

Rockwell Kent's Historic Passport Case¹

By Kent Gernander

Introduction

Rockwell Kent was many things – painter, illustrator, builder, writer, dairy farmer. For much of his life he was also a restless, adventurous, inquisitive traveler. His sojourns in Winona, Maine, Newfoundland, Alaska, Vermont, Tierra del Fuego, Ireland and Greenland produced art, memoirs and a thirst for further exploration.

Kent's sympathies for progressive causes and his associations with radical organizations led the U.S. State Department to refuse him a passport for travel abroad during the 1950s. His legal challenge to the denial resulted in a landmark decision of the U.S. Supreme Court, affirming that the right to travel is a constitutional right – a part of the liberty of which a citizen cannot be deprived without due process of law.

The case of *Kent v Dulles* brought together a cast of 20th Century artists and intellectuals, political radicals, New Deal progressives, cold warriors, and bureaucrats. The focus was passport issuance, but the conflict was one of social, cultural and political values, touching many of the defining themes of the 20th Century. As in all the dramatic events of his life, Rockwell Kent was the leading character.

Rockwell Kent

Kent was born in 1882 to a family of privilege. His father's ancestors, the Kents and Rockwells, arrived in America early in colonial days. They and their offspring prospered. Kent's grandfather was a New York merchant. His father, after an Ivy League education in mining engineering and law, established a law practice in New York while investing in foreign mining ventures. His mother was raised by a childless aunt and uncle, reported to be among New York's first millionaires. The family had servants and summer homes and enjoyed art and culture. The life of privilege ended for young Rockwell's family when Rockwell was five. His father, on a trip to Honduras, contracted typhoid fever, and he died soon after his return, leaving his young wife and three children as the poorer relatives of a genteel family. Although they lived modestly, they experienced and appreciated art and music, Rockwell was sent to private schools, and eventually he studied architecture at Columbia and art at the New York School of art.

Kent's career was primarily as an artist, illustrator and writer. He was drawn to remote and barren locales, mostly northern, where he painted land and sea scapes, and experienced adventure, isolation and companionship. He wrote captivating accounts of his experiences. His book illustrations captured the essence of his own writings and of classic writings including

¹ Presented at *Rockwell Kent in Winona: A Centennial Celebration*, Winona, Minnesota, February 9, 2013.

Moby-Dick, Leaves of Grass, The Canterbury Tales, Faust and The Complete Works of Shakespeare. Under the pseudonym "Hogarth, Jr." he produced whimsical and humorous drawings for Vanity Fair and other magazines. He was commissioned to produce large murals for public spaces. His travels, adventures, writings and art were so much in public view that the New Yorker once quipped: "That day will mark a precedent, which brings no news of Rockwell Kent."

From his young adulthood, Kent was an avowed socialist. He arrived at his political philosophy from theoretical and practical perspectives. His family's religion and politics were orthodox but not fervent. Rockwell found inspiration in the writings of Tolstoy, Darwin, Thoreau, and Marx. Darwin ignited a match that gave focus to Kent's views of God and the universe. He marked a passage in Tolstoy's "What is Art" that he experienced

as though my whole being had achieved the power of utterance, as though a God within me spoke, resolving the chaos that was me – my mind, my heart, my conscience – into an integrated man, aware and purposeful.

The passage was this:

The destiny of art in our times consists in this: To translate from the region of reason to the region of feeling the truth that the well-being of people consists in their union, and to substitute for the present kingdom of force, the kingdom of heaven, that is, love, which presents itself to us all as the highest aim of human life. . . . The destiny of Christian art is the realization of the brotherly union of mankind.

While Kent was undergoing a revolution in his thinking about life and art, he was influenced by a family friend, Rufus Weeks. Weeks was a wealthy insurance executive, a devout Christian, and also – or as he would say, therefore – a socialist. Kent described him as a man of advanced years – Weeks was 58 in 1904 when he took Kent to a socialist meeting. Kent said of the Socialist Party of that day, that it was not sufficiently vigorous to provoke overt persecution or serve as a scapegoat for disrupting organized labor. It was based precariously upon labor, but its leaders were Fabian or Marxist intellectuals and supported by those who saw in socialism the fulfillment of Christian ethics. With Weeks, Kent discussed the aspects of life that troubled him:

the origin and existence of privilege and its transmission to unworthy heirs; the concentration of great wealth in hands which had not labored to create it; the existence of poverty in a land of plenty; of unemployment – with always so much crying to be done!

Kent attended his first Socialist meeting in early autumn of 1904, when he was 22. Weeks picked him up in his coupe, driven by a Negro coachman. The meeting was in an apartment above a drug store, with 6 or 8 good hearted people including the Russian-born hosts. They

discussed the issues of the day: full employment, child labor, the 8-hour day, labor's right to organize, recurrent depressions and the growing power of trusts. At the end of the evening, Kent paid 25 cents in dues and was given a membership card. On election day in November, he declined a ride to the polls in the Republican party carriage and proudly walked to the polls to vote for Eugene Debs.

Kent's socialist views were also reinforced by his contacts with working people. Much of his art was executed with labor and craftsmanship, and he enjoyed all manner of physical work – building houses, fishing, sailing, dairying. In 1905 he went to Monhegan to paint the rugged scenery, and found himself working to earn a living by drilling wells, patching roofs, emptying privies, and lobstering. In 1912, when he was working as an architect, he was sent to Winona to supervise construction of the Prentiss and Bell mansions at Briarcombe. With time on his hands, he joined the carpenters and joiners union and became the carpenter foreman on the job. He became the workers' spokesman in threatening a strike over wages. In Newfoundland, Greenland, Tierra del Fuego and Alaska he lived and labored with people for whom life was work and survival. All these experiences reinforced Kent's practical view of socialism – that labor creates wealth and workers are entitled to the fruits of their labor.

Kent believed the eventual triumph of socialism was a moral imperative, but he had neither illusion nor desire that socialism would be achieved in America by violent overthrow of government. He said he was doing all he could do to help democracy pull through and keep the world at peace:

For peace, I wanted friendship with the Soviet Union; for peace I wanted fascism starved to death through lack of wars to feed upon. For peace I wanted socialism – but in America? No chance. Yet wanting socialism, I wanted the utmost that our way of life could yield to labor.

Like many socialists of his time, Kent was conflicted about Soviet Russia and the Communist revolution. He believed in its socialist creed and he admired its people for their courageous resistance to Nazi invasion. He hoped its repressions of freedom and other excesses were temporary expedients that would fade with international acceptance of a Communist state. As for the Communist Party, Kent never joined and regularly denied that he was a Communist.

Returning from Greenland in 1935, Kent was struck by the contrast between the simple goodness of the primitives and the growing sense that American and the world were corrupted by greed and prejudice and threatened by fascism and war. He joined artists and writers in the 1936 Artists Congress, whose manifesto of peace and anti-fascism became his Declaration of Faith. Until then he had not been a joiner; except for the carpenters union and a few artists groups he belonged to nothing. With his conscience roused he joined every movement directed to righting the wrongs he saw. Later he recalled reading a list of “what seemed to me practically every organization in America that was in my opinion doing good work, working for Negroes, for

freedom, for the poor, for good legislation. My conclusion on finishing that book was: what would America be without these so-called Communist fronts? What would it be without the Communists?" He said "I find that since 1935 I'm credited with part in only eighty-five, I am ashamed." He wrote in a letter to Linus Pauling:

If I should adopt a slogan for my conduct it would be that "Friendly co-existence, like charity, begins at home." I shall never turn my back upon or in any way avoid either people or organizations devoted to what in my mind are noble causes.

Kent never shied from controversy, sometimes delighting in goading his critics. In Newfoundland when WWI was approaching, his love of German music and culture was resented. His response was to decorate his studio door with a German eagle and to post a sign reading "Bomb Shop, Wireless Plant, Chart Room." This convinced the locals that he was a spy and resulted in his exile from the colony.

Kent enjoyed combining his art with political messages, as in his engravings "Workers of the World Unite" and "The Smith Act." Kent was commissioned to paint a mural for the Washington, D.C., post office depicting the range of mail deliveries from Arctic to Tropics. He painted a panel showing a plane and dog sled exchanging mail at an Eskimo settlement, and another panel showing Puerto Ricans receiving a message in an Eskimo script. With a great deal of publicity and controversy it was revealed that the message read "To the people of Puerto Rico, our friends. Go ahead, let us change our chiefs; that only will make us free."

While in Europe, Kent learned that his wife had rented his house at Au Sable Forks while she was in Arizona. Kent wrote to the tenant expressing his dismay at the rental and asking her to accept a return of her rent and to remain in the house as his guest. She refused in a letter that Kent considered insulting. Angry, he gave the rent money to the Communist Party of America because he thought it the best way to offend the wealthy tenant.

In 1948, Kent supported the candidacy for President of Henry Wallace and ran himself for Congress on the American Labor Party ticket. This led to a boycott of his dairy products, to which Kent responded by giving the dairy business and equipment to his workers.

In 1953, Kent appeared before Senator McCarthy's Government Operations Subcommittee, which was ostensibly investigating books used in US Information Offices overseas. Kent sparred with Sen. McCarthy and would not be bullied by him. He acknowledged supporting listed organizations that he believed to be doing good work, but invoked the Fifth Amendment to refuse questions about whether he was a Communist. He resisted McCarthy's assertion that taking the Fifth was an admission of guilt, and characterized the committee's activities as book burning like that of the Nazis. McCarthy refused to allow Kent to read a prepared statement, but he released it to the press. In it he said:

I am forced to the conclusion that a conspiracy exists for the purpose of overthrowing our Democracy in favor of a Fascist government. I have no hesitancy in charging that this Committee plays an active part in that conspiracy and that its Chairman, Senator McCarthy, is its leader. Moreover, and in view of the forces at the disposal of this Committee, I charge the conspiracy to be one to overthrow our form of government, if need be, by force and violence.

John Foster Dulles

John Foster Dulles probably regarded public service and power as a calling and a birthright. He was born in Washington, D.C. in 1888 to a Presbyterian minister. His maternal grandfather and an uncle served as Secretary of State. He was educated at Princeton and the Sorbonne, George Washington Law School, and joined Sullivan & Cromwell, a premier Wall Street law firm. During WW I he was appointed to the War Industries Board, and after the War he served as legal counsel to the U.S. delegation to the Versailles Peace Conference, and later as a member of the War Reparations Committee. During WW II he served as a lawyer on the War Trade Board, and after the War he participated in the formation of the United Nations and served as a US delegate. In 1949, he was appointed by NY Governor Dewey to fill a US Senate vacancy, but lost a special election the following year. In 1953 he was appointed Secretary of State by President Eisenhower, and served until shortly before his death in 1959.

If the Russian Revolution of 1917 offered hope to socialists, it created fear in ruling classes. What had been in America an internal threat of labor activism and anarchy became an external threat of international Communism directed by the Soviet Union, Red China and their satellites.

Dulles became the consummate Cold Warrior. He regarded communism as “Godless terrorism,” and advocated an aggressive policy of containing and rolling back the Communist Bloc gains in Eastern Europe and Asia. He fashioned mutual security agreements for containment and his state department cooperated with the clandestine activities of the CIA, which was directed by his brother Allen. He enjoyed the implicit confidence of President Eisenhower, who ignored all criticisms. In 1955 he was Time Magazine’s Man of the Year, and after his death he was awarded the Medal of Freedom. He is still credited by many with resisting and thwarting Communist Cold War strategy.

Personally he was harsh and inflexible, a tactician rather than a diplomat. He was a moralist and ideologue who took on the air of a stern church elder. He demanded of his State Department employees oaths of “positive loyalty.” Trying to preempt Sen. McCarthy, he hired a security chief, ran background checks involving lie detectors and phone taps, and dismissed nearly 200 employees identified as security risks. He banned questionable books from State Department libraries and had books pulled from shelves and burned.

In appearance and manner, Dulles was a stodgy Foggy Bottom official -- probably the most unlikely man in America to be the focus of a young woman’s romantic fantasies. The point was

made when an aspiring young cabaret singer appeared on Ed Sullivan to croon “I made a fool of myself over John Foster Dulles. Carol Burnett’s song concluded with the lines:

I'm not un-American and I'm not a spy
but how can I convince the FBI
that I'm simply on fire with desire
for John Foster Dulles.”

Dulles was the nominal defendant in Kent’s passport case, and a fitting adversary as he represented much of what Kent despised in America’s government and ruling class. However, Kent’s true adversaries were the heads of the State Department’s Passport Division.

Ruth Shipley

Ruth Shipley was the chief of the Passport Division from 1928 to 1955. She was one of the most powerful people in the federal government for nearly 30 years. Time Magazine called her “the most invulnerable, most unfirable, most feared and most admired career woman in Government.” She had the power to issue passports, and she personally reviewed many of the applications. For most of her tenure, her decisions could not be challenged. She routinely denied travel “that was not in the interests of the United States,” without stating further reason. During the 1950s, she denied passports to those believed to be supporters of Communism, including Paul Robeson, Arthur Miller, and Linus Pauling. On her retirement in 1955, she was awarded the State Department’s Distinguished Service Medal.

Frances Knight

Frances Knight served as Director of the Passport office from May 1, 1955 until 1977. She held several minor posts in the Roosevelt and Truman administrations. After a stint in the State Department’s USIA and Security Bureau, she was appointed by Eisenhower to succeed Mrs. Shipley.

Miss Knight inherited her sense of mission from Mrs. Shipley, whose authority and discretion in passport issuance had not been challenged. She ran an efficient office that generated positive revenues for the government, and she was an outspoken advocate for equal rights for women, especially in government. Like Mrs. Shipley, she sought to restrict travel by "dangerous undercover Communists engaged in espionage, sabotage and sedition." She was supported by Hoover and conservative Congressmen, and criticized by liberals who accused her of thought control and called her the “ogress.”

A Brief Passport History

Historically, a passport was not necessary for foreign travel. In times of peace, without formal permission, Americans were free to leave the country and foreigners were permitted to travel within the U.S. Passports were issued by a traveler’s home country to identify the traveler as a

citizen, and to request the assistance and protection of foreign countries. A foreign government would assent to the traveler's entry by issuing a visa on the passport. In America, passports were sometimes issued by the national government, and sometimes issued by state or local authorities. Legislative authority for issuing passports was non-existent and was not considered necessary. In 1856, an Act of Congress authorized the Secretary of State to issue passports. This was intended to centralize the authority and to enhance recognition of the passport by foreign countries. The State Department claimed authority to withhold passports at its discretion, but this was not considered a restriction of travel since a passport was not needed. Restrictions on issuing passports for foreign travel were occasionally imposed, as during the War of 1812 and the Civil War, when legislation prohibited residents from traveling to enemy territory without a passport.

The Travel Control Act of 1918 authorized the President to limit travel into and from the U.S. by aliens and citizens. As to citizens, the power could only be exercised when the U.S. was at war, and a Presidential proclamation found that public safety required travel controls. President Wilson issued such a proclamation in 1918. His executive order authorized examination of passport requests, and denial unless the applicant showed adequate reasons for travel and that it would not be prejudicial to the interests of the United States. In 1921, Congress passed a joint resolution declaring that the Act should be interpreted as if the war had terminated.

After the War, passports were not required for departure by U.S. citizens, but they were commonly obtained and required for admission to Europe.

The Passport Act of 1926 gave the Secretary of State exclusive authority to issue passports, under such rules as the President shall prescribe. President Roosevelt did not issue such rules until 1938. They contained detailed requirements for issuance, including an oath of allegiance, a description of the itinerary, and the object of each visit. A passport could be refused, or travel could be restricted, at the discretion of the State Department. Additional restrictions were imposed by the Neutrality Act in 1939 and the Nationality Act in 1940. These Acts transformed the Passport Office into a travel control office. During World War II more stringent restrictions on travel were imposed.

With the end of the war, travel restrictions might have been relaxed. However, the principle had been established that the U.S. government could restrict foreign travel by its citizens. In 1950, Congress passed the Internal Security Act, over President Truman's veto. It contained Congress's findings on the threat of an international Communist conspiracy:

Communism is "a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

The Subversive Activities Control Board was authorized to require Communist organizations to register, and once an organization was required to register, its members were not permitted to apply for or use a passport, with criminal penalties. The McCarron Act expanded travel controls by making it unlawful for a citizen to leave or enter the U.S. without a passport.

Kent's Passport Problem

Kent's passport problem arose in 1950. In March of that year, Kent traveled to Europe with a peace delegation to plead with several governments to outlaw atomic warfare and begin general disarmament. He had been issued a passport authorizing travel in Britain, France and Scandinavia. In Paris he spoke to the French Chamber of Deputies, and he accepted an invitation to go to Moscow to address the Supreme Soviet. From Moscow, he traveled to Sweden, where a committee of the World Peace Congress drafted the Stockholm Resolution, condemning atomic weaponry and branding the nation first using atomic weapons guilty of a crime against humanity and a war criminal. After his return to the U.S., a report by Tass, the Soviet News Agency, quoted Kent as having said in a speech in Moscow:

“As a member of this peace delegation and as a fighter for peace, I must tell you that I am not an official representative of the American Government. To be honest, I say that this Government is not my Government and does not represent me. You Soviet people are in the hearts of many Americans.”

The quote was repeated in the New York Times and other publications. Kent immediately wrote to Tass, and to others, to say that he was misquoted, his actual words being: “I must say, in respect to my own integrity, that the American government is not representative of me.” On March 18 he wrote to Mrs. Shipley, enclosing his letter to Tass. Mrs. Shipley did not reply to the letter.

In July, Kent applied for a renewal of his passport for travel to Czechoslovakia to attend a peace conference. Mrs. Shipley replied, noting that his passport had been used for travel in countries in for which it was not validated. She said the request for renewal would not be considered until the violation was explained in an affidavit. Although he explained the travel, he was informed the request was not granted.

The next year Kent applied again for a passport, this time to travel to Ireland to paint – a more innocent destination and purpose. Mrs. Shipley informed him that “the Department is not willing at this time to grant you passport facilities for travel to any country for any purpose.”

Kent accepted the denial and the ostensible reason for it, although he believed it was a pretext for restricting travel by him and other peace activists, including Paul Robeson. He told a friend that he believed travel to other countries was a right that could not properly be restricted by the U.S. government; but he was not inclined to “stick my neck out unless my feet are planted on firm ground – and in this case they are not.”

In 1955, Kent applied again for a passport, initially to attend a peace conference in Helsinki and later to travel in Europe for pleasure and prosecution of his profession. Miss Knight told him that his request was tentatively denied, on the grounds that he was reported to be a communist, he adhered to the Communist Party line, and his associations, speeches, writings, travels and friendships (catalogued in great detail) demonstrated that he was a sympathizer and supporter of communism. He could request an informal conference to discuss the request, but only if he submitted a sworn affidavit as to whether he was then or had ever been a communist. He did not submit an affidavit, but was eventually granted an informal hearing. At the hearing, the only evidence presented was Kent's autobiography, "It's Me O Lord," which he acknowledged to be his writing, and the transcript of his appearance before the McCarthy committee. Eventually he was informed the denial would not be reconsidered and he could not appeal the denial because he had not submitted a non-Communist affidavit.

Although Kent refused to forswear Communism to McCarthy or to the passport office, he was outspoken in his writings and in public. A reporter asked him if he was a member of the Communist Party. He replied:

No, I am not now and I never have been a member of the Communist Party. And practically everybody knows that. They know it, the courts know it, everybody else knows it.

Regarding the passport denial, he said:

It's very much, you know, like a woman's forbidding a man to go outdoors. And he says "I will go out." "Well," she says, "I can stop that by stealing your pants." They've stolen my pants in taking my passport, and I want my pants back.

When the denial was publicized, James McNair, a wealthy art collector, purchased several of Kent's paintings to help him out and express his anger with the State Department. Financial support was offered by Corliss Lamont, who had established a civil liberties defense fund. The Emergency Civil Liberties Union offered legal representation by its lawyer, Leonard Boudin.

Leonard Boudin

Leonard Boudin was a New York lawyer and scholar, noted principally for his advocacy in civil liberties cases. He represented labor leaders, political radicals, antiwar protesters, and foreign governments. He was general counsel for the ECLU, and his clients included targets of the McCarthy committee and several Americans who were denied passports. In later years he represented Benjamin Spock, Daniel Ellsberg, Julian Bond, Jimmy Hoffa, the Church of Scientology, and the governments of Cuba, Greece, Angola, Tanzania and Kenya. He argued twenty cases before the Supreme Court, establishing important constitutional rights.

If others were born to lives of privilege and influence, Leonard Boudin's family is associated with left-wing causes. He was the nephew of Louis Boudin, a labor lawyer and Yale professor of constitutional law. His brother-in-law was the journalist I. F. Stone. Leonard's daughter Kathy later achieved notoriety as a founder of the Weather Underground. She was convicted in 1984 of felony murder for her participation as getaway driver in an armed robbery in which three people were killed. Boudin's son Michael is a federal appeals court judge.

Boudin and Kent progressed from lawyer and client to a long and warm friendship, with frequent correspondence and family visits.

The Courts Limit Mrs. Shipley's Absolute Power

In the 1950s, Boudin wrote a highly regarded article in the Columbia Law Review on the Constitutional Right to Travel, and was involved in a series of passport cases, including his own, that challenged and limited the absolute and unreviewable authority of the passport office.

- In *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952), the D.C. District Court held that denial of a passport without a hearing violated due process of law.
- In *Nathan v. Dulles*, 129 F. Supp. 951 (D.D.C. 1955), the District Court ordered the State Department to hold a hearing on its denial of a passport to Otto Nathan, the executor of Albert Einstein's estate. The Department stalled, then appealed an order to issue the passport, and finally issued the passport rather than grant a hearing.
- In *Schachtman v. Dulles*, 325 F.2d 938 (D.C. Cir. 1955), the D.C. Court of Appeals held that it was improper to deny a passport to the chairman of an organization listed as subversive without an opportunity to contest the listing. The Department issued a passport rather than allow the challenge.
- In *Boudin v. Dulles*, 136 F. Supp. 218 (D.D.C. 1955) the district court held that Leonard Boudin was entitled to a hearing to contest the evidence on which the Department based its decision. The decision was affirmed by the Court of Appeals, which ordered the Department to state whether the decision was based on secret information not disclosed to the applicant. Rather than do so, the Department issued a passport.
- In *Robeson v. Dulles*, 235 F.2d 810 (1956), the court held that Robeson had not exhausted administrative remedies when he challenged passport regulations that required an affidavit without demanding a hearing.

None of these cases reached the U.S. Supreme Court, and none addressed the constitutional issues that Boudin and the ECLU wished to test. Kent's case presented the opportunity for such a challenge. He was a well-known public figure. His life and art required travel. He was not an

avowed Communist, but had been denied a passport on the basis of expressions and associations. He had been given a hearing and exhausted administrative appeals of the denial. Thus, the case offered hope for a Supreme Court determination that the right to travel is a constitutional right of citizens.

The Supreme Court – 1957-58 Term

The Supreme Court in 1958 was not a liberal court by today's standards, although it would become so in another decade under Chief Justice Earl Warren. The Supreme Court jurisprudence during the first half of the 20th Century reflected a conflict between conservatives who, in the name of freedom of contract and due process, were prepared to limit the power of government to legislate labor standards and social programs, and progressives who advocated judicial restraint and deference to legislative and executive authority. The Justices included five New Dealers appointed by Presidents Roosevelt and Truman and four Eisenhower appointees. Their judicial philosophies, however, were not reflective of the appointing Presidents. Chief Justice Warren and William Brennan, appointed by Eisenhower, proved to be solid members of the liberal majorities of the 1960s. Justices Clark and Burton, appointed by Truman, were generally conservative. Justice Frankfurter, appointed by Roosevelt, was an advocate of judicial restraint.

When the Court divided along liberal – conservative lines, the typical lineup had Chief Justice Warren and Justices Douglas, Black and Brennan on the liberal side, Justices Clark, Harlan, Burton and Frankfurter on the conservative side, and Whittaker as a swing vote without a clear ideology.

In some of the Court's decisions during the 1950s, a conservative majority accepted the Cold War view of the threat posed by world Communism.

In *Dennis v. United States*, 341 U.S. 494 (1951), the Supreme Court affirmed the conviction of Communist party officers for violating the Smith Act by advocating the overthrow of the government by force or violence. Seven justices concurred in the result; only Justices Black and Douglas dissented, with Justice Black writing:

Public opinion being what it is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society”.

In *Adler v Board of Education*, 342 U.S. 485 (1952), the Supreme Court upheld New York's Feinberg Law, which disqualified from teaching or employment in public schools any member of a listed Communist organization.

Kent v. Dulles

Kent's suit was filed in the Federal District Court for the District of Columbia, which summarily dismissed his claim. On appeal, the case of Kent was heard with that of Dr. Walter Briehl, a psychiatrist who was denied a passport when he refused to supply a Communist Party affidavit. The Court of Appeals affirmed the dismissals of both cases, by a 5-3 vote. *Kent v. Dulles*, 248 F.2d 600, D.C. Cir. 1957; *Briehl v. Dulles*, 248 F.2d 561 (D.C. Cir. 1957). The majority opinion quoted pronouncements of Congress, Presidents Truman and Eisenhower, and the Supreme Court about the nature of Communism and its threat to America, saying:

All three branches of the Federal Government . . . have declared unequivocally that the Communist movement today is an international conspiracy aimed at world domination and a threat to the internal security of this country.

It would be inexcusably naïve for any court to declare in the present state of the world that adherence to the Communist cause is a mere matter of politics or political opinion. We shall treat the Communist movement according to what the Congress, the President and the Supreme Court have declared it to be.

With that perspective the majority had little difficulty in concluding that the regulations prohibiting travel by supporters of Communism were valid. Dissenting judges found no authority for the regulations.

The appeals of Kent and Briehl were heard by the Supreme Court on April 10, 1958, and its decision was issued on June 16 of that year. *Kent v. Dulles*, 357 U.S. 116 (1958). The Court was divided 5-4, with Justice Douglas writing for the majority and Justice Clark writing in dissent. Joining the majority were Chief Justice Warren and Justices Black, Brennan and Frankfurter.

The Court held that the denial of passports because of the applicants' alleged Communist beliefs and associations and their refusal to file affidavits concerning Communist Party memberships was not authorized by Congress in requiring a passport for foreign travel. The Court began its analysis with a clear and firm statement that

“the right to travel is a part of the liberty of which a citizen cannot be deprived without due process of law.”

Interestingly, the Court pointed to no specific language in the Constitution conferring the right and no previous decision recognizing it. It noted only that the principle was conceded by the Solicitor General, and cited the Magna Charta as evidence that it has been long recognized in Anglo-Saxon law. Having pronounced that freedom of travel is “an important aspect of the citizen's liberty” the Court went on to say

”We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment.”

With the issue thus framed, the Court reviewed the history of passport and travel legislation and regulation. It construed narrowly the legislation that gave the Secretary of State broad discretion to grant or withhold passports, because it found the authority “was apparently long exercised quite narrowly” to deny passports only on grounds related to citizenship, allegiance or unlawful conduct. It considered and quickly passed over the practices of Mrs. Shipley:

One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But, as respects Communists, these are scattered rulings, and not consistently of one pattern.

Wartime measures that were more restrictive of travel were dismissed as irrelevant. Nor did the Court have to consider the effect of the Internal Security Act, which forbade issuance of passports to Communist Organizations required to register under the Act, because registration orders had not yet been issued. Another significant pronouncement of the Court was this:

We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations.

The Court’s opinion concluded:

[W]e deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms, and, absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.

Justice Clark wrote for four dissenting Justices. His opinion had the tone of the Cold War and his recitation of passport regulation and travel restriction since the 1920s probably reflected history more accurately than the majority opinion.

The interesting vote was that of Justice Frankfurter, whose general deference to legislative and executive authority was apparently overcome by a desire to constrain the excesses of McCarthyism.

The Aftermath

Rockwell Kent lost little time in securing his passport and departing for travel and work in Europe and a visit to Soviet Russia. In July he wrote to Leonard Boudin from London. Boudin was preparing to testify against proposed legislation that would grant the Secretary of State the discretion in denying passports that the Supreme Court said he lacked. He told Kent he would report on the apparent lack of harm to the United States from travel abroad by Kent, Robeson, and Pauling, and suggested that he join them to cross a foreign border hand in hand.

Kent continued to travel for much of the next decade. In 1957, an exhibition of his work honored Kent on his 75th birthday, but Kent had been unable to attend without a passport. Believing his work was unappreciated in America, he donated to the Russian people a large part of his personal collection. On later trips he was able to see it displayed in three prominent galleries and to receive the adulation of the Russians. He enjoyed a trip to Newfoundland in response to an invitation to atone for his earlier expulsion. Only when age and health kept him close to home did his foreign travels cease. He died at home in 1971.

Kent wrote to Justice Douglas in 1959 sending him a copy of his book “Of Men and Mountains.” Douglas thanked him for the book and noted that he wrote an article with the same title. Kent wrote an embarrassed apology, confessing that the article showed up in a copyright search, but he didn’t take the trouble to identify and locate the author, saying “whoever heard of William Orville Douglas.” A year later, Douglas sent Kent a copy of his “Points of Rebellion.” In 1959, Douglas was obliged to write to the State Department seeking personal consideration in reviewing the passport office’s denial of a passport for travel to China.

In 1962, the Supreme Court upheld the McCarron Act, which required the registration of Communist organizations, and forbade passports to registered organizations. Kent, who then wanted his passport re-issued, wrote Boudin that he was prepared to submit an affidavit that he was not a Communist. Boudin thought he might be able to secure a passport without the affidavit, but observed that Kent might not, at age 80, desire to be a litigant again. Kent submitted an affidavit and secured the passport.

Two years later, in *Aptheker v. Secretary of State*, 378 U.S. 500, 992 (1964), the Supreme Court held the passport provision of the McCarron Act unconstitutional. Reinforcing the pronouncement in *Kent v. Dulles* that the right to travel is an important aspect of liberty guaranteed by the Constitution, the Court said that the right cannot be abridged on the basis of associations protected by the First Amendment.

Kent v. Dulles was a blow to the State Department and Miss Knight, who continued to direct the Passport Office through two more decades, but without the absolute authority of Mrs. Shipley. The State Department sought legislation to curb the travel of American Communists, but without success. In testimony to the Warren Commission, Miss Knight blamed *Kent v. Dulles* for her inability to deny a passport to Lee Harvey Oswald despite his travels to the Soviet Union and his

attempt to defect. She complained that she could not rely on confidential information in FBI and CIA reports to deny passports. Later she wrote to J. Edgar Hoover complaining that liberals in the State Department were undermining her efforts to build a system that would be a tribute to President Nixon.

Kent v. Dulles was a landmark decision. It established important principles: first, that certain aspects of liberty and privacy are rights of citizens guaranteed by the constitution even though not enumerated; second, that freedom to travel is among these rights; third, that legislation restricting such rights will be narrowly construed; and fourth, that Congress will not be assumed to have granted broad powers where only narrow powers have been exercised.

Conclusion

It would be tempting to assume that principles so established would be immutable. Passport issuance is no longer in the hands of a Mrs. Shipley. Her index cards and file cabinets are replaced by computerized systems. Decisions are subject to administrative and judicial review. And the threat of the Communist movement that defined the Cold War and led to passport restrictions has evaporated.

However, the anti-Communist hysteria of the 1950s is mirrored in some aspects of the War against Terror, and today the right of travel may be denied based on terrorist screening and no-fly lists, compiled from secret information by a host of agencies, without effective review. One can easily imagine a Rockwell Kent today expressing solidarity with Islamists and being placed on a no fly list. He would not know it until denied boarding, and he would not know by whom he was listed or for what reason. His rights to challenge the listing would be limited and require penetration of a bureaucratic maze.

Edmund Burke said: “Those who cannot remember the past are condemned to repeat it.” Among the lessons of the Kent case are that personal liberties can be threatened by frightened people in positions of authority during times of real or imagined peril, that it takes courage to confront authority, and that the victories of those who do so – like Rockwell Kent and Leonard Boudin – should be remembered and cherished.

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Notes on the Supreme Court Justices:

- Chief Justice Warren was a California District Attorney, Attorney General and Governor, elected often without opposition. He was the Republican candidate for Vice President in 1948 and a presidential candidate in 1952. Although he and Nixon feuded and disliked one another, Eisenhower appointed him Chief Justice in 1953. He quickly took charge of the Court, managing to secure a unanimous decision in *Brown v. Board of Education*.
- Hugo Black was an Alabama Senator and one-time KKK member. As a Senator, he was an ardent supporter of the New Deal and of FDR's court-packing plan. After the court-packing plan failed, FDR wanted his first appointment to be a "thumping, evangelical New Dealer." Justice Black was a strict and literal constructionist of the Constitution, which placed him sometimes on the liberal side and sometimes on the conservative side of issues.
- William O. Douglas was a law professor and SEC Commissioner before his appointment by FDR. He served 36 years on the Court and was noted for liberal passion and popular references more than for legal scholarship.
- William J. Brennan, Jr., was a labor lawyer and a New Jersey Judge before his appointment by Eisenhower. He became the intellectual leader of the Warren Court's liberal majority.
- Felix Frankfurter was a Harvard law professor active in progressive and Zionist causes before his appointment by FDR in 1938 to replace Benjamin Cardozo. He advocated judicial restraint and deference to legislative and executive decisions.
- Tom C. Clark was a Texas democrat. As a Justice Department lawyer, he coordinated World War II internments. Truman appointed him Attorney General in 1945, and appointed him to the Court in 1949. When Clark joined the majority in the *Steel Seizure Case*, Truman said of Clark: "He's the dumbest sonofabitch I ever met."
- Charles E. Whittaker was a corporate lawyer and federal judge appointed to the Court by Eisenhower in 1958. He was considered weak and vacillating. In 1962, after he agonized over his vote in *Baker v. Carr*, he had a nervous breakdown and resigned.
- John Marshall Harlan was the grandson of a 19th Century Justice of the same name. He was a Wall Street lawyer and served on the 2nd Circuit Court of Appeals before being appointed to the Court by Eisenhower in 1955. He became the intellectual leader of the conservative minority of the Warren Court.
- Harold Burton was a corporate lawyer and politician, who was elected Cleveland mayor, Ohio legislator and U.S. Senator before being appointed to the Court by Truman in 1945.