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Constitutional Law: Right to Travel Abroad Protected by First and Fifth Amendments

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treated under the act.[27] The similarities between options and convertible securities would seem to justify identical treatment.[28] The use of two separate short-swing periods maximizes recoverable profits while remaining within the six-months limitation of the act. If, as in *Babbitt*, the option becomes exercisable, is exercised, and the common received is sold within a six-month period, profits recovered are the same under either standard. When the period between the date the option is first exercisable and the date of exercise exceeds six months and the underlying securities are then sold within six months of the exercise, the proposed standard would limit recovery to the increase in the value of the securities between exercise and sale. But if the option is exercised within six months from the time it first becomes exercisable and the stock is held for more than six months before sale, recovery of the increase in value of the option from the exercisable to the exercise date would be permitted under the proposed standard.

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Appellants, top-ranking leaders of the Communist Party of the United States,[1] had their passports revoked pursuant to Section 6 of the Subversive Activities Control Act of 1950.[2] Section 6 made it a felony for members of communist organizations,

calls, the proposal should be applicable to the option transactions. See note 24 *supra*.

27. See notes 9 & 12 *supra* and accompanying text.

28. The value of the underlying common stock may determine the value of either options or convertible securities. Exercise or conversion may be accomplished at the holder's discretion. See Heli-Coil Corp. v. Webster, 222 F. Supp. 831 (D.N.J. 1963), in which a corporate director who converted debentures into common stock and later sold the stock was held liable for profits both on the purchase and sale of the stock and on the receipt and conversion of the debentures. *Cf.* Rubin & Feldman, *supra* note 22, at 492. See also Meeker & Cooney, *supra* note 16, at 965. The fact that the option may be nontransferable is not sufficient reason to distinguish the two. See note 24 *supra*.

1. Appellant Aptheker is editor of *Political Affairs*, the theoretical organ of the party in this country and appellant Flynn is chairman of the party. Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964).

2. Section 6 reads:

> (a) When a Communist organization as defined in paragraph (5) of section 3 [*infra* note 14] of this title 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

ordered to register under the act,[3] to apply for, renew, or use passports. Appellants sought an order directing the Secretary of State to reissue them valid passports. The district court refused, holding section 6 valid.[4] The Supreme Court reversed,[5] *holding* section 6 unconstitutional on its face because it unduly restricted the right to travel. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Between 1952 and 1958 the almost absolute discretionary power, formerly exercised by the Secretary of State in issuing passports,[6] was curtailed by a series of lower court decisions which held: a passport could not be revoked without notice and hearing nor could renewal be denied without a hearing;[7] an applicant was entitled to a quasi-judicial hearing in which the Secretary must confront him with adverse evidence;[8] and the

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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.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

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

3. See 64 Stat. 1002 (1950), 50 U.S.C. § 794 (1958). Section 6 became applicable to Aptheker and Flynn when the Communist Party of the United States was ordered to register as a communist organization under the act and that order was upheld by the Supreme Court. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

4. 219 F. Supp. 709 (D.D.C. 1963), 1963 U. ILL. L.F. 709.

5. Mr. Justice Goldberg wrote the opinion of the Court; Mr. Chief Justice Warren, Justices Brennan and Stewart concurred. Justices Black and Douglas wrote separate concurring opinions. Justices Clark, Harlan and White dissented.

6. Since 1856 the Secretary of State has had authority to issue passports. Act of August 18, 1856, ch. 127, § 23, 11 Stat. 60. They were not a prerequisite to travel outside the Western Hemisphere other than in times of war until after World War II. See generally SPECIAL COMM. TO STUDY PASSPORT PROCEDURES OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, REPORT: FREEDOM TO TRAVEL (1958); Boudin, *The Constitutional Right To Travel*, 56 COLUM. L. REV. 47 (1956); Gould, *The Right To Travel and National Security*, 1961 WASH. U.L.Q. 334; Parker, *The Right To Go Abroad: To Have and To Hold a Passport*, 40 VA. L. REV. 853 (1954); Pollitt & Rauh, *Restrictions on the Right To Travel*, 13 W. RES. L. REV. 128 (1961).

7. Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952).

8. Nathan v. Dulles, 129 F. Supp. 951 (D.D.C. 1955).

power of the Secretary to deny passports could not be exercised arbitrarily.[9] In 1958, in *Kent v. Dulles*,[10] the Supreme Court held that a regulation restricting travel exceeded the Secretary's discretionary power as authorized by Congress and noted that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."[11]

Aptheker is the first case in which the Court has held that a *statute* restricting the right to travel abroad violated a citizen's constitutional rights. The majority recognized that Congress, for purposes of national security, can constitutionally impose some restrictions on an individual's liberty, but held that section 6 provided insufficient criteria, in light of due process requirements, for determining its application.[12] The law applied whether or not an individual actually knew that a group of which he was a member had been ordered to register;[13] it did not consider either the degree of the individual's activity within the group or his purpose of membership;[14] and no consideration was given to the purpose or place of travel.[15]

9. Schachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955).

10. 357 U.S. 116.

11. *Id.* at 125.

12. 378 U.S. at 514.

13. Section 13k of the Subversive Activities Control Act, 64 Stat. 1001 (1950), 50 U.S.C. § 792(k) (1958), states:

> When any order of the Board requiring registration of a Communist organization becomes final under the provisions of section 14(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

Therefore, actual knowledge of the order to register is not necessary to convict a member of a registered group for applying for a passport.

14. Nor is § 6 limited to Communist Party members. Section 3(5), as amended, 68 Stat. 777 (1954), 50 U.S.C. § 782(5) (1958), provides: "for the purposes of this subchapter . . . the term 'Communist organization' means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization." These organizations are defined in detail:

> The term "Communist-infiltrated organization" means any organization . . . which (A) is substantially directed, dominated, or controlled by an individual or individuals who are, or who within three years have been actively engaged in, giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement . . . and (B) is serving, or within three years has served, as a means for (i) the giving of aid or support to any such organization, government, or movement . . . ."

Section 3(4A), as amended, 68 Stat. 777 (1954), 50 U.S.C. § 782(4A) (1958).

15. 378 U.S. at 512. Under § 6 it is a crime "for a notified member of a registered organization to apply for a passport to travel abroad to visit a

The dissent contended that section 6 could constitutionally be applied to appellants and should not be judged on its face.[16] An act of Congress merits a strong presumption of validity[17] and should not be overruled on the basis of hypothetical cases.[18] Nor should constitutional questions be anticipated.[19] But these maxims of judicial restraint have given way to the preferred place accorded first amendment rights.[20] If the legislation has an inhibitory effect on free expression, the statute itself must be judged.[21] The "on its face" approach has been used when a restricted activity is considered essential to free expression. Such activities include passing out handbills[22] and the use of public streets as a speaking platform.[23] Neither of these activities is mentioned in the first amendment, but the Court has given them the same constitutional treatment as speech itself.

The right of expression is further protected by the prior restraint doctrine,[24] which forbids the prohibition of normally innocent activities in advance. Governmental sanctions are limited to punishment based upon a showing of illegal conduct resulting from those activities.[25] The doctrine is applied in the free expression context because of the undesirable consequences of prohibiting expression before its content can be judged. A prior restraint system usually requires a simple standard so that it will be easy

sick relative, . . . or for any other wholly innocent purpose." *Id.* at 511. The text of § 6, quoted in note 2 *supra*, leaves no doubt as to its application to this situation.

16. 378 U.S. at 523–25. The dissent pointed out that both Aptheker and Flynn had been witnesses on behalf of the party in the registration proceeding which resulted in the party being ordered to register and argued that the majority's objection as to knowledge and activity did not apply to those appellants. *Id.* at 523–24.

17. See, *e.g.*, United States v. National Dairy Prods. Corp., 372 U.S. 29, 32 (1963).

18. See, *e.g.*, United States v. Raines, 362 U.S. 17, 22 (1960).

19. *Id.* at 21.

20. "[T]he usual presumption supporting legislation is balanced by that preferred place given . . . the First Amendment." Thomas v. Collins, 323 U.S. 516, 529–30 (1945).

21. See, *e.g.*, NAACP v. Button, 371 U.S. 415, 438 (1963); United States v. Raines, 362 U.S. 17, 22 (1960); Thornhill v. Alabama, 310 U.S. 88, 96–98 (1940).

22. Lovell v. City of Griffin, 303 U.S. 444, 451 (1938).

23. Kunz v. New York, 340 U.S. 290, 293 (1951).

24. Near v. Minnesota, 283 U.S. 697, 716 (1931); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 652–55 (1955).

25. Prior restraint normally refers to an official restriction imposed on speech or other forms of expression in advance of actual utterance or publication. *Id.* at 648.

to apply. But in achieving simplicity the standard also tends to prohibit activities which would have innocent results.[26] Furthermore, prior restraints are usually administratively rather than judicially enforced. Administrators may not be as concerned with constitutional rights as the courts[27] and effective judicial review may be so delayed that the opportunity for expression is worthless by the time it is available.[28]

The major objection to the use of the prior restraint doctrine as a legal standard is that it is concerned only with the form of a restriction rather than its substance.[29] If the form of expression and the activity for which subsequent punishment is possible are as closely related as speech and slander or writing and libel, for example, this objection to the prior restraint doctrine may be valid, since the possibility of punishment for slander or libel may well prevent the expression just as effectively as a prior restraint. Thus the expresser, who is unable to determine what is libelous and fears a libel action, may choose not to express himself at all. But in the travel situation it is much easier to distinguish the innocent act of travel from some collateral act for which the traveler may be subsequently punished. Any fear the traveler may have of subsequent punishment will tend to deter him from the collateral act rather than the travel itself. In any event, the ramifications of subsequent punishment for a given activity should not affect the desirability of applying the prior restraint doctrine. They merely indicate that the prior restraint doctrine alone may not adequately protect constitutional freedoms.

The prior restraint doctrine is subject to exceptions in the expression area[30] and has never been applied to travel. But it

26. A system of prior restraint subjects all expression within the area controlled to government scrutiny, not just the patently bad. It is easier for the Government to refuse permission for some dubious expression when the duty is on the individual to obtain permission than it is for the Government to punish a person for expression which it must prove to be illegal. *Id.* at 656–60.

27. CHAFEE, FREE SPEECH IN THE UNITED STATES 314 (1941).

28. Emerson, *supra* note 24, at 657.

29. CHAFEE, *op. cit. supra* note 27, at 10, 521; Comment, *The Prior Restraint of Speech and Press—A Critique of the Doctrine*, 15 ALA. L. REV. 456, 459–60 (1963); Note, *Prior Restraint—A Test of Invalidity In Free Speech Cases*, 49 COLUM. L. REV. 1001, 1003 (1949).

30. In Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), the Court upheld Chicago's practice of requiring all motion pictures to be submitted for approval before being publicly shown. Conceding that the practice amounted to a prior restraint, the Court limited its holding to moving pictures.

seems well-suited for such application. Travel may be as essential an ingredient of expression as the opportunity to use a public speaking place or the right to pass out handbills. If travel to collect information is forbidden, the first amendment right of expression is curtailed. Travel abroad may furnish information, not otherwise available, which is essential to a meaningful discussion of important issues of foreign policy.[31] The right of expression is directly curtailed when a person can speak only in those places to which he can travel without a passport.[32]

The Court's discussion of the defects in section 6 may indicate its unwillingness to apply the prior restraint doctrine to the right to travel. If the statute were carefully redrawn to meet the Court's objections, an effective prior restraint could still be imposed on the right to travel of one falling within the statute's scope. But by focusing on the Court's concern over the "purpose of travel," application of the prior restraint doctrine is not inconsistent with the reasoning in *Aptheker*. The "purpose of travel" requirement could be read to mean that travel may not be restrained unless it has an illegal purpose. If the purpose of travel is illegal, denial of a passport can be viewed as part of the subsequent punishment for the crime of attempting or conspiring to commit an illegal act. It is also possible that if the statute is redrawn to suit the Court, in effect, denial of a passport will be permitted only as punishment for the crime of actively participating in a conspiracy to overthrow the Government. Under either possibility a defendant should be entitled to the protection of criminal trial procedures when his "right to travel" is at stake. The harmful prior restraint effects of a passport denial would thus be avoided.

In a more recent film censorship case, the Court distinguished *Times Film* and reversed a conviction for failure to submit a movie for censorship prior to public showing. Freedman v. Maryland, 85 Sup. Ct. 734 (1965). The Court held that the Maryland statute did not provide adequate procedural safeguards, *id.* at 739, but clearly stated that with such safeguards a prior submission requirement was not unconstitutional. *Id.* at 740.

31. See Boudin, *supra* note 6, at 50; Gould, *supra* note 6, at 343; Pollitt & Rauh, *supra* note 6, at 143–46. See also Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

32. See Boudin, *supra* note 6, at 50.