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Passport Denial As A Security Measure

This Note considers the constitutionality of passport denials based exclusively on the applicant's past or present beliefs and associations. After weighing the interests in favor of free travel against the protection afforded national security by these denials, the author concludes that they are unconstitutional.

Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

Madison to Jefferson, 1798.

I. INTRODUCTION

THE Supreme Court in *Kent v. Dulles*¹ has recently decided that the Passport Regulations² of the State Department are invalid insofar as the regulations authorize the State Department to deny passports to citizens of the United States who refuse to file noncommunist affidavits.³ The rationale of this decision is that Congress has not authorized⁴ passport denial based on an applicant's beliefs or associations. By basing its decision on the lack of congressional authorization, the Court avoided deciding the constitutionality of passport denial under the regulations' provisions,⁵ and since legislation has already been proposed to give the State Department the authorization which the Supreme Court found lacking,⁶ the passports problem will probably remain in heated, but

1. 357 U.S. 116 (1958) (5-4 decision). The Court also recently decided that basing passport denial on confidential information regarding a person's beliefs and associations is invalid, for the same reason as in *Kent*. *Dayton v. Dulles*, 357 U.S. 144 (1958) (5-4 decision). The issue of confidential information is, however, beyond the scope of this Note.

2. 22 C.F.R. §§ 51.101-170 (Supp. 1958).

3. 22 C.F.R. § 51.135 (Supp. 1958). This section provides in general that in order to prevent the use of passports to further the purposes of the communist movement, passports would not be issued to: a) present members of the Communist Party or those who had recently terminated their membership under circumstances leading to the conclusion that they continue to act in the furtherance of the aims of the Communist Party, b) persons whose activities in support of the communist movement indicated that they were being directed and controlled by the Communist Party, c) persons whose purposes in going abroad were to knowingly advance the purposes of the Communist Party.

For the section of the Regulations requiring a noncommunist affidavit, see 22 C.F.R. § 51.142 (Supp. 1958).

4. The State Department had found authorization for the regulations in congressional and executive action: Act of July 3, 1926, ch. 772, § 1, 44 Stat. 887 (1926), 22 U.S.C. § 211(a) (1952); 22 C.F.R. § 51.75, .77 (Supp. 1958).

5. 357 U.S. at 129.

6. See S. 4110, H.R. 13318, 85th Cong. 2d Sess. (1958). Congress adjourned without passing the proposed passport legislation this year, however.

unresolved, conflict for the next several years. Only an eventual holding or series of holdings by the Supreme Court on the basic issues of the constitutionality of passport denials based on the citizen-applicant's beliefs or associations will resolve the present conflict on a lasting, sound basis. This Note will discuss and analyze the practical considerations for and against passport denial based on beliefs and associations in an attempt to determine the constitutionality of such denial.

II. PASSPORTS POLICY OF THE STATE DEPARTMENT

Since early American history, the State Department has, in its discretion, denied passports to some American citizens.⁷ Prior to the early 1940's, however, there was little concern expressed over the denials, because until then passports were not necessary for travel abroad,⁸ and because the Department issued a passport to any citizen unless he was fleeing justice, immoral, or negligent in following required application procedures.⁹ However, shortly after passports became a prerequisite to travel overseas, the State Department instituted the policy of frequently denying passports on the ground that the applicant's proposed travels would be contrary to the "best interests of the United States."¹⁰ Shortly after *Bauer v. Acheson*,¹¹ which held that an applicant must be given notice and hearing of pending denial, the Department, in 1952, promulgated the regulations which were held invalid in *Kent*. These regulations required that an applicant be given such notice and hearing and, also, required that in case of denial an applicant should have the right to appeal his case before the State Department Board of Passport Appeals.¹² In addition to these procedural protections, the regulations set forth broad substantive standards providing for denial when the Department determined a) the applicant was a communist, b) the applicant was a communist affiliate or communist ad-

7. See O'Connor, *The State Department Defends*, Saturday Rev., Jan. 11, 1958, p. 11; 3 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 498 (1942). See note 4 *supra*.

8. Passports had previously been required for short periods when the United States was at war, but not until 1941 were they required for departure from the United States during every national emergency (the United States has been in a state of national emergency ever since 1941). See Comment, 61 *YALE L.J.* 171, 172 n.6 (1952). It is likely that the United States will remain in a state of emergency for quite some time. But even if it does not, so that passports would no longer be required for departure, passport denial would still result in travel control because most foreign countries require aliens attempting to enter to have passports. *Id.* at 171 n.3.

9. See 3 HACKWORTH, *op. cit. supra* note 7, at 498-512.

10. See Note, "Passport Denied" *State Department Practice and Due Process*, 3 *STAN. L. REV.* 312 (1951); Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 *YALE L.J.* 171 (1952).

11. 106 F. Supp. 445 (D.D.C. 1952).

12. 22 C.F.R. §§ 51.101-.170 (Supp. 1958).

vocate, or c) that the applicant's travels were intended to promote communism.¹³ Since passports had become necessary for travel abroad, and since there were frequent denials under the regulations, the validity of the regulations began to meet challenge in the courts.

III. PREVIOUS LOWER COURT DECISIONS

In the last decade several cases have been decided by lower federal courts which involved questions of the constitutionality of denials under the State Department Passport Regulations.¹⁴ The earlier of these cases¹⁵ ruled that if a passport applicant had not been given adequate notice and hearing, or if the denial of his passport was arbitrary, the denial would be invalid. These cases remained the only law on the subject until 1955, either because they were not appealed or, if appealed, because the State Department mooted the issue by granting the applicant's passport.¹⁶ By the time the passport was issued, however, the applicant's need for it had usually passed and thus the issuance of the passport was no victory for the applicant.

Schachtman v. Dulles,¹⁷ decided in 1955, held that passport denial must conform to the requirements of substantive due process of law. The court, expanding on this holding, said variously that there must be a reasonable relation between the denial and the conduct of foreign affairs, and that the right to travel could be impinged only by reasonable regulation under law. However, although *Schachtman* was significant because it held that passport denial must conform to the requirements of substantive due process, and for the first time held that United States citizens have a *constitutional* right to travel, it failed to go further and decide the constitutional validity of the regulations themselves, that is of passport denial under the regulations. None of the cases which had touched on questions of constitutionality had considered that every passport denial under the regulations might have been an unconstitutional denial of liberty without due process; they had only consid-

13. See note 3 *supra*.

14. *Briehl v. Dulles*, 248 F.2d 561 (D.C. Cir. 1957), *rev'd sub nom. Kent v. Dulles*, 357 U.S. 116 (1958); *Dayton v. Dulles*, 237 F.2d 43 (D.C. Cir. 1956), *rev'd*, 357 U.S. 144 (1958); *Boudin v. Dulles*, 235 F.2d 532 (D.C. Cir. 1956); *Schachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955). See cases cited notes 15 & 16 *infra*. See also *Kraus v. Dulles*, 235 F.2d 840 (D.C. Cir. 1956) (involving indigence as grounds for passport denial).

15. *E.g.*, *Nathan v. Dulles*, 129 F. Supp. 951 (D.D.C. 1955); *Clark v. Dulles*, 129 F. Supp. 950 (D.D.C. 1955); *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952).

16. See, *e.g.*, *Dulles v. Nathan*, 225 F.2d 29 (D.C. Cir. 1955). See *Doman, A Comparative Analysis: Do Citizens Have the Right to Travel?*, 43 A.B.A.J. 307, 309 (1957); see also *Boudin, The Constitutional Right to Travel*, 56 COLUM. L. REV. 47, 59 (1956).

17. 225 F.2d 938 (D.C. Cir. 1955), 40 MINN. L. REV. 709 (1956).

ered whether, *within the standards of the regulations*, particular denials were arbitrary or unreasonable.¹⁸

In 1957, however, the court of appeals in *Briehl v. Dulles*,¹⁹ did decide the validity of the regulations themselves. Holding the regulations valid, the court said the proper test was to balance the interests involved: the public interest in protecting national safety and security and in preventing diplomatic indiscretions abroad, against the citizen's interest in free travel.²⁰ The court's use of the balance of interests test was a good approach toward solving the problem of constitutionality of passport denial based on beliefs and associations; however, the court's balancing of the interests involved was inadequate. Stripped of excess verbiage, the reasoning which led the court to the conclusion that the regulations were valid is the following: that on balance, in this troubled hour of history with the world on the brink of a disastrous war, the public interest in protecting national security and preventing international diplomatic incidents outweighs the individual's interest in traveling abroad. The trouble with such reasoning is that the court failed to consider whether free travel actually endangers national security, and, if it does, whether passport denial abates that danger. Few people will dispute the fact that national security is of the utmost importance and outweighs the individual's interest in free travel, but if free travel has little or no effect on national security, there is no justification for restricting such travel (unless free travel is so insignificant a right that it makes little difference how it is treated). To arrive at the opposite conclusion would be as nonsensical as closing golf courses because national security is more important than playing golf.

In order to make a more adequate balance than that made by the court of appeals in *Briehl*, the constitutional nature of the right to travel and the relevance of the tests required by the constitutional provisions involved should be examined.

IV. THE CONSTITUTION AND THE RIGHT TO TRAVEL

Nature of the right to travel

Although courts which have been confronted with cases involving constitutionality of passport denial have held, either expressly or by implication, that there is a constitutionally protected right to

18. Extensive quotations from cases to this effect may be found in Boudin, *supra* note 16, at 56-58.

19. 248 F.2d 561 (D.C. Cir. 1957), *rev'd sub nom.* *Kent v. Dulles*, 357 U.S. 116 (1958).

20. 248 F.2d at 573.

travel,²¹ they have not clearly defined the nature of that right. The Supreme Court in the recent *Kent* decision expressed the strong and unequivocal dictum 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."²² The lower courts had also considered travel to come within the scope of "liberty,"²³ and with the exception of one case had limited themselves to consideration of only the fifth amendment. The court of appeals in *Briehl*, however, indicated that first amendment rights may be involved in passport denials.²⁴

Some scholars, likening the right to free travel to other rights such as "to speak, to write, to use the mails, to publish, to assemble, to petition,"²⁵ have gone further than *Briehl*, saying that travel itself, like these other rights, is a first amendment "freedom of expression." Though this approach is plausible, it is not clear that a court would construe the *specific* guarantees of the first amendment ("freedom of speech" and "of the press, . . . the right . . . peaceably to assemble" and "to petition") to be merely examples of a broad category called "freedom of expression"—a category, protected by the first amendment, which would include free travel as well. Certainly the argument for including travel among the fifth amendment "liberties" is much stronger than for including travel within the protection of the first amendment, since the term "liberty" is given meaning and content by judges. The judges, including those of the Supreme Court, who have considered the nature of the right to travel have found it to be a fifth amendment "liberty."

Others have said that the right to travel is indirectly a first amendment right on the grounds that when an applicant is denied the right to travel he is denied the right to free speech in foreign countries, the premise being that free speech is a right exercisable anywhere.²⁶ Assuming the constitutional freedom of speech to apply beyond the continental limits of the United States,²⁷ a free speech problem would be involved, certainly, to the extent that the Department de-

21. See text after note 17 indicating that *Schachtman* was the first case to expressly pass on the question of the constitutionality of the right to travel, whereas prior cases had just assumed the constitutional nature of this "right."

22. 357 U.S. at 125.

23. See, e.g., *Schachtman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955), 40 MINN. L. REV. 709 (1956).

24. 148 F.2d at 573. See also dissenting opinion of Judge Bazelon, *Id.* at 585-86.

25. Wyzanski, *Freedom to Travel*, *Atlantic Monthly*, Oct. 1952, pp. 66, 68.

26. See, e.g., Boudin, *supra* note 16, at 50; Comment, *The Passport Puzzle*, 23 U. CHI. L. REV. 260, 268, 288-89 (1956).

27. The Supreme Court once said, "The Constitution can have no operation in another country." *In re Ross*, 140 U.S. 453, 464 (1891) (dictum). Probably the biggest step away from this decision was in *Best v. United States*, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951), where the court said that "the protection of the Fourth Amendment extends to United States citizens in foreign countries under occupation by our armed forces." 184 F.2d at 138. It is not clear that the Supreme Court

nies a passport for the express purpose of prohibiting the applicant from speaking abroad.²⁸ To say that free speech is "a right exercisable anywhere," however, is to ignore the fact that though a person may have a right to speak, this right does not entitle him to go anywhere he may wish to speak if there are reasons for barring his presence other than just a desire to prevent his speaking.²⁹

Passport denial may also abate first amendment rights by indirectly punishing an applicant for his past free speech and association in the United States. Since past behaviour is used as evidence of probable behaviour abroad, perfectly legal left-wing association in the past may result in denial of a passport.

In summary, this writer concludes 1) with respect to the fifth amendment, that free travel is in itself included in that amendment as a "liberty" which cannot be denied to a person without due process of law, and 2) with respect to the first amendment, that free travel is not included within the guarantees of that amendment but is indirectly connected to the extent that the denial of free travel results in the denial of free speech. However, since both first and fifth amendment rights may be impinged by passport denial, though not necessarily both in the same case,³⁰ a proper test of constitutionality of denial should consider both first and fifth amendment requirements.

would maintain its 1891 position with respect to citizens not connected with armed forces, either, especially in view of the strong dictum in *Kent* to the effect that the right to travel is within the scope of fifth amendment "liberty." See generally Comment, *The Constitution Abroad: The Operation of the Constitution Beyond the Continental Limits of the United States*, 32 TEXAS L. REV. 58 (1953). Upon an evaluation of the extent of travel in 1958 as compared with that of 1891, and the much larger scale of necessary travel (business and education as opposed to just pleasure) today, this writer concludes with regard to actions of our Government, that American citizens should be granted constitutional protection throughout the world. The same conclusion has been reached by others:

The restrictive policy exemplified by the *Ross* case, which probably originated in the political ideologies of the 'Monroe Era,' is outmoded in a day when few Americans pass a lifetime without traveling beyond the continental boundaries of the United States.

Id. at 77.

28. This type of action by the government has been likened to the previous restraint involved in *Near v. Minnesota*, 283 U.S. 697 (1931). Comment, *supra* note 10, at 193-94. An illustration of this type may be the case of Judge Clark. *Clark v. Dulles*, 129 F. Supp. 950 (D.D.C. 1955). Clark was denied a passport to prohibit his speaking in Germany against our military occupation government in that country. It may be that the government would have its strongest case in a situation such as this where our government is in military occupation of a country, and someone proposes to go over there to speak against occupation.

29. For example, the right to freedom of speech obviously does not give a citizen the right to go to the center of an atomic laboratory at Oak Ridge to make a speech.

30. Since "liberty" within the fifth amendment would be involved in *every* case, *both* first and fifth amendment rights will be involved except where there is no encroachment on freedom of speech.

The right to travel and the fifth amendment

In determining the constitutionality of an abridgment of a fifth amendment right, the Supreme Court has said:

The Fifth Amendment . . . do[es] not prohibit governmental regulation for the public welfare. [It] merely condition[s] the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. . . . [T]he *reasonableness* of each regulation depends upon the relevant facts.³¹

In order to determine the "reasonableness" of the regulation the court must "[balance] private right against public requirement."³² When balancing these interests in a passport denial case, the court must therefore consider both the *importance of the right of free travel, and the effectiveness of passport denial as a means of protecting national security.*

(1) *Importance of free travel.* To the individual who wishes to travel abroad, the right to free travel is important for a number of reasons. First, to the businessman, the newsman, or the professional man going abroad on business, the right to travel is a property right of great practical importance, since it is necessary for his economic welfare.³³ To the person such as Dr. Briehl³⁴ whose purpose in going abroad is the furtherance of his education by either attending a conference or attending a foreign university, free travel is also a property right, at least to the extent that education increases a person's earning power and leads to a better economic or social position in the United States.

To a man such as Judge Clark³⁵ whose avowed purpose in going abroad is to criticize United States foreign policy, the right to travel is important primarily as a right to free speech. To him the right to travel is important in the same manner as is the right to free speech to a minority group such as the Jehovah's Witnesses. To the vacationing pleasure seeker, or the honeymooner, or the visitor with relatives residing abroad, the right to travel is primarily important

31. *Nebbia v. New York*, 291 U.S. 502, 525 (1934). (Emphasis added.) Although this case involved issues of economic due process, it was decided before the Supreme Court had adopted the more recent rational connection test for economic due process cases. See *Carolene Products v. United States*, 323 U.S. 18 (1944). *Nebbia* has been cited frequently for a statement of the post-1937 test for noneconomic due process cases. See, e.g., *Lapides v. Clark*, 176 F.2d 619, 620 (D.C. Cir. 1949).

32. *Briehl v. Dulles*, 248 F.2d 561, 573 (D.C. Cir. 1957).

33. See, e.g., *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952) (reporter); cf., *Edwards v. California*, 314 U.S. 160 (1941) (interstate migratory workers).

34. *Briehl v. Dulles*, 248 F.2d 561, 563 (D.C. Cir. 1957). Dr. Briehl sought a passport in order to attend an international psychoanalytic congress in Geneva.

35. *Clark v. Dulles*, 129 F. Supp. 950 (D.D.C. 1955).

as part of the traditional American liberty to do within reasonable limits what he pleases when he pleases.

Free travel is important to the nation as a collective group as well as to the individual. There is little question that the United States receives considerable economic benefit from the travels of the businessman, since he is directly engaged in bringing foreign trade to the United States and observing foreign methods that can be used in this country. The nation also derives indirect economic benefits from the travel of the person who goes abroad for educational purposes, since assumedly that person will increase his skill and thereby contribute more to the efficiency of the economy.

Politically, free travel is also important to the nation. As some scholars have pointed out,³⁶ by restricting citizens' free travel the United States is fighting communism with totalitarian methods, thus giving the appearance to the rest of the world that democracy works only until it is challenged by a totalitarian government; that by fighting communists with their own methods of suppression, the United States gives added stature to the effectiveness of those methods, and awakens a cynical attitude toward America's sincerity in her democratic ideals of freedom and equality. Russia appears honest by comparison because of her open adherence to totalitarianism. As Henry Steele Commager has said:

Does it ever occur to officials in the State Department that it might in fact be "in the best interests of the United States" to permit—nay encourage—criticism? Europeans are weary of official spokesmen who always defend government policy, and have learned to discount it. What really wins their interest is the spectacle of a nation permitting the utmost freedom of discussion and of criticism.

It is not in the best interest of the United States to confess to the world that we are afraid of what our own people may say about us, or to confess that we are so sensitive that we can't stand criticism or unfriendly discussion and that we seek to silence such discussion.³⁷

Or as President Eisenhower said, one of the United States' objectives is "to lower the barriers which now impede the opportunities of people to travel anywhere in the world for peaceful, friendly purposes, so that all will have a chance to know each other face-to-face."³⁸

36. See Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47 (1956); Marx, *Effects of International Tension on Liberty Under Law*, 48 COLUM. L. REV. 555 (1948); O'Brian, *New Encroachments on Individual Freedom*, 66 HARV. L. REV. 1 (1952); Welch, *What's Wrong With U.S. Passport Policy?*, Saturday Rev., Jan. 11, 1958, p. 10; Note, 27 IND. L.J. 550 (1952); but cf. Sutherland, *Freedom and Internal Security*, 64 HARV. L. REV. 383 (1951).

37. Commager, *A Nation of Travelers*, Saturday Rev., Jan. 11, 1958, p. 24, at 69-70.

38. N.Y. Times, July 23, 1955, § 1, p. 2, col. 4. Despite this statement, however, President Eisenhower is in favor of travel control through passport denial.

Another scholar has said that from a purely practical standpoint free travel is essential to the nation because it facilitates keeping a first-hand working knowledge of the events occurring in foreign countries.³⁹

When it is considered that over half a million people each year apply for passports for one or more of the above reasons,⁴⁰ it can be seen that the right to travel freely is important enough to the individual and to the nation that it should not be abrogated without a well considered determination that the national security can be protected by such abrogation.

(2) *Effectiveness of passport denial.* The State Department's position is that in order to protect national security, passports should be denied to persons who would use them to further international communism in an attempt to eventually accomplish the overthrow of the United States government.⁴¹ In order to prevent these persons from leaving the United States, it has been necessary to deny passports to applicants whose activities have indicated communist sympathies, since the largest number of active subversives would be found in that group. The theoretical justification for the unavoidable denial of some legitimate passport applications under this system is that protection of national security by this means outweighs the harm done by denying passports to nonsubversives. However, since professional spies would be too clever to blatantly display any un-American activities in their personal lives, the premise that most subversives would be prevented from leaving the United States by passport denials based primarily on an applicant's past activities⁴² is of doubtful validity. In most cases only propagandists and honest left-wing "radicals" would be denied passports. But the government has no valid interest that would be protected from these *effective* denials, because permitting criticism of our government in foreign countries would in most cases achieve more good than suppressing criticism.⁴³

Further, even when actual subversives are denied passports, there are good arguments⁴⁴ that such passport denial cannot be effective to stop the work of these subversive agents; that passport denial is

39. Welch, *supra* note 36, at 66.

40. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1957, at 100.

41. See, e.g., O'Connor, *supra* note 7, *passim*; but see ACHESON, A DEMOCRAT LOOKS AT HIS PARTY, 127 (1955).

42. See note 3 *supra*.

43. See text at notes 36 & 37 *supra*. Probably the government can be validly criticized for having failed to even attempt designating the various interests it has been trying to protect. Apparently, little distinction was to be placed between a person going overseas to commit espionage, subversion or merely to propagandise.

44. See, e.g., Welch, *supra* note 36, at 10; Comment, 61 YALE L.J. 171, 197 (1952).

a mere inconvenience to them. First, there are many other ways for an agent to get abroad, as by way of Mexico or Canada, or by off-shore submarine. Second, with today's efficient communications methods such as mail, telephone, cable and short wave radio, a message can easily be relayed to the Kremlin without the necessity of an agent's traveling abroad.⁴⁵

Since passport denial is an ineffective method of protecting the nation from the harmful activities of subversive agents residing in the United States, the writer concludes that it is an unreasonable abridgment of the citizen's constitutionally protected right to travel under the fifth amendment.

The right to travel and the first amendment

The test for constitutionality under the first amendment has been whether the speech or "words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."⁴⁶ Under this rule only serious harm to an important national interest can be abated.⁴⁷ In dealing with the communists, however, the Supreme Court has in recent years modified the clear and present danger test, stating that a requirement of clear and present danger would bar effective action against the long-term communist movement.⁴⁸ The modified test, first expressed in *Dennis v. United States*,⁴⁹ has been whether ". . . the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁵⁰ The *Dennis* test, some scholars have said, has replaced the clear and present danger test.⁵¹

However, whichever of the two tests the Supreme Court may apply in the future, both the clear and present danger and the *Dennis* tests are more stringent than the fifth amendment "reason-

45. See *Briehl v. Dulles*, 248 F.2d 561, 586 (D.C. Cir. 1957) (dissenting opinion).

With existing two day delivery time for mail between the United States and London or Paris in large volume, it is doubtful that there is much time for any governmental agency to check for coded messages and, consequently, little risk to the sender or receiver.

46. *Schenk v. United States*, 249 U.S. 47, 52 (1918). (Emphasis added.) *Accord*, *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

47. *American Communications Ass'n v. Douds*, 389 U.S. 382, 391 (1950).

48. See Corwin, *Bowing Out 'Clear and Present Danger'*, 27 NOTRE DAME LAW. 325, 349-56 (1952).

49. 341 U.S. 494 (1951), 36 MINN. L. REV. 96.

50. 341 U.S. at 510, quoting from, *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

51. Corwin, *supra* note 48, at 358; Gorfinkel and Mack, *Dennis v. United States and the Clear and Present Danger Rule*, 39 CALIF. L. REV. 475 (1951).

Perhaps the *Dennis* test, itself, has been modified by the Supreme Court. See *Yates v. United States*, 354 U.S. 298 (1957), 42 MINN. L. REV. 301.

ableness" test. The Court's consideration of the *importance of the private rights* under the first amendment differs from that under the fifth. To determine "reasonableness" the court must weigh the importance of the particular property right which the governmental regulation impinges, against the effectiveness of the protection afforded to the national interest by the challenged regulation. The first amendment tests, however, are founded on the premise that *every* first amendment freedom is of the utmost importance.⁵² Thus, the court need not consider the importance of a particular freedom under the first amendment test, but will consider only whether regulations impinging those freedoms afford sufficient protection to an important national interest to overbalance the *predetermined*, great importance of free speech. Because this fixed importance of first amendment freedoms results in more stringent requirements for abating those freedoms than for fifth amendment rights, the required effectiveness of the governmental regulations will, in every case, be greater for the first amendment. Applied to passports, this means that if passport denial is not an effective enough protection of national security to be constitutional under the fifth amendment, it must also be unconstitutional under the first amendment.

V. CONCLUSION

Any constitutional considerations, other than the balancing of the right to travel against the government's interest in national security as protected by denial of passports on the basis of beliefs and associations, were beyond the scope of this Note. This eliminated consideration of 1) those cases in which the State Department knows *for a fact* that the applicant's purpose is to commit espionage or sabotage, 2) denials based on preventing flight from justice, 3) denials based on noncitizenship, and 4) denials based on indigence.

The specific balance, then, drawn in this Note has led to the following conclusions: Since the right to travel is an important right within the first and fifth amendments, and since passport denial is an ineffective method of protecting national security, passport denial based on beliefs and associations is an unconstitutional impingement of the right to travel. A more effective *and constitutional*

52. At this point the reader might assume that the textual discussion relies on the "preferred freedoms" doctrine. For a discussion of that doctrine see Mason, *The Core of Free Government, 1938-40: Mr. Justice Stone and "Preferred Freedoms,"* 65 *YALE L.J.* 597 (1956). Whether first amendment freedoms enjoy a preferred status among constitutional rights has been an issue in controversy for some time. *Ibid.* However, the statement in the text that every first amendment right is of predetermined great importance does not turn on the status of the "preferred freedoms" doctrine. The statement is based, rather, on the fact that the clear and present danger test, applied in every free speech case, by its terms is more stringent than the fifth amendment "reasonableness" test.

way of preventing subversive activities by agents residing in the United States would be criminal prosecution by the proper authorities.⁵³ When there is insufficient proof to convict a "subversive," then he should have the freedom to go abroad just as he would have the freedom to go where he pleases within the borders of the United States.

53. "There are penal sanctions against the commission or attempt or conspiracy to commit espionage, sabotage, treason, sedition and subversion." *Briehl v. Dulles*, 248 F.2d 561, 587 (1957), *rev'd on other grounds sub nom. Kent v. Dulles*, 357 U.S. 116 (1958). See 18 U.S.C. §§ 371, 791-98, 2151-56, 2381-90 (1952).

