NOTE

The Public Forum Doctrine and *Haig v. Agee*

*By John E. Bolmer, II**

Introduction

The winter of 1979 was a tense time for the Department of State. On November 4, 1979, fifty-two Americans were taken hostage on the grounds of the American Embassy in Iran.[1] The Iranian captors had repeatedly threatened to try the hostages for espionage, and rumors spread that the Iranians had invited Philip Agee to serve as a juror at this trial.[2] Agee had worked for the Central Intelligence Agency (CIA) for eleven years before leaving to become one of the Agency's most outspoken critics.[3] In 1974, Agee embarked on a campaign to destroy the CIA. By 1979, he had released classified government information in several countries and had endangered the lives of CIA agents overseas by exposing their "covers."[4]

The thought that Agee might jeopardize the lives of fifty-two more Americans may have provided the final push necessary to stir the Secretary of State into action. In December, 1979, Secretary of State Vance revoked Agee's passport.[5] Agee was in West Germany at the time of the revocation[6] and could not go to another country without a valid passport.[7]

Agee charged that the Secretary had violated his First Amendment rights by denying him access to a foreign country, but the Supreme Court upheld the Secretary's actions in *Haig v. Agee*.[8] The majority's

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1. Haig v. Agee, 453 U.S. 280, 286 n.8 (1981).

2. *Id.*

3. *Id.* at 283-84.

4. *Id.* Agee had written: "One way to neutralize the CIA's support to repression is to expose its officers so that their presence in foreign countries becomes untenable. . . . I will continue to assist those who are interested in identifying and exposing the CIA people in their countries." P. AGEE, INSIDE THE COMPANY: CIA DIARY 598 (1975).

5. 453 U.S. at 286.

6. *Id.*

7. *See infra* note 76 and accompanying text.

8. 453 U.S. 280 (1981). Between the time of the revocation and the hearing before the Supreme Court, Secretary Vance had been replaced by Muskie, who himself was replaced by Haig as Secretary of State.

holding in *Agee*—upholding the denial of a passport—is defensible in view of the special circumstances of the case, but its reasoning potentially extends beyond these circumstances and raises questions about the power of the Secretary of State in less egregious situations.

This note will review the doctrine of access to public forums as it applies to domestic speech, and will compare the implications of domestic speech with those of international speech. It will then examine *Agee* in order to determine whether a new doctrine of foreign forum access has emerged and, if so, how the doctrine might affect the future of overseas travel.

I. Domestic Forum Denials

One way in which a government can control criticism is to limit the areas in which "free speech" may occur. Indeed, freedom of speech would lose much of its potency as a political tool if it did not include the right to speak to other people at a time and place that "gives [the speaker] an opportunity to win their attention."[9] Thus, the rights of free speech and free assembly largely depend upon the peripheral right to gain access to an appropriate forum.[10]

While access to forums of speech is an important right, the state often has a conflicting interest in preserving the orderly use of these areas. The importance of "maintaining public order" led the Supreme Court in *Cox v. Louisiana*[11] to conclude that: "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."[12] Blind protection of the individual's right of free speech would certainly prevent a repressive state. But ignoring the state's right to control the use of public places would lead to disorder and to the "excesses of anarchy"—an equally distasteful state of affairs.[13] *Cox* is a landmark in a series of cases in which courts have sought to find a proper balance between the

9. 1 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 268 (1968). *See also* Hague v. Committee for Indus. Org., 307 U.S. 496 (1939) (public lands held in trust as forums for exercise of free speech).

10. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 26 (1965) (Douglas, J., dissenting); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963). A peripheral right is one that is necessary for the full enjoyment of some other right.

The current discussion of access to forums necessitates a discussion of the right to travel. The discussion below will focus on the right to travel insofar as it is a right peripheral to the exercise of free speech. Consideration of the extent to which this right has its own basis for support is beyond the scope of this note.

11. 379 U.S. 536 (1965).

12. *Id.* at 554.

13. *Id.*

rights of the state and those of the individual.[14]

In *Cox*, the leader of a civil rights demonstration was arrested for disturbing the peace, obstructing public passages, and picketing near a courthouse. Reverend Cox and about 2000 others marched outside a Baton Rouge courthouse to protest the recent conviction of other protesters. The Chief of Police told Cox he could stage the protest on the far side of the street, but later ordered the group to disperse. When the group refused to leave, tear gas was used to force them away. The day after this incident, Cox was arrested for the three alleged violations of local statutes.[15]

Justice Goldberg, writing for the majority, divided the issues in *Cox* and delivered two separate opinions.[16] One reason for the separation might have been that the applicable statutes involved regulation of access to different forums. Throughout both majority opinions the state interest in preserving orderly use of a forum was considered in light of the purpose for which the public area was dedicated.[17]

Both the statute limiting protest near a courthouse and the one barring use of public streets for large gatherings were, at least on their face, blanket prohibitions on access to these forums. A blanket prohi-

14. Other cases include: Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Hague v. Committee for Indus. Org., 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

15. The breach of peace statute provided: "Whoever with intent to provoke a breach of the peace . . . crowds or congregates with others . . . in or upon . . . a public street or public highway, or upon a public sidewalk . . . and who fails or refuses to disperse . . . when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, . . . shall be guilty of disturbing the peace." LA. REV. STAT. ANN. § 14:103.1 (West Supp. 1962), *reprinted in Cox*, 379 U.S. at 544.

The obstruction of public passages charge rested on LA. REV. STAT. ANN. § 14:100.1 (West Supp. 1962), which stated: "No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, . . . or other passageway, or the entrance . . . of any public building, . . . by impeding . . . or restraining traffic or passage thereon or therein." *See* 379 U.S. at 560.

The third charge against Cox was based on LA. REV. STAT. ANN. § 14:401 (West Supp. 1962), which stated: "Whoever, with the intent of interfering with . . . the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana . . . shall be fined not more than five thousand dollars or imprisoned not more than one year, or both." *See* 379 U.S. at 562.

16. Cox v. Louisiana (No. 24), 379 U.S. 536 (1979), dealt with the charges of disturbing the peace and obstructing public passages. The charge of picketing near a courthouse was considered in Cox v. Louisiana (No. 49), 379 U.S. 559 (1965).

Three Justices—Black, Clark, and White—wrote separate opinions, concurring in No. 24 and dissenting in No. 49. Justice Harlan joined in the opinion of Justice White. None of the three authors found it necessary to write two opinions.

17. *See, e.g.*, 379 U.S. at 554-55, 562. *Compare* Adderley v. Florida, 385 U.S. 39 (1966) (use of jail grounds forbidden), *with* Brown v. Louisiana, 383 U.S. 131 (1966) (use of library approved).

bition denies all people, regardless of their character or beliefs, access to a particular forum. Although the Court reversed the convictions obtained under both of these statutes,[18] the opinion made it clear that a sufficient state interest in the type of activity conducted in a particular forum would support such blanket prohibitions.[19]

Twenty-six years prior to the *Cox* decision, in *Hague v. Committee for Industrial Organization*,[20] the Court stated that if access to a forum were to be offered, it would have to be offered on an equal basis to all citizens.[21] The Court has reached this same conclusion at various times since *Hague* by considering the proper role of discretion in First Amendment issues[22] or by analyzing equal protection arguments.[23] A string of decisions flowed from the conclusion that access to forums must be offered equally to all—a string which was woven into a comprehensive doctrine in *Cox*.

The Court has never spelled out a checklist for determining the validity of statutes restricting domestic forum access. But the series of cases in the *Cox* line indicate that a forum control statute must meet seven requirements in order to be held valid by the Court: (1) The statute must regulate some form of conduct and only incidentally affect "pure speech." The *aim* of the statute cannot be the suppression of speech.[24] (2) The state must have a legitimate interest in controlling the

18. *See* 379 U.S. at 558, 575.

19. *Id.* at 562.

20. 307 U.S. 496 (1939).

21. In Commonwealth v. Davis, 162 Mass. 510, 39 N.E. 113 (1895), Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, stated: "For the legislature absolutely or conditionally to forbid speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house." *Id.* at 511, 39 N.E. at 113. This notion of legislative power was echoed in the Supreme Court case which affirmed *Commonwealth v. Davis*: Davis v. Massachusetts, 167 U.S. 43 (1897). In the latter case, the Court concluded that the right to lay blanket prohibitions on forum use "necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." *Id.* at 48. *Davis* represented the prevailing view in the United States until *Hague*.

22. "This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas . . . ." Cox v. Louisiana, 379 U.S. 536, 556 (1965) (citing Saia v. New York, 334 U.S. 558 (1948)); *see also* Staub v. Baxley, 355 U.S. 313, 321-25 (1958).

23. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 557 (1965); *id.* at 581 (Black, J.); Niemotko v. Maryland, 340 U.S. 268, 272 (1951). *See also* Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 29-30.

24. United States v. O'Brien, 391 U.S. 367 (1968). *O'Brien* has been followed in several more recent opinions. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980); Police Dep't v. Mosley, 408 U.S. 92 (1972). *See* Young v. American Mini Theaters, Inc., 427 U.S. 50, 75-76 (1976) (Powell, J., concurring); Comment, *The Riot Curfew*, 57 CALIF. L. REV. 450, 473 & nn.103-04 (1969).

regulated conduct.[25] (3) The statute must be narrowly drafted so as to meet a specific evil within the proper legislative jurisdiction of the state. Speech may not be unduly burdened by a broad statute.[26] (4) The statute must be drawn clearly so that administrators and applicants for access permits will not have to guess at its application.[27] (5) Administrators may issue permits or licenses with only a limited degree of discretion.[28] (6) The Court would most likely forbid any discretion in the administering of a license statute based on prior consideration of the content of the speech.[29] (7) The statute must be applied consistently.[30]

A. Prior Restraints and Past Actions of the Speaker

The sixth element of the forum denial doctrine suggests that administrative discretion may not be allowed to encompass prior consideration of the content of speech. In other words, the state may not act as censor. Certain forms of speech may be made illegal, and the state may punish the speaker if he violates the law,[31] but the Court is not likely to allow controls on the content of speech which operate prior to the speech itself.[32]

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25. "[O]ur independent examination of the record . . . shows no conduct which the State had a right to prohibit as a breach of the peace." Cox v. Louisiana, 379 U.S. 536, 545 (1965). *See also* Koningsberg v. State Bar, 366 U.S. 36, 52-53 (1961); Barenblatt v. United States, 360 U.S. 109, 125-34 (1959); Dennis v. United States, 341 U.S. 494, 509 (1951); Comment, *supra* note 24, at 470-71.

26. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Niemotko v. Maryland, 340 U.S. 268 (1951); Lovell v. Griffin, 303 U.S. 444 (1938). *But see* Broadrick v. Oklahoma, 413 U.S. 601 (1973).

27. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

28. *See, e.g.*, Staub v. Baxley, 355 U.S. 313 (1958); Cox v. New Hampshire, 312 U.S. 569 (1941).

29. The Supreme Court has not ruled directly on this point. The sixth element would be consistent with the general opposition to prior restraints and with the implications of Kunz v. New York, 340 U.S. 290 (1951). For a discussion of prior restraints and the *Kunz* case, see *infra* notes 31-50 and accompanying text. In his concurring opinion in *Kunz*, Justice Frankfurter suggested that expected content of speech *may* be an appropriate basis for permit denial so long as the discretion of the administrator is limited. *Id.* at 285 (Frankfurter, J., concurring). *See also infra* text accompanying note 48. The majority seemed to reject the Frankfurter proposal, *see Kunz*, 340 U.S. at 294, but limited its holding to an invalidation of the statute due to its failure to limit administrative discretion. *Id.* at 295.

30. Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. New Hampshire, 312 U.S. 569 (1941). "Inconsistent application" should be distinguished from arbitrary use of discretion within the limits of a statute. Inconsistent application, as used above, refers to a statute that is clear on its face and limits discretion, but that is *invoked* arbitrarily. *See, e.g.,* Cox v. Louisiana, 379 U.S. at 557-58 (authorities in their discretion permitted parades in apparent violation of clear statute).

31. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964) (libel); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

32. *See supra* note 29.

If the utterance of certain statements may be made illegal because of their potentially harmful effects on the community, it might seem logical to allow authorities to prevent the release of such statements in the first place. The speaker would be spared criminal charges and the public would be saved from the expected harm. Yet prior restraints on speech have been assailed as evil since the time of William Blackstone.[33]

A system of prior restraints is inherently dangerous.[34] Prior restraints must be justified by predictions and judgments. There must be a prediction as to the content of the speech and a judgment that this content will be beyond the protections of the First Amendment. The Supreme Court will not allow judicial restraints based on "surmise or conjecture that untoward consequences may result."[35] When the system is carried beyond the courts, the hazards to free speech can only be increased.[36]

The potential benefit of prior restraints, as mentioned above, lies in the protection of the public from harm caused by release of unprotected speech. One danger in such a practice is that it may mistakenly prevent the release of protected speech. This danger flows in part from the procedures often used in administrative exercise of the restraints. "[T]he procedural protections built around the criminal prosecution . . . are not applicable to a prior restraint. The presumption of innocence, the heavier burden of proof borne by the government, the stricter rules of evidence, . . .—all these are not on the side of free expression when its fate is decided."[37] Errors caused by these procedures can be corrected if the administrator's decision is appealed. But the delay caused by an appeal has serious ramifications on free speech as well.[38]

The Court has made a few exceptions to the general rule prohibiting prior restraints. For example, the harm that might flow from the

33. Blackstone stated: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure . . . when published . . . ." 4 W. BLACKSTONE, COMMENTARIES *151-52, *quoted in* Near v. Minnesota, 283 U.S. 697, 713 (1931).

34. *See* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 656-60 (1955).

35. New York Times Co. v. United States (Pentagon Papers), 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring).

36. "Perhaps the most significant feature of systems of prior restraint is that they contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration. . . . [C]ommon experience is sufficient to show that [licensers' and censors'] attitudes, drives, emotions, and impulses all tend to carry them to excesses." Emerson, *supra* note 34, at 658.

37. *Id.* at 657.

38. *Id.*

release of obscenity[39] or from the distribution of information compromising the safety of American troops[40] might justify the burdens imposed by a system of prior restraints.

It has been argued that prior restraints on forum access should be allowed when based on a reasonable expectation of violence gained by observation of the past actions of the speaker.[41] This argument assumes that past acts (particularly past speeches) would provide a clear basis for the prediction of the content of future speech. Thus, the risk of arbitrary or erroneous administrative enforcement of the restraining power could be lessened. In his concurring opinion in *Kunz v. New York*,[42] Justice Frankfurter proposed that a speaker's past acts be examined when determining his eligibility for a license granting access to a controlled forum. The majority in *Kunz* did not adopt this proposal.

In *Kunz*, a local ordinance allowed revocation or denial of a permit to assemble after a hearing to determine whether the "privilege" to speak had been abused. Kunz's permit had been revoked and his application for a new permit denied after evidence showed that his "religious meetings had in the past caused some disorder."[43]

The majority in *Kunz* held that the statute created an unconstitutional prior restraint on speech.[44] The Court conceded that the state could punish Kunz for his past abuses, but argued that the proper concern of the Court in forum denial cases is "with suppression—not punishment."[45]

Kunz did not completely settle the issue of the appropriateness of using past conduct in the consideration of forum permits. Since the statute at issue was vague and required the Commissioner to guess at what conduct was condemned,[46] the Court, in holding the statute invalid, based its conclusion on the vagueness finding alone.[47] Justice Frankfurter concurred in the result, but stated that he would allow refusals of permits based on past conduct if the guidelines for this refusal were limited:

> [T]he license was refused because the police commissioner thought it likely . . . that Kunz would outrage the religious sensi-

39. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957).

40. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 716 (1931).

41. *See* Kunz v. New York, 340 U.S. 290, 295, 303, 312-13 (1951) (Jackson, J., dissenting).

42. *Id.* at 273 (Frankfurter, J., concurring).

43. 340 U.S. at 294.

44. *Id.* at 293.

45. *Id.*

46. *Id.*

47. *Id.* ("[T]here is no mention in the ordinance of reasons for which [a] permit application can be refused. This interpretation allows the police commissioner, an administrative official, to exercise discretion [on] the basis of his interpretation, at that time, of what is deemed to be conduct condemned by the ordinance.")

> bilities of others. *If such had been the supportable finding on the basis of fair standards in safeguarding peace* . . . [we] would not be justified in upsetting it . . . . But here the standards are [not so narrow as] to preclude discriminatory or arbitrary action by officials.[48]

Frankfurter would view a limited permit denial or revocation statute as a proper consequence of past acts rather than as a means of censoring future speech.[49]

Justice Frankfurter did not delineate the standards he would require for a valid license restriction. He did emphasize, however, that he was concerned with the potential for arbitrary administrative action. Consequently, in determining the validity of a statute restricting license availability, it would seem reasonable to demand, as a threshold requirement, that administrative consideration be limited to only those past acts that would be punishable. Indeed, Kunz's license was not revoked because his past speech was merely unpopular; his past speech was illegal.[50]

B. Summary

A domestic forum may be denied pursuant to a statute that: (1) is primarily a regulation of conduct; (2) reflects a legitimate state interest; (3) is narrowly drawn; (4) is clear as to its application; (5) allows only limited administrative discretion; (6) does not involve discretion based on the expected content of speech (prior restraint); and (7) is applied consistently.[51] The extent to which past conduct of the applicant may be used to determine eligibility is unclear.

II. Foreign and Domestic Forums Compared

Determination of the extent of the right to forum access requires a balance between the interests of the individual in free speech and the interests of the state. In the domestic setting, the state interests usually consist of preserving the orderly and intended use of the forum, or of protecting the community. A balancing process is also employed in the foreign setting, but the interests weighed in that balance differ from those in a domestic case. These differences may explain the dissimilar results of the balancing process in the two geographic settings. They

48. *Id.* at 285 (Frankfurter, J., concurring) (emphasis added). Frankfurter's concurrence also covers Niemotko v. Maryland, 340 U.S. 290 (1951), and Feiner v. New York, 340 U.S. 315 (1951), and appears before the majority opinion in *Kunz*.

49. 340 U.S. at 285 (Frankfurter, J., concurring).

50. Kunz violated a New York City ordinance that prohibited ridiculing or denouncing "other religious beliefs." 340 U.S. at 292.

51. *See supra* notes 24-30 and accompanying text.

also suggest that an analogy between foreign and domestic forum access is not perfect.

In the analysis of governmental interests in questions involving access to international forums, orderly use of the forums themselves is no longer a factor.[52] Instead, consideration is made of the interest in conducting foreign policy[53] and in preserving the government's ability to gather information overseas.[54] The most important concerns, however, are probably the interests in the protection of national security (which may be threatened by agitation and conspiracies abroad) and the security of nationals (including both the speaker and those who might be affected by his words).[55]

The governmental interests in restricting access to foreign forums are potentially great. As the Iranian crisis so well indicated, the ability of the United States government to protect those interests is more limited than if the same problems were to arise in a domestic incident.[56] These factors necessitate reexamination of the weight of the governmental arguments favoring restrictions on forum access.

The individual's interest in access to foreign forums involves his enjoyment of free speech. This raises an important question: Are First Amendment rights overseas protected to the same extent as they are within the United States? This question was specifically avoided by Chief Justice Burger in *Haig v. Agee*.[57] Nevertheless, we can gain some insight into the likely answer by looking at the reasons forwarded for free forum access and applying them to the two arenas.

Some have belittled the differences between the benefits of international and interstate travel: "Nor is there any reason to differentiate among intracity, interstate, and extranational travel in terms of the individual's interests which inhere in his ability to move about freely. . . . The abilities . . . to gather and disseminate information . . . are . . . fundamental values dependent upon freedom of intracity, interstate, and extranational movement alike."[58] And yet there *are* differences in the expectations of travelers in the two settings.

Access to domestic forums is necessary for the effective distribu-

52. *Agee* might mark an exception to this proposition. Since Agee's speech was to occur at an American embassy, the government did have an interest in protecting its citizens' use of that forum for the functions primarily intended.

53. *See, e.g.*, Haig v. Agee, 453 U.S. 282, 307 (1981); 22 C.F.R. § 51.70(b)(4) (1982).

54. *See, e.g., Agee*, 453 U.S. at 308; Snepp v. United States, 444 U.S. 507, 509 n.3 (1980).

55. *See, e.g., Agee*, 453 U.S. at 308 (imminent threat to nonspeaker abroad); Zemel v. Rusk, 381 U.S. 1 (1965) (threat to speaker and nonspeakers in U.S.); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (delayed threat to nonspeakers in U.S.).

56. The American hostages were held for a total of 444 days. An attempt to rescue them by force on April 24, 1980 failed.

57. 453 U.S. at 308.

58. Comment, *supra* note 24, at 470.

tion of information deemed essential to our democratic system.[59] It might be argued that access to foreign forums is important only for the *collection* of information.[60] Thus, there is less need to protect access to foreign forums so long as there are reasonable means of acquiring the information and, more importantly, an alternative domestic forum available to the speaker.[61] But this argument ignores the importance of the foreign forum for distribution of information. Justice Fortas has suggested that an essential consideration in forum denial cases is: "Were there facilities available for the protest which were *reasonably adequate* to serve the lawful purposes of the protesters . . . ?"[62] Overseas speech may attract special domestic attention.[63] The showcase provided by the international exposure of issues may make a domestic forum a less effective alternative. Denials of effective forums may have serious long-range implications for the welfare of the nation.[64]

It is important to recall that the Court in *Agee* declined to address the question of whether the First Amendment protects freedom of speech overseas.[65] Thus, while the Court may choose, as a matter of policy, to give the same strict protection to speech abroad as it gives to domestic speech, it may not be bound by precedent to do so.

It is unclear whether the Court views the individual's right to foreign forums less favorably than it views his right to domestic forums, or whether the Court has rebalanced the interests involved with a stronger emphasis on the governmental interest in controlling international travel and speech. What is clear is the fact that greater restrictions have been allowed on foreign travel than on domestic movement. The passport is an apt symbol of this difference: Few people question the right of Congress to require a passport for foreign travel, but such a "permit"

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59. *See supra* notes 9-12 and accompanying text.

60. *See, e.g.*, Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION 195-97 (1968); Zemel v. Rusk, 381 U.S. 1 (1965).

61. *See* B. SCHWARTZ, *supra* note 9, at 268; Groll, *Clash of Forces*, in THE LAW OF DISSENT AND RIOTS 109, 115 (M.C. Bassiouni ed. 1969).

62. A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 32 (1968) (emphasis in original).

63. This has been demonstrated by the recent travels of former Attorney General Ramsey Clark. *See* Will, *Again the Fact Finders*, NEWSWEEK, Mar. 1, 1982, at 80.

64. For example, criticism from one whose travels are restricted "may in the long run be more damaging because of the very fact that the critic may describe himself as a prisoner within the borders of the nation that professes adherence to the principles of freedom." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL 44 (1958) (report of the Special Committee to Study Passport Procedures) [hereinafter cited as FREEDOM TO TRAVEL]. Denial of effective forums may also cause an increase in domestic violence. The ability to control terrorism and rioting rests in part on the "underlying assumption . . . that it is possible to focus society's attention . . . upon a [sic] issue through lawful means." Groll, *supra* note 61 at 115.

65. *See* 453 U.S. at 308.

requirement would be unthinkable within the United States.[66]

How has the Court's rebalancing affected the applicability of the domestic forum denial doctrine to foreign forum denial cases? The discussion below will seek an answer to this question by looking at the string of passport cases culminating in *Haig v. Agee*. Before we begin this discussion, however, it will be helpful to gain some knowledge of the passport's significance.

III. Early Passport Cases

A passport is a "travel document issued under the authority of the Secretary of State attesting to the identity and nationality of the bearer."[67] Passports have always been required of United States citizens traveling during times of war,[68] but were not commonplace in peacetime travel until the middle of the twentieth century.[69]

The first major restriction on peacetime travel overseas came in 1952, when Congress made it illegal to leave or enter the United States without a valid passport.[70] Today, several statutes deal with the acquisition and use of passports.[71]

The passport existed long before it was considered essential. Consequently, it has sometimes been referred to as a privileged grant—one which is discretionary on the part of the government.[72] Of course, the fact that it is discretionary does not answer the deeper question of how that discretion may be exercised.

The Court has supported the categorization of a passport as a privilege by noting that the document itself is the property of the government.[73] This implies that the government maintains some control over the document even in the hands of the traveler. Some of the Court's decisions have stressed this property aspect at the expense of a consideration of the document's practical effects. This focus has allowed the Court to support restrictions on travel *with a passport* while condemning restrictions on the right to travel itself.[74] But the logic of this distinction is questionable in light of the present nature of the passport.

66. 2 B. SCHWARTZ, *supra* note 9, at 775.

67. 22 C.F.R. § 50.1(e) (1982).

68. U.S. DEP'T OF STATE, THE UNITED STATES PASSPORT: PAST, PRESENT, FUTURE 181 (1976).

69. *See* Zemel v. Rusk, 381 U.S. 1, 33 (1964), *reh'g denied*, 382 U.S. 873 (1965). *See also* Z. CHAFEE, *supra* note 60, at 176-93.

70. Act of June 27, 1952, § 215, 8 U.S.C. § 1185 (1976 & Supp. II 1978).

71. *E.g.*, 22 U.S.C. § 211a (1976). *See also* 22 C.F.R. §§ 50-53 (1982).

72. *See* Kent v. Dulles, 357 U.S. 116, 124 (1958).

73. *See, e.g.*, Lynd v. Rusk, 389 F.2d 940, 948 (D.C. Cir. 1967); 22 C.F.R. § 51.9 (1982); III G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 437-39 (1942).

74. *See* Lynd v. Rusk, 389 F.2d at 947; Comment, *supra* note 24, at 469-73.

Before the passport was commonly used in travel, the difference between the right to travel and the right to travel *with a passport* may have had a logical basis. Today, the practical distinctions are minimal.[75] The denial or revocation of a passport is "in effect a prohibition" against travel abroad.[76]

The Court still views the granting of a passport as a discretionary act. But the realization that the exercise of this discretion inexorably affects liberty interests in travel has led the Court to examine this exercise under the rigors of "due process."[77] The Fifth Amendment demands that no one shall be "deprived of life, liberty, or property, without due process of law."[78] The Court has interpreted this clause to mean that liberty interests may not be restricted without (a) a sufficient state interest in the restriction,[79] and (b) safeguards to insure "fair" application of the restriction.[80]

The first significant Supreme Court decision dealing with a passport denial was *Kent v. Dulles*.[81] Kent was associated with Communist organizations. His passport was denied on the strength of a State Department regulation limiting various activities of Communists and those involved in Communist Party campaigns.[82] Kent was given the opportunity to fight the denial at a hearing, but "as a matter of conscience" refused to supply the necessary affidavits concerning his Communist affiliations.[83]

The Court in *Kent* did not reach the issue of the constitutionality of the restrictions. Instead, it held that the Secretary of State's regulations in this case were not supported by a sufficient congressional delegation of authority.[84] Even though the constitutional issues were never reached in *Kent*, its dictum has been relied upon in subsequent analy-

75. "Most countries will admit no one without a passport issued by *some* government; a survey conducted in 1952 revealed that of 37 countries studied, only 5 would admit a traveler without a passport." Mittlebeeler, *Freedom to Travel Abroad*, in CIVIL LIBERTIES: POLICY AND POLICY MAKING 139, 145 (S. Wasby ed. 1976).

76. Aptheker v. Secretary of State, 378 U.S. 500, 507 (1964).

77. *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 125 (1958) (dictum).

78. U.S. CONST. amend. V. This same language is applied to the states in U.S. CONST. amend. XIV, § 1.

79. Substantive due process asks whether *any* restriction is justified. Most laws will meet this test under the present standard. *See, e.g.*, Exxon Corp. v. Governor of Md., 437 U.S. 117, 124-25 (1978).

80. *See, e.g.*, Matthews v. Eldridge, 424 U.S. 319 (1976). Considerations of the Court included "the probable value . . . of additional or substitute safeguards: and . . . the government's interest, including . . . fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.* at 335.

81. 357 U.S. 116 (1958).

82. *Id.* at 117-18.

83. *Id.* at 119.

84. *Id.* at 129.

ses of passport restrictions.[85]

Justice Douglas, speaking for the majority in *Kent*, echoed the views of Professor Zechariah Chafee that freedom of travel "has large social values."[86] Recognition of the importance of world travel led Douglas to declare that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process . . . ."[87] This was the first formal indication that international travel was a protected interest of American citizens.

The practical effect of denial of a passport is to deny access to a foreign forum.[88] Just as Kunz was required to obtain a license before he could gain access to a domestic forum,[89] so the overseas traveler must obtain a passport before she can gain access to a foreign forum. We have seen how the Court has kept a close watch over license requirement procedures used to deny access to domestic forums. Thus, it seems reasonable to expect the Court to be concerned with procedures restricting the issuance of passports, since passports are, in effect, "licenses" to use foreign forums.

The Court in *Kent* invalidated the Secretary's passport denial because of the basis for that denial—the applicant's "refusal to be subjected to inquiry" into his political beliefs and associations.[90] The ruling did not discuss the due process implications of this inquiry, but the majority opinion made clear that denials based on beliefs or associations would be overruled if the opportunity to do so were to arise.[91]

The next major Supreme Court passport decision was *Aptheker v. Secretary of State*.[92] This case also arose out of the Secretary's decision to deny a passport to a Communist Party member. *Aptheker* can be distinguished from *Kent*, however, because the Secretary of State's denial was made pursuant to a congressional delegation of authority.[93] Also, the Secretary's discretion in *Aptheker* was far more limited than it was in *Kent*. In *Aptheker*, he could not grant a passport to any Communist Party member, but he had no authority to deny a passport on other political activity grounds.

85. *E.g.*, Zemel v. Rusk, 381 U.S. 1, 14, *reh'g denied*, 382 U.S. 873 (1965).

86. 357 U.S. at 126-27 (citing Z. CHAFEE, *supra* note 60, at 195-97).

87. *Kent*, 357 U.S. at 125.

88. *See supra* notes 75-76 and accompanying text.

89. *See supra* text accompanying note 43.

90. 357 U.S. at 130.

91. *Id.* at 124-25.

92. 378 U.S. 500 (1963).

93. The Court declared unconstitutional § 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. § 785 (1977). The statute forbade the use of passports by members of registered Communist organizations.

The Court in *Aptheker* agreed that the statute was a clear delegation of power to the Secretary and that it gave him less leeway than did the *Kent* statute. Nevertheless, the Court struck down the statute on the ground that it was unconstitutionally overbroad.[94] Although the government is justified in acting to prevent the adverse effects of international travel by Communists conspiring to do violence against the nation, this statute restricted the right of *all* Communist Party members to travel, and therefore burdened the exercise of rights by those members who lacked the *mens rea* of conspiracy. Thus, the statute in *Aptheker* can be compared to one examined years later in *Cox v. Louisiana*: It "sweeps within its broad scope activities that are constitutionally protected."[95] Because of this flaw, the Court held both statutes unconstitutional.

Third in the line of passport cases is *Zemel v. Rusk*.[96] The applicant in *Zemel* was denied a passport to Cuba. The President and the Secretary of State had declared Cuba a travel-restricted area after the Cuban Missile Crisis of 1962.[97] This was, in effect, a blanket restriction of access, involving no consideration of the applicant himself. The Court upheld the denial and the statute on which it was based.[98]

Zemel argued that his First Amendment rights had been violated—specifically, his alleged right to gather information. But the Court held the restriction valid after determining that it was a control of action (presumably the act of traveling), not a control of speech.[99]

Foreign travel provides important opportunities for access to forums of speech and information gathering. These characteristics make travel a liberty interest which cannot lightly be abridged. The Court in *Zemel* reemphasized the importance of this liberty interest. This does not mean, however, that freedom of international travel is an absolute right. Rather, it may be restricted if the demands of due process are satisfied.

Due process requires consideration of the characteristics of any restrictions on protected interests.[100] The Court found that the procedures by which Zemel was denied his liberty to travel to Cuba were reasonable. Unlike the regulations in *Kent* and *Aptheker*, the statute authorizing the Secretary's actions in *Zemel* did not allow discrimina-

94. 378 U.S. at 512-14. For a discussion of the distinction between vagueness and overbreadth, see Sperber & Solomon, *Preserving the Peace: Vagueness, Overbreadth and Free Speech*, 3 LAW IN TRANSITION Q. 161, 163-66 (1966).

95. 379 U.S. 536, 552 (1965).

96. 381 U.S. 1 (1965).

97. *Id.* at 16.

98. *Id.* at 20.

99. *Id.* at 16.

100. *Id.* at 14.

tion between applicants on the basis of beliefs or associations.[101]

There are many similarities between the analysis used in the three passport cases and that used in the domestic access cases. In *Cox*, the Court declared blanket domestic forum denials permissible if the reasons for denial were sufficient to outweigh any interests of the individual.[102] *Zemel* reaffirmed general approval of blanket forum denials and attached greater weight to the administrator's judgment in the determination of the need for the restriction.[103]

Furthermore, even though the analogy between domestic and foreign forum access is not perfect, at least some of the required elements for valid discretionary domestic forum denials[104] appear in the passport cases as well. *Zemel* emphasized that the denials operated on action and only peripherally restricted speech (domestic element one); all three cases stressed the strong foreign policy and security interests of the government (domestic element two); and *Aptheker* squarely addressed the need for a narrow statute (domestic element three). *Kent* emphasized the need for specific grants of authority in each instance, since the Court "will not readily infer" delegation to the Secretary of "unbridled discretion" to limit constitutionally protected liberty interests (domestic elements four and five).[105]

The applicability of the sixth element of the forum denial doctrine is uncertain in the foreign setting. Domestic element six prohibits prior examination of the content of proposed speech from being used as the basis for discretionary forum access decisions. The passport cases indi-

101. *Id.* at 13. Zemel also argued that the administration was given too much discretion in the determination of "off limits" areas. The standards used to determine the need for blanket controls allegedly were not sufficiently definite. The Court agreed that the applicable guidelines were loosely worded, but held that "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Id.* at 17. This conclusion was based in part on a consideration of the inherent powers of the Executive, *see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), and on the enhanced ability of the Executive to acquire the information necessary for a quick decision. *See Zemel*, 381 U.S. at 17.

The Court in *Zemel* gave great deference to the judgment of the State Department that Cuba was a dangerous area. Indeed, only a cursory examination of the facts preceded the holding that the Secretary's conclusion was justified. *Id.* at 14-15. In view of the attention received by the situation in Cuba, extensive discussion may have been considered unnecessary by the Court. Furthermore, one of the "facts" considered relevant to this holding was the "judgment of the State Department" as to the goals of the Castro regime. *Id.* at 14. It thus seems the Court was reluctant to second-guess the Secretary as to which area quarantines were necessary for the protection of the general public.

102. *See supra* notes 18-20 and accompanying text.

103. The rules for blanket forum denials in the two settings thus seem quite similar. But the factors balanced to reach those rules are not directly comparable. *See supra* notes 52-66 and accompanying text.

104. *See supra* notes 24-30 and accompanying text.

105. 357 U.S. at 129.

cate that denials may not be based on mere beliefs or associations. But in *Aptheker* the Court struck down the statute because it burdened protected forms of speech as well as conspiracy and incitement. This implies that the Court would uphold a sufficiently narrow statute that screened only unprotected future speech. Any such screening decision would have to be based on (a) admissions of intention by the speaker; (b) examination of the speaker's past activities (in order to predict the nature of his speech from his character); or (c) examination of the text of the proposed address itself. However, this screening would be unlikely to pass Court scrutiny, for it is a form of prior restraint based on the expected content of speech, which apparently has been condemned in domestic forum cases.[106]

IV. *Haig v. Agee*

The fourth major passport decision was the recent case of *Haig v. Agee*.[107] Agee sued the Secretary of State for declaratory and injunctive relief from the passport denial. He was granted summary judgment in federal district court on the ground that the Passport Act of 1926,[108] which authorized the President to set rules for the issuance of passports, did not authorize rules for the revocation of passports.[109] This holding was affirmed in the court of appeals.[110] Neither of the lower courts reached the constitutional issues involved in the Supreme Court's decision.

It is important at this stage to mention the issues that were *not* argued before the Supreme Court. Most significant is the factual issue of whether Agee fell within the terms of the regulation. The regulation relied upon by the Secretary called for the refusal of a passport to anyone who was "causing or . . . likely to cause serious damage to the national security or the foreign policy of the United States."[111] Since Agee challenged this statute on its face, he admitted for purposes of summary judgment that he fell within its terms. Agee also conceded that the power to deny a passport implied the power to revoke one.

106. *See supra* notes 32-38 and accompanying text.

107. 453 U.S. 280 (1981). Some facts of this case have been discussed above, *see supra* text accompanying notes 1-8, but other aspects of the case should be noted. While Agee's proposed trip to Iran may have been the immediate cause of the revocation, the stated purpose of Secretary Vance's action was to prevent harm to American interests in all countries. Secretary Vance's successors (Secretaries Muskie and Haig) both refused to reissue the passport. Consequently, Agee's case was not made moot by the return of the hostages from Iran.

108. 22 U.S.C. § 211(a) (1976) (the language has not changed since 1926). *See* Haig v. Agee, 453 U.S. at 290.

109. Agee v. Vance, 483 F. Supp. 729, 732 (D.C. 1980).

110. Agee v. Muskie, 629 F.2d 80, 87 (D.C. Cir. 1980).

111. 22 C.F.R. § 51.70(b)(4) (1982).

Agee attacked the regulation on the grounds that it was vague, overbroad, unduly restrictive of his Fifth Amendment right of travel, and overly burdensome of his freedom to criticize government policies.[112] All of these arguments were rejected by the majority.

Agee's claims of vagueness and overbreadth were dismissed in a footnote of the majority opinion.[113] Agee had conceded that he posed a "serious danger" to the safety or policies of the United States in order to proceed with his motion for summary judgment. The Court held that this concession denied him standing to argue the vagueness or overbreadth of the statute.[114]

The regulation upheld in *Agee* permitted denial or revocation of an individual's passport if he were deemed likely to cause "serious damage" to the "national security" or "foreign policy" of the United States.[115] The Court stated that "the government's interpretation of the terms 'serious damage' and 'national security' shows a proper regard for constitutional rights . . . ."[116] The Court might also have questioned whether another arguably vague term—"foreign policy"—had been adequately interpreted. The State Department may in fact have shown "proper regard for constitutional rights" in its interpretation of these words. But unbridled power to interpret these terms could give the administrator undesirably broad discretion in the issuance of passports. A fair reading of any of the three terms here discussed shows that they could encompass a vast array of circumstances.[117] Agee's argument that the regulation carries with it the power to exercise impermissible discretion does not seem adequately rebutted by a finding that this power has not yet been abused.[118]

112. Haig v. Agee, 453 U.S. at 287. Agee also charged: (1) that Congress had not authorized the regulation; and (2) that failure to provide a prerevocation hearing violated the Due Process Clause of the Fifth Amendment. *See id.*

The Court held that 22 C.F.R. § 51.70(b)(4), which had been invoked by the Secretary, had been authorized by Congress. A full discussion of the Court's analysis of this issue is beyond the scope of this note. It might be mentioned in passing, however, that the Court in *Agee* was much more willing to find a congressional grant of power than was the Court in *Kent. See* Haig v. Agee, 453 U.S. at 312-18 (Brennan, J., dissenting). The due process argument was also rejected.

113. 453 U.S. at 309 n.61.

114. Justice Brennan attacked this holding in his dissent. *Id.* at 320-21 n.10 (Brennan, J., dissenting).

115. 22 C.F.R. § 51.70(b)(4) (1982).

116. 453 U.S. at 309 n.61.

117. "[The] word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." N.Y. Times Co. v. United States (Pentagon Papers), 403 U.S. 713, 719 (1971) (Black, J., concurring). "[T]he term 'national security' has no fixed content . . . ." FREEDOM TO TRAVEL, *supra* note 64, at 59. The authors of the preceding quotation do offer their "understanding" of the term. *Id.*

118. *See* Kunz v. New York, 340 U.S. 290, 295 (1950) (Frankfurter, J., concurring).

The Court also rejected Agee's claim of interference with his right to travel. In discussing this claim, the majority lifted a scale with liberty of travel on one side and national security on the other. The Court concluded that there is no right to international travel merely for the sake of travel comparable to the right of interstate travel. Thus, international travel may be restricted by reasonable measures. If Agee had, in fact, merely asserted the right to travel for its own sake, it would be difficult to contradict the Court's conclusion.[119] But travel is also important as a means of exercising free speech. The Court's conclusion affects this exercise and reflects a new shift in the balance towards the interests of the government.

A passport is, in effect, a license for access to a foreign forum.[120] Recognition of the passport's importance led the Court in *Kent* to require passport revocations to meet with the standards of due process. The majority in *Agee* claimed to accept *Kent*'s due process dictum, but went on to state that "the freedom to travel abroad with a 'letter of introduction' in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation."[121] "Letter of introduction" implies that the applicant must maintain a good character or must otherwise do something to merit receipt of the document. In contrast, the view that a passport is a key to the enjoyment of a liberty interest implies that the holder must do something to merit revocation of the document. In the latter case, the passport holder or applicant has a presumptive right to the document. Scholars agree that the passport serves a limited function as a letter of introduction in certain cases,[122] but its main function is as a voucher of citizenship and identity—not as a voucher of character.[123]

The Court's use of the expression "letter of introduction" reemphasizes the discretionary nature of the document. The majority recognizes the effects of passport denial on travel, but then ignores this factor as though it were irrelevant to its decision. The important governmental interests are weighed against the privilege of obtaining a govern-

119. This topic is beyond the scope of this note. *See supra* note 10.

120. *See supra* notes 72-76 and accompanying text.

121. 453 U.S. at 306.

122. *Cf.* 22 C.F.R. § 51.3 (1982) (special types of passports).

123. Professor Kenneth Culp Davis notes that the theory that issuance of a passport is a privilege may once have been valid. "[P]assports were for more than a century nothing but requests to other governments for safe and free passage for the holders . . . ." This theory "became unreal as the nature of a passport changed." Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 259-60 (1956), *reprinted in* STAFF OF SUBCOMM. ON CONST. RIGHTS OF SENATE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., THE RIGHT TO TRAVEL AND UNITED STATES PASSPORT POLICIES 29, 95-96 (Comm. Print 1958). *See also* 22 C.F.R. § 50.1(e) (1982) (definition of passport).

ment "sponsorship" of travel.[124] Cast in this light, the results of the balancing process are predictable.

Justice Brennan sought to regain the proper balance in his dissent.

> [R]evocation of [Agee's] passport obviously does implicate First Amendment rights by chilling his right to speak, and therefore the Court's responsibility must be to balance that infringement against the asserted governmental interests to determine whether the revocation contravenes the First Amendment.[125]

By failing to consider the implications of revocation on Agee's First Amendment rights, the majority struck a balance without weighing all of the consequences.

By analyzing the nebulous right to travel in a conceptual vacuum, the majority overlooked the effects of travel restrictions on forum access. The majority went so far as to say that the revocation does not inhibit speech because "Agee is as free to criticize the United States Government as he was when he held a passport."[126] Justice Brennan ridicules this statement in his dissent.

> Under the Court's rationale, I would suppose that a 40-year prison sentence imposed upon a person who criticized the Government's food stamp policy would represent only an "inhibition of action." After all, the individual would remain free to criticize the United States Government, albeit from a jail cell.[127]

This flaw in the majority argument, and the separation of the right to travel analysis from the First Amendment analysis suggest that forum denial issues were not seriously considered by the majority.

The Court turned next to a brief exploration of Agee's First Amendment arguments. Its summary treatment of complex issues in this area makes this section of the opinion somewhat confusing. The majority characterized the passport revocation as an inhibition of action "rather" than speech. But, as noted in Justice Brennan's dissent, the revocation was an inhibition of action *as well as* speech. Had the inhibition of Agee's speech been an incidental result of an impartial control of conduct, support of this action might have fit into the mainstream of previous forum denial cases. But inhibition of speech is not an incidental effect of this revocation—it is the underlying goal of the restriction. This factor distinguishes Agee's situation from that in *Zemel* and similar cases.

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124. *See, e.g., Agee*, 453 U.S. at 309. In Skokie v. National Socialist Party, 69 Ill. 2d 605, 373 N.E.2d 21 (1978), the court held that the City of Skokie, Illinois, had to allow parades in which Nazi uniforms were worn. We would not expect to hear that, by issuing a license for such a parade, the city had "sponsored" the event.

125. *Agee*, 453 U.S. at 320 n.10 (Brennan, J., dissenting).

126. 453 U.S. at 309.

127. *Id.* at 320 n.10 (Brennan, J., dissenting).

One other fact distinguishes the *Agee* case from prior cases where discretionary forum denials have occurred. It was the past conduct, character, and expected future conduct of Agee that triggered the revocation. This being so, the revocation constituted a prior restraint on speech.[128]

Under the general doctrine of prior restraint, the government must allow the speech or publication to take place before bringing an action against the speaker. *Near v. Minnesota*,[129] however, provides for exceptions to this rule, and the majority in *Agee* tries to avoid the prior restraints attack by claiming that Agee's speech falls within one of the *Near* exceptions.[130]

In *Near*, the Court held impermissible a prepublication restraint on what was expected to be libelous material. But a statement by the majority suggested that prior restraints would be allowed in certain situations:

> [N]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds . . . [t]he security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.[131]

This troop-safety example has become known as the *Near* exception.

The limits of the *Near* exception were tested by the government in two important cases: *New York Times Co. v. United States* (*Pentagon Papers*),[132] and *United States v. Progressive, Inc.*[133] None of the plurality opinions in the *Pentagon Papers* case commanded more than two votes, and these opinions expressed differing views as to the appropriate standard for application of the *Near* exception.[134] The federal district court in *Progressive, Inc.* adopted the test proposed by Justices White and Marshall and required a showing of "grave, direct, immediate and irreparable harm to the United States."[135]

The majority in *Agee* felt that the *Near* exception, as amended by the *Pentagon Papers-Progressive* test applied. But in *Agee*, there was no real proof of harm. Agee admitted *for purposes of summary judgment* that his conduct would fall within the regulation. "Therefore, until the facts are known, the majority . . . can have [no] idea whether Agee's

128. *See supra* notes 52-55 and accompanying text.

129. 283 U.S. 697 (1931).

130. *Agee*, 453 U.S. at 308.

131. 283 U.S. at 716.

132. 403 U.S. 713 (1971).

133. 467 F. Supp. 990 (W.D. Wis. 1979).

134. *See generally*, Note, *Open Secrets: Protecting the Identity of the CIA's Intelligence Gatherers in a First Amendment Society*, 32 HASTINGS L.J. 1723, 1730 (1981).

135. *Progressive, Inc.*, 467 F. Supp. at 996.

conduct actually would fall within the extreme factual category presented by *Near*."[136] In the *Pentagon Papers* and *Progressive* cases, proof of the eventual harm was provided by examination of the exact material to be released. No such proof was available in *Agee*.

The Court's statement that "[t]he revocation of Agee's passport rests in part on the content of his speech: specifically, his repeated disclosures of intelligence operations and names of intelligence personnel,"[137] is inaccurate. The statement should read: "The revocation of Agee's passport rests in part on the *expected* content of his speech . . . ." This expectation must be deduced by an examination of Agee's past speeches.

The *Agee* decision held that passport revocations may be based on the content of speech. This conclusion by itself is not extraordinary in view of the long-established *Near* exception and the concession by Agee for purposes of summary judgment that he was "likely to cause serious damage" to national security. What is extraordinary about this case is that the Court also allows restrictions based on content when the specific content is not known. In addition, the Court indicates that administrators may form the expectation of content by looking to the past acts and speeches of the speaker. These factors distinguish *Agee* from other cases that have applied the *Near* exception.

V. Applicability of the Domestic Doctrine Abroad

What portions of the domestic forum denial doctrine still apply to foreign forums after *Haig v. Agee*? Since the State Department regulates conduct (travel with a passport), and since it has a valid state interest in regulating this conduct, elements one and two of the seven-step doctrine may be said to apply in the foreign forum arena.[138] Elements three and four call for narrow statutes that clearly describe the situations under which they will apply.[139] These requirements were followed in *Kent* and *Zemel*, and the Court in *Agee* at least purported to follow these principles. But after *Agee*, the standards of narrowness and clarity in the authorizing statute will probably be less stringently applied to passport regulations. Element seven, calling for consistent application of a statute,[140] has not been a major factor in any of the passport decisions.

In part, then, the doctrine expounded in *Cox* is transferable to the foreign forum setting. But *Agee* leaves serious doubts as to the applicability of elements five and six. Element five demands that discretion in

136. 453 U.S. at 321 n.10 (Brennan, J., dissenting).
137. 453 U.S. at 308.
138. *See supra* text accompanying notes 24-25.
139. *See supra* text accompanying notes 26-27.
140. *See supra* text accompanying note 30.

administration of the statute be limited.[141] Element six forbids prior examination of the content of the speech.[142] *Agee* allows restrictions based on content and, as noted above, conflict between this fact and the dictates of the domestic forum denial doctrine cannot adequately be resolved by reference to the *Near* exception.[143] Furthermore, the Court will allow the Secretary of State to *infer* the content of speech from the past speech and conduct of the applicant, at least when the applicant admits that the intended speech will have the forbidden harmful effects. This implies that a potentially vast reservoir of discretionary power has been provided for the administrator. If so, a significant gulf has been opened between the rules for foreign and domestic forum access.

VI. Alternative Holdings

Critique of a case requires inquiry into the alternatives not chosen by the court. This section will examine various alternative holdings in a case such as *Agee*. At all times, certain policy goals should be kept in mind: (1) All viable alternatives should result in the least possible interference with access to a forum for free speech; (2) no alternative should cripple the government's ability to respond to a crisis situation; and (3) potential for administrative abuse of any rule should be minimized.

One problem with the *Agee* decision is the majority's failure to establish guidelines for the Secretary's exercise of discretion. The case allows him great flexibility in determining which speech should be subjected to prior restraint. Prior restraint can be a damaging tool in the hands of an overbearing administrator. Administrative action may result in only minor delay in forum access (at least where there is a possibility of prompt appeal), but at times even a short delay may be all that is needed to thwart the effectiveness of the speaker.[144] And often the mere presence of a restraining power will deter the full use of the right to free speech.[145] One option available to the Court would have been to uphold the Secretary's exercise of discretion in this case, while imposing strictures on later exercises of power.

The dissent in *Agee* argued that the *Near* exception was inapplicable because the Secretary was required to guess at both the content and the consequences of future speech. One of the reasons Agee's speech was expected to cause harm was the fact that he had special knowledge

141. *See supra* text accompanying note 28.

142. *See supra* text accompanying note 29.

143. *See supra* notes 135-36 and accompanying text.

144. *See* Emerson, *supra* note 34, at 657; Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773, 1787 (1967).

145. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51, 59 (1965).

of classified information—information presumed to be harmful if released generally. The Court could have limited the Secretary's discretion while upholding his actions by setting out a "CIA exception." In the majority of cases, travelers abroad will not have knowledge of confidential information. Nor will they have information that would meet the *Pentagon Papers-Progressive* standard for the imposition of a prior restraint. This standard calls for proof of grave, direct, immediate, and irreparable harm.[146] We have already seen how disclosures by CIA or former CIA agents might be presumptively harmful. The Court might allow a presumption of the content of the speech to arise upon proof that the speaker had previously violated the terms of his contract with the CIA.

It might be argued that these "CIA exception" presumptions would impose unconstitutional burdens on the First Amendment rights of CIA agents. Such an exception might also be challenged on equal protection grounds, since it would apply only to agents and former agents. But similar arguments have been rejected in recent cases.[147] CIA agents must sign an agreement with the government before they obtain their positions. This agreement prohibits agents and former agents from revealing "any classified information, or any information concerning intelligence or CIA that has not been made public by CIA . . . without the express written consent of the Director."[148] Courts have enforced this agreement in various contexts[149] and have developed the doctrine of "contractual prior restraints."[150] Therefore, precedent seems to exist in support of a CIA exception to passport revocations based on past conduct and future expectations.

The holding in *Agee* permits the State Department to invoke prior restraints in exceptional situations. This power is potentially harmful to the interests of the individual, because most systems of prior restraint "contain within themselves forces which drive irresistably toward unintelligent, overzealous, and usually absurd administration."[151] The fact that the administrator determines the existence of an exceptional situation only amplifies the dangers inherent in this system.

In *Freedman v. Maryland*,[152] the Court discussed the need for quick judicial review in censorship cases.[153] The reasons for this con-

146. United States v. Progressive, Inc., 467 F. Supp. 990, 996 (W.D. Wis. 1979).

147. *See, e.g.*, Snepp v. United States, 444 U.S. 507 (1980) (per curiam); United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

148. Snepp v. United States, 444 U.S. at 508 & n.1.

149. *See, e.g., id.* (damages for government after release of nonclassified information); United States v. Marchetti, 466 F.2d at 1309 (prior review of classified information).

150. *See generally* Note, *supra* note 134.

151. Emerson, *supra* note 34, at 658.

152. 380 U.S. 51 (1965).

153. *Id.* at 59.

clusion are the same as those that lead to a conclusion that postrevocation hearings in forum access cases may be meaningless. The majority in *Agee* held that due process does not require a prerevocation hearing in passport cases. But an alternative safeguard of individual rights was not discussed. In urgent situations, an ex parte proceeding (similar to the procedures used to obtain a search warrant) might be beneficial. Such a proceeding would allow a *judge* to determine the need for prior restraint, while protecting the governmental interest in the ability to react swiftly to perceived national security threats. Although the proceeding would not reduce the impact of a prior restraint upon those whose passports were indeed revoked, it would limit application of this restriction to those who, in the eyes of an impartial observer, present a probable danger to the nation.

The use of an ex parte proceeding would greatly reduce the potential for administrative abuse of the power to restrict passports. An exception, such as the CIA exception proposed above, would narrow the initial bases for administrative discretion. Neither alternative would change the result in *Agee*-type situations. Neither alternative was considered by the Court.

VII. Implications of *Haig v. Agee*

While the seven requirements of the domestic forum denial doctrine were generally adhered to in *Rusk* and *Zemel*, the *Agee* decision indicates an end to the applicability of those requirements in the foreign setting. The doctrine, as set out in *Cox*, represents the culmination of a slow, careful balancing between the rights of the individual and the interests of the government. *Zemel* and *Rusk* showed the same concern for balance while taking into account differences in particular interests. *Agee* dealt with a unique person involved in extraordinary circumstances. The fact that the Court did not find a way to limit its holding to these facts may signal a new trend—one that is likely to offer much less protection to those wishing to travel abroad in order to speak.

The Secretary's actions in *Agee* would not have met with Court approval had they involved denial of access to a domestic forum. In fact, the holding supporting the revocation regulation is in some ways a break with the spirit of previous foreign forum denial cases. More specifically, *Agee* grants the administrator of "licenses" for foreign forums extensive discretion to determine when, and to whom, restrictions on issuance of these licenses will apply.

The regulation upheld in *Agee* provides for denial whenever the applicant is causing or is likely to cause "serious damage to the national security or foreign policy of the United States." The implications of allowing the Secretary to determine the likelihood of damage

have already been discussed.[154] Possibly more significant, however, is the danger of a loose interpretation of "serious damage to foreign policy."

Brennan's dissent in *Agee* quotes from the transcript of oral argument. This portion of the dissent is particularly relevant to a discussion of the *Agee* implications.

> QUESTION: General McCree, supposing a person right now were to apply for a passport to go to Salvador, and when asked the purpose of his journey, to say, to denounce the United States policy in Salvador in supporting the junta. And the Secretary of State says, I just will not issue a passport for that purpose. Do you think he can consistently do that in the light of our previous cases?
>
> [SOLICITOR GENERAL] McCREE: I would say, yes he can. Because we have to vest these—The President of the United States and the Secretary of State working under him are charged with conducting the foreign policy of the Nation, and the freedom of speech that we enjoy domestically may be different from that that we can exercise in this context.[155]

Brennan concludes that the extent of the Secretary's power of discretion is "potentially staggering."[156]

Could the Salvador hypothetical come true? Certainly the Secretary of State would have to consider the political ramifications of such action before making his decision. But it seems that *Agee* would at least provide him with a legal basis for a decision not to issue the passport. Criticism presupposes displeasure with the state of affairs on the part of at least one citizen. Widespread dissension could hamper the world-wide reputation and subsequent effectiveness of foreign policy leaders. These possibilities might indeed be termed a "serious danger to . . . foreign policy." The hypothetical would be consistent with a modest reading of the State Department's regulation. Since the admissions of the intentions of the speaker give the Secretary an expectation as to the nature of the speech, denial in this case apparently would also be consistent with *Agee*'s application of the *Near* exception.

Conclusion

In many of the forum denial cases, both domestic and foreign, the applicants for access represented unpopular and arguably dangerous points of view. Yet the Court looked beyond the facts of each case and framed its holdings with an eye toward future repercussions. Its primary concern was not to sustain an administrative judgment at all

154. *See supra* text accompanying note 151.

155. *Agee*, 453 U.S. at 319 n.9 (Brennan, J., dissenting).

156. *Id.*

costs, but rather to apply the facts to a doctrine in a way that would balance impartially the interests involved. It is unfortunate that the Court has abandoned this tradition with *Agee*. The narrowness with which the majority examined the issues caused it to overlook serious implications of the holding on the future of foreign travel. It is unfortunate that the Court took this approach where alternatives were available which could have supported the Secretary's action while guarding against future abuses of discretion.

The Court was faced with unique facts. It did not choose to distinguish the case from precedent on the basis of these facts, however. Having with one stroke of the pen destroyed many of the protections previously thought available to passport applicants, the Court erased even more protections by refusing to establish any formal limits on the discretion of the Secretary of State.

Many would argue that the Secretary of State should have the power to curb criticism abroad. It may be true that unbridled criticism lessens his effectiveness in the conduct of foreign policy. Justice Goldberg said, in a different context: "If the exercise of . . . rights will thwart the effectiveness of a system . . . , then there is something very wrong with that system."[157] Free exercise of the right to speak might not be compatible with the smooth operation of our system of conducting foreign policy. In the wake of *Agee*, the courts will be forced to decide which of these interests is more important to the health of the nation.

157. Escobedo v. Illinois, 378 U.S. 478, 490 (1964).