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Right to Travel, The;Note

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NOTES

THE RIGHT TO TRAVEL

This is a discussion of natural law and the right to travel, or freedom of movement, as it is sometimes expressed,[1] particularly in its relation to the passport problem which arose in recent years in the Courts of the District of Columbia. It will not involve a technical or philosophical discussion of the relation of the right to travel to the natural law, but rather a discussion of the legal evolution of the right in the light of the concept of the natural law as found in the Declaration of Independence and the Fifth Amendment to the Constitution.

When the authors of the Declaration placed in its opening paragraphs reference to the "laws of Nature and of Nature's God,"[2] and later stated that among the inalienable rights with which the Creator had endowed all men are "life, liberty, and the pursuit of happiness," they expressed their recognition of a natural law and its supernatural authorship. Their reference was not to rights declared by positive law, or to those resting upon custom or usage. Their reference — their appeal — was to rights pertaining to the nature of man as a child of God. No other interpretation of their language seems possible.

When the influence of Jefferson, powerfully augmented by Mason and others, was drawn to the necessity for a Bill of Rights to become a part of the Constitution, two of the three rights described as inalienable in the Declaration found a place in the Fifth Amendment to the Constitution itself: "nor shall any person . . . be deprived of life, liberty, or property without due process of law." The vaguest of the original three — "the pursuit of happiness" — was not carried forward *in haec verbae*. Instead, "property" is placed with "life" and "liberty" as a possession of which one may not be deprived without due process of law.

We are concerned with "liberty." Its meaning is not as definite as that of "life" and "property."[3] There would seem to be no basis, however, for giving it a different meaning in the Declaration than in the Fifth Amendment. There is too much of common origin in the use of the terms to believe that the authors of the two state papers were thinking along very different lines. This is so even though we remind ourselves that neither the Declaration nor the Constitution contains a philosophical discussion of liberty to aid in comparing its use in one with its use in the other.

Though the general scope of the liberty of the Declaration is the same as the liberty of the Fifth Amendment, we are not precluded from making a distinction derived from the context in which each appears. Thus, the liberty of the Declara-

1. See Zechariah Chafee, Three Human Rights in the Constitution of 1787 (U. of Kansas Press, 1956).
2. Declaration of Independence.
3. This is so notwithstanding the fact that there can be much dispute also about the full meaning of "property," often a matter of controversy in cases arising in varying circumstances. See, as a recent example, Greene v. McElroy, 360 U.S. 474, 492 (1959).

tion is stated there to be inalienable, while the Fifth Amendment implies, at least to some extent, that the liberty to which it refers is alienable with due process of law. There may be some liberty not alienable in any circumstances; one may not be deprived of it by any means, such as liberty of conscience. But the fact that much of liberty, and even life, may be the subject of deprivation, does not change the essential truth that the "unalienable" liberty of the Declaration is essentially the liberty of the Fifth Amendment. In providing that no one could be deprived of the latter without due process the Framers meant that all persons had at least that much protection of all their liberty, and not that all liberty was deprivable by due process.[4]

Liberty is not easily defined. And the necessity for laws to regulate the relationship between society and the individual, and between individuals, calls for continuing consideration of its meaning. That it covers a broad area of conduct is demonstrated by its setting in the Declaration. The latter's reference to liberty as an endowment of the God of Nature, and its proclamation against enumerated tyrannies, against the suppression of liberty, throws light on the meaning of the liberty proclaimed. Though the inalienable character attributed to it was not entirely retained when the men of the revolutionary period came to formulate a plan of government, the meaning of liberty was not changed. Rather, its inalienable character was recognized as being subject to some conditioning in the common good; its exercise in some instances could be controlled by due process of law, by the law of the land as Magna Charta originally expressed it.

It would seem clear enough that the underlying principle of the Declaration is that man starts with liberty in his relations with his fellow man. But he assumes, as the Fifth and the Fourteenth Amendment provide, the obligations due to the Creator and, through Him, to his fellow man. The latter are often expressed in valid law reasonably essential to the common good and to the protection of the liberty of all. If it seems contradictory to say that the inalienable liberty of the Declaration is alienable by due process of law it is only to the extent that the Declaration speaks of the fundamental right while the Constitution in its scheme of government places the fundamental right in the environment of a society organized to promote a common good and to avoid anarchy.

A natural limitation of individual liberty is seen to exist as soon as it is realized that the individual has natural relationships as part of a larger unit of society, the family. This natural relationship prevents the father, for example, from walking out on his child. There is no freedom of movement, no right to travel, which dispenses with this parental obligation. And when the individual is also considered as a member of the still larger unit comprising either the immediate community or the state or nation — to go no further — other limitations arise due to those relationships.

The further the individual moves away as it were into these larger units of

4. In referring to the Constitution mention has been made thus far of the Fifth Amendment, which applies only to action by the Federal Government. Since the adoption in 1868 of the Fourteenth Amendment, the States of course are under the same constitutional restraint; they too cannot deprive anyone of life, liberty, or property without due process of law.

society the weaker the natural restraints upon his liberty become. The natural restraints upon the citizen, as citizen, are not as strong in relation to the state as are the natural restraints upon the father, as father, in relation to his child. In the larger units the bonds in which natural law holds the larger or more numerous relationships become somewhat weakened and the requirements of positive law take hold, acting within due process of law. Perhaps it may be said there occurs at times a sort of merging of the natural with the positive law, that due process of law takes on a certain quality of natural law in regard to the particular subject, and the natural law accommodates itself to due process of law.

The passport cases gave rise to consideration of the meaning of liberty in terms of international travel. The problem came to the courts because restrictions had been imposed by the federal government, during a presidentially declared emergency, upon a citizen's ability to depart from or enter the United States without a passport.[5] Issuance of passports had been lodged by law in the Executive acting through the Secretary of State under presidentially approved regulations which set the "national interest" as the guide; and Congress had made it unlawful for a citizen to depart from or enter the United States without a passport.[6]

Some aspects of the law in relation to travel had been considered by the Supreme Court before the passport cases arose. A brief review of the earlier cases seems desirable.

In 1867, a year before the adoption of the Fourteenth Amendment, *Crandall v. Nevada*[7] was decided by the Supreme Court. Nevada had levied a tax of one dollar upon each person leaving the state by common carrier. The Court did not discuss freedom of movement, or the right to travel, as a basic liberty of the individual. Finding the tax invalid, the opinion of Mr. Justice Field assailed the measure not as a deprivation of liberty without due process of law, but as preventing free access of the citizen to the federal government. Heavy reliance was placed upon the dissenting opinion of Chief Justice Taney in the *Passenger Cases*,[8] decided in 1849, as follows:

> Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States, from the most remote States or Territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State and Territory of the Union. . . . [A] tax imposed by a State for entering its territories or harbours is inconsistent with the rights which belong to the citizens of other States as members of the Union, and with the objects which that Union was intended to attain.[9]

5. For purposes of simplicity this paper, it will be noted, refers in terms to citizens, not to persons in general.
6. I have not thought it necessary in this discussion to set forth the details of the statutes, proclamations, and regulations. These are found in the opinions of the Supreme Court in Kent v. Dulles, and Briehl v. Dulles, 357 U.S. 116 (1958).
7. 73 U.S. (6 Wall.) 35 (1867).
8. 48 U.S. (7 How.) 282, 463 (1849) (dissenting opinion).
9. *Id.* at 491-92.

Mr. Justice Clifford and Chief Justice Chase thought the invalidity of the state tax should rest upon the power of the federal government to regulate interstate commerce, to the general exclusion of state control.

Without suggesting that the opinion is inadequate, the difference between the approach of the Court in *Crandall* and the larger view of the liberty to travel subsequently recognized, is I think of interest. The starting point in *Crandall* was not the existence of a basic liberty but the existence of a travel right incident to national citizenship. Such a right depended upon the existence of the federal government. It was not a right independent of the Constitution, of which one could be deprived only by constitutional means.

After some years a case[10] arose in Louisiana which had nothing to do with travel but which led to a valuable discussion of the nature of liberty. A Louisiana statute prohibited anyone from effecting insurance on property within the state with any marine insurance company which had not complied with all the laws of Louisiana for the doing of business there. Pursuant to the statute Allgeyer was convicted of placing insurance contracts for certain goods with a New York insurance company which had not so qualified. In this rather prosaic setting the opinion, by Mr. Justice Peckham, declared the statute violated due process of law and proceeded to describe the liberty protected by the Fourteenth Amendment as,

> not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will. . . .
>
> It was said by Mr. Justice Bradley, in *Butchers' Union Company v. Crescent City Company,* 111 U.S. 746, 762, in the course of his concurring opinion in that case, that "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."[11]

A few years later in *Williams v. Fears,*[12] the Supreme Court upheld the validity of a tax levied by Georgia on the occupation of hiring persons to labor outside the State. Against the validity of the statute was interposed the claim of a citizen's right to move from one State to another. It was urged that the tax abridged the citizen's privileges and immunities protected by the Fourteenth Amendment and impaired "the natural right to labor." The Court upheld the tax but said:

> [T]he right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right

10. Allgeyer v. Louisiana, 165 U.S. 578 (1897).
11. *Id.* at 589-90.
12. 179 U.S. 270 (1900).

> secured by the Fourteenth Amendment and by other provisions of the Constitution.[13]

The Court quoted the meaning of liberty set forth in *Allgeyer v. Louisiana,* but held that the impact of the statute on freedom of egress from the State, or on freedom to contract, was only incidental and remote, was not discriminatory as between citizens of other States and citizens of Georgia, and, moreover, that the statute did not impinge upon the federal power to regulate interstate commerce.

Again the years passed and there came to the Court *Edwards v. California.*[14] California in 1901 had enacted a statute to prohibit anyone from transporting an indigent nonresident into its territory knowing the person to be nonresident and indigent. Here was a problem of many human and practical facets. As in *Crandall* and *Williams,* movement was affected. As in *Crandall,* the State's restriction was held inconsistent with national interests. This time the majority of the Court, as had the minority in *Crandall,* placed reliance upon the federal control over commerce, Mr. Justice Byrnes saying for the majority, "it is unnecessary to decide whether the Section [of the state statute] is repugnant to other provisions of the Constitution." [15]

Mr. Justice Douglas, writing for himself and Justices Black and Murphy, was not content with this basis for striking down the statute, nor was Mr. Justice Jackson, writing separately. Unwilling to equate the right of persons freely to move with the regulation of the movement across state lines of "cattle, fruit, steel and coal," Mr. Justice Douglas spoke of the right on a more human level, concentrating upon the incidents of national citizenship and the provisions of the Fourteenth Amendment protecting the privileges and immunities of citizens from state interference. He said:

> Now it is apparent that this right [to move from State to State] is not specifically granted by the Constitution. Yet before the Fourteenth Amendment it was recognized as a right fundamental to the national character of our Federal government. It was so decided in 1867 by *Crandall v. Nevada,* 6 Wall. 35.[16]

The opinion also called upon *Williams v. Fears,* to which we have already referred.

Mr. Justice Jackson eloquently supported the right of an indigent nonresident to go into California as a privilege of national citizenship,[17] saying:

> Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself. Property can have no

13. *Id.* at 274.
14. 314 U.S. 160 (1941).
15. *Id.* at 177.
16. *Id.* at 178 (concurring opinion).
17. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. Const. amend. XIV, § 1.

> more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights. Where those rights are derived from national citizenship no state may impose such a test, and whether the Congress could do so we are not called upon to inquire.[18]

None of the opinions in *Edwards* places the "right to travel" or "freedom of movement" on quite the plane it occupies now as a result of the passport cases. While the opinion of Mr. Justice Douglas refers to freedom of movement as a "personal liberty," quoting from *Williams v. Fears,* I believe it is accurate to say that his opinion, as well as that of Mr. Justice Jackson, rested upon the position that freedom to move from one state to another was an implicit right of national citizenship; that is, as held in *Crandall,* a right derived from the Constitution and not a liberty which existed apart from the Constitution, to be protected by the Due Process Clauses from unlawful deprivation.[19]

A decade and a half after *Edwards* the passport cases arose, involving the control of foreign travel by federal authority.[20] *Bauer v. Acheson*[21] was the first of the cases. Miss Bauer, an American citizen, had been granted a passport and had traveled to Paris. While she was there the Secretary of State, without notice or hearing, revoked her passport, on the ground that "her activities are contrary to the interests of the United States." The Secretary refused to renew the passport except to enable Miss Bauer to return to the United States. Under the law and regulations as then administered it was unlawful for an American citizen to travel to Europe or to enter the United States from Europe without a valid passport. Miss Bauer sought relief by suing the Secretary in the United States District Court for the District of Columbia. A statutory three-judge court, composed of District Judges Curran and Keech, and the present writer as the Circuit Judge, was constituted to hear the case, Judge Keech writing the opinion for himself and Judge Curran.[22]

Judge Keech brought the Due Process Clause of the Fifth Amendment for the first time directly into a judicial opinion on the right to travel. He drew upon the dicta of *Williams v. Fears,* which in turn had drawn upon the dicta of *Allgeyer v. Louisiana,* and then applied to travel beyond the United States the views expressed in those opinions that freedom of movement from state to state was "an attribute of personal liberty." He said:

> Since denial of an American passport has a very direct bearing on the applicant's personal liberty to travel outside the United States, the executive department's discretion, although in a political matter, must be exercised with regard to the constitutional rights of the citizens, who are the ultimate source of all governmental authority.
>
> The liberty guaranteed by the Constitution is not absolute. . . . Thus,

18. 314 U.S. at 185 (concurring opinion).
19. See CHAFEE, *op. cit. supra* note 1, at 189 *et seq.*
20. State action is not involved to any degree in the passport cases. The control over passports has long since been vested solely in the Federal Executive.
21. 106 F. Supp. 445 (D.D.C. 1952).
22. The writer dissented on jurisdictional grounds only, believing the case to be one for a single district judge to decide, rather than for a court specially constituted of three judges under the provisions of 28 U.S.C. § 2282 (1958).

> freedom to travel abroad, like other rights, is subject to reasonable regulation and control in the interest of the public welfare. However, the Constitution requires due process and equal protection of the laws in the exercise of that control.[23]

The action of the Secretary in revoking the passport was set aside unless a hearing were accorded within a reasonable time. *Bauer* thus applied the standards of procedural due process to the methods by which the federal government could restrict travel; that is, the right to travel was held to be a liberty protected by the Fifth Amendment from deprivation without a hearing. The Secretary of State appears to have acquiesced in the decision, and the case did not reach the Court of Appeals.

We come now to the developments which grew out of the *Shachtman* case. The Secretary of State had denied a passport to Mr. Shachtman. The District Court upheld the Secretary on the theory that the issuance of passports was a political matter within the Secretary's discretion and that the judiciary accordingly must not interfere. This theory had been considered sound during most of our history when it was not unlawful to travel without a passport; but when the *Shachtman* case reached the Court of Appeals the problem could not longer be solved in those simple terms.[24] A passport had become more than a political document to facilitate the amenities of foreign travel; the government was now requiring a citizen to have a passport to enable him to go to Europe; that is, the absence of a passport constituted a restraint upon travel there. As in *Bauer* the question was whether this was the deprivation of a liberty protected by the Fifth Amendment.

The Court of Appeals held that such a liberty was involved. *Bauer* had attached to this liberty the protection of procedural due process. *Shachtman* extended to it the protection of substantive due process; that is, not only must the method of restraint be fair and appropriate but the substantive content of executive criteria for travel control must not be unreasonable, and the question of reasonableness was to be considered in light of the high character of the liberty sought to be restrained. The court said the discretionary power of the Secretary was confined to grounds[25] which when challenged must satisfy judicially established criteria of substantive due process. The determination as to this could not be left entirely to the Executive because, since a liberty of the individual was affected, the judiciary had a responsibility in a case or controversy to resolve the issue consistently with the Fifth Amendment.[26]

Bauer had required procedural due process — there notice and hearing —

23. 106 F. Supp. at 451.

24. Shachtman v. Dulles, 96 U.S. App. D.C. 287, 225 F.2d 938 (1955). The case was decided by the Court of Appeals composed of Judge Edgerton, Judge Washington, and the present author. The opinion written by the author was concurred in by both his colleagues. Judge Edgerton also wrote a separate concurring opinion.

25. "Discretionary power does not carry with it the right to its arbitrary exercise." 96 U.S. App. D.C. at 290, 225 F.2d at 941.

26. We are not concerned in this discussion with what constitutes either procedural or substantive due process in any of the varying circumstances in which the question might arise. Our problem is rather whether due process is necessary to the validity of the denial of a passport when such denial causes the individual to be restricted in his travel.

on the basis that the right to travel was a personal liberty. The main *Shachtman* opinion described this right as "a natural right."[27] Under each description it was a liberty within the meaning of the Declaration and the Fifth Amendment.[28] It would be unacceptable to give the liberty declared in the Declaration and safeguarded by the Amendment a meaning which did not include such a basic attribute of man. Of course, calling the right a natural one did not make it so; one must rather appraise the soundness of the judgment which ascribes that character to it. It seemed to the court to be so obviously a part of the whole man as to be natural to him; and if that were so, the right to its exercise was a natural one, a part of the natural law. The physical limitations imposed by mountain, water, desert, or otherwise, do not affect the nature of the right itself. They bear upon the ability to exercise it; so, too, the restraints and prohibitions imposed throughout history, in peace and in war, by rulers and by positive law,[29] during the evolution of the means by which society is governed. Like speech, a normal attribute of man, movement is a liberty to be curtailed in a free society only by means and for reasons which meet the tests such a society establishes for the regulation of individual freedom.

The *Shachtman* case did not reach the Supreme Court. The executive branch of the Government, as we shall see, accepted the basic thesis of the opinion, and a passport was issued to Mr. Shachtman. But somewhat later the Supreme Court granted certiorari to review the cases of *Kent v. Dulles* and *Briehl v. Dulles*[30] after their decision by the Court of Appeals sitting en banc. The full Court of Appeals had reaffirmed the *Shachtman* approach, saying that limitations upon travel by passport controls were "as we said in *Shachtman v. Dulles,* an infringement upon a natural right of a citizen to travel." But a majority of the nine members of the court upheld the denial of the passports by the Secretary.[31] They found due process of law had not been denied by the Secretary's insistence, as a condition to issuance of a passport to either applicant, that he submit a sworn statement as to whether he was then or ever had been a Communist, which the applicant refused to do.[32]

After *Shachtman* was decided by the Court of Appeals and before the Supreme Court decided *Kent* and *Briehl* there were published two discussions which were to be referred to in the majority opinion of the Supreme Court. One was Professor Chafee's study already mentioned and the other an article by

27. "The right to travel, to go from place to place as the means of transportation permit is a natural right subject to the rights of others and to reasonable regulation under law." 96 U.S. App. D.C. at 290, 225 F.2d at 941.

28. The Supreme Court, as we have seen, in its opinion in Williams v. Fears had referred to the "natural right to labor."

29. See generally CHAFEE, *op. cit. supra* note 1.

30. These companion cases are reported at 357 U.S. at 116.

31. Briehl v. Dulles, 101 U.S. App. D.C. 239, 248 F.2d 561 (1957).

32. Judge Bazelon, joined by Judge Edgerton, dissented, being of the view that Congress had not delegated to the Executive authority to deny a passport to a citizen on any ground to which the unanswered question related; that is, on grounds having ideological overtones. This was the position adopted by a divided Supreme Court. The present writer dissented also but on the more limited ground that though power had been given by Congress, the Secretary had not been justified in denying the passports without exercising a judgment of his own rather than permitting the refusal to answer the question to operate as a denial.

Professor Jaffe in *Foreign Affairs.* Professor Chafee expressed some disagreement with the reliance by the Justices in *Edwards v. California* solely upon either the commerce or the privileges and immunities provision of the Constitution. In this connection he wrote:

> Why do we need to struggle through the swamp of the rights of United States citizens when we can walk on solid ground? Already in several decisions the Court has used the Due Process Clause to safeguard the right of the members of any race to reside where they please inside a state, regardless of ordinances and injunctions. Why is not this clause equally available to assure the right to live in any state one desires? And unreasonable restraints by the national government on mobility can be upset by the Due Process Clause in the Fifth Amendment, if the *Schachtman* [*sic*] case on passports (to be discussed soon) is upheld by the Supreme Court. Thus the "liberty" of all human beings which cannot be taken away without due process of law includes liberty of speech, press, assembly, religion, and also liberty of movement.[33]

Professor Jaffe also referred sympathetically to the *Shachtman* characterization of the right to travel as a liberty protected by the Fifth Amendment.[34]

Another and important statement of position should be noted. The Solicitor General of the United States in his brief filed with the Supreme Court in the *Kent* and *Briehl* cases said:

> [W]hile this Court has not yet decided whether the Constitution protects the travel of citizens across the boundaries of the nation as it protects their travel across state boundaries, we do not challenge, but readily accept, the existence of a general "natural" or "constitutional" right to depart from or enter the country as an aspect of the "liberty" subject to the protections of the Constitution. We fully accede to the definitive ruling of *Shachtman v. Dulles,* 225 F.2d 938, 941 (C.A.D.C.) — confirmed in substance in the opinions below — that there is a "right to travel" and that restraints on that right must conform to the Fifth Amendment. Our position in these cases does not deny that principle, but rather rests on the claim that what the Secretary has done here accords with both the procedural and the substantive aspects of due process of law.[35]

The principal Supreme Court opinion, appearing in the *Kent* case, states,

> 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. So much is conceded by the Solicitor General.[36]

The Court then cites Professor Chafee and refers to the Court's earlier decisions in *Crandall, Williams* and *Edwards,* continuing, "Freedom to travel is, indeed,

33. CHAFEE, *op. cit. supra* note 1, at 192-93.
34. Louis L. Jaffe, *The Right to Travel: The Passport Problem,* 35 FOREIGN AFFAIRS 17, 21 (1956).
35. Brief for Government, pp. 26-27, Kent v. Dulles, 357 U.S. 116 (1958).
36. 357 U.S. at 125. The majority opinion was written by Mr. Justice Douglas and concurred in by the Chief Justice and Mr. Justices Black, Frankfurter and Brennan. Mr. Justice Clark wrote the dissenting opinion.

an important aspect of the citizen's 'liberty,' "[37] and includes it among the activities which are "natural and often necessary to the well-being of an American citizen."[38]

Thus, though *Bauer* and *Shachtman* were not cited, the Supreme Court accepted the views advanced in the opinions in those cases as to the nature of the right to travel.

And so the matter stands today in the courts: the right to travel — a natural or personal right — is a liberty within the protective provisions of the Fifth Amendment. The consequence is that proceedings looking toward restraint upon this liberty, at the hands of federal authority, must conform with constitutional provisions, including both procedural and substantive due process of law. Thus it is fair to say that the positive law, insofar as it is evidenced by judicial thinking, recognizes the right to travel, or freedom of movement, as a part of the natural law, as within the idea of liberty with which all men are endowed by their Creator, to return to the Declaration, the starting point of our discussion. This liberty does not depend for its existence upon the Constitution or upon any other positive law, though a citizen is protected by the Constitution from its deprivation without due process of law.

One starts out as it were with freedom to travel, to go from place to place, but on the way one may be held to the use of this freedom so as, in the common good, to safeguard the freedom of others. One starts out with an inalienable liberty and is nevertheless bound to recognize its partial alienability. The natural right exists but its exercise is subject to "reasonable regulation under law,"[39] so that the natural and the positive law begin to merge, the positive law itself, however, being subject to limitations as to the means and the reasons by which it can limit the fullness of the natural right. For liberty is precious and one may be deprived of it only by methods which are fair and for reasons which are sound and rest on the common good, on a good so great as to outweigh in some circumstances the great good of individual liberty.[40]

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37. *Id.* at 127. The Court found it unnecessary, however, to decide whether the control over this liberty of Mr. Kent and Mr. Briehl had been exercised consistently with constitutional safeguards in the denial of the passports. The constitutional questions were not reached because the Court found, as had the dissent of Judge Bazelon in the Court of Appeals, concurred in by Judge Edgerton, that Congress had not delegated to the Executive authority to exercise by passport control restriction on travel of a citizen upon the basis of his associations and beliefs. The dissenting Justices, for whom Mr. Justice Clark wrote the opinion, were of the view Congress had delegated to the Executive the questioned power; but since the majority held otherwise, the dissenting Justices also refrained from discussion of the merits of the constitutional questions.

38. *Id.* at 129.

39. Shachtman v. Dulles, *supra* note 24.

40. This discussion has intentionally omitted, as somewhat irrelevant to its theme, treatment of the Government's right to control travel to a particular territorial area, such, e.g., as the portions of China under Communist control. See Worthy v. Herter, 106 U.S. App. D.C. 153, 270 F.2d 905, *cert. denied*, 361 U.S. 918 (1959).