and noted that it was a basic liberty to move from place to place within the United States. Having made that observation the court went on to say:

> It is difficult to see where, in principle, freedom to travel outside the United States is any less an attribute of personal liberty. Especially in this time today where modern transportation has made all the world easily accessible and when the executive and legislative departments of our governments have encouraged a welding together of nations. . . .[26]

However, the court did not strike down as unconstitutional any of the legislative acts which presumably gave the Secretary of State his discretion, but merely concluded that the plaintiff did not have a hearing consistent with procedural due process. Unfortunately the plaintiff did not press the issue of substantive due process; however, the court made it clear that there was a constitutional right of freedom of movement to cross our national borders. The court emphasized the point that freedom to travel is subject to *reasonable* regulation in the interest of our national welfare, and that the Secretary of State does not have absolute discretion. The question of what constituted reasonable regulation remained to be answered.

Shortly after the *Bauer* case was decided, the Department of State promulgated its *Passport Regulations*.[27] These regulations purported to

[23] Robeson v. Acheson, 198 F.2d 985 (D.C. Cir. 1952).
[24] 106 F. Supp. 445 (D.D.C. 1952).
[25] 179 U.S. 270 (1900).
[26] 106 F. Supp. 445, 451 (D.D.C. 1952).
[27] 22 C.F.R. §§ 51.135-.170 (Supp. 1956).

insure departmental compliance with both procedural and substantive due process requirements. A Board of Passport Appeals was created[28] and hearings with records were provided for, although the board could consider any confidential information in its possession[29] when making its decision. The regulations created three categories of subversives who would be denied regular passports: (a) persons who are members of the Communist Party, or who recently terminated such membership unless evidence indicates a change of affiliation; (b) persons who engage in communistic activities; and (c) persons, whom it is believed are going abroad to engage in communistic activity.[30]

The cases which followed the *Bauer* decision involved problems of procedural due process. In *Clark v. Dulles*[31] the court said an informal conversation between the applicant and the Under Secretary of State was not a fair hearing. Because of the rule that one must exhaust his administrative remedies before he may obtain relief from the courts, Clark was sent back for a hearing. The State Department later decided, for no apparent reason, to give him a passport. In the case of *Nathan v. Dulles*[32] the disappointed applicant asked for a passport in December, 1952. This request was denied without a hearing. After many delays he appealed to the court and was told in February, 1955, that he had not had a fair hearing. On March 15, 1955, the court directed, that because the Secretary of State had still not complied with the order, the Department should issue the plaintiff a passport. The court then ordered an immediate hearing and stated that if a passport were denied, the State Department must *immediately* inform the court and Nathan of the reason for the denial or show cause for the failure to give a reason. Several days later Nathan was issued a passport, some two and a half years after he had applied for one. It would appear that the State Department was delaying or avoiding the necessity of a judicial test of any substantive due process issues.

Until late in 1955 no substantive question of due process was ever posed in respect to the right of transit out of the United States. No question had been raised as to the legality of the creation and operation of the Board of Passport Appeals or the constitutionality of refusing persons

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[28] 22 C.F.R. §§ 51.151-.170 (Supp. 1956).

[29] 22 C.F.R. § 51.170 (Supp. 1956).

[30] 22 C.F.R. § 51.135 (Supp. 1956). Authority for the establishment of these regulations was said to be 44 STAT. 887 (1926), 22 U.S.C. § 211 (a) (1952). This was the act which vested the authority to grant passports in the Secretary of State. Also, the Internal Security Act of 1950, 64 STAT. 993, 50 U.S.C. § 785 (1952) was cited to lend support to the State Department's position. This act makes it unlawful for members of communist organizations to utilize passports.

[31] 129 F. Supp. 951 (D.D.C. 1955).

[32] 225 F.2d 29 (D.C. Cir. 1955).

passports for political reasons. Toward the end of 1955 the District Court for the District of Columbia decided a case touching upon substantive due process under the fifth amendment. In *Shachtman v. Dulles*[33] the petitioner was denied a passport, ostensibly because he was chairman of the Independent Socialist League which had been classified by the attorney general as subversive and communistic. The applicant had a State Department hearing at which he had tried to explain that the League was not allied with communism and that he had been trying to obtain a hearing before the attorney general for nearly six years. No complaint was made that a fair hearing was not granted by the State Department. Fundamentally, there was involved a question of whether the grounds for refusal were legally sufficient. The court held that the right to travel was a natural right included within the terms of the fifth amendment. It recognized that possession of a passport is an essential requisite for departure from the United States and that, therefore, its issuance could not be denied arbitrarily. The court concluded that it was an abuse of discretion for the Secretary of State to deny a person a passport solely because he was a member of an organization appearing on the attorney general's list, when that person had attempted for six years to obtain a hearing. A concurring opinion emphasized that fact that the attorney general's list was prepared to screen government employees, not passport applicants.

The *Shachtman* case, along with the *Bauer* case, clearly indicates that the right to secure a passport is guaranteed by the fifth amendment. Also, in the *Shachtman* case, the court, touching on the substantive issue, excluded the use of the attorney general's list of subversive organizations as a basis for denying passports.

The first case which effectively challenged the validity of the passport regulations[34] was *Boudin v. Dulles.*[35] The applicant refused to sign an affadavit asserting that he had never been a communist and was subsequently denied a passport. He had previously sworn that he was not at that time a communist. He appealed to the Board of Passport Appeals which affirmed the denial. The district court did not hold the Passport Regulations unconstitutional, but sent the case back to the Passport Board because the petitioner had not had a fair hearing,[36] as the finding was not substantiated by evidence in the record. The State Department had

[33] 225 F.2d 938 (D.C. Cir. 1955); 44 GEO. L.J. 141 (1955).

[34] 22 C.F.R. §§ 51.135-.170 (Supp. 1956).

[35] 136 F. Supp. 218 (D.D.C. 1955), *aff'd*, 235 F.2d 532 (D.C. Cir. 1956). Leonard Boudin is the author of an article attacking the validity of the Passport Regulations. Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47 (1956).

[36] 136 F. Supp. 218 (D.D.C. 1955).

claimed that it need not reveal security information. The district court stated:

> The right to a quasi-judicial hearing must mean more than the right to permit an applicant to testify and present evidence. It must include the right to know that the decision will be reached upon evidence of which he is aware and can refute directly.[37]

Both parties appealed and the circuit court found that the evidence did not bring the petitioner within any of the three classes which the Department had established under the Passport Regulations.[38] The court then stated that a passport may not be denied unless an applicant comes within one of these categories. In addition, in dealing with the difficult problem of confronting an applicant with security information, the court concluded that if Boudin were refused a passport after further consideration the State Department must state in the record whether its findings are based upon openly produced evidence, or on secret evidence. If the latter, it should be explained in so far as possible, why such information may not be disclosed.

The *Boudin* case furnished answers to several perplexing problems. The opinion tacitly indicated that the Board of Passport Regulations was established under proper authority. Although the record shows no discussion of the petitioner's contention that the Passport Regulations are unlawful, the circuit court remanded the case for a hearing consistent with the regulations, which would indicate judicial approval of the regulations. Viewed from another angle the *Boudin* case also implicitly shows that the Secretary of State has power, within certain discretionary limits, to prevent persons suspected of subversive activity from leaving this country.

Recently, further light was shed on the meaning of the *Boudin* case. Another frustrated passport applicant challenged the validity of the Passport Regulations and further asserted that the denial of a passport violated due process.[39] The Secretary of State, pursuant to requirements set down in the *Boudin* case, submitted the record to the court showing the reasons for the refused passport. The reasons were based on information that the plaintiff was at one time chairman of a communist propaganda and espionage committee, that he collaborated with Julius Rosenberg and other alleged communists, and that he was suspected of being an espionage agent. The record also showed that the above information was based on the findings made at the hearing plus confidential information which, the Department explained, could not be disclosed without prejudice to

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[37] *Id.* at 222.

[38] 22 C.F.R. § 51.135 (Supp. 1956).

[39] Dayton v. Dulles, 146 F. Supp. 876 (D.D.C. 1956).

the conduct of foreign relations. It was concluded that the Secretary of State had complied with the necessary due process requirements.

The district court also reaffirmed the validity of the Passport Regulations. It was pointed out that the Secretary of State was given this authority by legislation and presidential delegation of power.[40] Thus this court clearly decided that the Board of Passport regulations is lawfully created under congressional act and by executive authority.

CONCLUSIONS

In recent years, during a period of strained international relations the courts have been dealing with the problem of lawful restraint of free movement. Although the Supreme Court has not reviewed the subject the following observations might be made on the basis of the district court and appellate court decisions:

1. The right to travel abroad is considered a fundamental right embraced by the fifth amendment.

2. Within the scope of procedural due process of law, a person who is denied the right of travel is entitled to an administrative hearing, and upon appeal to a court, may require an explanation as to why he is not confronted with the evidence compiled against him.

3. Within the scope of substantive due process of law, persons who are suspected of communistic affiliations may constitutionally be prevented from departing from the United States in the interest of national preservation, although there is no actual warfare.

It would be foolish to assume that our national security is not endangered during the present "cold war." However, it seems clear that there should be a genuine threat or danger to our form of society before an inalienable right should be abridged as a matter of reasonable control.[41] A person who is a known communist suspected of engaging in subversive activity might constitute such a threat.

One of the chief problems in this area seems to be the State Department's attitude. The Department created the Board of Passport Appeals in 1952. Yet the Department never made use of the Board until it was forced to do so in 1955. Passport applications are often stalled for long periods and then finally issued in order to avoid a judicial decision. With this attitude there is danger of abuse of discretion, especially when the curtain of "confidential information" is used to shield the Department's

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[40] The court cites 44 STAT. 887 (1926), 22 U.S.C. 211 (a) (1952) and 22 C.F.R. § 51.1 (Supp. 1956).

[41] It has been suggested that the "clear and present danger" test be applied to the present situation. Wyzanski, *Freedom to Travel,* Atlantic Monthly, October, 1952, p. 66.