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## Constitutional Law - *Aptheker v. Secretary of State* - Freedom of Movement and a New Approach to the Constitutionality of Statutes

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# NOTES

## Constitutional Law — *Aptheker v. Secretary of State* — Freedom of Movement and a New Approach to the Constitutionality of Statutes



### I. THE ORIGIN OF THE FREEDOM

The United States was first concerned with freedom of movement as it pertained to travel among the several states. The Articles of Confederation, article IV, provided that, "the people of each state shall have free ingress and regress to and from any other state." The Constitution deleted this phrase, and no mention of freedom of movement is made therein.

The Supreme Court mentioned the freedom of movement as early as 1867.<sup>1</sup> Nevada had enacted a capitation tax of one dollar upon every person leaving the state by a vehicle for hire, the proprietor of such a vehicle to pay the tax. The Supreme Court held this statute unconstitutional, saying that a citizen "has the right to come to the seat of government to assert any claim he may have upon that government or to transact any business he may have with it."<sup>2</sup> The Court held that a citizen had a natural or inherent right to the freedom of movement. Although the commerce clause was considered a possible rationale,<sup>3</sup> the Court rejected the use of that theory. Many years later the freedom of movement was reiterated in *Edwards v. California*,<sup>4</sup> in which a statute attempting to discourage entry by unwelcome, indigent settlers during the depression was invalidated as an undue burden on interstate commerce. In neither case was the statute held to violate the due process clause.

There was little early litigation on the freedom to travel abroad because the freedom to leave the United States, except in times of war, was seldom denied a citizen of this country prior to the 1950's. "Until less than forty years ago this right was completely enjoyed by American citizens."<sup>5</sup> In *Urtetiqui v. D'Arbel*,<sup>6</sup> the Supreme Court

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<sup>1</sup> *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

<sup>2</sup> *Id.* at 44. The dissent favored the commerce clause as the basis for the decision.

<sup>3</sup> *Id.* at 41-42. This case is often cited as one decided under the privileges and immunities clause, although no mention of that clause is made in the case. See Cushman & Cushman, *Cases in Constitutional Law* 542 (1958).

<sup>4</sup> 314 U.S. 160 (1941). The dissent this time favored the "privileges and immunities" clause as a rationale.

<sup>5</sup> Chafee, *Three Human Rights in the Constitution of 1787*, 193 (1956).

<sup>6</sup> 34 U.S. (9 Per.) 692 (1835).

had held that a passport was not necessary for foreign travel but was merely a request to a foreign nation that the bearer pass safely and freely. A passport, as a means of identification, might help one obtain special privileges abroad, but it did no more. Ironically, only Czarist Russia required passports.<sup>7</sup>

## II. FEDERAL RESTRICTIONS ON TRAVEL

The first limitation on outward freedom of movement was imposed by Congress in 1918, when passports were required for foreign travel during the war.<sup>8</sup> The statute was revived during World War II,<sup>9</sup> and in 1952 it was re-enacted so that it could be invoked not only in time of war, but also in the time of any national emergency proclaimed by the President.<sup>10</sup> A proclamation of a national emergency has continued in effect until this time and, thus, passports are currently required for foreign travel.<sup>11</sup> The question has become not one of the right to travel but of the right to a passport to travel. Congress also enacted a provision that, "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."<sup>12</sup> From the wording of this grant of sole authority, it was assumed that the Secretary of State had complete discretionary power. Thus passports were denied merely because "travel abroad at this time would be contrary to the best interest of the United States."<sup>13</sup> No hearing was given and no particular reason was required to deny a passport under these arbitrary proceedings.

In *Bauer v. Acheson*,<sup>14</sup> the courts first examined this highly arbitrary procedure, and the federal district court held that "due process" required a hearing before the revocation of a passport. A subsequent court of appeals decision held that, without precise findings by the

<sup>7</sup> Chafee, *op. cit. supra* note 5, at 193.

<sup>8</sup> An Act to Prevent in Time of War Departure from or Entry into the United States contrary to the Public Safety, 40 Stat. 559 (1918).

<sup>9</sup> An Act to Amend the Act of May 22, 1918, 55 Stat. 252 (1941).

<sup>10</sup> 66 Stat. 190 (1952), 8 U.S.C. § 1158(b) (1958). This is the present statute regarding passports. "[D]uring the existence of any national emergency proclaimed by the President . . . it shall . . . 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."

<sup>11</sup> Proc. No. 3004, 67 Stat. C31 (1953).

<sup>12</sup> 66 Stat. 190 (1952), 8 U.S.C. § 1185(b) (1958). (Emphasis added.) Since previously a passport was not a legal prerequisite to foreign travel, many federal, state and local officials issued letters in the nature of passports. To avoid this practice, Congress enacted what is presently the major passport statute providing that the Secretary of State alone may issue passports under such rules as the President may designate. This general statute is supplemented by the following rules: 22 C.F.R. §§ 51.135-51.170 (1958).

<sup>13</sup> *Boudin v. Dulles*, 235 F.2d 532, 534 (D.C. Cir. 1956).

<sup>14</sup> 106 F. Supp. 445 (D.D.C. 1952).

Secretary of State, the record lacked substantial evidence to support his action.<sup>15</sup>

In 1958 when the application of one Kent for a passport was refused according to regulations of the Secretary of State which denied issuance of passports to Communists,<sup>16</sup> the Supreme Court for the first time based the freedom of travel on the due process clause. "The right to travel is a part of the 'liberty' of which they cannot be deprived without the *due process of law* under the fifth amendment."<sup>17</sup> This statement reaffirmed the one by a court of appeals in *Sbachtman v. Dulles* that "freedom to leave a country or a hemisphere is as much a part of liberty as freedom to leave a state."<sup>18</sup>

The Supreme Court in *Kent v. Dulles*<sup>19</sup> did not decide the constitutional question of whether passports could be withheld solely because of Communist Party membership without denying due process of law. Instead, the Court held that Congress had not delegated to the Secretary of State the authority to deny passports because of political beliefs and associations, reasoning that, under the general language of the present passport statute,<sup>20</sup> the only grounds for refusal were related to the citizenship of the applicant or to his unlawful conduct. With this stand of precedents and this constitutional question still undecided, the path was clear for the decision of *Aptheker v. Secretary of State*.<sup>21</sup>

### III. APTHEKER V. SECRETARY OF STATE

*Aptheker* involved the constitutionality of section 6 of the Subversive Activities Control Act of 1950 which provides that: "when a Communist organization . . . is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for *any member* of such organization, with knowledge or notice that such organization is so registered or that such order has become final—(1) to make application for a passport . . . or, (2) to use or attempt to use any such passport."<sup>22</sup> Section 6 became operative on October 20, 1961, when the Subversive Activities Control Board directed the Communist Party to register.<sup>23</sup> *Aptheker*

<sup>15</sup> *Boudin v. Dulles*, 235 F.2d 532 (D.C. Cir. 1955).

<sup>16</sup> 22 C.F.R. §§ 51.135-51.170 (1958).

<sup>17</sup> *Kent v. Dulles*, 357 U.S. 116, 125 (1958). (Emphasis added.)

<sup>18</sup> 225 F.2d 938, 944 (D.C. Cir. 1955).

<sup>19</sup> 357 U.S. 116 (1958).

<sup>20</sup> 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1958). See note 12 *supra*.

<sup>21</sup> 378 U.S. 500 (1964).

<sup>22</sup> 64 Stat. 993 (1950), 50 U.S.C. § 785 (1958). (Emphasis added.) "Communist organization" is defined in 64 Stat. 990 (1950), as amended, 50 U.S.C. § 782 (1958).

<sup>23</sup> The registration was upheld in *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961). The Court held that the provision was regulatory not prohibitory, and that it did not make unlawful pursuit of the objectives defined.

and Flynn, top-ranking party leaders, were notified thereafter of the revocation of their passports. Under the 1952 regulations<sup>24</sup> set up following the *Bauer* decision,<sup>25</sup> appellants received hearings and after an unfavorable decision appealed to the Board of Passport Appeals. Subsequently, a three-judge federal court upheld the validity of the statute.<sup>26</sup>

In the *Aptheker* opinion, written by Mr. Justice Goldberg, the Supreme Court applies the familiar principle that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."<sup>27</sup> Protection of the national security is a valid end,<sup>28</sup> but "precise regulation must be the touchstone in an area so closely touching our most precious freedoms."<sup>29</sup> Thus, the Court looks at a regulation from two points of view: whether the *end* is sufficiently important to justify a restriction of liberty, and whether the *means* used are the least drastic with which effective regulation can be achieved. Although the purpose of national defense is admittedly a valid one, the statute in *Aptheker* sweeps too broadly across the freedom of travel and thus violates the due process clause for several reasons. Most significant among these reasons is the fact that publication in the Federal Register that an organization has been denominated subversive is inadequate notice to a member that a subsequent application for or use of a passport will subject him to criminal punishment. In suggesting additional reasons, the Court proposes consideration of: (1) the degree of activity, (2) commitment to purpose, (3) the purpose of travel, and (4) the security-sensitivity of the destination. Using all these criteria, Mr. Justice Goldberg determines that the statute is unconstitutional "on its face," and refuses to consider its application solely to *Aptheker* and Flynn.

#### A. Notice

For a valid, nondiscriminatory regulation of protected liberties there must be adequate notice that defendant is subject to the regulation. Thus, if membership in an organization is the sole criterion for

<sup>24</sup> 22 C.F.R. §§ 51.135-51.170 (1958).

<sup>25</sup> *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952). See note 14, *supra*.

<sup>26</sup> *Flynn v. Rusk*, 219 F. Supp. 709 (D.D.C. 1963).

<sup>27</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). The Supreme Court recently pointed out that, "[T]his Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964). See also *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943).

<sup>28</sup> *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-60 (1962).

<sup>29</sup> *NAACP v. Button*, 371 U.S. 415, 438 (1963).

limiting the freedom of an individual, a substantial relationship between the individual and the organization must be shown.<sup>30</sup> With notice defined in section 13(k) of the act as "publication in the Federal Register of the fact of registration or issuance of a final order to register,"<sup>31</sup> the act applies whether or not "any member" knows he is associated with what is deemed to be a "Communist-action" or a "Communist-front" organization. The act also applies whether or not a member knows the aims of the world Communist conspiracy. Supreme Court cases have consistently held that before sanctions may be based upon membership, a member of the Communist Party must have knowledge of the aims of that party.<sup>32</sup> *Wieman v. Updegraff* first enunciated the principle that "indiscriminate classification of the innocent without knowing activity must fall as an assertion of arbitrary power."<sup>33</sup> Employees of the state or municipality<sup>34</sup> or state office-seekers<sup>35</sup> have been required to take oaths, but in these cases due process required the language of the oaths to disclaim either advocacy of overthrow of the government by unlawful means or *knowing* membership in listed organizations which embraced that philosophy. Mere membership in an organization does not provide notice sufficient to meet the minimum requirements of due process. Thus, the "any member" provision in the Subversive Activities Control Act is insufficient to provide the necessary scienter.

#### B. Other Defects In The Statute

Had the act even required consideration of the degree of activity in the party, it might have been sufficient without proof of actual knowledge. Moreover, the purposes of the travel, according to the Court, should have been considered as well as the security-sensitivity of the areas in which travel is desired. The Court points out that the restrictions do not include the Western Hemisphere, and that these areas could also be very important to our national security, for often Communist-inspired rebellions arise in the South American nations. Travel to Ireland seems less dangerous to the United States than travel to trouble spots such as Guatemala and Panama. Thus, it seems that in determining whether a regulation was invalid, the Court put

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<sup>30</sup> *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952); *Adler v. Board of Education*, 342 U.S. 485 (1952); *Garner v. Board of Public Works*, 341 U.S. 716 (1951); *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951).

<sup>31</sup> 64 Stat. 995 (1950), 50 U.S.C. § 788(d) (1958).

<sup>32</sup> *Scales v. United States*, 367 U.S. 203 (1961); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

<sup>33</sup> 344 U.S. 183, 191 (1952).

<sup>34</sup> *Adler v. Board of Education*, 342 U.S. 485 (1952); *Garner v. Board of Public Works*, 341 U.S. 716 (1951).

<sup>35</sup> *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951).

added emphasis on the possibility of *less drastic means of regulation* being used. Mr. Justice Goldberg cited Mr. Justice Stewart's statement in *Shelton v. Tucker*:<sup>36</sup>

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.<sup>37</sup>

#### IV. THE "ON THE FACE" DOCTRINE EXTENDED

The Court here declared the Subversive Activities Control Act invalid on its face.<sup>38</sup> Mr. Justice Goldberg followed *Thornhill v. Alabama*<sup>39</sup> in which the Court, in holding an anti-picketing statute invalid on its face, observed that with respect to regulations of the liberty of free discussion there exist special reasons for following the rule that it is the statute, and not the accusation or evidence under it, which prescribes the limits of permissible conduct and warns against transgression.<sup>40</sup> Similarly, the Court cited *Staub v. City of Baxley*<sup>41</sup> in which the defendant was charged with soliciting members for an organization without a permit. The Court declared the statute requiring a permit unconstitutional on its face.

These cases, however, deal with first amendment freedoms, and prior to *Aptheker*, which was decided on the basis of the due process clause of the fifth amendment, *only* statutes raising questions under the first amendment were so treated. All other cases turned on the particular facts presented. Mr. Justice Goldberg completely ignored one of the most important of the latter cases, *United States v. Raines*.<sup>42</sup> There the Supreme Court, in considering the voter registration provision of the 1957 Civil Rights Act<sup>43</sup> as applied to a *state* official, stated that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that

<sup>36</sup> 364 U.S. 479 (1960). See *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Martin v. Struthers*, 319 U.S. 141 (1943); *Schneider v. Irvington*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938).

<sup>37</sup> *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Instead of the state statute requiring teachers to file an annual affidavit listing every organization to which he had belonged or contributed, a more satisfactory means might have been for the state to list certain organizations in the inquiry sufficiently related to the legitimate area of inquiry.

<sup>38</sup> The lower court ruled that the "sole question to be decided by this court is the constitutional validity of the section in question as applied to the facts of these cases." *Flynn v. Rusk*, 219 F. Supp. 709, 712 (D.D.C. 1963).

<sup>39</sup> 310 U.S. 88 (1940).

<sup>40</sup> *Id.* at 97-98.

<sup>41</sup> 355 U.S. 313 (1958).

<sup>42</sup> 362 U.S. 17 (1960).

<sup>43</sup> 71 Stat. 639 (1957), 42 U.S.C. § 1971 (1958).

impliedly it might also be taken as applying to other persons or to other situations in which its application might be unconstitutional."<sup>44</sup> In *Raines* the Court reasoned that "application of this rule frees the Court not only from unnecessary . . . issues, but also from premature interpretations of statutes in areas in which their constitutional application might be cloudy."<sup>45</sup> The Supreme Court considered the problem again in *United States v. National Dairy Prods. Corp.*<sup>46</sup> The vague language of the Robinson-Patman Act made it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition. . . ."<sup>47</sup> The Court applied the terms of the statute only to the large firm involved, and held that as applied to it, the statute was constitutional. "The approach to 'vagueness' governing a case like this is different from that followed in cases arising under the first amendment. There we are concerned with the vagueness of the statute 'on the face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct."<sup>48</sup> The argument by Mr. Justice Goldberg that *National Dairy Products* can be distinguished because it controls construction of vague language while an attempt to construe the precisely-worded statute in *Aptheker* would inject an element of vagueness seems, at best, unconvincing.<sup>49</sup>

Aptheker was a top party leader who did not claim lack of notice or lack of knowledge of the requirements of the statute. Thus, the Court could not have declared the statute unconstitutional "if it had followed these cases in which the Court considered the validity of the statutes as applied only to the litigants in question. In this respect the Supreme Court in *Aptheker* made a significant departure from an established rule. The Supreme Court for the first time followed the rationale of the first amendment cases in a situation other than one involving such a first amendment freedom. Reconciliation of the majority's views in *Aptheker* with earlier decisions such as *Raines*<sup>50</sup> is impossible.

Mr. Justice Goldberg attempted to draw an analogy between the facts of *Aptheker* and the first amendment rights: "[S]ince freedom of travel is a constitutional liberty closely related to rights of free

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<sup>44</sup> *United States v. Raines*, 362 U.S. 17, 21 (1960).

<sup>45</sup> *Id.* at 22.

<sup>46</sup> 372 U.S. 29 (1963).

<sup>47</sup> 49 Stat. 1528 (1936), 15 U.S.C. § 13a (1958).

<sup>48</sup> *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963).

<sup>49</sup> *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964). Mr. Justice Goldberg's comment that, "The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting," seems strikingly reminiscent of Mr. Justice Black's dissent in *United States v. National Dairy Products*, 372 U.S. 29, 37 (1963), in which Mr. Justice Goldberg joined.

<sup>50</sup> *United States v. Raines*, 362 U.S. 17 (1960).



speech and association, we believe that appellants in this case should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel."<sup>51</sup> Many noted writers on the subject of freedom of travel have also emphasized its close relationship to first amendment freedoms. A leading authority has noted that travel abroad can play an important part in keeping our citizens well-informed on the vital issues of today by allowing us to gain our own impressions of people and events.<sup>52</sup> The first amendment, and indeed the entire conception of an effectively functioning democratic society, rests on a belief in the need for a free and fully informed exchange of opinion prior to decision making.<sup>53</sup> However plausible such an analogy may seem, whether a "close relation" to the first amendment rights will restrict the extension of this type of holding is uncertain. It is likely that the Court will extend the practice of ruling on the constitutionality of a statute in the abstract into the fields of other personal liberties. The *Aptheker* decision in general language significantly proclaims: "Since this case involves a *personal liberty protected by the Bill of Rights*, we believe that the proper approach to legislation curtailing that liberty must be that adopted by the Court in [the *Button* and *Thornhill* cases—*i.e.*, the 'on the face' approach]. . . ."<sup>54</sup>

#### V. CONCLUSION

Freedom of travel is recognized as a specific privilege which, while not absolute, must be scrutinized from two angles. The Supreme Court will ask (1) whether there is sufficient reason for the invasion of the liberty and (2) whether there is any other less drastic manner in which to regulate it. The Court attempts to restrict the invasion of constitutional liberties to only necessary invasions instituted to accomplish some sufficiently important purpose.

The question of the validity of a more precise regulation is left open, but it is hoped that such controls might be allowed. It is suggested that a statute applicable to active, knowing members should be upheld without attaching burdensome and ineffective considerations of the purpose of travel and the security-sensitivity of the destination. However, the majority seems to prefer very stringent safeguards. A probable solution might be a statute which required the member to have knowledge of the aims of the Communist Party and then, if the statute applied, a hearing. In the hearing such factors

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<sup>51</sup> *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964).

<sup>52</sup> Chafee, *Three Human Rights in the Constitution of 1787*, 175 (1956).

<sup>53</sup> See Landis, *Freedom of Speech and of the Press*, 6 Encyc. Soc. Sci. 455, 457-58 (1930).

<sup>54</sup> *Aptheker v. Secretary of State*, 378 U.S. 500, 516 (1964). (Emphasis added.)