

The Right of Communists To Travel Abroad and the Unresolved Problem of Due Process

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disseminating the photographs. The court refused the injunction, stating that the taking of the pictures must be considered the same as other administrative procedure of the police to which a person, at times, must be subjected for the common good.

CONCLUSION

Though many of the factual situations dealt with have not come up in Illinois, it is probable that the courts here will follow the reasoning in sister state cases.

In the matters of advertising and magazine-newspaper articles, not too much difficulty arises. It is often obvious just what does constitute a newsworthy event which will deprive people of their right to privacy.

In regard to the problem of fingerprints and photographs of arrested men and the right to distribute such materials, the problem is slightly more complex. The present position in Illinois is that upon acquittal the file need not be surrendered, if the file was used for limited purposes and not in a rogues' gallery. But as to what must be done after a pardon, or before a conviction, in regard to placing a picture in a rogues' gallery or disseminating the information, the Illinois courts are silent.

THE RIGHT OF COMMUNISTS TO TRAVEL ABROAD AND THE UNRESOLVED PROBLEM OF DUE PROCESS

A Bill has been introduced in Congress which would give the Secretary of State the power to deny passports to persons knowingly engaged in activities intended to further the international Communist movement.¹ This proposed legislation comes as a result of two decisions, *Kent and Briehl v. Dulles*,² and *Dayton v. Dulles*,³ by the Supreme Court on June 16, 1958, declaring that the Secretary of State has no such power in the absence of express Congressional provision.

POLICY TOWARDS COMMUNISTS FROM WORLD WAR I TO THE KENT AND DAYTON CASES

The policy of refusing passports to leading American Communists was first adopted after World War I. The policy was ignored between 1931

¹ H.R.55, introduced by Rep. Selden January 7, 1959. For an excellent historical and critical approach to American passport policies, together with recommendations for revised legislation, consult Freedom to Travel, New York Bar Association, Dodd, Mead & Company, New York, 1958.

² 357 U.S. 116 (1958).

³ 357 U.S. 144 (1958). There is a sharp distinction between these two cases. Dayton was accused of being a Communist. Kent and Briehl were refused passports due to their refusal to file an affidavit stating whether or not they were or ever had been Communists.

and World War II. After 1948, the Department of State permitted the issuance of passports to Communists and supporters of Communism who satisfied the Department that they were not going abroad in the furtherance of the Communist cause. An exception was made in favor of journalists active in Communist affairs. Soon thereafter, however, the espionage, propaganda and revolutionary activities carried on by American Communists and alien Communists in possession of American passports was taken into consideration by the Department of State, which promulgated various policies, resulting in considerable judicial criticism and finally producing the pending legislation.⁴

In order to evaluate judicial criticism of passport policies, it is necessary to trace the evolution of the concept of administrative discretion as applied in the interpretation of the federal statute conferring authority to grant, issue and verify passports.⁵ The first important federal decision concerning passports, *Urtetiqui v. D'Arcy*,⁶ defined a passport as a political document in the nature of a request by the Secretary of State addressed to a foreign power, that the bearer may pass safely and freely. It was also considered as evidence of the citizenship of the bearer. Issuance of a passport was thus discretionary with the Secretary.⁷ As recently as 1955, the Court found a "large discretion" in passport matters lodged by Congress in the Secretary of State. Accordingly, revocation of a passport did not amount to a deprivation of a citizenship right.⁸

*Bauer v. Acheson*⁹ was the first case to proclaim the right to travel abroad as being one protected by the Fifth Amendment. Therefore, cancellation of an outstanding passport without a hearing deprived the bearer of liberty without due process of law, of which the essential elements are notice and an opportunity to be heard. The appropriate procedure for such process was not deemed to be necessarily a judicial hearing, but one

⁴ For a detailed outline of the State Department's passport policy in regard to Communists over the years, consult *The Right to Travel*, Committee on the Judiciary of the Senate, 85th Congress, U.S. Government Printing Office, Washington, 1958, at page 263, pages 268-274.

⁵ 22 U.S.C.A. § 211 (a) (1949): "The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, 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.

⁶ 9 Pet. (U.S.) 692 (1835).

⁷ *Perkins v. Elg*, 307 U.S. 325 (1938); *Edsell v. Mark*, 179 Fed. 292 (C.A. 9th, 1910); *Miller v. Sinjn*, 289 Fed. 388 (C.A. 8th, 1923); *In re Gee Hop*, 71 Fed. 274 (D.D.C., 1896), have reiterated and accepted this discretionary power.

⁸ *Communist Party of United States v. Subversive Activities Control Board*, 223 F.2d 531 (App. D.C., 1955).

⁹ 106 F.Supp. 445 (D.D.C., 1952).

appropriate to the disposition of issues. In accordance with this decision, the Department of State issued regulations¹⁰ specifying standards for denial of applications presented by Communists, and created a Passport Appeals Board to hear appeals from adverse decisions. The rules accorded such applicant only the right to a hearing, to be represented by counsel, and to examine the transcript of his own testimony.¹¹

When an applicant refused to appeal to the Board, but instead took his case to court, as in *Nathan v. Dulles*,¹² the court, in effect expressing displeasure over the regulations, was not satisfied that plaintiff had failed to exhaust his administrative remedies, but took the position that he never in fact had any. The Secretary of State was ordered to issue a passport. On appeal the order was stayed and the Department was ordered to accord a quasi-judicial hearing to the applicant. In an effort to make the decision moot, a hearing was held by the board under the regulations and a passport was granted.

In *Schachtman v. Dulles*,¹³ it was found that substantive due process had been violated. The Secretary of State had acted arbitrarily in refusing a passport, acting under regulation 51.135,¹⁴ on the grounds that applicant was the head of an organization which had been listed by the Attorney General as subversive, and that he was going abroad on behalf of such organization.

The court in *Boudin v. Dulles*¹⁵ construed regulation 51.135 together with section 51.170 (which allowed confidential information to be used in a passport hearing, but called for consideration of the inability of applicant to meet the information or to attack the credibility of confidential

¹⁰ C.F.R. 22: 51.135-51.170 (1958).

¹² 225 F.2d 29 (App.D.C., 1955).

¹¹ C.F.R. 22: 51.139 (1958).

¹³ 225 F.2d 938 (App. D.C., 1955).

¹⁴ C.F.R. 22: 51.135 (1958) "Limitation on Issuance of Passports to Persons Supporting Communist Movement. 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 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."

¹⁵ 136 F. Supp. 218 (D.D.C., 1955).

informants) to give substantially unrestricted discretion to the Passport Office. In the words of the court,

Confidential information is of unquestionable importance to executive officers in performing their duty, but it should be confined for use in obtaining factual data which may itself be used of record. . . . All evidence upon which the office may rely for its decision under §51.135 must appear on record so that the applicant may have the opportunity to meet it and the court to review it.¹⁶

THE KENT AND DAYTON CASES

In June, 1958 the Supreme Court was faced with the problem of the validity of the refusal to issue passports to three applicants, Rockwell Kent, Walter Briehl and Weldon Bruce Rayton, under regulation 51.135; findings in the case of Dayton as to his Communist affiliations were based on confidential information. The Court reasoned that the right of exit is a personal right included within the word "liberty" as used in the Fifth Amendment. Delegated powers which curtail or dilute such rights are to be construed narrowly. Therefore, a study of policies at the time of the Passport Act of 1926,¹⁷ and again in 1952, when Congress made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, was thought necessary to discover congressional intent. It was found that administrative practice at the time of passage of the first act had gelled around only two categories: (1) Questions pertinent to the citizenship and allegiance of applicant,¹⁸ and (2) Questions as to whether applicant was engaging in conduct which would violate the laws of the United States.¹⁹ Furthermore, the court refused to impute to Congress the purpose, at the time of passage of the 1952 statute, to give the Secretary unbridled discretion. Action in categories other than the two already mentioned was found to result solely from war power, the application of which had no relevancy at this time. Therefore, in the absence of express legislative provision in explicit terms, the grounds of Communism formed no valid standard by which a citizen's right of movement might be restricted.

The legislation currently pending²⁰ would provide such express provision in explicit terms. However, concurrently with solving the problem of authority, the passage of such a law would create many procedural problems.

¹⁶ *Ibid.*, at 222.

¹⁷ 22 U.S.C.A. § 211(a) (1949).

¹⁸ "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." 22 U.S.C.A. § 212 (1949).

¹⁹ The Court relied on 3 Moore, *International Law Digest* (1906) § 512; 3 Hackworth, *Digest of International Law* (1942) § 268; 2 Hyde, *International Law* (2d rev. ed., 1945), § 401.

²⁰ Authority cited note 1, *supra*.

THE UNRESOLVED QUESTION OF DUE PROCESS

The Supreme Court recognized that a problem of the constitutionality involved in the use of confidential information existed in the *Dayton* case, but found it unnecessary to deal with this problem, due to the fact that the Secretary was found to lack authority in the first instance. In the event that Congress delegates such authority, will decisions based on information necessarily confidential be upheld?

A possible solution to this question may be found in close scrutiny of the judicial history of the *Dayton* case. The Secretary of State had obtained summary judgment in the district court. On appeal,²¹ the Court of Appeals for the District of Columbia called for an affidavit of detailed finding in keeping with the requirements of the *Boudin* case. The Secretary was ordered to state whether the evidence was disclosed or not to applicant, and if the latter, to explain the reason therefor with such particularity as in his judgment the circumstances permitted.

The case was remanded to the District Court, and after consideration of "Decisions and Findings in the case of Weldon Bruce Dayton" filed in accordance with the appellate court order, the Secretary was found to be acting both within his authority and in accordance with due process requirements.²² The latter finding is of importance in the light of possible granting of such authority.

The affidavit filed by the Secretary of State set forth various associations and activities of Dayton which were proved by information contained in open record, including in some instances applicant's own statements. Each of these associations and activities was then designated as Communist, on the basis of confidential information contained in the files of the Department of State. The Secretary stated that the substance of this confidential information was disclosed to the applicant during his passport hearings. (Applicant's counsel were also allowed to cross-examine three Government witnesses.) Public disclosure of sources and details, however, was deemed "detrimental to our national interest" in that it would adversely affect the ability to obtain further information and prejudice foreign relations. Thus, in effect, a statement of the fact alone, but not the basis for considering those facts as proof of Communism, was presented for judicial scrutiny. The district court considered itself bound to accept the reasons advanced for not disclosing sources of the confidential information. Neither a violation of procedural nor substantive due process was found. Upon appeal, the Court of Appeals for the District of Columbia affirmed this finding.²³

²¹ *Dayton v. Dulles*, 237 F.2d 43 (App.D.C., 1956).

²² *Dayton v. Dulles*, 146 F.Supp. 876 (D.D.C., 1956).

²³ *Dayton v. Dulles*, 254 F.2d 71 (App. D.C., 1957).

Since the Supreme Court did not discuss the due process requirement in the *Dayton* case, the district court opinion in this case, and the appellate court's affirmative opinion remain the last word on the problem of whether denial of a passport based on confidential information is violative of due process.

REASONING OF THE DISTRICT COURT

Strength for the *Dayton* decision in the district court was culled from the observation by Mr. Justice Holmes in *Moyer v. Peabody*: "It is familiar that what is due process depends on circumstances. It varies with the subject-matter and the necessities of the situation."²⁴ Thus far, this principle has been applied to cases of summary proceedings for taxes,²⁵ executive decisions for exclusion from the country,²⁶ emergency executive power at times of insurrection,²⁷ and times of strike,²⁸ and more recently, to the taking of a party into protective custody under an applicable insanity statute.²⁹ Most cases seem to imply the "necessities of the situation" call for immediate action because of emergency conditions. No attempt was made by the district court in the *Dayton* case, however, to characterize present world conditions or the circumstances of our foreign relations as being in a state comparable to an emergency situation.

Appeal was further made in *Dayton* to the words of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath*:

Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.³⁰

As illustration, Frankfurter cited two cases for contrast. *Ng Fung Ho v. White*,³¹ wherein Chinese claiming citizenship were, under due process entitled to a judicial as opposed to merely an executive determination of the fact of their citizenship, in deportment proceedings, was compared with *Murray's Lessee v. Hoboken Land and Improvement Company*,³² which declared summary proceedings sufficient for taxes, authority for such action found in practice from remote antiquity due to imperative

²⁴ 212 U.S. 78, 84 (1909).

²⁵ 18 How. (U.S.) 272 (1855).

²⁶ *United States v. Ju Toy*, 198 U.S. 253, 263 (1905).

²⁷ *Moyer v. Peabody*, 212 U.S. 78 (1909); *United States ex rel Seymour v. Fisher*, 280 Fed. 208 (D. Neb., 1922).

²⁸ *Adams v. United States ex rel Palmer*, 29 F.2d 541 (C.A. 8th, 1928).

²⁹ *Kenney v. Killian*, 133 F.Supp. 571 (W.D.Mich., 1955).

³⁰ 341 U.S. 123, 163 (1951). Thus, Frankfurter declared the Attorney General's listing of certain organizations subversive without notice or hearing, as violative of due process.

³¹ 259 U.S. 276 (1922).

³² 18 How. (U.S.) 272 (1855).

necessity, which permitted few countries to allow their tax claims to become subjects of judicial controversy. The *Dayton* case appears to be much more similar to the Chinese case, a fact which lessens, possibly destroys, the value of Frankfurter's words as applied by the district court in support of the use of confidential information.

Another source of authority was found in *Betts v. Brady*:

That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may in other circumstances, and in the light of other considerations, fall short of such denial.³³

Such was the pronouncement of the Supreme Court in finding that the refusal of a state court to appoint counsel to represent an indigent defendant at a trial in which he was convicted of robbery, did not deny him due process of law. In *Betts*, the Supreme Court further made a comparison with the case of *Lisenba v. California*,³⁴ which dealt with the voluntary confession phase of due process, and declared the aim of due process in forbidding the use of involuntary confessions as being to prevent fundamental unfairness inherent in the use of such evidence, whether true or false. The failure of the arresting officers promptly to produce the defendant before an examining magistrate, their detention of him for three days, and a minor assault committed upon him (he was slapped once), together with unauthorized removal of defendant for questioning, and denial of the opportunity to consult counsel at one of the interrogation sessions were all deemed illegal and in deprivation of liberty without due process. Defendant would have been afforded relief if he could have gained access to a court to seek it. However, these facts were not such as to render the confession later obtained involuntary, as opposed to confessions extorted in graver circumstances under which there would be no hesitation in setting aside a conviction.³⁵

An examination of the basis for the concept of "fundamental fairness under the circumstances" as proposed in the *Betts* case leaves grave doubt as to the fundamental fairness in allowing *Dayton* to examine government witnesses in a private hearing, while not allowing the credibility of these witnesses to be attacked in court. At the least, it may definitely be said that the issue is arguable both in favor and against a finding of such fairness, and mere reference to the *Betts* principle without an attempt to draw an analogy to the facts of the *Dayton* case is quite invalid.

³³ 316 U.S. 455, 462 (1941).

³⁴ 314 U.S. 219 (1941).

³⁵ "These were secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified; who sensed the adverse sentiment of the community and the danger of mob violence; who had been held incommunicado, without the advice of friends or of counsel; some of whom had been taken by officers at night from the prison into dark and lonely places for questioning." *Ibid.*, 239.

The *Dayton* case continues at page 882:

In addition to providing protection to the rights of individual citizens, the Constitution also recognizes interests of the Government and when conflicts arise, they can be resolved only by "balancing the conflicting individual and national interests involved."

At this point, the district court is quoting from *American Communications Association, C.I.O. v. Douds*,³⁶ which case balanced the effects of the National Labor Relations Act in excluding certain union rights from Communists, as weighed against the public right to protection against political strikes. The Fifth Amendment was not in issue.

In conclusion, the *Dayton* case considered the problem disposed of in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences.³⁷

However, the airlines case dealt with a controversy arising because the Civil Aeronautics Board awarded the right to engage in overseas and foreign air transportation over a certain air route to one of two competing applicant companies. Such decisions, when approved by the President, were said to "embody presidential discretion as to political matters beyond the competence of courts to adjudicate."³⁸ Clearly, the great amount of litigation on the subject has established passport to be outside the realm of unlimited presidential discretion in political matters.

APPELLATE COURT REASONING IN THE DAYTON CASE

In affirming the district court decision, the Appellate court for the District of Columbia³⁹ took into consideration several cases dealing with the application of due process to commerce rights. *West Coast Hotel Co. v. Parrish*⁴⁰ involved the minimum wage act. The freedom to contract—one of the freedoms guaranteed by due process of law—was limited upon the ground that community interest required protection of the health of women and of a relatively helpless class of workers.

*United States v. Curtiss-Wright Export Corp.*⁴¹ allowed the President to

³⁶ 339 U.S. 382, 410 (1949).

³⁷ *Chicago and Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 337 U.S. 103, 111 (1948).

³⁸ *Ibid.*, at 114.

³⁹ *Dayton v. Dulles*, 254 F.2d 71 (App. D.C., 1957).

⁴⁰ 300 U.S. 379 (1937).

⁴¹ 299 U.S. 304 (1936).

consider confidential information in reaching a decision to forbid the sale of munitions of war to persons in certain countries, since the embargo was within the area of foreign affairs (or at least affected foreign relations). Similar results were reached in cases involving presidential prohibition of the exportation of coal and other materials.⁴²

The appellate court presented a better argument than the district court, in that it recognized the analogical inadequacies in arguing from cases involving commerce, in respect to which the scope of due process is not the same as it is in respect to the inherent rights of individuals. The appellate court argued, nevertheless, that the principles of the commerce cases are "of assistance" in testing the nature of process necessary to the deprivation of the individual right to travel abroad.

The Communist abuse of such right, in the opinion of the appellate court, obviously affects our foreign affairs. The court takes care to point out that this is not to say that the issuance of a passport is such conduct of foreign affairs as to grant unfettered discretion to the Secretary of State. Nevertheless, in applying the principles of the commerce cases considered above, and as a simple matter of common sense, the appellate court felt obliged to decree that the Secretary can not be compelled to disclose information so as to adversely affect our international security or the conduct of our foreign affairs.

CONCLUSION

Dissatisfaction with the application by the district and appellate courts in *Dayton* of arguments as to the flexible character of due process requirements leads to the conclusion that, had the Supreme Court reached this constitutional question, the decision on this point would also have been reversed. This seems especially true in view of the strict treatment of discretionary power in regard to Communists, of which the State Department had considered itself possessed since World War I.

It would seem wise, therefore, for Congress to set out the procedure under which passports will be denied to Communists, especially in regard to the use of confidential information. Of course, this will be subject to judicial review under due process standards. At any rate, in the event of the passage of House Bill 55,⁴³ more pronouncements by the Supreme Court can be expected, either in judgment of procedural legislation or in judg-

⁴² *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). *Chicago and Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 337 U.S. 103 (1948), discussed at length by the district court, was again quoted with approval.

⁴³ Authority cited note 1, *supra*.

ment of procedural rules adopted by the Department of State as a result of the failure of Congress to legislate specifically on the matter.⁴⁴

⁴⁴ Legislation is also needed on the issue of requiring an affidavit as to Communist associations to be filed on the part of an applicant. As stated above, *supra* at footnote 3, this problem played an important role in the Kent and Briehl cases. The Appellate Court for the District of Columbia in *Briehl v. Dulles*, 248 F.2d 561 (App. D.C., 1957), decided such affidavit, the requirement of which would come prior to any actual allegations of Communist activities, and by which the applicant was not entitled to be confronted with witnesses and evidence sustaining the Secretary's suggestion of Communist affiliations, was not in violation of due process. The point was resolved on two bases: (1) Applying the rules of civil procedure, it is found that applicant must raise the issue of facts as to his Communist affiliations, in order to get an evidentiary hearing on the facts. (2) It is customary to require applicants to supply pertinent information under oath. There is no reason to treat a passport application differently. Chief Judge Edgerton, dissenting, pointed out the critical factual differences between this case, where the liberty to travel is made subject to restraints, and prior cases dealing, for example, with the retention of State employment [as in *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716 (1951)].

The Supreme Court did not consider the issue, since it solved the Kent and Briehl cases, as it did the Dayton case, on the basis of lack of authority on the part of the Secretary of State to deny passports on the grounds of Communism. Thus, some definite statement, promulgated by Congress, or issued by the Secretary with power derived from Congress is necessary. Both will necessarily be subject to Constitutional interpretation by the Court.

SOME ASPECTS OF ILLINOIS LAND TRUSTS

INTRODUCTION

The last half-century has seen the development in Illinois of a rather curious type of trust; namely, the Illinois land trust. Based on a liberal application of fundamental common law principles, it offers many advantages in the holding of real property and estate planning.¹

Under a typical Illinois land trust agreement, the beneficiary retains the right to possession and control over the real estate, including the full power of management. He collects and distributes the income, leases, insures, develops, finances and directs the sale of the property as he sees fit. He may terminate the trust when he desires or may add property to the trust when he wishes. The beneficiary has exclusive and full powers in these matters. The trustee may execute deeds and mortgages or otherwise deal with the real estate only upon the written direction of the beneficiary. The beneficial interest is assignable and transferrable with the same facility as a stock certificate. Since it is assignable, the beneficial interest can be

¹ An Illinois land trust may be created by anyone who desires it. It is generally known as an excellent procedure for holding real estate by syndicates, subdividers, builders, industrial concerns, partnerships, associations, professional groups, societies and corporations. For a thorough discussion of Illinois land trusts and their present popularity in Florida, see Caplan, *The Law of Land Trusts* (Central Bank & Trust Co., Florida, 1958).