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# Passports--A Modern Gordian Knot

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# NOTES

## PASSPORTS—A MODERN GORDIAN KNOT

From 1796, the date of the first United States passport, until 1947, there were relatively few restrictions upon peacetime travel. During this period the main requirement for obtaining a passport was that one be a citizen or otherwise subject to the jurisdiction of the United States. Historically, the passport was a document, useful, but not essential, for traveling abroad. Its primary purpose was to facilitate travel.<sup>1</sup> Early in the history of our country the practice of issuing passports in time of peace was engaged in not only by the State Department, but also by state and local officials.<sup>2</sup> As late as 1835 in the case of *Urtetique v. D'Arcy*, the Supreme Court said:

There is no law in the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done or declaring their legal effects. It is understood, as a matter of practice, that some evidence of citizenship is required by the Secretary of State, before issuing a passport. This, however, is entirely discretionary with him. . . . It is a document which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely . . . to be considered . . . a political document. . . .<sup>3</sup>

The language in the *D'Arcy* case points up the fact that there was no centralized office for issuing passports, but, that as to passports which the Secretary of State should issue, he had entire discretion as to what evidence should support a claim for a passport. The Court further takes occasion to point out that a passport should be considered merely a diplomatic document of identification implying that it was not a document necessary for travel.

<sup>1</sup> Hackworth, *Digest of International Law*, Vol. 3, p. 435 defines a passport as: . . . a document of identity and nationality issued to persons owing allegiance to the United States and intending to travel . . . in foreign countries. It indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and . . . foreign governments permit the bearer to travel . . . and . . . to give him all lawful aid and protection. It has no other purpose.

Rex v. Brailsford, 2 K.B. 730 at 745 (1905); *Gillars v. United States*, 182 F. 2d 962 at 981 (1950).

<sup>2</sup> Boudin, *The Constitutional Right to Travel*, 56 *Columbia L. Rev.* 47 at 52 (1956). This is a very penetrating analysis into the problem of travel control in which Boudin develops a strong case for treating the issuance of a passport as a right.

<sup>3</sup> 34 U.S. 692, 698 (9 Pet. 1835). See also *In re Gee Hop*, 71 F. 274 (1895).

In 1856, Congress enacted legislation which vested in the Secretary of the State the *exclusive power* to issue passports.<sup>4</sup> This was done to remedy the abuses which resulted from the lack of an organization in passport issuance and to decrease "impositions practiced upon the illiterate and unwary by the falsification of worthless passports."<sup>5</sup>

Prior to World War I, peacetime travel abroad was enjoyed free, for the most part, of any restrictions imposed by the Secretary or by other countries. A passport was not a condition precedent for either leaving this country or gaining admission to another country. One who obtained a passport merely received an added assurance that as an American citizen traveling abroad he would receive all the lawful aid and protection which foreign governments could extend. It purported only to be a document by our government attesting to the bearer's identity and requesting safety and freedom for the bearer and nothing more. In this context a passport was a privilege which the state department was under no duty to give, but which could be issued at its sole discretion, since a citizen had no right to compel his government to request that a foreign state protect him. Thus, traditionally, "travel was the right; passport the privilege."<sup>6</sup>

In 1918, Congress passed the Travel Control Act<sup>7</sup> which authorized the President to make it illegal for any person, including a citizen, to enter or leave the United States without a passport. Thus, for the

<sup>4</sup> 11 Stat. 60 (1856); "The Secretary of State shall be authorized to grant and issue passports . . . under such rules as the President shall designate. . . ."

<sup>5</sup> Boudin, *Supra* at note 2 at 52. In 1875, Rev. Statutes, sec. 4075, as amended 22 U.S.C. sec. 211A (1952) the wording of the Secretary's discretion was altered. "The Secretary of State may grant and issue passports. . . ." In his brief, at p. 18, in *Shachtman v. Dulles*, 225 F. 2d 938 (1955), the Secretary argued that this language gave him absolute control and discretion over the grant and denial of passports. At least three objections to this contention can be pointed out: (1) the purpose for which the statute was enacted, (2) the historical or traditional meaning attached to a passport, (3) interpretation of the language in question under "established principles of statutory construction." 56 *Columbia L. Rev.* at 54-55. It should be noted that the fundamental passport statute does not give any procedural or substantive standards.

<sup>6</sup> 41 *Georgetown L. Jour.* 63 at 77 (1932). This article offers perhaps the best historical treatment of the evolution of the passport to its modern day significance. The use of the word "privilege" is an unfortunate one since it has caused more confusion than benefit. Davis, *Administrative Law*, 246-254 (1951). Perhaps a more meaningful expression would be that the Secretary has the prerogative which might indicate that the activity enjoyed is that of the sovereign, and as such may be given and withdrawn at his will. See *Pike v. Walker*, 121 F. 2d 87 (1941) for an example of the problem the courts have found themselves in attempting to distinguish "privileges" from "rights". For an attempted distinction see *Packard v. Banton*, 264 U.S. 140, 145 (1924); *State v. Montgomery*, 177 Ala. 212, 59 So. 294 (1912). A Kentucky case pointing out the problem is *Fleener v. Hammond*, 116 F. 2d 982 (1941). At least one writer apparently would do away with the entire notion of "privileges", and would apply the test of due process in all cases involving the normal activities of mankind. 3 *Stanford L. Rev.* 312 (1951).

<sup>7</sup> 40 Stat. 559 (1918). During the War of 1812, passports were required by statute of citizens leaving the United States. 3 stat. 199 (1815). This restriction lasted only for the duration of the conflict.

first time since the War Between the States the passport was chosen as a vehicle for prohibiting American citizens from traveling on ships of belligerent states and from traveling in areas which were declared as unsafe by various presidential proclamations. "The passport was an ideal device for control of movements of American citizens. . . ."<sup>8</sup> With the end of hostilities, citizens were again free to travel as they desired.

But the war had left its effect upon free international travel. All during the nineteenth century there had been a movement to eliminate the need for passport to travel in Europe and by 1867, all of Europe, except Russia and Turkey, had practically eliminated the requirement of a passport. However, since the end of World War I many foreign governments have refused to allow American citizens to enter their country without passports issued by the Secretary of State.<sup>9</sup> As the consequence of this reaction toward more control upon international travel, the passport, without any legislative or executive action here in America, became a document necessary to one seeking to go abroad. It might very well be argued that at this point in world history the historic distinction between international travel and passport was no longer valid.

Prior to 1941, the discretion exercised by the Secretary of State related chiefly to a determination of whether there was adequate evidence presented to justify issuance of a passport. The basic problem dealt with was the question of citizenship in or allegiance to the United States. Other grounds for refusal were previous unlawful activities, previous activities against a friendly government, being a paroled convict, seeking to avoid military service or tax obligations, or seeking to avoid criminal or civil prosecution. Despite these exceptions, it has been the policy of the State Department to grant passports, in an overwhelming number of cases, to parties upon a mere showing of citizenship.<sup>10</sup>

<sup>8</sup> Stuart, *Safeguarding the State through Passport Control*, 12 *State Dept. Bulletin* 1066 at 1067 (1945). During the years beginning with 1914 and ending 1918, the number of passports issued and renewed were 20,320, 23,119, 23,118, 37,615 and 56,822. These figures were obtained from the passport office under date of February 1, 1956.

<sup>9</sup> In reply to a questionnaire sent out in 1952 to thirty-seven foreign countries, only ten allowed their nationals to leave the country without a passport. Only five did not require aliens attempting to enter to have passports. Boudin, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 *Yale L. J.* 172, footnote 3 (1952). It has been suggested by Richard D. Gilliam, Esq., who directed this paper, that at least two possible factors might have caused this change: (1) visa money presented a new source of income, and (2) a reaction to the threat of international communism which appeared in Russia.

<sup>10</sup> *N. Y. Times*, Jan. 17, 1956, p. 32. *New and Renewal Applications for Passports*, 529,785; number issued 525,259. Of the remaining 4,526 not granted, 13 were for security reasons.

In 1926 a new passport act, which is the basis for the modern act, was enacted.<sup>11</sup> In 1939, as the result of hostilities in Europe, the State Department invalidated all passports issued for travel in Europe. By the time the United States entered the war in 1941, the passport, due largely to Congressional acts, presidential proclamations, and State Department regulations, had become virtually a license necessary to travel.<sup>12</sup> The Immigration and Nationality Act of 1952<sup>13</sup> provided that should the President, during a war or national emergency, find it in the interest of the country to restrict departure from and entry into the United States, it should be unlawful for any citizen of the United States to depart from or enter the United States without a passport. In 1953 the President made this provision operative.<sup>14</sup>

Within this legal framework the character of the United States passport has changed from an unnecessary but beneficial diplomatic document, the primary purpose of which was to establish a citizen's identity, to, in effect, a license to travel. Since shortly after the end of hostilities in 1945, this transition has resulted in judicial examination of the refusal to issue passports. In defining the scope of the Secretary of State's discretion in the issuance of passports, considerable attention has been directed to the meaning of the phrase "may grant" as used by Congress in the statute.<sup>15</sup> Do these words give the Secretary absolute discretion to deny a citizen a passport?

As early as 1869 the federal government had taken the position that the State Department had absolute discretion in the issuance of passports.<sup>16</sup> This view was later reiterated in 1901:

The Act of Congress which defines your duties in the matter of the issuance of passports expressly says 'the Secretary of State may grant and issue passports'. The provision is not in term mandatory, and I know of no law which gives to the citizens the right to a passport. . . .

<sup>11</sup> 44 Stat. 887 (1926) 22 U.S.C. 211a. "The Secretary of State may issue passports . . . under such rules and regulations as the President may prescribe. . . ." This is the language presently applicable. In 1938, on the basis of this statute, Executive Order 7856 (3 F.R. 68; 22 Code of Federal Regulations 51.1-51.77) passport regulations were drawn up.

<sup>12</sup> 41 Georgetown L. Jour. 63 at 78.

<sup>13</sup> 66 Stat. 163,190 (1952), 8 U.S.C.A. sec. 1185(A)(B). Does this statute represent a congressional acknowledgement of the power of the Secretary to deny a passport anytime? It should also be noted that there is no provision for judicial review.

<sup>14</sup> By Executive Proclamation, No. 3004, 18 Fed. Reg. 489 (Jan. 3, 1953) U.S. Code and Congressional and Administrative News p. 915 (1953), the departure and entry of citizens and nationals shall become subject to regulations prescribed by the Secretary of State. 22 Code of Federal Regulations sec. 53.1-53.9. (Hereafter the Code of Federal Regulations will be referred to as CFR).

<sup>15</sup> *Supra*, note 5.

<sup>16</sup> 13 Opinions of the Attorney General 89 (1869).

Continuing, Attorney General Knox observed:

Substantial reasons exist for the use by Congress of the word 'may' in connection with authority to issue passports. Circumstances are conceivable, which would make it most inexpedient for the public interest . . . to grant a passport to a citizen of the United States.<sup>17</sup>

It has been further argued that in addition to this statutory discretion, the discretionary authority in the issuance of passports is inherent in the exercise of the presidential authority to conduct foreign affairs.<sup>18</sup>

In 1939 the Supreme Court decided the case of *Perkins v. Elg*.<sup>19</sup> Elg sought, among other things, a declaratory judgment as to her United States citizenship, and an injunction against the Secretary of State restraining him from denying her a passport. The district court dismissed the complaint as to the Secretary of State because of his official discretion in the issuance of passports. The Supreme Court held that the decree should include the Secretary of State, and that it would in no way interfere with the Secretary's discretion with respect to the issuance of passports, but would simply preclude a denial on the *sole ground* that Elg had lost her American citizenship if she had, in fact, not lost it.

In the *Elg* case the Court quite obviously recognized the fact that the Secretary had official discretion in passport issuance, but the span of that discretion was cut down as far as it relates to the determination of citizenship. The Court seems to be saying that if the sole ground for refusal of a passport is loss of citizenship, there is presented a question of fact reviewable by the courts. In a later case<sup>20</sup> the government took the position that the *Elg* case did not impeach the Secretary's position as to his absolute discretion. It contended that in the *Elg* case the Court considered and *decided* the question of citizenship—a matter properly within the judicial sphere; this matter, it further asserts, is not dependent upon the exercise of the executive discretion or judgment. Therefore, even after the *Elg* case the Secretary's decision that it would not be in the interest of the United States to allow a particular person to travel abroad is still not subject to judicial review.

<sup>17</sup> 23 Opinions of the Attorney General 509 (1901). "An administrative history developed when a passport was a request to a foreign government for protection, but unnecessary to permit travel abroad, is hardly a valuable precedent at a time when the passport has become a *sine qua non* for international travel. Brief for appellant Shachtman, p. 11, *Shachtman v. Dulles*, 224 F. 2d 938 (1955).

<sup>18</sup> United States Department of State Bulletin, Vol. 26, June 9, 1952, 919-920. See also *U.S. v. Curtis-Wright Corp.*, 299 U.S. 304 (1935); *Chicago So. Airlines v. Watterman*, 333 U.S. 103 (1945). See also Boudin, 61 *Yale L. J.*, 186 (1952).

<sup>19</sup> 307 U.S. 325 (1939).

<sup>20</sup> Brief for the Government, p. 18-19, *Shachtman v. Dulles*, *supra*, at note 17.

A more critical reading of the language of the *Elg* case would lead one to infer that the Court meant to say that while the judiciary will generally not interfere with the exercise of the Secretary's discretion, it will subject his decisions in a passport ruling to review where the reason ascribed for the denial is attacked as *factually erroneous*. Thus, when the Secretary gives a reason for refusal, and it is factual, the accuracy of that fact is subject to judicial inquiry. However, the *Elg* decision would also seem to say that if the Secretary in the exercise of his discretion chooses not to give a factual basis for his refusal to issue a passport, but denies it on the grounds that it would be contrary to the best interest of the United States, then the Court will not subject his denial to judicial review.

Since shortly after the war of 1941-45, the State Department's refusal to grant passports to prominent figures in American life has caused considerable comment on the passport problem. In the overwhelming number of these cases the refusal appears to have been based not on traditional reason, i.e., seeking to avoid legal sanctions, payment of taxes, etc., but rather on reasons of security.<sup>21</sup> It was only natural that in the light of circumstances,<sup>22</sup> i.e., the increase of travel abroad, the necessity of a passport, and the position of the State Department, that litigation on the issuance of passports should arise.

In 1952 the case of *Bauer v. Acheson* was decided.<sup>23</sup> The plaintiff was a naturalized American citizen working in France. In 1951 the State Department, without any notice or hearing, revoked the plaintiff's passport and thereafter refused to validate or renew it, except to amend it so that it would be valid only for her return to the United

<sup>21</sup> See Boudin, *supra*, at note 18 at 174-178. 8 Bull. Atomic Scientist, 209-261 (October, 1952). Typical is the later case of Dr. Linus Pauling. He was invited to London to address the Royal Society and to attend its discussion meeting on the structure of protous on May 1, 1952. On January 24th he applied for a passport. On February 14th he received a letter of denial. After two months of correspondence and interview with officials failed to change the decision, he cancelled his London appearance. A remonstrance by Senator Morse of Oregon elicited a response from the passport office that it could furnish no detailed information. However, on July 15th the decision was reversed. Six months after his application, he was informed that a passport would be issued to him if he signed a non-communist affidavit. He did so on July 11th. It added nothing to the evidence because he had given the State Department a similar statement in April before his scheduled departure.

<sup>22</sup> The increasing importance of international travel is illustrated by the following figures: In 1877, 41,484 citizens returned to the United States; in 1880 this number increased to 88,017, and at the turn of the century 120,477 citizens returned from other countries. Department of Commerce, Statistical Abstract of the U.S. 1901, p. 415. By 1947 and the following years until 1954 the number of citizens departing from the United States were 447,320; 474,048; 548,352; 651,595; 812,644; 812,644; 923,560; 969,221 respectively. Department of Commerce, Statistical Abstract of United States, 1955, p. 102.

<sup>23</sup> 106 F. Supp. 445 (D.D.C. 1952). This case was sponsored by the American Civil Liberties Union.

States. The reason given for the refusal to grant a renewal was that it would be contrary to the best interest of the United States. Bauer contended that either the Passport Act of 1918, as amended, or the construction by the Secretary that the Act authorized him to revoke a passport without notice and hearing, was unconstitutional as a violation of the due process clause of the Fifth Amendment. She sought declaratory judgment that the action of the Secretary was null and void and, further, that he be enjoined from denying her a passport without notice and hearing.<sup>24</sup>

The District Court, three judges sitting, found that the failure of the Secretary to give the plaintiff notice and hearing was without authority of law. The Secretary was directed to renew her passport, without qualifications, unless a hearing were accorded her within a reasonable time.

In rejecting the assertions that the Secretary's discretion was absolute, the court pointed out that there existed a "recognized limitation" on the power of the executive, and that the nature of that limitation was to be found in the Constitution:

This court is not willing to subscribe to the view that the executive power included absolute discretion which may encroach on the individual's constitutional rights, or that Congress has power to confer such absolute discretion . . . like other curtailments of personal liberty for the public good, the regulation of passports must be administered, not arbitrarily or capriciously, but fairly, . . . and with due process adapted to the exigencies of the situation.<sup>25</sup>

The opinion leaves little doubt that the Secretary may not revoke a passport without giving notice and a hearing. Yet, unfortunately, there is no language in the opinion which spells out the type of hearing which will meet the requirements of due process. There is no elaboration of the standards with which the Secretary will have to comply in his denials so as to satisfy due process. In addition to the form of hearing required, there still remains open the question of the amount and type of evidence which may be utilized by the State Department in reaching its decision as to passport issuance. Can the Secretary use evidence received from informants known to the Secretary and satisfactory to him without making it known to the applicant or allowing him to confront his accusers?

The district court refused to accept the position that a passport is a purely political document addressed to a foreign power and therefore solely in the realm of foreign affairs, saying, "It is unrealistic to con-

<sup>24</sup> Bauer also contended that the action of the Secretary violated the ex post facto and bill of attainder provision of the Constitution. The Court disposed of these contentions briefly. *Id.* at 449-450.

<sup>25</sup> Bauer case, *supra*, note 22, at 452.



tend that the denial of an American passport does not restrict the plaintiff's right to travel". Thus, the court recognized for the first time that there existed a *right to travel abroad* and that a passport was an inherent part of the right. Quoting with approval from *Williams v. Fear*,<sup>26</sup> and observing that while the Court there was referring to freedom of movement among the States, the circuit court found, "it is difficult to see where . . . freedom to travel outside the United States is any less an attribute of personal liberty."

Unfortunately, the issue of whether the Secretary has absolute discretion to *issue* a passport was not contested nor squarely examined by the court. This was not placed in issue by the pleading since the plaintiff petitioned the court for a hearing and not a passport. The district court took cognizance of the fact that the matter of passports must be left within the wide discretion of the Secretary, and that he was authorized to establish a reasonable classification as to passport issuance, but that this power was not absolute.<sup>27</sup>

In order to obviate the procedural due process objections voiced by the Court in the *Bauer* case, the State Department established new regulations.<sup>28</sup> These new regulations provide that no passport, except one limited for direct and immediate return to the United States shall be issued to: (1) members of the Communist party; (2) persons in affiliation with the Communist party; (3) persons regardless of their formal state of affiliation with the Communist party who are going abroad to engage in activities which will advance Communist activities; (4) persons who are going abroad to engage there in activities which would violate the laws of the United States or which, in the United States, would violate the security laws.<sup>29</sup> These standards leave a considerable amount of discretion to the State Department.

<sup>26</sup> 179 U.S. 270 at 274 (1900). "Undoubtedly the right of locomotion, the right to move 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 provision of the Constitution."

<sup>27</sup> Despite the Court's ruling that the Secretary of State renew or revalidate the plaintiff's passport, unless a hearing be accorded within a reasonable time, Miss Bauer received neither a hearing nor a passport because of delaying tactics, and finally, she gave up her American citizenship and the lawsuit as well. The Nation, July 30, 1955, p. 96.

It is of interest to note that while in the *Bauer* case the Court declared the specified "reason" for revoking the passport "to be in the best interest of the United States," a bald statement, there is no indication that the "bald statement" should be amplified to make it explanatory. Yet, the Court has implicitly, it seems, developed the proposition that a refusal based on the "best interest" reason, standing alone, will not be adequate.

<sup>28</sup> Departmental Regulations, 17 F.R. 8013; 226 F.R. 51.135 to 51.143.

<sup>29</sup> Id. at 51.135-51.136. Sec. 51.136 as amended in 1956 reads, ". . . passport facilities . . . will be refused to a person when it appears to the satisfaction of the Secretary . . . that [it would] (1) violate the laws of the United States, (2) be prejudicial to the orderly conduct of foreign affairs, or (3) otherwise be prejudicial.

One whose application for a passport has been disapproved will be notified of the reason for the decision "as specifically as in the judgment of the Secretary of State, security considerations permit."<sup>30</sup> Under this language it would be adequate to give the "best interest of the United States" as a "reason" for the decision. The applicant has a right to a hearing before the Board. The final administrative authority in the matter is the Secretary of State. There is no provision for judicial review. These provisions have come under attack from numerous quarters. At least three objections are raised: (1) there is no full guarantee that all reasons will be given, (2) there is no opportunity for confrontation, and (3) no standard whatsoever has been laid down for persons who are not alleged Communists or Communist sympathizers.<sup>31</sup>

On February 28, 1955, the United States District Court handed down its decision in the case of *Nathan v. Dulles*.<sup>32</sup> In a very brief opinion, Schweinhaut, J., expressly took the position that, while the court would not attempt to define the character of the hearing, one should be held. The judge was extremely critical of the recently approved passport regulations, noting: "It does not satisfy me to argue that the plaintiff has not exhausted his administrative remedies, since I think as a matter of practical fact that he has none."<sup>33</sup>

Despite the order of the court that Nathan be granted a hearing, no such hearing was immediately granted.<sup>34</sup> Nathan later filed a motion asking that the passport office be held in civil contempt or directed to issue a passport in compliance with the decree of the court given on March 15th. On June 1, Judge Schweinhaut issued a formal order *directing the issuance of a passport*.

The State Department contended that it had offered Nathan a hearing before the Board of Passport Appeals under standard departmental regulations.<sup>35</sup> The United States Attorney asked the court to reverse

<sup>30</sup> *Id.*, at 51.137.

<sup>31</sup> For a commentary on these regulations see James D. Barnett, *Passport Administration and the Courts*, 32 *Ore. L. Rev.* 193 at 209 (1953). Also see American Civil Liberties Union publication, *Washington Digest*, June 27, 1955 at p. 5.

<sup>32</sup> 129 F. Supp. 951 (1955) decided with *Clark v. Dulles*.

<sup>33</sup> 129 F. Supp. at 952. Although there is no reference in the opinion to rules of passport appeals (22 CFR 51.151-51.170) which had been approved by the Secretary of State on January 4, 1955, the opinion leaves little doubt as to the position of the Court as to these regulations.

<sup>34</sup> 22 C.F.R. 51.159 "Applicant shall receive not less than five calendar days notice in writing of the scheduled date and place of hearing which shall be set for a time as soon as possible after receipt by the Board of Applicant's Petition." There is no time specified within which a hearing must be given. See Pauling case at footnote 21, *supra*.

<sup>35</sup> Nathan was asked to file an affidavit that he was not a communist and further to sign a statement that he had never belonged to a communist organization. The latter Nathan refused to do, unless the State Department named the organizations and described their character.

its order that the Secretary issue a passport and its ruling that the hearing provided by the regulations was a violation of due process. In so asking that its regulations be construed the State Department was obviously preparing to appeal Judge Schweinhaut's ruling on constitutional grounds. Both of these requests were denied.<sup>36</sup>

On June 2, upon appeal, the circuit court of appeals ordered the State Department to grant Nathan a hearing on his application. The court also prescribed the standards under which the hearing was to be conducted. The action of the court in this regard was termed "history-making" since it was the first time that a court had prescribed rules for a State Department hearing. The appellate court also ordered the decree of Judge Schweinhaut, directing the department to issue a passport to Nathan, to be stayed pending the completion of the hearing.<sup>37</sup>

The appellate court's order directed the State Department to give Nathan a "quasi-judicial" hearing. The court also laid out a time schedule for the hearing. In the event that a passport were denied by the State Department, the applicant and the court must be informed "with particularity" of reasons for such denial or show cause to the court "with particularity" for any failure to supply such reasons.<sup>38</sup>

On June 6, the State Department informed the court that Nathan's passport had been approved and issued. Thus, instead of giving Nathan the type of hearing prescribed by the court, the State Department granted him a passport.<sup>39</sup>

Had the appellate court supported the position of Judge Schweinhaut in ordering the Secretary to issue a passport there would have been no doubt that the passport was no longer solely a "political document". Congressional action and presidential declarations had made the passport a document indispensable to travel abroad, and in view of this fact the judge recognized that any denial of a passport by the Secretary must be for a reason consistent with due process, failing which the court will order the Secretary to issue a passport. The tenor of the Judge's order is a far cry from recognition of the "absolute discretion" asserted by the State Department.

Nevertheless, the appellate court did take the view that a passport could not be denied without a hearing the standards of which were subscribed by the court. Further, the Court reserved for the judiciary

<sup>36</sup> New York Times, June 2, 1955, p. 13. Judge Schweinhaut specifically accused the State Department of "dilly-dallying, delaying tactics."

<sup>37</sup> New York Times, June 3, 1955, p. 11.

<sup>38</sup> Ibid.

<sup>39</sup> State Department Bulletin 1050 (1955).

the right to determine whether a "quasi-judicial" hearing had in fact been granted.

The decision of the court of appeals in the *Nathan* case was not an order to the department, but rather it was a condition to a stay sought by it. The first specific order came in the case of *Foreman v. Dulles* where the district court incorporated the formula laid down in the *Nathan* case, in directing the State Department to give a hearing.<sup>40</sup> Instead of complying, the State Department notified Foreman that upon a complete review of his case, his application had been approved.<sup>41</sup> The result of these two decisions—*Nathan* and *Foreman*—has in essence nullified the existing procedural regulations of the passport division.

In *Shachtman v. Dulles*<sup>42</sup> the court further assaulted the State Department's position by specifically challenging the nature and sufficiency of passport standards. Shachtman asserted that his application for a passport had been denied on a ground which was legally insufficient—the fact that his organization was on the Attorney General's subversive list, having been placed there in denial of due process. The lower court dismissed his complaint for failure to state a claim upon which relief could be granted. The appellant did not ask that the Secretary be required by the court to issue him a passport, but only that the court rule upon the sufficiency of the reason given by the Secretary.

In refusing the contention of the Secretary that the subject of the passport was beyond judicial review, the appellate court addressed itself to the substantive due process question involved. Without passing upon the validity of the listing of the Attorney General, the court held the listing by the Attorney General of the plaintiff's organization is not per se a sufficient ground for denial of a passport.<sup>43</sup>

In its opinion the appellate court rejected the idea that a passport was a matter of prerogative held exclusively by the Secretary of State:

The denial of a passport . . . causes a deprivation of liberty that a citizen would otherwise have. The right to travel to go from place to place as the means of transportation permit, is a *natural right* subject to rights of others and to *reasonable regulation under law*. A restraint imposed by the Government . . . must conform with the

<sup>40</sup> Civil No. 4924-25 D.D.C., June 28, 1956. See Boudin, Columbia L. Rev., supra, at note 2 at 71.

<sup>41</sup> New York Times, Jan. 14, 1956, p. 4; The Nation, July 30, 1955, p. 97.

<sup>42</sup> 225 F. 2d 938 (1955).

<sup>43</sup> The Court did not find that the listing was inadmissible as evidence, and intimated that in a proper case it might be considered as an element in the final determination, but limited its position by saying that if the applicant's allegations are true, then it would be arbitrary for the Secretary to rely solely upon the listing. Query: Could the Secretary rely solely upon the listing if the allegations are not found to be true?

provision of the Fifth Amendment that 'No person shall . . . be deprived of . . . liberty . . . without due process of law!'<sup>44</sup> (Italics added)

The appellate court realized the fact that the issuance of passports was tied in closely with the conduct of foreign affairs. It sought to find a proper balance between the conduct of foreign affairs and the rights of an individual to travel abroad.

For even though his application might be said to come within the scope of foreign affairs in the broad sense, it is also within the scope of the due process clause, . . . There must be some reconciliation of these interests where the rights of a particular individual to travel is involved and not a question of foreign affairs on a political level.<sup>45</sup>

In recognition of this fact the court further defined what would be "a reasonable regulation under the law" by observing that in weighing the action of the Secretary it would consider whether the "deprivation of liberty [was] without a reasonable relation to the conduct of foreign affairs". In effect the court seems to be saying that since it is no longer possible for an individual to exercise his right to travel abroad without a passport, and since a passport may be related to the conduct of foreign affairs, the court, in determining whether the Secretary had adhered to the principles of due process, will consider whether the actions of the Secretary had a reasonable relation to foreign affairs. Thus, a reasonable relation to the conduct of foreign affairs becomes a factor in considering whether the Secretary's action was arbitrary or not.

This test of the "reasonable relation to the conduct of foreign affairs" for determining whether executive action meets the requirements of the due process clause is not without its difficulties for it would impose upon the court the task of making a determination of what is related to foreign affairs, a process which perhaps smells more

<sup>44</sup> Shachtman case, 225 F. 2d at 941. Authorities are divided as to whether in the early days of the common law the king had the right to restrain a subject from leaving. Beames, *A Brief View of the Writ Ne Exeat Regus* (2nd Am. Edition) (1841), p. 7. Chitty, *Treatise on the Law of the Prerogative of the Crown*, (1820) p. 21; Sharwood, *Blackstone Commentaries*, 1879, sec. 134,265. See also 41 *Georgetown L. Rev.* 63 (1952). There is no mention of such a right in *The Federalist Papers* nor in Max Farrand's *The Records of The Federal Convention of 1787*, 3 vols., (1911).

In 40 *Va. L. Rev.* 853 at 856 it is suggested that the right to travel is a part of the natural right of expatriation. See also 3 *Stanford L. Rev.* 313. Patterson, *The Forgotten Ninth Amendment* (1955), the author seems at least to imply that the right to travel abroad might be included in the Ninth Amendment. Also see 23 *Chicago L. Rev.*, 26 at 266 et seq (1956). United Nations Annual Assembly Declaration of Human Rights includes among its provisions the right to travel. Art. 13, Par. 2. "Everyone has the right to leave any country including his own, and to return to his country." 19 *State Dept. Bulletin* 752 (1948).

<sup>45</sup> Shachtman case, 225 F. 2d at 944. See 23 *Chicago L. Rev.* 261 (1956).

of the political rather than the legal. It further raises the question of just how much of a relationship must be shown and who shall have the burden of proof.<sup>46</sup>

Unfortunately, there is language in the opinion which would seem to say that the Secretary will not always be required to justify his action. It is suggested that in some cases, where a disclosure might adversely affect national security, the State Department will not be required to give the basis of its decision. Recourse to this defense, unless subject to judicial review, might serve to limit the scope of the decision.

The court did not decide whether Shachtman should or should not be given a passport, but remanded the case to the lower court with directions that the reasons given by the Secretary for denial were inadequate. The government abandoned the litigation and granted Shachtman a passport.<sup>47</sup>

Before the year was completed the courts were again faced with a passport problem. The State Department refused to issue Louis Boudin a passport on the ground that he was ineligible under certain provisions of passport regulations.<sup>48</sup> He instituted suit in the district court<sup>49</sup> for a declaratory judgment that he was entitled to a passport and that the passport regulations under which he was denied a passport were invalid and unconstitutional; and for an injunction requiring the Secretary to issue him a passport.

In his opinion Judge Youngdahl further defined the content of due process, ruling that the State Department must reveal the basis of its decisions and that the Secretary had no power to deny a passport on the basis of evidence which did not appear upon the record and which the applicant had no opportunity to meet.

In ordering the case back to the passport office for a hearing within a definite time schedule, the court cautioned the passport office that there must be a disclosure on the record so that the applicant may have the opportunity to meet it and the court to review it. A quasi-

<sup>46</sup> See Louis L. Jaffe, *The Passport Problem*, *Foreign Affairs*, Vol. 35, p. 17 (1956); also see 23 *Chicago L. Rev.* at 278. A brief resume of Mr. Jaffe's article can be found in the November 29, 1956 issue of the *Harvard Law Record*. See also *The Economist*, July 2, 1955, p. 35.

<sup>47</sup> *New York Times*, August 4, 1955, p. 38. Despite the position of the court in the Shachtman case, the Secretary continued to take the position that the words "may grant and issue" gives him absolute discretion in regard to passport. *B.N.A. Gov't Sec. and Loyalty Man. Newsletter*, March 30, 1956, p. 5 as cited in 8 *Stanford L. Rev.* 675.

<sup>48</sup> Passport Regulation 22 C.F.R. 51.135 "no passport . . . shall be issued to (a) persons who are members of the Communist party . . . (b) persons . . . who engage in activities which support the Communist movement . . . (c) persons . . . going abroad to engage in activities which will advance the Communist movement. . . ."

<sup>49</sup> *Boudin v. Dulles*, 136 F. Supp. 218 (1955).

judicial hearing in the language of the court, "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 be refuted directly."<sup>50</sup> While Boudin sought to compel the Secretary to issue a passport, this request was denied by the court.

Upon appeal<sup>51</sup> by both the applicant and the Secretary, the Court of Appeals considerably restricted the holding of the lower court and affirmed the decision of the lower court on the ground that the Secretary of State had failed to set out facts which would place the applicant within the exclusion provisions of the passport regulations.

The Court of Appeals refused to discuss the question of whether the Secretary could rely upon confidential information in reaching his decision. It ordered that the Secretary give Boudin a hearing, and that after such a hearing if Boudin demanded further judicial review, the lower court was to consider "whether the findings made are justified by the evidence of record, or if they are not so justified, whether the Secretary has given reasons valid in law for keeping confidential any information . . . upon which he states he has relied."<sup>52</sup> However, the proverbial fly in the ointment is that the explanation required of the Secretary need be stated only with such particularity as in his judgment the circumstances permit.<sup>53</sup> The State Department again avoided the issue by granting Boudin a passport.<sup>54</sup>

The most recent adjudication of the passport problem was the case of Weldon Bruce Dayton, a cosmic ray physicist, who has been trying to get a passport since 1954 to go to India.<sup>55</sup> The case had been remanded to the District Court under a ruling by the Circuit Court of Appeals which directed the Secretary of State, if he refused a passport, to state whether his findings are based on evidence openly produced or whether on evidence obtained by secret information not dis-

<sup>50</sup> Boudin case, *supra*, note 49 at 222 (1955).

<sup>51</sup> 235 F. 2d 532 (1956).

<sup>52</sup> *Id.* at 536.

<sup>53</sup> *Ibid.*

<sup>54</sup> *New York Times*, Sept. 14, 1956, p. 8. A few months after the Boudin case, another judge in the same district reached an opposite result on a similar factual issue in *Dayton v. Dulles*. The Court found that the denial was a reasonable exercise of the Secretary's discretion under valid regulations. *New York Times*, Feb. 10, 1956, p. 3. Upon appeal, the circuit court of appeals ruled that the State Department must say to what extent secret information played a part in any denial of a passport to travel and remanded the case.

<sup>55</sup> 146 F. Supp. 876 (1956). See note 54 for the judicial history of this case. After the appellate court's order, the Secretary of State said "he had reason to believe, on the balance of evidence that Dayton is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement." Dayton seeks to go to India to accept a three-year appointment at an educational institution there. *Louisville Courier-Journal*, December 22, 1956, p. 4.

closed to the applicant. On December 21, 1956, United States District Judge McGarraghy ruled that the State Department had met the requirements of the appellate court in disclosing the extent of confidential information relied upon and explaining why such information may not be divulged. The sum total of the district court's opinion appears to be that the State Department has a right to refuse passports on the basis of confidential information it does not disclose.

Since the end of the First World War there have been many factors afoot which brought forth recognition of the right to travel abroad. Since that time this country has undergone a transition from a debtor nation oriented primarily toward local markets, to a creditor nation with a need for foreign markets. Militarily, we have emerged as a world power with commitments at all corners of the world. Our area of vital interest embraces the world. Further, the incidence of travel has increased at an enormous rate. The number of American citizens who left the United States in 1955 was over a million.<sup>56</sup>

The courts have shown a desire to place the right to travel abroad within the confines of the word "liberty" of the Fifth Amendment. This may raise many problems.<sup>57</sup> However, the decisions have been directed toward attempting to define the extent to which the Secretary of State may encroach upon this right. The question of national security is a real one, especially since our entry into the world arena. The international communistic conspiracy has forced the courts to re-examine the delicate dichotomy in democratic society—liberty versus security. It has been shown that international communism requires an immediate and confidential relationship among its proponents.<sup>58</sup> The problem has been recognized by the Union of South Africa which recently instituted travel controls similar to those of the United States.<sup>59</sup>

The decisions to date apparently have established that one has a right to a passport and that this right may not be denied in an arbitrary manner. No longer is there any judicial debate over whether the Secretary has absolute discretion in the issuance of a passport.

<sup>56</sup> Department of Commerce, Statistical Abstract, p. 101. Compare this with 41,487 Americans returning to the United States in 1877. In 1955 the passport office issued 528,000 passports. More passports, 71,626, were issued in the month of June, 1955 alone than the entire years 1912-1914. In 1956, the passport office had an increase in applications of 7.7 percent over the first nine months of 1955; and passports issued or renewed during the first nine months of 1956 totaled 480,188, an increase of 7.4 percent over the first nine months of 1955. Statistical Report, Passport Office, Dept. of State, Oct. 22, 1956.

<sup>57</sup> In 23 Univ. of Chicago L. R. 261 at 287 et seq. there is presented an extremely critical examination of these problems.

<sup>58</sup> In 34 Cornell L. Q. 181 (1948) there are discussed some of the problems involved. Hildred, Very Suspicious Characters, Saturday Evening Post, December 7, 1946.

<sup>59</sup> New York Times, September 12, 1954, p. 17.



The courts in the cases are all seeking to determine what is the standard of due process both substantive and procedural which an applicant is entitled to before his passport may be denied. Clearly he is entitled to a hearing; also he is entitled to have his case reviewed by the courts, and further, it is no longer a valid basis per se that the applicant's organization has been placed on the Attorney General's list by procedures which denied due process, but beyond these three areas the standard of due process is very nebulous. In fact, in the light of the recent decision handed down by the district court in the *Dayton* case,<sup>60</sup> it is once again questionable whether the requirement that a hearing be given has very much significance. If the *Dayton* case stands for the proposition that the Secretary may use confidential information in his determination, and by means of the cloak of national security can withhold the nature and extent of this information from the applicant, can one say that the hearing and notice requirements of the due process clause have any true meaning as related to passports?

In the *Shachtman* case the appellate court expressed a view which seemed to lay the foundation for the use of secret information as a basis for passport refusals. In that case the court indicated that there were some cases in which the basis for denial need not be disclosed for reasons of national security or otherwise. This language if seized upon by the Secretary, as he has apparently done in the *Dayton* case, would make procedural due process in a passport case a mere sham. What is a hearing if one cannot be apprised of the evidence against him? Of what value is the substantive right to travel abroad if one does not have the benefit of procedural due process to compel the State Department to show that its refusal was not arbitrary?

It appears that the question of passports will not be solved in the immediate future because of the State Department's policy of issuing a passport rather than pressing the issue in the courts. In all probability the State Department is patiently awaiting an "ideal" case before attempting to get a Supreme Court ruling as to its discretion to refuse to issue passports.<sup>61</sup> Meanwhile, what is due process ranges from the very exacting standards developed by District Judge Youngdahl in the *Boudin*<sup>62</sup> case to the view of the district court in the *Dayton*<sup>63</sup> case which seems to allow a "secret" passport refusal by the Secretary.

Melvin Scott

<sup>60</sup> See notes 54 and 55, supra.

<sup>61</sup> Recently the Supreme Court denied certiorari in a suit by Paul Robeson. *Robeson v. Dulles*, 77 S. Ct. 131 (1956).

<sup>62</sup> Supra, notes 49 and 51.

<sup>63</sup> Supra, note 54. See also *Kraus v. Dulles*, 235 F. 2d 840 (1956), where the Court rejected the establishment of a means test for passport applicants. Prettyman, J. dissented.