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Constitutional Law - Due Process of Law - Statute Denying Passports to all Communist Party Members Violative of Due Process Clause

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It seems quite clear from the majority decision that the Court intended to establish a constitutional rule that immunity from prosecution in one jurisdiction must extend to another jurisdiction in order to compel incriminatory testimony. Although there were no dissents in the *Murphy* case, four Justices—White, Stewart, Harlan and Clark, all of whom dissented from the decision in the *Malloy* case, which extended the Fifth Amendment to the States—wrote or joined in concurring decisions in *Murphy* which would limit the requirement of granting immunity from prosecution in another jurisdiction. For instance, Justice Harlan stated that the rule preventing federal officials from using incriminating testimony compelled in a state proceeding, should be enforced by excluding such testimony or its fruits by exercising the Supreme Court's supervisory power over the federal courts, and not as a constitutional rule.

Congress has passed legislation which extends to a witness in a federal proceeding immunity from prosecution, both as to federal and state crimes. State immunity statutes, however, have never extended immunity from federal crimes because to do so would probably violate the "supremacy clause" of Article VI of the Constitution.[22] However, the cases of *Counselman*,[23] which requires the immunity to be coextensive with the constitutional provision it replaces; *Malloy*,[24] which makes the Fifth Amendment applicable to the States and the state and federal standard the same; together with *Murphy*,[25] which holds that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner; would seem to require that state immunity statutes be extended to protect the witness from federal prosecution. At the very least, the rule established in *Murphy* requires that the Federal Government establish that it had an independent source of evidence upon which to prosecute, should there have been a prior state inquiry in which the witness was compelled to give incriminatory testimony in return for a grant of immunity.

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CONSTITUTIONAL LAW—DUE PROCESS OF LAW—STATUTE DENYING PASSPORTS TO ALL COMMUNIST PARTY MEMBERS VIOLATIVE OF DUE PROCESS CLAUSE—In the recent case of *Aptheker v. Secretary of State*, 378 U.S. 500, 84 Sup. Ct. 1659 (1964), the Supreme Court of the United States was faced for the first time with a challenge to the constitutionality of Section 6 of the

22 The authority of state laws or their administration may not interfere with the carrying out of a national purpose, and where enforcement of a state law would handicap efforts to carry out the plans of the United States, the state enactment must give way. United States v. Mayo, 47 F. Supp. 552 (N.D. Fla. 1942), *aff'd*, 319 U.S. 441, 63 Sup. Ct. 1137 (1943).

23 Counselman v. Hitchcock, 142 U.S. 547, 12 Sup. Ct. 195 (1891).

24 Malloy v. Hogan, 378 U.S. 1, 84 Sup. Ct. 1489 (1964).

25 Murphy v. Waterfront Comm'n of New York Harbor, *supra* note 25.

Federal Subversive Activities Control Act,[1] which made it unlawful for any member of a registered Communist organization to apply for, use or attempt to use a passport. The resulting decision, in holding that section invalid on its face, suggested permissible limitations on peace-time legislative control over foreign travel by United States Communists.

Section 6 of the Act provided:

> (a) When a Communist organization[2] . . . is registered, or there is in effect a final order of the [Subversive Activities Control] 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 the renewal of a passport, to be issued or renewed by or under the authority of the United States; or
>
> (2) to use or attempt to use any such passport.[3]

In 1961, a final order of the Subversive Activities Control Board directed the Communist Party of the United States to comply with the registration provisions of the Act. Subsequently, two top-ranking Party leaders, Herbert Aptheker, who was editor of the Party's "theoretical organ," and the late Elizabeth Gurley Flynn, who was chairman of the Party, were notified that their passports were revoked; the use of those documents was said to violate Section 6. After adverse holdings by the appropriate State Department administrative bodies which reviewed the revocation orders, Aptheker and Flynn brought separate actions for declaratory judgments and injunctive relief in a federal district court.[4] In those actions, both plaintiffs alleged, among other things, that Section 6 violated the Due Process Clause of the Fifth Amendment. A three-judge district court unanimously sustained the constitutionality of Section 6. The prohibitions of that section were held to occupy a reasonable relation to the danger that the section was intended to prevent, the danger including foreign travel by United States Communists which was inimical to the internal security of the United States.[5] Under the Act, the purpose of the foreign travel (effectively prevented by revocation of the passport) was not relevant in deter-

1 64 Stat. 993 (1950), 50 U.S.C. § 785 (1958).

2 The term "Communist organization" was defined in the Act as any "Communist-action organization, Communist-front organization or Communist-infiltrated organization." 64 Stat. 990 (1950), *as amended*, 68 Stat. 777 (1954), 50 U.S.C. § 782 (1958).

3 *Supra* note 1.

4 The decision in both cases is found in Flynn v. Rusk, 219 F. Supp. 709 (D.D.C. 1963).

5 The other grounds embodied in the complaint were that Section 6 was unconstitutional as (1) an abridgement of the plaintiff's freedoms of speech, press, and assembly under the First Amendment, (2) a prohibited bill of attainder under Article I, Section 9 of the Constitution, (3) a deprivation of the right to a trial by jury required by the Fifth and Sixth Amendments and Article III, Section 2, Clause 3 of the Constitution, and (4) the imposition of a cruel and unusual punishment in violation of the Eighth Amendment. Since the decision of the Supreme Court rested on the violation of the Due Process clause alone, the other grounds were not discussed by the Court.

mining the applicability of the provision. Nevertheless, the district court felt that the resulting presumption-in-fact of a harmful purpose was "not so unreasonable as to violate plaintiffs' constitutional rights."[6]

On appeal, the Supreme Court held Section 6 to be excessively broad and therefore unconstitutional. Contrary to the decision in the district court, the Supreme Court held that the section did not bear a reasonable relation to the danger it was intended to prevent. The majority of the Supreme Court considered the section invalid on its face, incapable of application even to the top-ranking Party leaders involved in the present case. Justices Clark, Harlan and White dissented.

Prior to *Aptheker*, there were few cases involving the constitutionality of peace-time restrictions on foreign travel. Freedom to travel had been expressly recognized to be within the "liberty" of the Due Process Clause of the Fifth Amendment.[7] Today, a passport is necessary to exercise this freedom to travel abroad, and, in fact, a federal regulation makes it a crime to travel outside the Western Hemisphere or to Cuba without a passport.[8] Moreover, as a common means of proving citizenship, a passport is essential to free movement in and out of most foreign countries.

It has long been recognized that the freedoms set forth in the Bill of Rights are not as absolute as the language by which they are set forth; the federal government can impose restraints, if reasonable, on those basic freedoms to prevent substantive harm, for example the harm to the people resulting from tactics designed to overthrow the government by violence.[9] If the restraint in a given situation is not reasonably related to the danger sought to be prevented, the statute can be declared unconstitutional and inapplicable,[10] or even absolutely void in some situations, *e.g.*, if it invades First Amendment freedoms.[11] Recognizing the dangers created by Communist organizations' advocacy of the violent overthrow of the government, the courts have repeatedly upheld legislation checking such dangers at the expense of the members' First Amendment freedoms.[12]

Prior to *Aptheker*, an administrative body had imposed restrictions on the issuance of passports to members of Communist organizations. In the period between 1917 and 1931, and from World War II until 1958, the

6 219 F. Supp. 709, at 715 (D.D.C. 1963).

7 Kent v. Dulles, 357 U.S. 116, 78 Sup. Ct. 1113 (1958).

8 In accordance with 22 C.F.R. §§ 53.1-53.8 (1959), as amended 22 C.F.R. § 53.2 (Supp. 1964), issued and promulgated under 66 Stat. 190 (1952), 8 U.S.C. 1185(b) (1958). The provision of this statute making it unlawful to enter the United States without a passport was held unconstitutional in Worthy v. United States, 328 F.2d 386 (5th Cir. 1964).

9 American Communications Association v. Douds, 339 U.S. 382, 70 Sup. Ct. 674 (1950); Dennis v. United States, 341 U.S. 494, 71 Sup. Ct. 857 (1951); compare Yates v. United States, 354 U.S. 298, 77 Sup. Ct. 1064 (1957).

10 Shelton v. Tucker, 364 U.S. 479, 81 Sup. Ct. 247 (1960).

11 Thornhill v. Alabama, 310 U.S. 88, 60 Sup. Ct. 736 (1940), one of the earlier cases taking this view.

12 See generally Annot., 95 L. Ed. 875 (1951) and Annot., 100 L. Ed. 661 (1956).

State Department had denied passports to American Communists who went abroad to engage in activities detrimental to national security. This action was taken pursuant to a federal statute which gave the Secretary of State the authority to "grant and issue passports."[13] However, in the 1958 case of *Kent v. Dulles*,[14] that federal statute was held not to delegate the power to deny passports to persons based on their Communistic beliefs or Communist associations. But lower federal courts, prior to the Aptheker case, had implied that the freedom to travel could be limited by specific Congressional action.[15]

The 1950 Subversive Activities Control Act was designed to correct the danger presented by the United States Communist organization and the world Communist movement. The legislative intent, embodied in Section 2 of the Act,[16] included the statement that foreign travel was a prerequisite for carrying on activities to further the purposes of the Communist movement. The justifications of the latter finding, which were documented in the Appellee's brief in the *Aptheker* case,[17] were that foreign travel by American Communists was necessary: (1) to give orders and to exchange secret information, (2) to receive training in subversive activities, (3) to allow the Russian dominated movement to exercise closer control over its branches, (4) to carry on espionage, propaganda and revolutionary activities in foreign countries, and (5) to provide a supply of United States passports that could be used by third parties.

In the *Aptheker* case, the Supreme Court, in reversing the lower court, found that: (a) Section 6 was unconstitutional because it did not bear a reasonable relation to the danger sought to be protected against; and (b) regardless of the fact that travel of top-ranking Party members, such as the plaintiffs, might have been the very danger that the section was designed to prevent, the breadth of the section rendered it void on its face.

The unreasonableness of the section was said to be found in three factors. First, the section applied whether or not the individual actually knew he was associated with a Communist organization; constructive knowledge by publication in the Federal Register was sufficient. The case of *Wieman v. Updegraff*[18] was said to support a finding that the lack of a requirement of (actual) knowledge was unreasonable. In that case, Oklahoma attempted to bar disloyal state governmental workers by requiring

13 44 Stat. 887 (1926), 22 U.S.C. § 211a (1958). For the history of administrative regulation of passports, particularly in respect to Communist Party members, see generally Brief for Appellee, pp. 81-87, Aptheker v. Secretary of State, 378 U.S. 500, 84 Sup. Ct. 1659 (1964).

14 357 U.S. 116, 78 Sup. Ct. 1113 (1958).

15 Schactman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955); Worthy v. Herter, 270 F.2d 905 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 918, 80 Sup. Ct. 255 (1959); Worthy v. United States, 328 F.2d 386 (5th Cir. 1964).

16 64 Stat. 987 (1950), 50 U.S.C. § 781 (1958).

17 Brief for Appellee, *supra* note 13, at pp. 25-35.

18 344 U.S. 183, 73 Sup. Ct. 215 (1952).

state employees and officers to take a loyalty oath to the effect that for the past five years they had not been members of groups included on the United States Attorney General's list of Communist front and subversive organizations. Ultimately, the Supreme Court of the United States found this requirement to violate the Due Process Clause of the Fourteenth Amendment on the ground that one must know the organizational purpose of a particular group before the fact of membership could be said to indicate disloyalty. The Oklahoma statute did not require such scienter. Any membership, in effect, gave rise to a conclusive presumption of disloyalty. However, as pointed out by the dissent in *Aptheker*, the statute in the *Wieman* case did not require knowledge of the government's listing, and termination of membership in the particular organization would not avoid the sanctions of the statute. The contrary was true under Section 6 of the Federal Subversive Activity Control Act since actual or constructive knowledge of the registration or final order was necessary, and termination of membership was said to permit avoidance of the sanctions of the Act. The majority decision countered the attempted distinction by stating that in any event actual knowledge was sufficient, and that freedom of association certainly would be denied if the effect of Section 6 was to force the termination of membership.

The second and third factors listed by the majority in *Aptheker* to show Section 6 to be unconstitutionally broad were that the individual's degree of activity in the organization, and his purpose for travel were not relevant in determining the applicability of the section. These, the most serious objections, were said to be highly relevant in determining the likelihood that the travel would be attended by the type of activity which Congress sought to control. The government had argued that it would be impossible to prevent travel associated with activities dangerous to internal security without proscribing all Communist travel. Once the trip was made the possible harm could not be prevented. The dissenting justices agreed with the government's contention, citing numerous cases where all persons in a class were validly barred from certain conduct, although all persons in that class might not engage in harmful conduct. The majority of the cited cases could be divided into two classes: those relating to prohibitions affecting persons in peculiarly influential positions, for example, the exclusion of any labor unions from enjoying the privileges of the National Labor Relations Board if any officer of that union was a Communist Party member;[19] and those relating to prohibitions as to aliens or naturalized citizens, for example, the deportation of all aliens who had been members of the Party.[20] However, none of these cases involved the *broad* restraint (*e.g.*, denial of a passport that would permit travel) of *all* citizens, (who need not be in peculiarly influential positions) on the ground of Communist Party membership. The NLRB regulation, which affected only a small number of Party

19 American Communications Ass'n v. Douds, 339 U.S. 382, 70 Sup. Ct. 674 (1950).
20 Harisiades v. Shaughnessy, 342 U.S. 580, 72 Sup. Ct. 512 (1952).

members, was considered the only method of minimizing the dangerous political strikes advocated by the Party, and could be said to merely take away the power by which the Party members, union officers, could call political strikes. Resident aliens' rights in a deportation proceeding are considerably less than those of a citizen.[21] Congress, having the power to naturalize citizens, likewise has the power to denaturalize for acts indicating lack of allegiance to the United States.[22]

In declaring Section 6 void on its face, the Supreme Court accorded protection to the freedom of travel, the freedom implied in the Due Process Clause, similar in breadth to that protection given the First Amendment freedoms.[23] Because of the "case and controversies" limitation to any factual situation, not only the one before the court, *i.e.*, decisions that a statute was void on its face were generally peculiar to the area of freedom of expression. The case of *Thornhill v. Alabama*[24] suggests the reason for that exception in the freedom of expression area. There, individuals who appeared to have been engaged in relatively peaceful picketing pursuant to a labor dispute, were indicted under an anti-picketing statute. The all-inclusive anti-picketing statute was held invalid on its face. The Court there recognized that a State might have the authority to prohibit certain types of picketing, for example, violent picketing; but all picketing could not be proscribed. Peaceful picketing was the working man's means of expression. And, although a court would normally restrict its holding regarding the invalidity of a statute to the facts before it, a broad statute which was capable of sweeping and improper application in the area of First Amendment freedoms could be declared invalid on its face. Otherwise, an inhibitory effect on such freedoms could result.

Likewise, in *N.A.A.C.P. v. Button*,[25] the court held invalid on its face a Virginia statute under which the state sought to prevent the NAACP and its separate incorporated Legal Defense Fund from retaining attorneys in connection with actions to which those organizations neither were parties nor had a pecuniary right or liability. It had been the common practice of those organizations to provide such services for private parties in actions which could effect the maintenance of racial barriers. The statute was held void on its face because it could curtail litigation and thus considerably slow down civil rights activity on behalf of Negro citizens.

The basis of the majority decision in *Aptheker* was that the travel restrictions effectively imposed by Section 6 violated the Due Process Clause.

21 See generally 3 Am. Jur. 2d, *Aliens and Citizens* §§ 71, 81 (1962), and Annot., 100 L. Ed. 661, 664 (1956).

22 See 3 Am. Jur. 2d, *Aliens and Citizens*, §§ 140, 166 (1962).

23 Exceptions to this general rule, including that exception regarding laws which would deter freedom of expression, are listed in United States v. Raines, 362 U.S. 17, 80 Sup. Ct. 519 (1960).

24 310 U.S. 88, 60 Sup. Ct. 736 (1940).

25 371 U.S. 415, 83 Sup. Ct. 328 (1962).

It is interesting to note, however, that here the Court was not only concerned with the freedom to travel. The freedom to travel was firmly bound to the freedom to associate with groups of ones own choosing. Membership in subversive organizations resulted in a bar to the use of a passport necessary to travel.

The *Aptheker* decision makes it clear that Congress cannot validly prohibit peace-time foreign travel by all members of Communist organizations. The decision further suggests that such travel might be limited if the act proscribed the use of passports by individuals (a) knowing themselves to be members of registered organizations and knowing the subversive purposes of such organizations, (b) being active in such organizations, and (c) intending to travel abroad with the object of engaging in conduct that could be dangerous to internal security. Whether a statute so limited could effectively prevent subversives from engaging in conduct abroad that would be dangerous to internal security appears doubtful. Dangerous activity could be engaged in by inactive or seemingly inactive Party members. Certainly, the intention of engaging in dangerous activities abroad would not be truthfully communicated to passport officials before departure from the United States. After the individual returned to the United States, the giving of orders and exchange of secret information would have taken place, the training would have been received, and the other dangerous activities accomplished. More drastic measures would then be necessary to minimize the effects of the activities.

It is now apparent, however, that the freedom to travel declared to be guaranteed by the Due Process Clause will be viewed by the courts with respect approaching that accorded to the First Amendment freedoms.

MRS. S. MELOY

CONSTITUTIONAL LAW—CONFESSIONS—NEW YORK PROCEDURE FOR DETERMINING THE VOLUNTARINESS OF A CONFESSION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT—In the case of *Jackson v. Denno*, 378 U.S. 368, 84 Sup. Ct. 1774 (1964), the United States Supreme Court held that the New York procedure for determining the voluntariness of a confession did not adequately protect the defendant's constitutional right[1] to be free from a conviction based on a coerced confession.

Under the New York rule,[2] the trial judge was required to make a preliminary determination regarding the voluntariness of a confession

1 It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession. Rogers v. Richmond, 365 U.S. 534, 81 Sup. Ct. 735 (1961).

2 People v. Weiner, 248 N.Y. 118, 122, 161 N.E. 441, 443 (1928).