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Renee L. Bowser

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New Tension Between the Right to Travel Abroad and National Security Interests: The Passport Case, *Haig v. Agee*

The Supreme Court's decision in *Haig v. Agee*¹ marks a major expansion of the government's power to restrict a citizen's² international travel in the interest of foreign policy and national security. The government's tool of control is the passport. In its most technical terms, *Haig v. Agee* is a case of statutory construction. The majority purported to rely upon general rules of statutory construction and the two major Court precedents in the area of passport regulation to determine whether Congress had authorized the President, acting through the Secretary of State, to deny or revoke a citizen's passport based upon the character and activities of that citizen. *Haig v. Agee*, however, makes more far-reaching pronouncements and carries greater implications for those citizens whose activities abroad are not merely pleasure trips, but embrace politics. The Court restructures the passport's modern functions by reestablishing it as a primarily political document. Moreover, the Court declares a policy of limited justiciability of controversies involving the constitutional rights of citizens abroad and their right to travel abroad when those controversies involve matters relating to the nation's security and foreign policy. Finally, the Court indicates the degree of scrutiny with which it will examine particular executive action impacting on foreign policy when a citizen claims that such actions encroached upon his constitutional rights.

In *Haig v. Agee* the Supreme Court examined whether Congress, by enacting the Passport Act of 1926, had delegated power to the Secretary of State to promulgate section 51.70(b)(4) and section 51.71(a) of the passport regulations.³ These 1966 regulations contain provisions permitting the Secretary to deny an individual a passport or revoke one previously issued him based upon the Secretary's determination that the individual's activities abroad have been or will become a substantial danger to United States foreign policy and national security. The

1. 453 U.S. 280 (1981).

2. The State Department's passport authority extends to United States citizens and to nationals, residents of United States possessions, because these persons are subject to the territorial jurisdiction of the United States. See 22 U.S.C. § 212 (1976); *Woodward v. Rogers*, 344 F. Supp. 974, 984 (D.D.C. 1972).

3. 22 C.F.R. § 51.70(b)(4) (1981) provides: "[a] passport may be refused in any case in which: The Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." 22 C.F.R. § 51.71(a) (1981) states: "[a] passport may be revoked, restricted or limited where: The national would not be entitled to issuance of a new passport under § 51.70."

Secretary revoked Philip Agee's passport pursuant to these regulations. The Supreme Court stated, "We hold that the *policy* announced in the challenged regulations is 'sufficiently substantial and consistent' to compel the conclusion that Congress has approved it."⁴ The Court went on to hold that none of Agee's asserted constitutional rights were violated by the Secretary's revocation of his passport.

Factual Background and History

Philip Agee was a former agent for the Central Intelligence Agency (CIA). During his eleven year employment that ended in November, 1968, Agee worked for an intelligence gathering division and was trained in clandestine operations.⁵ Through his assignments he learned about undercover operations and cooperating organizations in various foreign countries and of the identities of employees and outside persons who cooperated in the agency's activities. Though Agee resigned, many of the operations in which he participated are still active, and many persons he knew continue to cooperate with the CIA.⁶

In 1974 Agee announced a campaign to thwart the CIA wherever the organization was operating.⁷ To this end, Agee wrote books and articles about CIA activities, identified CIA personnel and front operations in various countries, and worked with likeminded persons in several countries to systematically expose the CIA in those areas.⁸ Prior to the present case, Agee experienced difficulties with the CIA because he violated his secrecy agreement by publishing writings and speeches about the agency without preclearance.⁹

In December, 1979 the State Department revoked Agee's passport on the authority of the 1966 regulations without affording him a prerevocation hearing. The letter announced that the Secretary acted after de-

4. 453 U.S. at 307 (emphasis added).

5. *Id.* at 283.

6. *Id.*

7. *Id.*

8. *Id.* n.3 & text accompanying. For a more complete discussion, see Comment, *The CIA Responds to Its Black Sheep: Censorship and Passport Revocation—The Cases of Philip Agee*, 13 CONN. L. REV. 317, 320-26 (1981).

Agee authored three books examining CIA activities: *INSIDE THE COMPANY: CIA DIARY* (1975), *DIRTY WORK: THE CIA IN WESTERN EUROPE* (1978), and *DIRTY WORK II: THE CIA IN AFRICA* (1980). The latter two books contained articles by various CIA critics. Agee worked with Louis Wolf in preparing *DIRTY WORK: THE CIA IN WESTERN EUROPE*. Agee was also associated with a magazine critical of the CIA. Agee's and co-editor Wolfe's practice of publicizing names of covert CIA operatives brought forth the greatest furor from the agency and Agee's critics. These critics charged that the public disclosures have caused serious harm and even death to several operatives. Many of the names of CIA operatives were gathered from publicly available nonclassified State Department records.

9. *Agee v. CIA*, 500 F. Supp. 506 (D.D.C. 1980). The district court issued an order requiring Agee's full future compliance with his secrecy agreement, which required his preclearing with the CIA any information or material relating to the agency he seeks to have published. *Id.* at 509.

termining that Agee's activities in countries to which he had traveled "have caused serious damage to the national security and foreign policy of the United States,"¹⁰ and his "stated intention to continue such activities threatens additional damage of the same kind."¹¹ Bypassing any attempt to seek administrative relief, Agee immediately filed suit in federal district court¹² seeking declaratory and injunctive relief against then Secretary of State Vance and moved for summary judgment on the issue of the Secretary's authority to act pursuant to the challenged regulations. For purposes of the motion, Agee's attorney conceded that Agee's activities had been or were likely to be detrimental to national security.

The district court held that the Secretary had promulgated the regulations without congressional authority.¹³ The court reasoned that recent amendments¹⁴ to passport legislation which circumscribed the Executive's authority to impose area restrictions and decriminalized violations of existing restrictions undermined the government's argument that Congress by its silence had delegated additional expansive authority under the Act.¹⁵ The District of Columbia Circuit Court¹⁶ affirmed the lower court ruling that the regulations had been promulgated "without the requisite express or implied authorization of Congress,"¹⁷ cautioning that "the criterion for establishing congressional assent by inaction is the actual imposition of sanctions and not the mere assertion of power."¹⁸ The Supreme Court granted certiorari and stayed the order to restore Agee's passport.¹⁹

The Court's Analysis: Executive Power Over Foreign Affairs

Chief Justice Burger began his analysis with the language of the Passport Act of 1926.²⁰ The Act provides no particular grounds for regulating the issuance of passports, nor does it expressly authorize the

10. 453 U.S. at 286.

11. *Id.*

12. *Agee v. Vance*, 483 F. Supp. 729 (D.D.C. 1980).

13. *Id.* at 732.

14. See Comment, *supra* note 8, at 378. In response to President Carter's abolition of area restrictions to all countries in March, 1977, the Senate Foreign Relations Committee stated the "freedom-of-travel principle is sufficiently important that it should be a matter of law and not dependent upon a particular Administration's policy." *Report of the Committee on Foreign Relations United States Senate Foreign Relations Authorization Act Fiscal Year 1979*, S. Rep. No. 95-482, 95 Cong., 2d Sess. 14 (1978).

15. 483 F. Supp. at 732.

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

17. *Id.* at 87.

18. *Id.*

19. 449 U.S. 818 (1980).

20. 22 U.S.C. § 211a (1976 & Supp. II 1978). The Passport Act provides in pertinent part:

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States

Secretary to revoke a passport in the interest of national security. The Court stated that particular criteria for issuing, refusing to issue, or revoking, passports could be identified notwithstanding the absence of express statutory directives outlining such criteria. The Court began to list reasons approved by earlier Court decisions for specific types of passport control.²¹ The Court, however, suspended its examination of the kinds of particular controls previously authorized to discuss the role of the Executive in national security and foreign policy matters, and the Court's role in reviewing this area of executive conduct. The Court concluded that in the realm of foreign policy and national security, Congress did not intend to scrutinize the particularities of the Executive's activity because of the highly complex and changing problems involved in international relations.²² Reasoning that only the Executive can be intimately aware of volatile foreign policy and national defense conditions, the Court limited itself to superficial scrutiny of the matters it deemed largely political. The Court, as shall be discussed, regarded passport regulation as primarily a part of the political regulation of foreign affairs. It therefore would find special merit in the executive branch's interpretation of the Passport Act.²³

Next the Court analyzed the function of the passport in international relations. The Chief Justice repeatedly emphasized the political character of the passport in foreign affairs. He first described it as "a political document, by which the bearer is recognized . . . as an American citizen,"²⁴ then as a document by which the government "vouches for the bearer and for his conduct."²⁵ Later, the Chief Justice approved the revocation of a holder's passport as a means by which the government may prevent "exploit[ation of] the sponsorship of his travels by the United States."²⁶ The Court relegated to a footnote the fact that the passport now controls a citizen's lawful departure for travel beyond the western hemisphere and subsequent reentry, even in non-emergency peacetime.

. . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other persons shall grant, issue, or verify such passports.

21. 453 U.S. at 290-91. The Court noted *Kent v. Dulles*, 357 U.S. 116 (1958) approval of withholding passports where there was a question regarding the applicant's citizenship or allegiance or regarding the applicant's alleged unlawful conduct in foreign nations; the Court also noted *Zemel v. Rusk*'s, 381 U.S. 1 (1965) approval of withholding a passport where the applicant sought to travel to a restricted area.

22. 453 U.S. at 291.

23. *Id.*

24. *Id.* at 292 (quoting *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835)).

25. *Id.* at 293.

26. *Id.* at 309.

Implied Delegation of Congressional Power

Having established the passport as a political document for regulating the citizen's international travel, the Court offered a history of Executive control over passport use in light of the government's concern with foreign policy and national security concerns. In assessing the Secretary's power over passport issuance throughout history, the Court accorded as much weight to the Executive's assertion of power in this area as it did to the *practice* of restricting passports on various foreign policy and national security grounds. As examples of refusals based on foreign policy and national security, the Court cited refusals to persons who sought to travel abroad without bond while subject to military service, to persons who promoted gambling and immoral houses while abroad, and to a citizen who slandered foreign diplomats while abroad.²⁷

The Court reasoned that existing executive policy regarding passport regulation had been implicitly approved by Congress when it enacted the Passport Act of 1926. The executive had professed absolute discretion over passport issuance (and revocation) as early as 1790.²⁸ It continued to foster this position after Congress centralized passport issuance in the Secretary of State in 1856.²⁹ The Court found that Congress neither disavowed prior executive policy nor denounced any of the Secretary's refusals of revocations at the time it passed the 1926 Act.³⁰ It therefore held that Congress' passage of the Passport Act meant implicit delegation of lawmaking power to the executive consistent with that branch's interpretation of that power.³¹ Because it gleaned no change in the Secretary's passport policies after the enactment of the 1926 Act, the Court reasoned that all regulations promulgated by the Secretary from the passage of the 1926 Act through the 1952³² and 1956³³ regulations carried the congressional approval incor-

27. Gambling abroad is an example of conduct which would be illegal if conducted in the United States. See *infra* note 33.

28. 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 194 (1967).

29. 453 U.S. at 294.

30. The majority cites *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969) for the proposition that administrative construction of a statute should be followed, particularly when Congress had not altered administrative construction. *Red Lion* presented a situation in which Congress expressly approved the administrative interpretation of the statute in question at the time it enacted amendments to the statute.

31. Here the Court cited *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In *Lorillard*, the Court had to decide whether a statute accorded a right to a jury trial. The Court held that a right to a jury trial existed because an earlier statute, on which the new statute's enforcement procedures were based, accorded the right to jury trial based upon longstanding judicial interpretation. After successful litigants obtained judicial decisions approving jury trials under the earlier statute, one can presume that the litigants proceeded with their jury trials. Therefore there existed an established practice of jury trials in addition to the judicial interpretation of the statute.

32. 22 C.F.R. § 51.135 (1952) (the first regulation expressly directing passport denials for conduct prejudicial to foreign relations).

porated in the 1926 Act. The Court included passport refusals to persons whose travels were not in the "best interests of the United States" as part of the history of the Secretary's foreign policy and national security refusals.³⁴ Because the 1966 regulations "closely parallel[ed] the 1956 regulations,"³⁵ the Court inferred that they too carried congressional authorization. The Court further noted that Congress failed to repudiate the Secretary's asserted authority over passport control when it again legislated in the passport field twelve years following the promulgation of the 1966 regulations.³⁶ Accordingly, the Court found the position for encompassing passport control power strengthened.

The Court then rejected Agee's contention that the Secretary's consistent assertion of power alone was insufficient proof that Congress had implicitly authorized the Secretary's actions pursuant to his announced policy. In doing so, the Court distinguished earlier Supreme Court decisions on delegation under the Passport Act of 1926. These decisions found a delegation of Congress lawmaking power only after detecting a longstanding, consistent practice of passport refusals and revocations.

The Court, however, could find very few instances in which the Secretary refused or revoked passports for reasons of foreign policy or national security under the provisions in the 1952, 1956, and 1966

33. 22 C.F.R. § 51.136 (1965). This regulation was revoked in 1966. *Agee*, 453 U.S. at 299; *Lynd v. Rusk*, 389 F.2d 940, 943 (D.C. Cir. 1967). Subsection '(a)' of this regulation, which permitted refusals of passports to persons whose activities abroad would "violate the laws of the United States," was the "most frequently invoked subsection" of the regulation. 8 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 266 (1967).

34. Note, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 *YALE L.J.* 171 (1952). The Note lists five major cases of passport denials on best interests grounds. One, the denial of a passport to a radiation physics and biochemistry expert in 1947, could not be said to have been based on premise of protecting the nation's security in that there was no fear that the scientist might disclose secret information, and the Atomic Energy Commission had no objection to the scientist's leaving the country. In 1944 the scientist had lunched with the Soviet vice consul in a public restaurant. In 1948 a United States Congressman was denied a passport to attend a conference because it was to be attended by an organization that aided Greek rebels. The government had allowed actual members of the American Council for Aid to Democratic Greece to attend the conference. The Congressman was to be merely an observer for that organization. In 1950 Paul Robeson's passport was revoked because the State Department disapproved of the political thoughts and opinions he expressed abroad. In 1950 a scientist and his wife had their passports invalidated. The scientist had partially supported the Lysenko theory of genetics. The State Department also refused or revoked passports of leftists, including Communists, on best interest grounds. For a short list of additional passport refusals on best interests grounds, see Parker, *The Right to Go Abroad: To Have and To Hold a Passport*, 40 *VA. L. REV.* 853 (1954).

35. 453 U.S. at 299.

36. Act of Oct. 7, 1978, § 707, Pub. L. No. 95-426, 92 Stat. 992, 993 (amending 8 U.S.C. § 1185 (1976)), § 215 of the Immigration and Nationality Act of 1952), made passports necessary during all periods for travel outside western hemisphere. Act of Oct. 7, 1978, § 124, Pub. L. No. 95-426, 92 Stat. 971 (amending 22 U.S.C. § 211a (1976)) eliminated area restrictions except with respect to countries with which United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or physical safety of United States travellers.

regulations.³⁷ The Court therefore ruled that the standard previously applied by the Supreme Court was not the exclusive means by which to determine the legality of the regulations under attack. Instead of requiring a pattern of actual practice of passport denials based on a specific reason the Court accepted the Secretary's longstanding assertion of absolute discretion over passport issuance as sufficient proof that the regulations under attack were drafted pursuant to power delegated under the 1926 Act.

Upon finding congressional authorization for the Secretary of State's revocation of Agee's passport, the Court summarily dismissed Agee's attacks on the constitutionality of the regulations. In the Court's view, the government's "obvious and unarguable"³⁸ compelling interest in the security of the nation was sufficient to defeat Agee's right to international travel, which was "no more than an aspect of the 'liberty' "³⁹ to be "regulated within the bounds of due process."⁴⁰ The Court found it unnecessary to balance the particular need for the control against the degree of encroachment upon the asserted constitutional right in question.⁴¹

Next, the Court disposed of Agee's first amendment claim on the authority of *Near v. Minnesota*.⁴² The Court ruled that Agee's speech, admittedly designed to expose and obstruct CIA operations, was not protected by the Constitution. After an additional brief examination, the Court determined that Agee's first amendment claim was only academic, because revocation of Agee's passport inhibited not speech, but action. Finally the Court held that the urgency of protecting the compelling interest of national security from possible effects of Agee's activities justified the revocation of Agee's passport prior to a hearing.

37. 453 U.S. at 301-02. In *Agee v. Muskie*, 629 F.2d 80, (D.C. Cir. 1980) the Court noted, the Secretary details only one instance in twelve years in which 22 C.F.R. § 51.70(b)(4) was employed to revoke a passport [the 170 revocation of Charles McKissack's passport], and only five refusals to passport applications, two prior to the passage of the Passport Act of 1926 and three during the mid-1950's, which were even arguably for national security or foreign policy reasons.

629 F.2d at 86 & nn.6 & 7.

38. 453 U.S. at 307 (quoting *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978)).

39. *Id.*

40. *Id.*

41. In order to determine whether the liberty of the right to travel internationally was restricted in accordance with due process the Supreme Court in *Zemel v. Rusk*, 381 U.S. 1, 14 (1965) held that "the extent of the governmental restriction imposed" on the right and "the extent of the necessity for the restriction" must both be examined. See also *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964) which prescribed a closer relationship between means used by Congress to accomplish its objective and its objective of safeguarding national security where constitutional liberty was involved; Recent Developments, *Constitutional Law: Authority of Secretary of State to Revoke Passports—Agee v. Muskie*, 22 HARV. INT'L L. J. 187, 194 (1981).

42. 283 U.S. 697 (1931).

Therefore the Secretary's action did not violate Agee's due process rights.

The Dissenting Opinion

The dissent reached only the suit's statutory interpretation grounds. Justice Brennan, joined by Justice Marshall, considered the issue readily resolvable by following the Court's prior passport rulings, which had identified the standard for determining what particular authority to deny a passport Congress had delegated to the executive branch under the Passport Act of 1926. In contrast to the majority's approach, Justice Brennan began his analysis by recognizing that the major effect of passport control on the individual citizen is its impact on his right to travel abroad—an "important personal right embodied within the 'liberty' guaranteed by the fifth amendment."⁴³ Because an individual's constitutional rights were affected, Brennan recalled the cautioning policy of *Kent v. Dulles*:⁴⁴ delegations to the executive branch of Congress' lawmaking functions that curtail liberty must be construed narrowly.⁴⁵

To determine whether there had been such delegation in the absence of express authorization, Justice Brennan adhered to the authority of *Kent v. Dulles* and *Zemel v. Rusk*.⁴⁶ Justice Brennan quoted extensively from both opinions to rebut the majority's reliance upon the Executive's own interpretation of its authority under the 1926 Act. In his view, *Kent* and *Zemel* required evidence of a longstanding and consistent practice. Citing *Kent* Justice Brennan found "the key to [the] problem [in] the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion."⁴⁷ Because passport revocation implicates "sensitive constitutional questions,"⁴⁸ Brennan objected to reliance upon mere administrative interpretation as weak proof of congressional approval of executive authority under the 1926 Act.⁴⁹

43. 453 U.S. at 312 (Brennan, J., dissenting).

44. 357 U.S. 116 (1958).

45. 357 U.S. at 129.

46. 381 U.S. 1 (1965).

47. 453 U.S. at 315 (Brennan, J., dissenting) (quoting *Kent v. Dulles*, 357 U.S. at 124-25) (emphasis added by J. Brennan).

48. "[I]t must be made clear that . . . Congress . . . specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . . . [Otherwise] decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene v. McElroy*, 360 U.S. 474, 507 (1959) (The Court rejected the contention that acquiescence or implied ratification was sufficient to show delegation of either Presidential or congressional authority to the Defense Department to create a security clearance program which permitted the Department to terminate a contractor's security clearance without affording him due process of law).

49. Justice Brennan said that a pattern of actual denials in a specific category of cases would make Congress aware of the Secretary's actions. In *Udall v. Tallman*, 380 U.S. 1 (1965), cited by both the majority and dissent, the Court quotes the following passage:

It may be argued that while these facts and rulings prove a usage they do not establish its

The dissent attacked "the paucity of recorded administrative practice . . . with respect to passport denials or revocations based on foreign policy or national security considerations relating to an individual."⁵⁰ It found that the few occasions on which the Secretary refused or revoked a passport because of such considerations provided scant practice and failed to rebut the "presumption against an implied delegation"⁵¹ of lawmaking power in "an area fraught with important Constitutional rights."⁵² Thus, the dissent found the regulations under which Agee's passport was revoked invalid because they had been promulgated without authority of the Passport Act.⁵³

The Court's Rationale

Haig v. Agee will be examined with respect to the policies it advances, the premises which underlie those policies, and the relevance of its cited authority in support of its major premises.

The two Supreme Court precedents examining disputes under the Passport Act of 1926 are *Kent v. Dulles*⁵⁴ and *Zemel v. Rusk*.⁵⁵ In *Kent v. Dulles*, Kent challenged the Secretary of State's refusal to grant him a passport on the basis of section 51.135 of the passport regulations. These regulations prohibited issuance of passports to Communists and those who further the Communist movement. The Passport Act did not expressly deny passports to Communists. Nor had the Secretary engaged in a consistent pattern of denying passports on the ground of Communist affiliation by the time Congress passed the Passport Act. The Court therefore refused to infer implicit authorization for the restriction.

In *Zemel* the Court examined the Secretary's refusal to issue passports for travel to Cuba. The Court approved the substantial and consistent practice test for determining Congress' implicit delegation of power to the Secretary under the Act, and found a substantial and con-

validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

Id. at 17 (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915)).

50. 453 U.S. at 317-18 (Brennan J., dissenting).

51. *Id.* at 2788.

52. *Id.*

53. *Id.* Justice Brennan did not reach Agee's constitutional claims because he held the regulations invalid. In a footnote Justice Brennan stated that the majority's treatment of Agee's claims was an "extreme oversimplification of constitutional doctrine or [was based upon] mistaken views of the law and facts of this case." 453 U.S. at 320.

54. 357 U.S. 116 (1958).

55. 381 U.S. 1 (1965).

sistent practice of refusing passports for travel to specific areas and countries, during war and peacetime, both before and after the passage of the Act. Upon these findings, the Court upheld the Secretary's refusal to issue passports for travel to Cuba as the sort of refusal implicitly approved by Congress.

The *Agee* Court incorporated collateral aspects of *Kent* and *Zemel* into its analysis while ignoring their method of analysis and the underlying reasoning that supported it. The Court first limited the *Kent* test to a consistent practice test⁵⁶ ignoring that the test, as reaffirmed in *Zemel*, stressed that the practice regarding a particular restriction must be both consistent and substantial before the Court would find it authorized by Congress. Then *Agee* summarized *Kent* as a case narrowly construing Congress' delegated power when the subject matter of the passport regulation involved beliefs and speech.⁵⁷ The Court contrasted *Agee* as a case concerned primarily with the regulation of action. The Court principally relied upon *Zemel* for the proposition that earlier Court decisions had approved considerations of weighty national security objectives in restricting passport use in foreign countries.⁵⁸ The Court failed to acknowledge, however, that *Zemel* brought forth these considerations only after determining that the Secretary possessed the questioned authority.⁵⁹ After finding such power, the Court discussed national security problems regarding Cuba as evidence of the need for travel restrictions regarding that area.

Expansion of Traditional Doctrines

In *Haig v. Agee* the Court was principally concerned with the government's freedom to operate in foreign policy matters. The Court supported the government's contention that the Secretary of State's action impacted almost exclusively upon foreign policy and national security concerns. Using *United States v. Curtiss-Wright Export Corp.*⁶⁰ as its principal authority, the Court espoused limited judicial inquiry of executive actions regarding such matters. In *Curtiss-Wright*, the Court rejected a claim that an express congressional delegation of power to the President was unconstitutional. The Court also distinguished the executive's power over purely foreign or external affairs from its power over internal affairs, and concluded that congressional authorization was unnecessary in the foreign affairs arena. According to the *Curtiss-Wright* Court, the "vast external realm" involved executive actions of

56. 453 U.S. at 303.

57. *Id.* at 304.

58. *Id.* at 290-91.

59. 381 U.S. 1, 14-15 (1965).

60. 299 U.S. 304 (1936).

waging war, concluding peace, negotiating treaties, and maintaining diplomatic relations with other sovereignties.⁶¹ The Court affirmed expansive executive discretion over these matters. The Court noted however, that such deference to executive action would be inappropriate were only domestic affairs involved. Moreover the Court recognized that the nation's citizens are protected by the Constitution's guarantees even in foreign territories.⁶² Contrary to suggestions in *Agee*, *Curtiss-Wright* did not authorize unbridled executive discretion. After making a specific delegation of power to the President to prohibit American citizens and companies from selling guns to particular countries engaged in conflict, Congress expressly allowed the President to use his discretion to determine when circumstances warranted his exercising the delegated power.

The Court's premise regarding the Executive's discretionary authority in foreign affairs was inapposite to a discussion of the facts and issues raised in *Agee*. The Court repeatedly cited *Curtiss-Wright* to emphasize the Executive's independent foreign affairs role while having acknowledged at the outset of its opinion that authority for the challenged regulations must be drawn from an act of Congress. In fact the government defended the Secretary's action of invoking the regulations on the theory that it was authorized by the Passport Act of 1926, not upon any assertion of independent executive power.⁶³ Thus Congress' intention in passing the Act must be examined in light of all aspects of passport regulation, not merely the foreign policy aspects.

Insisting upon limiting passport regulation to its foreign policy effects, the Court adhered to its view that it possessed limited competence to review the Secretary's action. As further support for its view of judicial incompetence in foreign policy matters, the Court cited *Chicago & Southern Air Lines v. Waterman S.S. Corp.*⁶⁴ and *Harisiades v. Shaughnessy*.⁶⁵ In *Waterman* the President acted pursuant to his independent constitutional powers and in his role as the nation's organ for foreign affairs.⁶⁶ He used these powers in sharing with the Civil Aeronautics Board the responsibility for granting and denying certificates to citizen air carriers for foreign commercial air transportation. The President coordinated foreign air travel with his national defense plans. No con-

61. *Id.* at 319.

62. *Id.* at 318. "[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 5 (1957) (Court held nonmilitary personnel accompanying military outside limits of continental United States had right to trial in civilian courts under civilian laws and procedures, including the Bill of Rights).

63. 453 U.S. at 289 n.17.

64. 333 U.S. 103 (1948).

65. 342 U.S. 580 (1952).

66. 333 U.S. at 111.

stitutional guarantees of the nation's citizens were involved.⁶⁷ The decision was a political one. Similarly, *Harisiades* presented what was continued to be recognized as primarily a political question. *Harisiades* involved the deportation of aliens. The Court held that because policies regulating the activities of aliens implicate the war powers, foreign relations, and the republican form of government, they are largely non-justiciable.⁶⁸

The Court attempted to bring passport regulation within the sphere of the political question doctrine. One strand of this doctrine—exemplified in *Waterman*—emphasizes the judiciary's inability to competently review certain issues because of the inaccessibility of the information upon which the relevant determinations are based.⁶⁹ Such a situation can arise when the President makes foreign policy decisions in his capacity as commander-in-chief and as organ of the nation's foreign affairs. To the degree that passport regulation affects important constitutional rights of individuals, such regulation is not totally within the realm of foreign affairs. It is therefore pertinent that "[t]he Court will not usually apply the political question doctrine to the constitutional guarantees of individual rights."⁷⁰ Furthermore, "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation."⁷¹ As noted earlier, *Curtiss-Wright* expressed the continued relevance of the Constitution to all affairs dealing with the nation's citizens while affirming wide discretion and freedom from statutory restrictions in foreign affairs.⁷² Passport regulation implicates both the constitutional rights of citizens and foreign policy matters. It therefore should warrant closer judicial scrutiny than accorded by the *Agee* majority.

In *Agee* the Supreme Court applied the doctrine of executive independence in foreign affairs to areas not originally encompassed by pure foreign affairs. The Court never attempted to provide definitions for "national security" and "foreign policy," the phrases used in the challenged regulations.⁷³ The Court indicated its expansive characteriza-

67. *Id.* at 108.

68. 342 U.S. at 588-89. Though the Court has been sensitive to the equal protection claims of aliens, it has not accorded them the full constitutional protection of citizens, particularly when faced with Congress' plenary power over aliens. *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

69. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 473-74 (9th ed. 1975).

70. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517 (1966).

71. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

72. 299 U.S. at 318.

73. For definitions of the terms foreign policy and national security, see Note, *Passport Revocations or Denials on the Ground of National Security and Foreign Policy*, 49 *FORDHAM L. REV.* 1178, 1181 n.20, 1181-82 n.21 (1981).

tion of these terms, however, by the examples of passport refusals and revocations that it held to be related to foreign policy and national security. The enumerated passport refusals and revocations were based upon a variety of grounds, which included denial to those who supplied arms to groups with interests contrary to those of the United States and to those who sought to travel to the site of an international hijacking. The Chief Justice held that foreign policy and national security considerations "cannot neatly be compartmentalized."⁷⁴ Legislative history confirms that the State Department grouped statistics on refusals and revocations of passports without regard to the diverse reasons on which the refusals were based. The State Department considered all of these actions foreign policy and national security related. In 1956 the statistics on denials and revocations regarding participants in political affairs abroad whose activities were deemed harmful to good relations were grouped with refusals and revocations regarding persons whose previous conduct abroad would bring discredit on the United States and cause difficulty for other Americans (gave bad checks, left unpaid debts, had difficulty with police, etc.).⁷⁵ The following year the Department listed this category as illegal activities or activities prejudicial to the orderly conduct of foreign relations.⁷⁶ The Court found the diverse refusals and revocations grouped under the above headings to be persuasive evidence of prior passport regulation based on criteria substantially similar to that found in the challenged 1966 regulations.

It is relevant to consider whether the Court in prior passport cases allowed the Secretary's expression of broad foreign policy objectives⁷⁷ to eliminate the need to determine whether Congress had delegated power to carry out the particular challenged activity. In *Kent v. Dulles*

74. 453 U.S. at 307.

75. Statistics covering the work of the Passport Office from Jan. 1 to Dec. 31, 1956 in *The Right to Travel: Hearing Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary United States Senate*, 85th Cong., 1st Sess. 128-29 (1957) [hereinafter cited as *The Right to Travel*]. The number of refusals in 1956 in the combined category was ten. In 1955 these categories were separate. There were six refusals to participants in political affairs abroad whose activities were deemed harmful to good relations and fifteen refusals to persons whose previous conduct abroad had been such as to bring discredit on the United States and cause difficulty for other Americans. *Id.* at 127-28. The Passport Office maintained a separate category for refusals to Communists. *Id.* at 128-29.

76. *Passport Legislation: Hearings Before the Committees on Foreign Relations United States Senate*, 85th Cong., 2d Sess. 30, 40 (1958) [hereinafter cited as *Passport Legislation 1958 Senate Hearings*]. The statistics indicated sixty-one refusals in this category.

77. See Statement of Fifield Workmun, Special Committee on Passport Procedures, Association of the Bar of New York City in *Passport Legislation 1958 Senate Hearings*, *supra* note 76, at 117-18. Mr. Workmun called the policy of refusing passports for conduct prejudicial to the orderly conduct of foreign relations or otherwise prejudicial to United States interest "nebulous criteria." See also *United States v. United States District Ct.*, 407 U.S. 297, 314 (1972). "The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'"

the Court found two categories for which it could identify a pattern of refusals by the Secretary, unlawful conduct abroad and lack of citizenship or allegiance to the United States.⁷⁸ The Court then concluded:

We, therefore hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.⁷⁹

Only after examining whether there existed a sufficiently substantial and consistent administrative practice "with regard to the *sort* of passport refusal involved"⁸⁰ did *Zemel v. Rusk* conclude that area restrictions were authorized by Congress. Consistent with its previous emphasis upon examining specific executive conduct in foreign policy and national security matters under the Passport Act of 1926, the Court in *Aptheker v. Secretary of State*⁸¹ focused upon the specific means by which Congress sought to fulfill its national security objectives under section six of the Subversive Activities Control Act. The Court found the absolute denial of passports to Communists unconstitutional because such means were not properly "tailored to the constitutional liberties of the individual."⁸² Even prior restrictions of a citizen's rights to a passport based upon the need to safeguard national security during war and the pendency of national emergencies require a balancing of the exigencies of war against the citizen's constitutional rights.⁸³ In light of these precedents, *Agee* seems to give unprecedented deference to general national security and foreign policy concerns.

The Passport and the Right to Travel Abroad

Supporting its contention that foreign policy and national security matters predominate in *Agee*, and that therefore the Secretary of State's actions warranted only superficial review, was the Court's premise that a passport remains largely a political document issued at the discretion of the Secretary. Yet each of the previous cases in which the Supreme Court examined the passport's modern function had concluded that its major function was control over a citizen's lawful departure from the United States to areas beyond the western hemisphere. Therefore, issuance could not depend upon unconstrained executive discretion. In

78. See *supra* note 21.

79. 357 U.S. 116, 128 (1958).

80. *Zemel v. Rusk*, 381 U.S. 1, 12 (1965) (emphasis added).

81. 378 U.S. 500 (1964).

82. *Id.* at 514. Section 6 of the Subversive Activities Control Act, 50 U.S.C. § 785 (1976), required any Communist related organization to register with the Subversive Activities Control Board, and made it unlawful for members of such organizations to obtain a passport for foreign travel.

83. *The Right to Travel*, *supra* note 75, at 174; *Kent*, 357 U.S. at 129.

1958, in *Kent v. Dulles*, the Court stated, "the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection. . . . But that function of the passport is subordinate. Its crucial function today is control over exit."⁸⁴ The next decade, in *Zemel v. Rusk*, the Court, in upholding the Secretary's imposition of area restrictions on travel to Cuba, "proceed[ed] on the assumption that the Secretary's refusal to validate a passport for a given area acts as a deterrent to travel to that area."⁸⁵ Today, passport regulation is even more extensive. In 1978, Congress imposed the requirement that all citizens and nationals who travel outside the United States carry passports even during non-emergency peacetime.⁸⁶ Thus even though *Agee* sought to minimize the significance of the right to travel internationally, the constitutional underpinnings of passport regulation remain significant in light of Congress' extension of the passport requirement.

Both *Kent* and *Zemel* declared the right to travel abroad a personal right included within a citizen's liberty protected by the due process clause of the fifth amendment. As such, if certain circumstances require restrictions on this right such restrictions can be imposed only in accordance with the requirements of due process.⁸⁷ Thus when the Secretary exercises control over passport issuance, he exercises control over the enjoyment of a constitutional right.

The involvement of an important constitutional right in regulation of a citizen's passport was the basis of the *Kent* Court's hesitancy to accept the existence of unbridled executive discretion in this area. In *Zemel* the Court said the Passport Act of 1926 did not grant the Executive "totally unrestricted freedom of choice" even though it deals with foreign relations, but "authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.'"⁸⁸ Reversing this policy, *Agee* rein-

84. 357 U.S. at 129.

85. 381 U.S. 1, 13-14 (1965). See *United States v. Laub*, 385 U.S. 475 (1967).

86. See *supra* note 36. For a discussion of early passport history, see Note, *The Right to Travel and the Loyalty Oath*, 12 COLUM. J. TRANSNAT'L L. 387; M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 196 (1967). Generally before 1941, Congress had conditioned lawful exit upon possession of a passport only during wars (War of 1812 and W.W. I if the President issued a proclamation requiring restrictions). During the Civil War, President Lincoln required passports for citizens' departures and entries. In 1941 Congress amended the Act of May 22, 1918 to permit the President to restrict travel without a passport when the United States was at war or when the President declared a national emergency. The Immigration and Nationality Act passed in 1952, made the passport a requirement for travel abroad during the course of a national emergency proclaimed by the President. From 1952 to 1978 a state of national emergency existed. Except for the restrictions imposed by President Lincoln during the Civil War, the above restrictions were express delegations of power to restrict international travel through passport regulation.

87. *Zemel*, 381 U.S. at 14.

88. 381 U.S. at 17-18. See Statement by Honorable Robert D. Murphy, Deputy Under Secretary of State in *Passport Legislation 1958 Senate Hearings*, *supra* note 76, at 22-23 in which he asserted existing discretionary powers of the Secretary to withhold passports from persons whose

stated the notion of plenary executive discretion over passport issuance. The considerations discussed above rebut a major premise of the *Agee* Court—that the Secretary's action was merely a political act included in his overall dealings in the politics of foreign policy. Until *Agee* the Supreme Court had addressed the problems of passport regulation sensitive to the earlier expression of Judge Fahy:

We must not confuse the problem of appellant's application for a passport with the conduct of foreign affairs in the political sense, which is entirely removed from judicial competence. For even though his application might be said to come within the scope of foreign affairs in a broad sense, it is also within the scope of the due process clause, which is concerned with the liberty of the individual free of arbitrary administrative restraint. There must be some reconciliation of these interests where only the right of a particular individual to travel is involved and not a question of foreign affairs on a political level.⁸⁹

The *Agee* Court gave little attention to these important concerns.

Chief Justice Burger relied on *Califano v. Aznavorian*⁹⁰ to minimize the importance of the right to travel internationally. Before *Aznavorian* the Court had assigned similar constitutional significance to the right to travel internationally and the right to travel interstate. *Kent* examined both rights as aspects of the freedom of movement, and noted the importance of international travel to the livelihoods and socialization of the nation's citizens.⁹¹ Then in *Zemel*, the Court analogized the restrictions on travel to Cuba to the constitutionally allowable restrictions on the right to travel interstate.⁹² But *Aznavorian* halted the parallel development of these rights. As part of the liberty protected by the Constitution, the freedom to travel internationally is regulated within the bounds of due process. This, said the Court, established the "critical difference"⁹³ between that right and the right of interstate travel which is "virtually unqualified."⁹⁴ The statute in *Aznavorian* only incidentally burdened the citizen's right to travel internationally. Therefore after finding a rational basis for the statute, the Court held it valid. In contrast to the incidental effect occasioned by the withdrawal of Social Security Insurance benefits when the citizen remained outside the United States for an extended period, passport revocation directly and immediately extinguishes the citizen's right to go abroad.⁹⁵ *Agee* not

activities or presence abroad would impair the conduct of United States foreign relations or be inimical to the security of the nation. He also recognized the Court's restrictive interpretation of those powers.

89. *Shachtman v. Dulles*, 225 F.2d 938, 944 (D.C. Cir. 1955).

90. 439 U.S. 170 (1978).

91. 357 U.S. 116, 125-27 (1958).

92. 381 U.S. at 15-16 (1965).

93. 439 U.S. at 176.

94. *Id.*

95. The Court distinguished *Aznavorian* from *Kent*, *Aptheker*, and *Zemel*. The Court held

only ignored the distinction between direct and indirect impact, but failed to use any standard to examine the constitutionality of the Secretary's actions in this case. The Court sanctioned unspecified measures to protect the secrecy of the government's foreign intelligence operations.⁹⁶ As a result *Agee* widened the disparity between international and interstate freedom of movement.

Congressional Awareness of State Department Policy

Finally it is important to examine the claim of congressional acquiescence in the Secretary's assertion of complete discretion over passport regulation. Legislative history does not support this claim. Through hearings and correspondence with the State Department, Congress sought statistics on the Secretary's practice with regard to passport refusals and revocations for the 1940's and the 1950's and criticized the Secretary's failure to provide full information.⁹⁷ Although Congress agreed with the Secretary on the need to protect the nation's security, it exhibited concern over the Secretary's means for achieving his objective.⁹⁸ In addition, hearings indicate that the State Department sought legislation to make the Secretary's determination to deny or revoke a passport final if the resume on an applicant established *prima facie* support for the denial.⁹⁹ This action was criticized by members of Congress. Congress continued to hold hearings in the 1960's to examine administrative control over the citizen through passport regulation.¹⁰⁰ Thus, legislative history demonstrates that Congress has not fully as-

that the statutory provision under attack in *Aznavorian* "d[id] not have nearly so direct an impact on the freedom to travel internationally" as did the provisions and regulations in the above cited cases. 439 U.S. at 177.

96. 453 U.S. at 307.

97. *The Right to Travel*, *supra* note 75, at 127 (Senate Committee on Foreign Relations requested statistics on passport denials since 1941, and that they be broken down into categories reflecting typical reasons given to applicants for denial of passports. The State Department did not have statistics back as far as 1941 as requested.) *Passport Legislation 1958 Senate Hearings*, *supra* note 76, at 40 (Deputy Under-Secretary of State Murphy said the Department was unable to comply with the request for the number of passport denials and revocations for the ten year period of 1948-1958.)

98. *Passport Legislation Hearings Before the Committee on Foreign Relations United States Senate*, 86 Cong., 1st Sess. 1 (1959) (Chairman Fullbright speaking of congressional concern about the executive branch's interference with freedom of citizens to travel abroad.) *Passport Legislation 1958 Senate Hearings*, *supra* note 76, at 31 (Senator Fullbright questioning the State Department's means of protecting the nation's security.) *The Right to Travel*, *supra* note 75, at 124 (Correspondence to Secretary John Foster Dulles from Thomas Hennings, Chairman of Constitutional Rights Subcommittee, indicating that policy questions remained unanswered concerning State Department's constitutional authority to issue passports, and that grave constitutional doubts existed about the Department's procedures employed in handling passport applications.)

99. *Passport Legislation Hearings Before the Committee on Foreign Relations United States Senate*, 86 Cong., 1st Sess. 1 (1959).

100. See *House Committee on Foreign Affairs, Subcommittee on State Department Organization and Foreign Operations, Passports and the Right to Travel: A Study of Administrative Control of the Citizen*, 89 Cong., 2d Sess. (1966).

sented to the executive's activities restricting the issuance and revocation of passports.

Conclusion

Haig v. Agee endorsed a policy of deferentially examining the means by which the government attempts to accomplish its objectives when its goals are related to foreign policy and national security. In *Agee* the Court fostered this policy by allowing the Secretary of State more freedom to act than had prior Court decisions. In addition the Court expanded the province of foreign relations and truly made it a vast encompassing realm. Important to formulating this policy was Agee's de-emphasis of Court precedent that delegations of Congress' lawmaking powers must be construed narrowly when important constitutional rights are involved. The Court viewed the freedom to travel internationally as a right of limited constitutional importance. It therefore deferred consideration of the right until after it determined that Congress had delegated power to the Secretary to promulgate the 1966 regulations, rather than considering the right as a factor in making the delegation determination. After finding delegation the Court ignored the precedent for balancing the individual's constitutional rights against the need for and the extent of the governmental restriction on such rights. In sum, the Court allowed unproven foreign policy and national security concerns to justify the Secretary's revocation of Philip Agee's passport.

The Court's position in *Agee* is consistent with the posture it has taken in two recent cases in which the government's conduct in matters of national security/defense and foreign policy touch on the constitutional rights of citizens.¹⁰¹ Precedent regarding these contending concerns, however, confirms the Court's ability to scrutinize the specific means used by the Executive and to balance the necessity for the par-

101. See also *Rostker v. Goldberg*, 453 U.S. 57 (1981). In *Goldberg* the Court considered whether the Military Selective Service Act violated the equal protection component of the due process clause of the fifth amendment by requiring males but not females to register for possible military service. The Court found "[t]he operation of a healthy deference to legislative and executive judgments in the area of military affairs . . . evident in several [of its] recent decisions. . . ." *Id.* at 66.

See also *Snepp v. United States*, 444 U.S. 507 (1980). In *Snepp* the Court imposed a constructive trust on the proceeds from a book published by a former CIA agent who failed to comply with the secrecy agreement mandating preclearance by the CIA. The Court said violation of the secrecy agreement irreparably harmed the United States government (on the basis of testimony by Admiral Turner, Director of the CIA), and impaired the CIA's ability to perform its statutory duties even though none of the information in the book was classified.

ticular administrative action against the extent of the encroachment on protected liberties without sacrificing the protection of the nation.¹⁰²

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102. See *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd mem.*, 449 U.S. 979 (1981). This case examined when the constitutional rights of privacy and first amendment may be overborne by the Executive in order to protect the security of the entire nation. The court said "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which make defense of the Nation worthwhile." *Id.* at 1199 (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967)). See also *United States v. United States District Court*, 407 U.S. 297, 314-15, 320 (1972). The Court mandated a balancing of the government's need to protect the domestic aspects of national security against the potential danger to individual privacy and free expression. The Court declined to exempt the Executive from the warrant requirement in domestic security surveillance matters because the vagueness of the domestic security concept, the ongoing nature of surveillance, and the risks that surveillance poses to political dissent may combine to threaten constitutionally protected privacy of speech.

