

"Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association."

APTHEKER v. SECRETARY OF STATE

378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964).

Sec. 6 of the Subversives Activities Control Act of 1950 provides that, when the Subversives Activities Control Board requires a communist organization to register:

[I]t 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.

In 1962, after the Subversives Activities Control Board ordered the Communist party to register, the State Department revoked the passports of Herbert Aptheker and other officers of the party. After obtaining an administrative hearing that affirmed the revocation, Aptheker et al. sued in a special three-judge district court for an injunction against the revocation. They lost and appealed to the U.S. Supreme Court.

Mr. Justice **GOLDBERG** delivered the opinion of the Court....

I

In 1958 in *Kent v. Dulles*, this Court declared that the right to travel abroad is "an important aspect of the citizen's 'liberty' " guaranteed in the Due Process Clause of the Fifth Amendment. The Court stated 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. ... Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, ... may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values....

... The denial of a passport, given existing domestic and foreign laws, is a severe restriction upon, and in effect a prohibition against, world-wide foreign travel.... The restrictive effect of the legislation cannot be gainsaid by emphasizing, as the Government seems to do, that a member of a registering organization could recapture his freedom to travel by simply in good

faith abandoning his membership in the organization. Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association....

... It is a familiar and basic principle, recently reaffirmed in *NAACP v. Alabama* [1958], 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." See, e.g., *NAACP v. Button* [1963]; *Louisiana ex rel. Gremillion v. NAACP* [1961]; *Shelton v. Tucker* [1960]; *Schwartz v. Board* [1957]; *Martin v. Struthers* [1943]; *Cantwell v. Connecticut* [1940]; *Schneider v. State* [1939]....

This principle requires that we consider the congressional purpose underlying § 6 of the Control Act. The Government emphasizes that the legislation in question flows, as the statute itself declares, from the congressional desire to protect our national security. That Congress under the Constitution has power to safeguard our Nation's security is obvious and unarguable. Cf. *Kennedy v. Mendoza-Martinez* [1963]. As we said in *Mendoza-Martinez*, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." At the same time the Constitution requires that the powers of government "must be so exercised as not, in attaining a permissible end, unduly to infringe" a constitutionally protected freedom. *Cantwell*.

Section 6 provides that any member of a Communist organization which has registered or has been ordered to register commits a crime if he attempts to use or obtain a United States passport. The section applies to members who act "with knowledge or notice" that the organization is under a final registration order. "Notice" is specifically defined in § 13(k). That section provides that publication in the Federal Register of the fact of registration or of issuance of a final registration order "shall constitute notice to all members of such organization that such order has become final." Thus the terms of § 6 apply whether or not the member actually knows or believes that he is associated with what is deemed to be a "Communist-action" or a "Communist-front" organization. The section also applies whether or not one knows or believes that he is associated with an organization operating to further aims of the world Communist movement and "to establish a Communist totalitarian dictatorship in the countries throughout the world...." ... The provision therefore sweeps within its prohibition both knowing and unknowing members.... In *Wieman v. Updegraff* [1952], the Court held that the due process guarantee of the Constitution was violated when a State, in an attempt to bar disloyal individuals from its employ, excluded persons solely on the basis of organizational memberships without regard to their knowledge concerning the organizations to which they had belonged. The Court concluded that: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

Section 6 also renders irrelevant the member's degree of activity in the organization and his commitment to its purpose. These factors, like knowledge, would bear on the likelihood that travel by such a person would be attended by the type of activity which Congress sought to control. As the Court has elsewhere noted, "men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles. Cf. *Schneiderman v. United States* [1943].

... The prohibition of § 6 applies regardless of the purposes for which an individual wishes to travel. Under the statute it is a crime for a notified member of a registered organization to apply for a passport to travel abroad to visit a sick relative, to receive medical treatment, or for any other wholly innocent purpose. In determining whether there has been an abridgment of the Fifth Amendment's guarantee of liberty, this Court must recognize the danger of punishing a member of a Communist organization "for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto v. United States* [1961]; *Scales v. United States* [1961]....

In determining the constitutionality of § 6, it is also important to consider that Congress has within its power "less drastic" means of achieving the congressional objective of safeguarding our national security. *Shelton v. Tucker*....

In our view the foregoing considerations compel the conclusion that § 6 of the Control Act is unconstitutional on its face. The section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe.... The section therefore is patently not a regulation "narrowly drawn to prevent the supposed evil," cf. *Cantwell*, yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms, *NAACP v. Button*....

Reversed and remanded

Mr. Justice **BLACK**, concurring....

... I think the whole Act including § 6, is not a valid law, that it sets up a comprehensive statutory plan which violates the Federal Constitution because (1) it constitutes a "Bill of Attainder," which Art. I § 9, of the Constitution forbids Congress to pass; (2) it penalizes and punishes appellants and restricts their liberty on legislative and administrative fact-findings that they are subversives, and in effect traitors to their country, without giving them the benefit of a trial according to due process, which requires a trial by jury before an independent judge, after an indictment, and in accordance with all the other procedural protections of the Fourth, Fifth, and Sixth Amendments; and (3) it denies appellants the freedom of speech, press, and association which the First Amendment guarantees....

Mr. Justice **DOUGLAS**, concurring....

We noted in *Kent v. Dulles* [1958] that "freedom of movement," both internally and abroad, is "deeply ingrained" in our history. I would not suppose that a Communist, any more than an indigent, could be barred from traveling interstate. I think that a Communist, the same as anyone else, has this right. Being a Communist certainly is not a crime; and while traveling may increase the likelihood of illegal events happening, so does being alive....

Freedom of movement, at home and abroad, is important for job and business opportunities— for cultural, political, and social activities— for all the commingling which

gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.

Freedom of movement is kin to the right of assembly and to the right of association. These rights may not be abridged, *De Jonge v. Oregon* [1937]; *NAACP v. Alabama* [1958], only illegal conduct being within the purview of crime in the constitutional sense.

War may be the occasion for serious curtailment of liberty. Absent war, I see no way to keep a citizen from traveling within or without the country, unless there is power to detain him. *Ex parte Endo* [1944]....

Mr. Justice **CLARK**, whom Mr. Justice **HARLAN** joins and whom Mr. Justice **WHITE** joins in part, dissenting....

II

... While the right to travel abroad is a part of the liberty protected by the Fifth Amendment, the Due Process Clause does not prohibit reasonable regulation of life, liberty or property. Here the restriction is reasonably related to the national security. As we said in *Barenblatt v. United States* (1959):

That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court.... In the last analysis this power rests on the right of self-preservation, "the ultimate value of any society," *Dennis v. United States* [1951].

The right to travel is not absolute. Congress had ample evidence that use of passports by Americans belonging to the world Communist movement is a threat to our national security.... The Congress had before it evidence that such use of passports by Communist Party members: enabled the leaders of the world Communist movement in the Soviet Union to give orders to their comrades in the United States and to exchange vital secrets as well; facilitated the training of American Communist leaders by experts in sabotage and the like in Moscow; gave closer central control to the world Communist movement; and, of utmost importance, provided world Communist leaders with passports for Soviet secret agents to use in the United States for espionage purposes. This evidence afforded the Congress a rational basis upon which to place the denial of passports to members of the Communist Party in the United States. The denial is reasonably related to the national security. The degree of restraint upon travel is outweighed by the dangers to our very existence.

The remedy adopted by the Congress is reasonably tailored to accomplish the purpose. It may be true that not every member of the Party would endanger our national security by traveling abroad, but which Communist Party member is worthy of trust? Since the Party is a secret, conspiratorial organization subject to rigid discipline by Moscow, the Congress merely

determined that it was not wise to take the risk which foreign travel by Communists entailed....

Mr. Justice **WHITE** joins in Section I of this dissent and for the reasons stated therein would affirm the judgment.

Editors' Notes

(1) **Query:** What combination of *approaches, modes, and techniques* of constitutional interpretation does Goldberg use? How did his usage(s) compare with that/those of Clark? Of Black? Douglas?

(2) Compare the result, the reasoning, and the methods of constitutional interpretation used here with those in *Trop v. Dulles* (1958; reprinted above, p. 144) and *Haig v. Agee* (1981; reprinted above, p. 533), which also involved revocation or denial of passports.

(3) *United States v. Robel* (1967) invalidated that portion of the Internal Security Act of 1950 that forbade members of a communist controlled organization "to engage in any employment in any defense facility."

(4) **Query:** For some reason, the Court, when discussing a right to travel, seldom mentions *Crandall v. Nevada* (1868; reprinted above, p. 426), even though it would seem to be directly in point. To what extent might this omission be due to the justices' reluctance to engage in *overt* structural analysis?