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## Passport Revocation: A Critical Analysis of Haig v. Agee and the Policy Test

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# Passport Revocation: A Critical Analysis of Haig v. Agee and the Policy Test

Joy Beane

## **Abstract**

Part I of this Note will discuss briefly the history of the Passport Act and of travel control statutes with an emphasis on the changing nature and purpose of passports. That section will also review a significant case, decided in 1955 in which the power of the Secretary to deny a passport was challenged. Part II will examine the rationale underlying the *Kent v. Dulles* decision. Finally, Part III will focus on the Supreme Court's treatment of the issues presented in *Haig v. Agee* and will explore the effects of the Court's decision on first and fifth amendment rights.

PASSPORT REVOCATION:  
A CRITICAL ANALYSIS OF  
HAIG V. AGEE AND THE POLICY TEST

INTRODUCTION

In 1978 Section 215 of the Immigration and Nationality Act (INA) was amended to make it unlawful for an American to depart from or enter the United States without a valid passport.<sup>1</sup> Prior to the adoption of that amendment, passports were required only during times of war or national emergency and even then, only when the President proclaimed that travel restrictions were necessary.<sup>2</sup> Because such a proclamation had been in effect continuously since 1952,<sup>3</sup> the 1978 amendment worked no real change in a United States citizen's need for a passport. The amendment is significant, however, in that it marks the first occasion in this country's history that passports have been required during peacetime without the trigger-mechanism of a Presidential proclamation.<sup>4</sup>

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1. 8 U.S.C. § 1185(b) (Supp. III 1979). Section 215(b) states "[e]xcept as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." *Id.* A citizen of the United States may not be denied entry nor face criminal penalties for entry into the country for failure to carry a valid passport. *See Worthy v. United States*, 328 F.2d 386, 394 (5th Cir. 1964). Section 215(c) of the Immigration and Nationality Act (INA) had imposed criminal sanctions for failure to carry a valid passport. 8 U.S.C. § 1185(c) (1976). These were eliminated when the INA was amended in 1978. *See Foreign Relations Authorization Act, Fiscal Year 1979*, Pub. L. No. 95-426, § 707(d), 92 Stat. 992-93 (codified at 8 U.S.C. § 1185 (Supp. III 1979)). Currently, a citizen does not need a passport to travel between parts of the United States as defined in 22 C.F.R. § 50.1 (1981) or between the United States and adjacent countries (except Cuba). 22 C.F.R. § 53.2(a)-(b) (1981).

2. *See* Immigration and Nationality Act (INA) § 215(a)-(b), 8 U.S.C. § 1185(a)-(b) (1976). That version of Section 215(a) of the INA, in effect from 1952 to 1978, provided that the President could proclaim that travel restrictions were necessary when the nation was at war or during the existence of a national emergency. Section 215(b) provided that when such a proclamation was in force, it would be unlawful for citizens to depart from or enter the United States without a valid passport. Satisfaction of the conditions set out in Section 215(a), that is, the existence of war or national emergency and a presidential proclamation imposing travel restrictions, triggered the operation of the passport requirement. When the nation was not at war, *two* presidential proclamations were necessary to invoke Section 215(b) of the INA; before a proclamation imposing travel restrictions could be effective, there had to be a proclamation of the existence of a national emergency. *Id.* *See* notes 33 & 34 *infra* and accompanying text.

3. *See* note 34 *infra* and accompanying text.

4. *See* notes 25, 30 & 32 *infra* and accompanying text.

The Passport Act of 1926<sup>5</sup> (Passport Act) vests authority to issue passports in the Secretary of State in accord with rules prescribed by the President.<sup>6</sup> While the Passport Act does not expressly grant authority to either the Secretary or the President to refuse to issue or to revoke a passport, its broad language has been construed as giving the Secretary wide discretion in matters relating to passports.<sup>7</sup> The Secretary himself has consistently interpreted the statute to include the power to deny and revoke passports.<sup>8</sup>

The Secretary's power to revoke passports was recently challenged in *Haig v. Agee*.<sup>9</sup> The Supreme Court held that the Passport Act authorizes the Secretary to revoke passports on the grounds that the holder's activities are causing or are likely to cause serious damage to the national security or foreign policy of the United States.<sup>10</sup> The Court's decision altered the test for interpreting the

5. 22 U.S.C. §§ 211a-218 (1976 & Supp. III 1979).

6. *Id.* § 211a (Supp. III 1979). Section 211a states, "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports." *Id.* In Executive Order No. 11,295, 3 C.F.R. 138 (1966 Compilation), the President delegated to the Secretary of State the power to designate rules governing the granting, issuing and verifying of passports.

7. See *Perkins v. Elg*, 307 U.S. 325, 349-50 (1939); *Shachtman v. Dulles*, 225 F.2d 938, 940 (D.C. Cir. 1955); *Boudin v. Dulles*, 136 F. Supp. 218, 220 (D.D.C. 1955); *Bauer v. Acheson*, 106 F. Supp. 445, 449 (D.D.C. 1952); 3 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* § 264, at 467-70 (1942). The courts have recognized that the Secretary's discretion is subject to due process and equal protection requirements. See *Bauer v. Acheson*, 106 F. Supp. at 451. See also *Shachtman v. Dulles*, 225 F.2d at 944; notes 44 & 46 *infra* and accompanying text.

8. See *Kent v. Dulles*, 357 U.S. 116, 124-25 (1958); *Bauer v. Acheson*, 106 F. Supp. 445, 448-49 (D.D.C. 1952); 23 Op. Att'y Gen. 509, 511 (1901); 3 G. HACKWORTH, *supra* note 7, § 268; 3 J. MOORE, *A DIGEST OF INTERNATIONAL LAW*, § 512, at 920-23 (1906). The Secretary has consistently promulgated rules which reflect his belief that he has the power to deny or revoke a passport. See 22 C.F.R. § 53.8 (1949 Compilation) (reservation of discretion to refuse to issue passports for purpose of restricting travel to certain countries); 22 C.F.R. §§ 51.135, 51.136 (1957-1966) (refusal to issue passports to Communists and certain persons whose activities abroad would be prejudicial to the interests of the United States); 22 C.F.R. §§ 51.70-.71 (1980) lists the following six grounds upon which the Secretary may at his discretion deny or revoke a passport: where the applicant has not repaid a loan received from the United States to effectuate his return from a foreign country; where the applicant has been declared legally incompetent; where the applicant is under the age of 18; where the applicant's activities abroad are likely to cause serious damage to the national security or the foreign policy of the United States; where the applicant's passport has been revoked and there has been no change in circumstances to warrant issuance of a new passport; and where the applicant is subject to a restraining order of the United States Armed Forces.

9. 101 S. Ct. 2766 (1981).

10. *Id.* at 2783.

Secretary's powers under the Passport Act which it had previously established in *Kent v. Dulles*.<sup>11</sup>

Part I of this Note will discuss briefly the history of the Passport Act and of travel control statutes with an emphasis on the changing nature and purpose of passports. That section will also review a significant case, decided in 1955 in which the power of the Secretary to deny a passport was challenged. Part II will examine the rationale underlying the *Kent v. Dulles* decision. Finally, Part III will focus on the Supreme Court's treatment of the issues presented in *Haig v. Agee* and will explore the effects of the Court's decision on first and fifth amendment rights.

## I. PASSPORTS AND THEIR REGULATION PRIOR TO KENT V. DULLES

### A. History of Passports 1856-1978

Traditionally, a passport has been defined as:

A document of identity and nationality issued to persons owing allegiance to the United States and intending to travel or sojourn in foreign countries. It indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular offices abroad and requests on the part of the government of the United States that officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection. It has no other purpose.<sup>12</sup>

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11. 357 U.S. 116 (1958).

12. 3 G. HACKWORTH, *supra* note 7, § 259, at 435. See 3 J. MOORE, *supra* note 8, at § 492; Ehrlich, *Passports*, 19 STAN. L. REV. 129, 129-30 (1966). See also *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835) (characterizing a passport as a political document). It has been thought, too, that the United States government would more readily assist its own citizens abroad if they held passports. See 3 G. HACKWORTH, *supra*, § 264, at 470; 3 J. MOORE, *supra*, § 492, at 859; but see Ehrlich, *supra*, at 120-30.

The United States defines a passport as a "travel document . . . [which attests] to the identity and nationality of the bearer." 22 C.F.R. § 51.1 (e) (1981). A United States passport will be issued only to a national of the United States, 22 C.F.R. § 51.2 (1981), and only upon proof of the applicant's nationality, 22 C.F.R. § 51.41 (1981). The applicant has the burden of proving that he is a national of the United States. 22 C.F.R. § 51.40 (1981). A copy of a birth certificate or certificate of naturalization or citizenship supplies sufficient evidence of nationality to meet that burden of proof. 22 C.F.R. § 51.44 (1981). Although citizens retain physical possession of passports, a United States passport remains the property of the United States government at all times. 22 C.F.R. § 51.9 (1981).

With the advent of travel control statutes requiring nationals to obtain passports for travel outside the United States, however, a passport has begun to serve another purpose; by identifying the holder it has become a means of controlling exit from *this* country.<sup>13</sup> An understanding of the erosion of the distinction historically drawn between control over passports and control over travel<sup>14</sup> is thus a prerequisite to understanding the implications of the *Agee* decision.

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13. See *Lynd v. Rusk*, 389 F.2d 940, 947 (D.C. Cir. 1967). In *Lynd*, the court noted that historically the role of a passport was to identify the bearer as a United States national entitled to the protection of American diplomatic officers abroad and to request foreign governments to offer the bearer aid and protection. However, the court determined that the primary function of a passport under Section 215 of the INA was "as an exit permit." *Id.* See INA § 215(a)-(b), 8 U.S.C. § 1185(a)-(b) (1976). When a passport is characterized as an exit permit, the power to withhold a passport from a citizen is equivalent to the power to deny him exit for travel abroad. For a brief discussion of the *Lynd* court's response to this problem, see note 14 *infra*.

14. See *Lynd v. Rusk*, 389 F.2d 940, 947 (D.C. Cir. 1967); See also *Proposed Travel Controls: Hearings on S3243 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 89th Cong. 2d Sess. 56 (May 17, 18, 19, 1966) (remarks of Rep. Sourwine) (hereinafter cited as *1966 Hearings on S3243*). Representative Sourwine noted that passport regulation did not become travel control until a passport was made a prerequisite of travel abroad.

In *Lynd v. Rusk*, the court examined the question whether and to what extent the Secretary of State could enforce compliance with area restrictions on foreign travel. 389 F.2d at 942. At the time, the Secretary had determined that travel to China, Cuba, North Korea, North Vietnam and Syria would be inimical to the nation's foreign relations. *Id.* Lynd's passport was tentatively withdrawn upon his return from North Vietnam; after an administrative hearing, final withdrawal was recommended because, although he promised not to take a passport into a restricted area, Lynd refused to assure the Secretary that he would not travel to restricted areas *without* a passport. *Id.* at 942-43. Stating that, although the Secretary had the power to control the lawful travel of a passport, he did not have authority to control the travel of the person, the court held that the Secretary could not withhold Lynd's passport because he failed to give assurances that he would not travel to restricted areas without one. 389 F.2d at 947-49.

The case is important because it curtailed the Secretary's powers to *restrict travel* by means of area restrictions. Cf. *Zemel v. Rusk*, 381 U.S. 1 (1965) (Passport Act authorizes the Secretary to *restrict the validity of United States passports* for travel to designated areas). In 1978, the Passport Act was amended by adding to Section 211a the sentence, "[U]nless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers." 22 U.S.C. § 211a (Supp. III 1979), codifying the Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 94-426, 92 Stat. 971 (1978).

## 1. Control Over Passports

Prior to 1856 responsibility for issuing passports did not rest in any single branch of government.<sup>15</sup> In addition to officers of the federal government, state governors and other local authorities routinely issued passports.<sup>16</sup> The Act of August 18, 1856,<sup>17</sup> the predecessor of the Passport Act of 1926, appears to have been enacted primarily to end the practice of local issuance of passports.<sup>18</sup> In language similar to that later adopted in the Passport Act of 1926, it consolidated passport issuance in the Executive branch of the federal government.<sup>19</sup>

Before Congress passed the first travel control statute in 1918, a passport had been infrequently used as a means of controlling travel.<sup>20</sup> Prior to 1918, a passport served primarily as an embodi-

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15. See 3 J. MOORE, *supra* note 8, § 493, at 862; Special Committee to Study Passport Procedures of the Ass'n of the Bar of the City of New York, *Freedom to Travel* 5 (1958) (hereinafter cited as *Freedom to Travel*).

16. 3 J. MOORE, *supra* note 8, § 493, at 862; *Freedom to Travel*, *supra* note 15, at 5-6. The State Department itself was somewhat lax in asserting its authority in this area prior to 1856. The Department often delegated the authority to issue passports, permitting collectors of customs and others to issue passports in their discretion. 3 J. MOORE, *supra* note 8, § 493, at 862.

17. Ch. 127, 11 Stat. 52 (1856).

18. *Id.* § 23, 11 Stat. 60-61 (1856). The act vested authority to issue passports in the Secretary of State and made it a misdemeanor for anyone else to issue them. *Id.* The legislative history of the act is scanty. It is worth noting, however, that prior to the passage of the 1856 Act, foreign governments had begun to refuse to recognize locally issued passports. See 3 J. MOORE, *supra* note 8, § 493, at 863; *Freedom to Travel*, *supra* note 15, at 6. Also, prior to 1856, the Department of State recognized the desirability of establishing a uniform practice of passport issuance. See 3 J. MOORE, *supra* note 8 § 493, at 863.

19. See 11 Stat. 60 (1856). The Act of 1856 reads, "[t]he Secretary of State shall be authorized to grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States . . ." *Id.* Compare the language of the Act of 1856 with that of Section 211a of the Passport Act set out at note 6 *supra*. The Act was revised in 1874 to read "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate for and on behalf of the United States." Rev. Stat. § 4075 (1875). Thus "shall" was changed to "may" in the 1874 codification of federal law. See *id.* There appears to be no legislative history of this change. See *Haig v. Agee*, 101 S. Ct. 2766 at 2775 n.26. Apparently this is one of the inaccuracies for which the 1874 statutory revision is notorious. See Dwan & Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008 at 1012 (1938). The Passport Act of 1926 adopted the language of the 1874 revision. See note 6 *supra*.

20. During the War of 1812, Congress required citizens traveling to enemy territory to carry passports. Act of February 4, 1815, ch. 31, § 10, 3 Stat. 199 (1815). During the Civil War, the Department of State issued a regulation which required persons going abroad to carry passports. The regulation, issued on August 19, 1861, read:

ment of a request to foreign powers to offer aid and protection to the holder and as proof of the identity of the holder as a citizen of the United States.<sup>21</sup> Thus, the primary concerns of the State Department in issuing passports at that time were the citizenship of the applicant and his allegiance to the United States.<sup>22</sup> Indeed, one of the reasons for consolidating the issuance in the Executive branch was to prevent non-citizens from obtaining passports. This practice had lessened the reliability of United States passports.<sup>23</sup> Passage of the first travel control statute, and other statutes requiring a passport for travel outside the United States, have, however, facilitated the use of a passport as a means of controlling travel.<sup>24</sup>

## 2. Control Over Travel

During the United States involvement in the First World War, Congress passed the first travel control statute, the Act of May 22,

[u]ntil further notice, no person will be allowed to go abroad from a part of the United States without a passport either from this Department or countersigned by the Secretary of State; nor will any person be allowed to land in the United States without a passport from a minister or consul of the United States, or, if a foreigner, from his government, countersigned by such minister or consul.

Freedom to Travel, *supra* note 15 at 8. For a discussion of war-time regulations of travel preceding World War I, see 3 J. MOORE, *supra* note 8, § 532 at 1015-21.

21. For a discussion of the passport as an identity document containing a request to foreign governments to let the traveler pass safely through their territories, see note 12 *supra* and accompanying text. Prior to World War I, few Americans bothered to obtain a passport since they were free to leave the United States without one and few foreign countries required entering aliens to exhibit them. Ehrlich, *supra* note 12, at 129.

22. See 3 J. MOORE, *supra* note 8, §§ 495, 512.

23. See 3 J. MOORE, *supra* note 8, § 495, at 869. Explaining the Department of State's decision to end the practice of American consuls giving passports to non-citizens as they had done in the case of Italian refugees after the fall of the government of Mazzini, Secretary of State Everett said in 1852 that "[t]he value of the passport to those entitled to it would soon sink if it were understood that in cases of emergency it could be obtained by those who are not entitled to it." *Id.* at 870. Secretary Everett also noted that he was concerned about the credibility of the government if he were to issue a passport containing the words "citizen of the United States" to one he knew was not a citizen. *Id.*

24. See Freedom to Travel, *supra* note 15, at 20. See also Ehrlich, *supra* note 12; Rauh & Pollitt, *Restrictions on the Right to Travel*, 13 W. RES. L. REV. 128 (1961). Rauh and Pollitt maintain that since World War II the United States has used the passport to further a two-pronged project to restrict the right to travel abroad. They argue that one prong is aimed at those individuals whose political persuasions are deemed suspect by the State Department; the other prong denies travel facilities to designated geographical areas. *Id.* at 128. For a discussion of Congressional response to the State Department's practice of imposing geographical restrictions on travel, see note 14 *supra*.



1918.<sup>25</sup> That statute, enacted in response to the prevailing social and political climate produced by the war in Europe, made it unlawful for United States citizens to travel abroad without a valid passport in time of war.<sup>26</sup> In requiring citizens to obtain passports for travel during wartime, Congress intended to exercise control over entry and exit.<sup>27</sup> It was feared that without a means of identifying United States citizens, non-citizens and spies could travel freely between this country and enemy nations, taking with them sensitive military information.<sup>28</sup>

The 1918 Act was operative only in wartime and had to be invoked by Presidential proclamation.<sup>29</sup> In 1941 the 1918 Act was amended so that it could be invoked during the *then-existing* emergency.<sup>30</sup> President Roosevelt issued a proclamation which invoked

25. Ch. 81, § 2, 40 Stat. 559 (1918).

26. The statute, entitled "An Act to prevent in time of war departure from or entry into the United States contrary to the public safety," read:

[W]hen the United States is at war, if the President shall find . . . that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall . . . be unlawful . . .

. . .

. . . after such proclamation . . . has been made . . . [and] is in force . . . for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport.

Ch. 18, 40 Stat. 559 (1918).

27. See 56 CONG. REC. 6029 (1918) (remarks of Rep. Flood). See also, 2 HYDE, INTERNATIONAL LAW DIGEST §§ 405 & 406, at 1202-06 (2d rev. ed. 1947). Hyde points out that a state engaged in war may with reason adopt extraordinary measures to control the entry into and departure from its territories of both aliens and nationals. *Id.* at 1202.

28. See H.R. Rep. No. 485, 65th Cong., 2d Sess. 2-3 (1918); 101 S. Ct. at 2776-77.

29. See note 26 *supra* and accompanying text. Proclamation No. 1437, 40 Stat. 1829 (1918), invoked the passport requirement of the 1918 statute. In 1926, when Congress enacted the Passport Act which vested authority to issue passports in the Secretary of State, passports were no longer required for travel abroad. Proclamation No. 1437 which had triggered the requirements of the 1918 travel control statute had been terminated by the Act of March 3, 1921, ch. 136, 41 Stat. 1359 (1921). That Act provided, "[t]hat in the interpretation of any provision . . . in any Acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the duration or the date of the termination of . . . [the war with Germany] . . . the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war . . . ." *Id.*

30. Act of June 21, 1941, ch. 210, § 1, 55 Stat. 252 (1941). The 1941 Act amended the first paragraph of the 1918 statute as follows: "When the United States is at war or *during the existence of the national emergency proclaimed by the President on May 27, 1941* . . . and the President shall find that the interests of the United States require . . . [travel restrictions] . . . it shall . . . be unlawful." *Id.* at 252-53 (emphasis indicates language added in 1941). In contrast to Section 215 of the INA of 1952, the 1941 Act was specific to the national emergency declared in 1941. Compare Act of June 21, 1941 with INA § 215, 8 U.S.C. § 1185 (1976), *supra* note 2.

the passport requirement of the newly amended statute,<sup>31</sup> and passports were again required for travel abroad. In 1952, the Immigration and Nationality Act superseded the 1918 Act as amended and made passports a requirement for citizens traveling into or out of the United States in times of war or during the existence of *any* national emergency proclaimed by the President if the President proclaimed that such travel restrictions were necessary.<sup>32</sup> The national emergency declared by President Truman in 1950 continued until 1978,<sup>33</sup> satisfying the initial condition of the statute. Successive proclamations restricting travel in effect from 1949 to 1978 satisfied the second condition, triggering the documentation requirement.<sup>34</sup> As noted above, the conditions precedent to invoking the documentation requirement were eliminated in 1978, and a blanket requirement imposed when Section 215 of the INA was amended.<sup>35</sup> Thus, a passport has been required for external travel almost continuously since World War II.

### B. *The 1950s Cases*

The Secretary of State has long maintained that he has broad powers in all matters relating to passports, including the power to deny and revoke them in his discretion.<sup>36</sup> In the 1950s, however,

31. Proclamation No. 2523, 3 C.F.R. 115 (1941 Supp.) *reprinted in* 55 Stat. 1696 (1941).

32. Pub. L. No. 82-414, § 215, 66 Stat. 190 (1952) (codified at 8 U.S.C. § 1185(a)-(b) (1976)). *See* note 2 *supra* and accompanying text.

33. Proclamation No. 2914, 3 C.F.R. 71 (1950 Supp.) *reprinted in* 64 Stat. A454 (1950). The national emergency proclaimed by Proclamation No. 2914 remained in effect continuously until September 14, 1978 when it was terminated pursuant to section 101 of the National Emergencies Act, 50 U.S.C. § 1601 (1976).

34. Proclamation No. 2850 which imposed travel controls amended Proclamation No. 2523, *supra* note 31, and continued to invoke the passport requirement of the 1941 statute. Proclamation No. 2850, 3 C.F.R. 41 (1950 Supp.), *reprinted in* 63 Stat. 1289 (1949). In 1953, it was revoked by Proclamation No. 3004 which invoked the passport requirement of the INA. Proclamation No. 3004, 3 C.F.R. 301 (1953) *reprinted in* 67 Stat. c31 (1953). Proclamation No. 3004 continued in effect until the INA was amended in 1978. *See* note 1 *supra*.

35. *See* note 1 *supra* and accompanying text.

36. *See* note 8 *supra* and accompanying text. In addition to claiming authority under the Passport Act, the Secretary has claimed that he has inherent power to revoke passports. In *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952), the Secretary contended that the issuance and revocation of passports was a matter entirely within the realm of foreign affairs and was thus within the absolute discretion of the Executive and through his delegation, within the discretion of the Secretary. *Id.* at 448. For a discussion of the inherent powers of the Executive and their relation to passport revocation, *see* notes 85, 86 & 123 *infra* and accompanying text.

the Secretary's discretion with respect to passport revocation or denial was repeatedly challenged in the courts.<sup>37</sup> In reviewing passport denials the courts evaluated the status of external travel to determine if it was a right protected under the Constitution. In concluding that travel abroad was a basic right,<sup>38</sup> the courts were forced to examine both the purpose of a passport and the Secretary's power, if any, to withhold passports.

The early decisions did not directly examine the *source* of the Secretary's power to withhold passports; they were concerned primarily with the manner in which he exercised that power. The courts concluded that an individual whose passport application was denied was entitled to notice of the denial and an opportunity for a fair hearing.<sup>39</sup> The Secretary also had to comply with substantive, as well as procedural, due process.<sup>40</sup> A notable case which illustrates these principles is *Shachtman v Dulles*.<sup>41</sup>

In *Shachtman*, the plaintiff, chairman of the Independent Socialist League,<sup>42</sup> challenged the Secretary's refusal to issue him a

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37. See *Kent v. Dulles*, 357 U.S. 116 (1958); *Dayton v. Dulles*, 357 U.S. 144 (1958); *Briehl v. Dulles*, 248 F.2d 561 (D.C. Cir. 1957); *Kraus v. Dulles*, 235 F.2d 840 (D.C. Cir. 1956); *Robeson v. Dulles*, 235 F.2d 810 (D.C. Cir. 1956); *Shachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955); *Boudin v. Dulles*, 136 F. Supp. 218 (D.D.C. 1955); *Nathan v. Dulles*, 129 F. Supp. 951 (D.D.C. 1955); *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952). The Secretary's discretion was rarely challenged prior to the 1950s largely because passports were not generally required for travel abroad. See *Freedom to Travel*, *supra* note 15, at 10.

38. See *Shachtman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955) (travel abroad is a "natural right"); *Boudin v. Dulles*, 136 F. Supp. 218, 220 (D.D.C. 1955) (travel abroad is more than a privilege, "[i]t is a right, an attribute of personal liberty"); *Bauer v. Acheson*, 106 F. Supp. 445, 451 (D.D.C. 1952).

39. See *Boudin v. Dulles*, 136 F. Supp. 218, 222 (D.D.C. 1955); *Nathan v. Dulles*, 129 F. Supp. 951, 952 (D.D.C. 1955); *Bauer v. Acheson*, 106 F. Supp. 445, 451-52 (D.D.C. 1952). An individual whose passport has been denied must be given an opportunity in a hearing to refute the evidence upon which the Secretary has relied for the denial. 136 F. Supp. at 222.

40. See *Shachtman v. Dulles*, 225 F.2d 938, 943 (D.C. Cir. 1955); *Bauer v. Acheson*, 106 F. Supp. 445, 452 (D.D.C. 1952). See also *Kraus v. Dulles*, 225 F.2d 840, 842 (D.C. Cir. 1956). In *Kraus*, plaintiff's passport application had been denied because he failed to demonstrate that he had sufficient funds for travel abroad. *Id.* at 841. The district court had dismissed plaintiff's action for declaratory judgment; the appellate court vacated the district court's order and remanded the case for further proceedings. *Id.* at 842. The appellate court expressed concern that the Secretary had acted arbitrarily in denying the plaintiff a passport because on the record from the district court it did not appear that the State Department had a practice of requiring applicants to establish financial ability to travel abroad. *Id.*

41. 225 F.2d 938 (D.C. Cir. 1955).

42. The Independent Socialist League had been classified by the Attorney General as a subversive organization. *Id.* at 942.

passport. The Secretary had refused to issue a passport because he had determined that granting a passport to the head of a subversive organization would be contrary to the best interests of the United States.<sup>43</sup> The court acknowledged the relationship of the Secretary's action to the conduct of foreign affairs, but rejected the government's argument that its action was not subject to judicial review because it was a political question.<sup>44</sup> The court stated that travel abroad was a natural right which could not be abridged without due process of law.<sup>45</sup> The court's opinion emphasized the interest of the individual to be free from arbitrary administrative restraint and held that the Secretary's refusal could not be upheld because it was arbitrary and based solely on the applicant's membership in a 'subversive' organization.<sup>46</sup> The court noted, too, that a passport was "essential to the lawful departure of an American citizen for Europe"<sup>47</sup> and that denial of a passport, therefore, re-

43. *Id.*

44. *Id.* at 944. The court said:

[E]ven though [Shachtman's] 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.

*Id.*

45. *Id.* at 941.

46. *Id.* at 943-44. In holding that the Secretary's denial was arbitrary, the court was primarily concerned with the *use* by the Secretary of a list prepared by the Attorney General which classified the Independent Socialist League as subversive. *Id.* Shachtman claimed that the Attorney General had erred in listing the International Socialist League as a subversive organization. The Secretary did not challenge Shachtman's allegations. Thus the court found that denial of his passport purely on the basis that Shachtman's organization was on a list made by the Attorney General was arbitrary. *Id.* In other cases which involved deprivation of a liberty because of membership in an organization and which were decided on due process grounds, courts have been concerned with the absence of criteria in the regulation linking the bare fact of membership to the individual's knowledge of, activity in or commitment to the organization. See *Aptheker v. Secretary of State*, 378 U.S. 500, 511 (1964) (striking down a statute which made it illegal for a member of the Communist Party to obtain a passport. In *Aptheker*, the Court noted that such factors as a member's degree of activity in and commitment to the organization were relevant to "the likelihood that travel by such a person would be attended by the type of activity which Congress sought to control." *Id.* at 510.

47. 225 F.2d at 940. The *Shachtman* court qualified the traditional view that a passport was in the nature of a political document. Compare *Shachtman v. Dulles*, 225 F.2d at 940 (characterizing a passport as an exit permit) with *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835) (passport found to be a political document by which the bearer was recognized as a United States citizen).

sulted in a "deprivation of liberty which a citizen otherwise would have."<sup>48</sup>

## II. KENT V. DULLES: A TEST FOR DETERMINING THE SECRETARY'S POWER TO REVOKE PASSPORTS

### A. *Kent v. Dulles*

Against the background of *Shachtman* and other 1950s passport denial cases which focused on due process considerations<sup>49</sup> *Kent v. Dulles*,<sup>50</sup> decided in 1958, is a landmark case. There the Supreme Court firmly established the right to travel abroad as a constitutional right;<sup>51</sup> it also focused on the source and extent of the Secretary's authority to refuse passport applications.<sup>52</sup> Moreover, *Kent* articulated a test for determining whether the circumstances permit the Secretary to refuse a passport application.<sup>53</sup>

*Kent v. Dulles* focused on the Secretary of State's denial of a passport application submitted by Rockwell Kent on the ground that he was a member of the Communist Party.<sup>54</sup> When notified of his right to an administrative hearing, Kent was told that regardless of the outcome of the hearing, he would have to sign an affidavit concerning any past or present membership in the Communist Party.<sup>55</sup> After the hearing, when Kent refused to supply an affidavit, he was advised that no further action would be taken on his passport until he complied with the Secretary's regulation.<sup>56</sup> Kent sued in district court for declaratory relief;<sup>57</sup> the court granted summary judgment for the government<sup>58</sup> and the appellate court affirmed.<sup>59</sup>

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48. 225 F.2d at 941.

49. See notes 39 & 40 *supra*.

50. 357 U.S. 116 (1958).

51. *Id.* at 130.

52. The *Kent* Court said that whatever power the Secretary has to revoke passports must be authorized by Congress. *Id.* at 129.

53. *Id.* at 127-28.

54. *Id.* at 117-18.

55. *Id.* at 118. See 22 C.F.R. § 51.142 (1958).

56. *Id.* at 119.

57. *Id.*

58. *Id.*

59. *Id.* at 120. On appeal, Kent's case was heard with that of Walter Briehl, a psychiatrist whose passport was denied when he refused to supply an affidavit concerning his membership in the Communist Party. *Id.* at 119.

The Supreme Court reversed and held that neither the Passport Act of 1926 nor the INA authorized the Secretary to deny passports on the grounds of the applicant's political beliefs or associations.<sup>60</sup> The Court acknowledged that the Passport Act had long been interpreted as granting the Secretary broad discretion with respect to the *issuance* of passports,<sup>61</sup> but refused to find in such discretion the power to withhold a passport.<sup>62</sup> The Court's decision rests on the premise that the Secretary's power to deny or revoke a passport is not inherent but stems from the authority granted to him by Congress in the Passport Act.<sup>63</sup> Because the Passport Act contains no express delegation of authority to revoke passports, such power, if it exists, must be implied. Recognizing that important constitutional rights are involved in the question of passport denial, the Court held that the Passport Act should be narrowly construed. The Court believed that it would be imprudent 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 unbridled discretion to grant or withhold a passport for any substantial reason he may choose."<sup>64</sup> Only where the Secretary could show a consistent and substantial *practice* of denying passports for a particular reason would the Court imply from congressional acquiescence, the authority to deny a passport for that reason.<sup>65</sup> The Court discerned only two situations where the Secretary had consistently refused to issue passports: (1) where the applicant was not a citizen of the United States<sup>66</sup> and (2) where the applicant was engaged in illegal conduct.<sup>67</sup>

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60. *Id.* at 130.

61. *Id.* at 124-25.

62. *Id.* at 125.

63. The Court focused on the extent to which, if any, Congress had authorized curtailment of the right to travel, *id.* at 127, and implicitly rejected the argument that revocation of passports in this case fell within the Secretary's power to conduct foreign affairs. *Id.* at 129. The *Kent* Court stated that the case did not involve a political question. *Id.*

64. *Id.* at 128.

65. *Id.*

66. *Id.* at 127. Citizenship has always been a prerequisite to the issuance of a passport. See notes 12 & 23 *supra* and accompanying text. Indeed, revocation on grounds of lack of citizenship does not entitle the individual to administrative review. See 22 C.F.R. § 51.80 (1981). Allegiance to the United States has also been a factor in determining a person's eligibility for a passport. See 357 U.S. at 127; 3 J. MOORE, *supra* note 8, at § 513.

67. 357 U.S. at 127. For a discussion of the history of denying passports because the applicant was engaged in illegal conduct, see 3 J. MOORE, *supra* note 8, at § 512; 3 G.

*Kent* is important because in it the Court recognized that in controlling external travel, constitutional rights other than the right to travel might be abridged.<sup>68</sup> The regulation at issue in *Kent* permitted the Secretary to curtail an individual's freedom of movement solely because of his refusal to be subjected to inquiry concerning his political beliefs and associations.<sup>69</sup> Thus, it not only allowed the Secretary to abridge the right to travel, but it also forced an individual to choose between exercising his right to travel abroad or exercising his first amendment rights to believe what he will and associate with whom he chooses. By forcing the applicant to make this choice, the regulation served to inhibit or punish the exercise of first amendment rights.<sup>70</sup> It is precisely because travel control could also be used to inhibit or punish the exercise of first amendment rights that the Court in *Kent v. Dulles* insisted on a narrow construction of the Secretary's delegated powers under the Passport Act.

#### B. Construction of Power Delegated Under the Passport Act

Implicit in the *Kent* Court's analysis is a presumption against recognizing any statutorily-implied power in the Secretary to revoke or deny a passport.<sup>71</sup> Under the decision, when the Secretary wishes to use discretionary power, or when such a use is challenged, he must show that Congress has implicitly authorized him to revoke passports in such cases based on its acquiescence in the Secretary's past practice of exercising that power.<sup>72</sup> The *Kent* Court's reluctance to read into the Passport Act the power to withhold passports

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HACKWORTH, *supra* note 7, § 268, at 500. Department of State regulations direct that a passport will not be issued to an applicant who is the subject of an outstanding federal warrant of arrest or who is the subject of a subpoena in a matter involving a federal prosecution for, or grand jury investigation of, a felony. 22 C.F.R. § 51.70(a)(1), (a)(5) (1981).

68. 357 U.S. at 130. *See also* *Zemel v. Rusk*, 381 U.S. 1 (1965). In *Zemel*, the Court upheld a regulation of the Secretary which provided that a passport would not be issued to one whose stated destination was Cuba. The Court distinguished *Kent*, stating that the regulation restricting travel to Cuba did not interfere with first amendment rights. *Id.* at 16. For a discussion of the Secretary's practice of denying passports for travel to designated geographical areas, *see* note 14 *supra* and accompanying text.

69. 357 U.S. at 130.

70. For a discussion of how inhibition of first amendment rights damages constitutional values, *see* notes 134 & 136 *infra* and accompanying text.

71. *See* *Haig v. Agee*, 101 S. Ct. 2766, 2788 (1981) (Brennan, J., dissenting).

72. *Id.*

reflects its concern that any restrictions on constitutional rights be rooted in legislative acts of Congress rather than discretionary acts of an administrator whose power to abridge such rights is unclear.<sup>73</sup>

This principle of construing delegated power narrowly is in part a correlary to the separation of powers doctrine embodied in the Constitution.<sup>74</sup> The Constitution gives to the legislative branch the power to make laws;<sup>75</sup> the Congress must necessarily formulate the policy under which those laws are to be carried out.<sup>76</sup> The courts have long held that the Constitution permits Congress to delegate the function of implementing its laws and carrying out its policy.<sup>77</sup> But, to ensure that Congress does not abdicate its law-making function, it has been held that delegated authority must be narrowly defined and limited in scope.<sup>78</sup> Laws passed by Congress must reflect legislative policy and contain sufficient standards for implementation so that the delegate may make rules and determi-

73. 357 U.S. at 129.

74. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 284-91 (1978); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 420-30 (1935); *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring). In his concurring opinion in *United States v. Robel*, Justice Brennan said, "Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people." *Id.* at 276.

75. U.S. CONST. art. I, §§ 1, 8, cl. 18.

76. See note 74 *supra*.

77. *United States v. Rock Royal Coop*, 307 U.S. 533, 574 (1939); *Currin v. Wallace*, 306 U.S. 1, 16-17 (1939); *Interstate Commerce Comm'n v. Goodrich Transit Co.*, 224 U.S. 194, 215 (1912); *United States v. Grimaud*, 220 U.S. 506, 517 (1911); *Union Bridge Co. v. United States*, 204 U.S. 364, 385-88 (1907); *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904); *Field v. Clark*, 143 U.S. 649, 690-91 (1892); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

78. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). *Panama Refining* was the first case in which the Court invalidated a congressional delegation. L. TRIBE, *supra* note 74 at 287 n.10. In *Panama Refining* the Court struck down § 9(c) of the National Industrial Recovery Act which authorized the President to prohibit transportation in interstate and foreign commerce of petroleum produced in excess of the amount permitted under state law. 293 U.S. at 414-15, 433. The Court stated that § 9(c) contained no expression of legislative policy; nor did it indicate why Congress chose to allow the President to prohibit the transportation of "hot oil." *Id.* at 418. The Court found that § 9(c) set no criteria to govern the President's course. Rather, "[t]he Congress left the matter to the President without standard or rule, to be dealt with as he pleased." *Id.* The section constituted an invalid delegation because it authorized "such a breadth of . . . action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy." *Id.* at 418-19. See also *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).



nations of fact that are consistent with the legislature's intent.<sup>79</sup> Regulations issued by a delegate are valid only as rules subordinate to legislative policy; they cannot substitute for laws.<sup>80</sup>

It has been suggested that in the realm of foreign affairs, the standards for delegating authority are less strict than those applicable to legislation pertaining to domestic affairs.<sup>81</sup> Proponents of

79. See *Panama Ref. Co. v. United States*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935). That legislation should reflect a policy and contain standards for its implementation is especially important where constitutional rights may be involved. See L. TRIBE, *supra* note 74 at 288-91; *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *Greene v. McElroy*, 360 U.S. 474, 507 (1959); *Barenblatt v. United States*, 360 U.S. 109, 139-40 (1959) (Black, J., dissenting). In his dissent in *Barenblatt*, Justice Black said, "[where] governmental procedures . . . reach to the very fringes of congressional power . . . more is required of the legislatures than a vague delegation to be filled in later by mute acquiescence." *Id.* (footnote omitted).

80. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 428-29 (1935). See *Zemel v. Rusk*, 381 U.S. 1, 20 (1965), where Black in his dissenting opinion said:

[s]ince Article I, however, vests 'All legislative Powers' in the Congress, and no language in the Constitution purports to vest any such power in the President, it necessarily follows, if the Constitution is to control, that the President is completely devoid of power to make laws regulating passports or anything else. And he has no more power to make laws by labelling them regulations than to do so by calling them laws.

*Id.* (Black, J., dissenting).

81. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 96, 118-20 (1972). The case most often cited to support broad delegations in the field of foreign affairs is *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). There, the Court upheld a Joint Resolution, Act of May 28, 1934, ch. 365, 48 Stat. 811, which made it unlawful to sell arms and munitions to persons acting on behalf of the countries involved in the Chaco conflict if the President determined that such a prohibition would contribute to the re-establishment of peace between the countries involved in that conflict. In determining whether the delegation to the President was valid, the Court examined the nature of the powers of the federal government in foreign and domestic affairs, 299 U.S. 315-21, and concluded that "[t]he whole aim of the [Joint] Resolution [was] to affect a situation [which was] *entirely* external to the United States" and one which fell within the category of foreign affairs. *Id.* at 315 (emphasis added). The case articulates the principle that the foreign affairs power of the government stems not from the Constitution, but from the concept of national sovereignty. See *id.* at 318; L. HENKIN, *supra*, at 19-24. Justice Sutherland wrote in *Curtiss-Wright* that participation in the exercise of the [foreign affairs] power is significantly limited . . . [as contrasted with the domestic affairs power].

. . . It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority *plus* the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations. . . .

299 U.S. at 319-20 (emphasis added).

For a discussion of *Curtiss-Wright* which does not endorse expansive delegations in the realm of foreign affairs and which proposes that the President has no independent power in this regard, see Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 138-47 (1971).

this view, recognizing that in the area of domestic affairs, the Constitution makes the Executive's role ancillary to that of the legislature,<sup>82</sup> argue that in foreign affairs greater leeway should be given to the Executive.<sup>83</sup> In part this view rests on the premise that the Executive has inherent power to conduct foreign affairs<sup>84</sup> and thus any congressional delegation of foreign affairs power to the Executive is perfunctory since they were his to exercise anyway on his own constitutional authority.<sup>85</sup> However, the *Kent* decision

82. L. TRIBE, *supra* note 74, at 161.

83. See L. HENKIN, *supra* note 81, at 119; *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). The Court in *Zemel* said:

because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, 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.*

84. See L. HENKIN, *supra* note 81, at 37-54; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

85. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 320. The power of the President as the sole organ of the federal government in the field of international relations "does not require as a basis for its exercise an act of Congress." *Id.* But see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *Youngstown*, steel companies challenged the authority of the President to order the Secretary of Commerce to seize and operate the nation's steel mills which had been threatened to be closed by a labor strike. The President ordered the seizure because he believed that a shutdown of the mills would jeopardize the national security. The government contended that the President's power to seize the mills should be implied from his "aggregate . . . powers under the Constitution." *Id.* at 587. The Court held that the President had exceeded his authority. In his concurring opinion, Justice Jackson noted that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* at 635. Accordingly, he set out the following scheme to describe when the President's authority is at its maximum and when it is at its minimum:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.

. . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can rely only upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.

. . .

3. When the President takes measures incompatible with the expressed or implied will of Congress his power is at its lowest ebb, for then he can rely only on his own constitutional powers minus any constitutional power of Congress over the matter.

quite correctly suggests that such an interpretation is not permissible where delegated power impinges on individual rights.<sup>86</sup>

Because travel abroad is a constitutional right<sup>87</sup> and passports affect an individual's ability to exercise that right, revocation or refusal to issue passports cannot be premised on the Executive's inherent power to conduct foreign affairs.<sup>88</sup> Delegations of power which affect constitutional rights, even if in the area of foreign affairs, must be carefully scrutinized to ensure that those rights are not abridged except pursuant to constitutional congressional statutes.<sup>89</sup> Even if legislative policy is clear, failure to state standards for its application reflects a failure on the part of the legislature to

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*Id.* at 635, 637. Justice Jackson noted that the question presented in *Curtiss-Wright* involved the President's power to act in accord with an express grant of authority from Congress, and that therefore his powers were at their maximum. *See also* *Dames & Moore v. Regan*, 101 S. Ct. 2972, 2981, 2983 (1981).

86. *See* *Kent v. Dulles*, 357 U.S. at 129-30. The *Kent* Court determined that travel abroad was a liberty under the fifth amendment and stated that "if that right is to be regulated, it must be pursuant to the law-making functions of the Congress." *Id.* at 129 (citing *Youngstown v. Sawyer*, 343 U.S. 579 (1952)). *See also*, L. TRIBE, *supra* note 74, at 166; L. HENKIN, *supra* note 81, at 119-20. *Cf.* *Zemel v. Rusk*, 381 U.S. 1, 21 (1965) (Black, J., dissenting) (Justice Black stated that the President has no inherent authority to make regulations governing the issuance and use of passports).

87. *See* *Kent v. Dulles*, 357 U.S. at 129 (1958). *Lynd v. Rusk*, 389 F.2d 940, 944 (D.C. Cir. 1967); *Worthy v. Herter*, 270 F.2d 905, 907 (D.C. Cir. 1959); *Shachtman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955); *Boudin v. Dulles*, 136 F. Supp. 218, 220 (D.D.C. 1955); *Bauer v. Acheson*, 106 F. Supp. 445, 451 (D.D.C. 1952).

88. *See* *Zemel v. Rusk*, 381 U.S. 1, 21 (Black, J., dissenting); *Aptheker v. Secretary of State*, 378 U.S. 500, 518 (1964) (Black, J., concurring); *Kent v. Dulles*, 357 U.S. 116, 129 (1958). The cases upholding the Secretary's denial of a passport because the applicant's stated destination was to an area designated by the Secretary as restricted for travel appear to rest in large measure on the inherent power of the Executive to conduct foreign affairs. *See* *Worthy v. Herter*, 270 F.2d 905, 910 (D.C. Cir. 1959); *MacEwan v. Rusk*, 228 F. Supp. 306, 308 (D.D.C. 1964) (The court in *MacEwan* said, "[i]t would be a serious restriction of the presidential authority to conduct foreign affairs to deny to him and his authorized subordinates the power to prevent travel by curious citizens to countries where their presence might jeopardize the relations of the United States with foreign countries." *Id.* at 308 (footnotes omitted)). The Supreme Court in *Zemel v. Rusk*, 381 U.S. 1 (1965), however, makes it clear that the Secretary's authority to refuse to issue passports for travel to designated areas is implied from congressional acquiescence in the consistent application of the Secretary's practice of imposing travel restrictions. *Id.* at 10-12. *See also* *Lynd v. Rusk*, 389 F.2d 940 (D.C. Cir. 1967). There the Court, cutting back somewhat on the *Zemel* decision, held that the Secretary could not deny a passport because the applicant had failed to give assurances that he would not travel to a restricted area. *Id.* at 945, 947. For a discussion of *Lynd v. Rusk* and Congress' response to the Secretary's practice of imposing geographical restrictions on travel, *see* note 14 *supra*.

89. *Kent v. Dulles*, 357 U.S. at 129; *Lynd v. Rusk*, 389 F.2d at 945. *See* note 79 *supra* and accompanying text.

articulate a judgment as to the scope of the policy and the extent to which it should be applied.<sup>90</sup>

### III. HAIG V. AGEE: THE "POLICY TEST" AND FIRST AMENDMENT RIGHTS

#### A. The Facts

On December 23, 1979, the Secretary of State revoked the passport of Philip Agee, a United States citizen living in West Germany,<sup>91</sup> pursuant to a determination by the Secretary that Agee's activities abroad were causing "serious damage to the national security or the foreign policy of the United States."<sup>92</sup> In a letter notifying Agee of the action taken with respect to his passport, the Secretary stated that his determination was based on Agee's stated intention to disrupt the intelligence operations of the United States.<sup>93</sup>

90. See *United States v. Robel*, 389 U.S. 258, 269 (1967) (Brennan, J., concurring). In *Robel*, the Court struck down § 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 64 Stat. 992 (1950), which provided that when a Communist organization was registered it would be unlawful for any member of the organization to work in a defense facility. Justice Brennan disagreed with the majority's finding that the section was overbroad on its face. His concurring opinion focused instead on the lack of standards provided in the delegation of power to the Secretary of Defense to designate defense facilities under the Act. "The failure to provide adequate standards [for designating defense facilities . . . reflects Congress' failure to have made a 'legislative judgment', *Cantwell v. Conn.*, 310 U.S. at 307, on the extent to which the prophylactic measure should be applied." *Id.* at 275-76 (Brennan, J., concurring).

91. 101 S. Ct. at 2769-71.

92. *Id.* at 2771. Department of State regulations provide that a passport may be revoked in any case where "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. § 51.70(b)(4) (1981). See *id.* § 51.71(a). It was on the basis of these regulations that Agee lost his passport.

93. 101 S. Ct. 2771. Agee, a former employee of the Central Intelligence Agency (CIA), resigned from the CIA in 1968. *Id.* at 2770. At a 1974 press conference in London, he announced that he was embarking on a campaign to fight the United States intelligence agency wherever it was operating, to expose its officers and agents, and to "take the measures necessary to drive them out of countries where they are operating." *Id.* at 2770 n.2. In furtherance of his campaign, Agee made personal appearances, held press conferences around the world and published exposés of the CIA and its agents. See *Agee v. Muskie*, 629 F.2d 80, 89 (D.C. Cir. 1980); P. AGEE, *INSIDE THE COMPANY: CIA DIARY* (1975); *DIRTY WORK: THE CIA IN WESTERN EUROPE* (P. AGEE & L. WULF eds. 1978).

The Supreme Court recognized the lower courts' suggestions that the Secretary's revocation of Agee's passport may have been prompted by the Iranian hostage crisis. 101 S. Ct. at 2771 n.8. See also *Agee v. Vance*, 483 F. Supp. 729, 732 (D.D.C. 1980), *aff'd sub nom.* *Agee v. Muskie*, 629 F.2d 80, 84 n.3, 90 (D.C. Cir. 1980). In his dissent from the court of appeals' decision, Judge MacKinnon referred to a newspaper article that reported that Agee has been

Agee declined his right to an administrative appeal<sup>94</sup> and filed suit in the United States District Court for the District of Columbia for declaratory and injunctive relief.<sup>95</sup> He alleged that the revocation was invalid because the regulation on which it was based was not authorized by Congress<sup>96</sup> and was unconstitutional because it infringed first and fifth amendment rights.<sup>97</sup> For purposes of testing the validity of the regulation Agee conceded that his activities were causing serious damage to the national security or foreign policy of the United States.<sup>98</sup> The district court held that the regulation was not authorized by Congress<sup>99</sup> and that therefore the Secretary had acted without authority in revoking Agee's passport.<sup>100</sup> The court reasoned that any power the Secretary had to revoke passports derives from Congress<sup>101</sup> and that, absent an express delegation of authority to the Secretary in the Passport Act, any such authority must be found to be implied.<sup>102</sup> The court noted that in this case particular care was warranted in construing

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invited to Iran to participate in a tribunal to judge the hostages taken in the seizure of the United States embassy in Teheran. 629 F.2d at 90. Agee denied having been invited to Iran. *Id.* at 81 n.1. The district court noted in its opinion that if Agee's activities were deemed to be detrimental to the hostages in Iran, a special statute, 22 U.S.C. § 1732 (1976), may have given the President extraordinary authority to revoke Agee's passport as part of an attempt to effectuate the release of citizens imprisoned by a foreign government. 629 F.2d at 732.

94. 483 F. Supp. at 730. Any person whose passport has been revoked by the Secretary can require the Secretary to establish the basis for the revocation before a hearing officer. 22 C.F.R. § 51.81 (1981). The person so affected is entitled to be informed of all of the evidence before the hearing officer. 22 C.F.R. § 51.85 (1981). *See Boudin v. Dulles*, 136 F. Supp. 218 (D.D.C. 1955), in which the court held that the Secretary may not withhold confidential information on which he based his determination not to issue a passport. On appeal, the court remanded the case to the district court for further proceedings on factual matters and expressly declined to consider the propriety of the Secretary's use of confidential information. 235 F.2d 532 (1956).

95. 483 F. Supp. 729 (D.D.C. 1980).

96. *Id.* at 730.

97. *Id.*

98. 483 F. Supp. at 730. Justice Brennan in his dissenting opinion in *Haig v. Agee* notes that Agee's concession that his activities fell within the scope of the regulation was solely for the purpose of testing the *facial validity* of the regulation and not its *application* in his case. 101 S. Ct. at 2784, 2788 n.10.

99. 483 F. Supp. at 732. In finding that Congress had not authorized the regulation, the court stated that "[l]egislative silence cannot be read as implicit adoption of an obscure, virtually unused regulation that limits the free exercise of protected rights . . . . The [c]ourt is forced to conclude that the Secretary's promulgation of the challenged regulation was without authorization from Congress." *Id.*

100. *Id.*

101. *Id.* at 730.

102. *Id.* at 731.

the Secretary's authority because the regulation permits him to take action against an individual.<sup>103</sup> Relying on the practice test articulated in *Kent v Dulles*<sup>104</sup> the court held that the Secretary had not established a practice of revoking passports on the grounds specified in the regulation sufficient to warrant a finding of Congressional authorization to revoke on those grounds.<sup>105</sup> The court of appeals affirmed<sup>106</sup> the district court, and certiorari was granted by the Supreme Court.<sup>107</sup>

The Supreme Court reversed the lower courts and upheld the validity of the regulation.<sup>108</sup> The Court held that the *policy* announced in the challenged regulation was "sufficiently substantial and consistent" to compel the conclusion that Congress had approved it.<sup>109</sup> Having found that the regulation was authorized by Congress, the Court held further that Agee's constitutional claims<sup>110</sup> were without merit.<sup>111</sup>

103. *Id.* at 730-31.

104. 357 U.S. 116, 128 (1958). The consistent and substantial administrative practice test has been used by courts since *Kent* to determine whether the Secretary has the power to revoke or deny a passport. *See, e.g.,* *Zemel v. Rusk*, 381 U.S. 1, *reh. denied*, 382 U.S. 873 (1965); *Lynd v. Rusk*, 389 F.2d 940, 945-46 (D.C. Cir. 1967); *Woodward v. Rogers*, 344 F. Supp. 974, 985 (D.D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir. 1973). According to *Zemel* the 1926 Act only authorizes those refusals which "it could fairly be argued were adopted by Congress in light of prior administrative practice." 381 U.S. at 18, quoting *Kent v. Dulles*, 357 U.S. at 128.

105. 483 F. Supp. at 731.

106. 629 F.2d 80 (D.C. Cir. 1980).

107. 101 S. Ct. 69 (1981).

108. 101 S. Ct. 2766 (1981).

109. *Id.* at 2781.

110. Agee claimed that the Secretary's revocation of his passport violated his first amendment right to criticize government policies and that failure to grant him a pre-revocation hearing violated his fifth amendment right to procedural due process. *Id.* at 2781. Agee claimed, too, that the regulation was unconstitutional on its face because it was overbroad. *See* notes 128-46 *infra* and accompanying text. The Court never directly considered this question. In a footnote, the Court notes that the district court held that since Agee's conduct fell within the core of the regulation, he lacked standing to challenge the regulation for being overbroad. *Id.* at 2783 n.61. *But see* 2788 n.10 (Brennan, J., dissenting).

111. 101 S. Ct. at 2781. The Court held that the right to travel abroad with a "letter of introduction" in the form of a passport was subordinate to national security and foreign policy considerations. 101 S. Ct. at 2781. Reasoning that because national security is a compelling governmental interest, and that secrecy of foreign intelligence operations serve those interests, the Court rejected Agee's claim that the Secretary's regulation impermissibly restricted his freedom to travel. *Id.* at 2782. The Court also held that Agee's claim that revocation of his passport was intended to penalize his first amendment right to criticize the government was without merit. *Id.* at 2783. To reach this conclusion the Court distinguished between speech and conduct. Analogizing Agee's disclosures about the CIA to publication of

In setting out a framework for determining whether the Passport Act gives authority to the Secretary to revoke passports on national security or foreign policy grounds, the Court focused on the Executive's inherent authority in matters relating to national security and foreign policy.<sup>112</sup> The Court observed that since the Passport Act granted broad rule-making authority to the Executive<sup>113</sup> and since Congress was silent on the extent of the Secretary's power under the Act,<sup>114</sup> courts should follow a consistent administrative construction of the statute.<sup>115</sup>

The Court also examined the history of the Passport Act against the background of the travel control statute of 1918.<sup>116</sup> Interpreting the 1926 Passport Act, the Court concluded that Congress necessarily included therein the power to revoke passports on the ground of national security because failure to have done so would have frustrated the purpose of the 1918 statute.<sup>117</sup> The *Agee* Court's analysis is flawed, however, because the Court overlooked the fact that in 1926 a passport was not required for travel abroad. The 1918 statute provided that passports would be required *in time of war* and then only when the President proclaimed travel restrictions necessary.<sup>118</sup> In 1926 the nation was not at war and the

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the sailing dates of military transports or the number and location of military troops, the Court held that his activities were not protected by the Constitution. *Id.* As to *Agee's* claim that revocation prior to a hearing violated his fifth amendment right to due process, the Court stated that where there is a likelihood of severe damage to national security or foreign policy, the government is not required to hold a pre-revocation hearing. *Id.*

112. See 101 S. Ct. at 2774. Implicit in the Court's approach to construction of the Passport Act is the idea that issuance of passports involves the foreign affairs power of the Executive. In its analysis the Court noted that "the President is the sole organ of the nation in its foreign affairs." *Id.* (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)). For a discussion of *Curtiss-Wright*, see note 81 and accompanying text. The *Agee* Court also stated that "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that customarily wielded in domestic areas." 101 S. Ct. at 2774, (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)), and further, that matters of foreign policy are rarely proper subjects for judicial intervention. 101 S. Ct. at 2774. For a discussion of the principle that Congressional delegations in the field of foreign affairs should be construed broadly and a criticism of that approach, see note 85 *infra* and accompanying text.

113. 101 S. Ct. at 2774.

114. *Id.*

115. *Id.*

116. *Id.* at 2776-77.

117. *Id.* at 2776.

118. *Id.* at 2777. The *Agee* Court concluded that the purpose of the 1918 Act authorizing travel controls was to protect the national security. *Id.* at 2776. (citing Act of May 22, 1918, ch. 81, §§ 1-2, 40 Stat. 559). See note 27 *supra* and accompanying text.

Presidential proclamation which invoked the passport requirement of the 1918 Act had lapsed.<sup>119</sup> There is little in the legislative history of the 1926 Act which would indicate that Congress intended the Secretary to have power to withhold passports during peacetime.<sup>120</sup> Indeed, in 1978 when the INA was amended to require passports during peacetime,<sup>121</sup> the Passport Act was amended to expressly limit to wartime the Secretary's power to impose geographical restrictions on travel, one basis upon which he had relied to withhold passports in the past.<sup>122</sup>

The *Agee* Court, in reading into the Passport Act the power to revoke on grounds of national security, revitalizes the idea that the Secretary's power stems from inherent Executive powers in the area of foreign affairs.<sup>123</sup> In reviving that theory the Court ignored the

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119. See note 29 *supra* and accompanying text. As the title of the 1918 Act suggests, it was as much concerned with the safety of United States travelers during wartime as with national security. See note 26 *supra* and accompanying text. Indeed, the safety of United States travelers provided the impetus for amending Section 215 of the INA in 1978. See 124 Cong. Rec. H4689-90 (daily ed. May 31, 1978) (remarks of Reps. Eilberg and Fish). The passport requirement would have lapsed when President Truman's 1950 proclamation of national emergency was terminated on September 14, 1978 pursuant to the National Emergencies Act. See note 33 *supra*. In proposing the amendment which was subsequently adopted, Representative Eilberg said that "[t]he thrust of [the] amendment is to facilitate travel, not to obstruct it and cover it with penal overtones." 124 Cong. Rec. H4689, *supra*.

120. The legislative history on the Passport Act of 1926 makes no mention of passport revocation. The purpose of the Act appears to have been threefold: (1) to facilitate the issuance of passports by enabling such foreign representatives of the United States government as consuls and vice-consuls designated by the Secretary of State to issue passports; (2) to facilitate refunds of erroneously collected passport fees; and (3) to validate passports issued to United States teachers for a four-year period instead of the usual two-year period. See H.R. Rep. No. 1358, 69th Cong., 1st Sess. (1926); 67 Cong. Rec. 11705-06. See also 44 Stat. 887 (1926).

121. See note 2 *supra*.

122. 22 U.S.C. § 211a (Supp. III 1979) (codifying the Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 94-426, 92 Stat. 971 (1978)).

123. See note 112 *supra* and accompanying text. See also *Bauer v Acheson*, 106 F. Supp. 445, 448 (D.D.C. 1952) (where the Secretary contended that the issuance and revocation were entirely within the realm of foreign affairs and as such within the absolute discretion of the Executive branch of the government under its inherent power); *Hearings on Gaps in Internal Security Laws Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 136 (June 30, 1966) (remarks of S. J. Tracy). Mr. Tracy said that while "statutory authority to grant or withhold a passport was vested in the Secretary of State by the Congress over 100 years ago . . . the exercise of discretion in the issuance of passports is actually grounded in the power over foreign relations placed in the Executive by the Constitution." That Congress amended the Passport Act in 1978 to prohibit the Secretary from imposing geographical restrictions on travel except in time of war refutes the idea that the Secretary's power to revoke a passport *during peacetime* derives from the Executive's inherent power to conduct foreign affairs. See notes 14 & 88 *supra* and accompanying text.



rationale underlying its decision in *Kent v. Dulles* and the prevailing view that where constitutional rights are involved, delegated power must be sufficiently specific to ensure that it is being exercised in a manner consistent with legislative policy.<sup>124</sup>

What is perhaps most startling about *Agee* is that the Court, without acknowledging the import of its own action rejected the practice test and substituted in its place a test based on executive policy.<sup>125</sup> Under the policy test, the Secretary need not show that he has consistently applied the power he claims to have but merely that he has consistently *asserted* it.<sup>126</sup> In other words, he no longer has to point to a number of cases in which he actually revoked passports for a particular reason; he may instead rely on his own long-standing claim to that power. The Court in *Agee* failed to consider that the Secretary's regulation as it is written affects not only the right to travel but first amendment rights as well.<sup>127</sup> The regulation, construed according to the policy test is thus open to criticism as being overbroad. Although the majority ignores this criticism which is raised in the dissenting opinion, it is strikingly similar to the arguments raised in a series of cases twenty and thirty years ago.

In the late 1950s and 1960s, the Supreme Court struck down a number of laws on the ground that they were overbroad.<sup>128</sup> In *United States v. Robel*,<sup>129</sup> the Court struck down a provision of the

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124. See notes 79 & 89 *supra* and accompanying text.

125. See 101 S. Ct. at 2785 (Brennan, J., dissenting). In responding to *Agee's* argument that *Kent v. Dulles* required a consistent practice by the Secretary, the Court said that the regulation in *Kent* had been struck down because the Secretary had never applied it consistently; absent a consistent application the Court said that in *Kent* it could ascertain no definitive administrative policy in which Congress could be said to have acquiesced. 101 S. Ct. at 2780. By contrast, in *Agee* the Court found a consistent policy and stated that the government could not be faulted for not having had a previous opportunity to apply the regulation. *Id.* While the majority succeeded in distinguishing *Kent*, Justices Brennan and Marshall in dissent were compelled to conclude that the court's decision overruled *Kent v. Dulles sub silentio*. *Id.* at 2788 (Brennan, J., dissenting). Justice Blackmun, in his concurring opinion, thought that the majority was cutting back on *Kent*. *Id.* at 2786 (Blackmun, J., concurring).

126. *Id.* at 2780.

127. See note 68 *supra* and accompanying text.

128. See *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). Cf. *American Communications Ass'n. v. Douds*, 339 U.S. 382 (1950) (where the Court upheld Section 9(h) of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947). See also *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940).

129. 389 U.S. 258 (1967).

Subversive Activities Control Act which made it a crime for any member of the Communist Party to work in a defense facility.<sup>130</sup> The Court reasoned that although the statute was directed at employment, it also affected first amendment freedoms.<sup>131</sup> In finding the statute overbroad, the Court expressed concern with the chilling effect it had on the freedom of political beliefs and associations guaranteed by the first amendment.<sup>132</sup> Even where the statute did not infringe directly on an individual's rights, the fact that its prohibitions rested on political association inhibited the exercise of those rights.<sup>133</sup> A statute's overbreadth damages constitutional values because it operates on the minds of would-be actors.<sup>134</sup> Absent guidelines, the actors do not know the limits of the law and might therefore confine their activities far within the circumscribed area for fear of overstepping its bounds.<sup>135</sup> In this way, overbroad

130. *Id.* at 260-61. In *Robel* the Court struck down § 5(a)(1)(D) of the Subversive Activities Control Act, Pub. L. No. 831, § 5(a)(1)(D), 64 Stat. 987 (1950).

131. *Id.* at 265.

132. *Id.* The Court recognized that the government had a not insubstantial interest in the statute and that its purpose was to reduce the threat of sabotage and espionage in the nation's defense plants. However, the Court expressed concern about the means by which the government had attempted to achieve its purpose:

[i]t cannot be doubted that the means chosen to implement the governmental purpose in this instance cut deeply into the right of association. Section 5(a)(1)(D) put appellee to the choice of surrendering his organizational affiliation, regardless of whether his membership threatened the security of a defense facility, or giving up his job.

*Id.* at 264-65 (footnote omitted). The Court also noted that the right to employment free from governmental interference was within the liberty of the fifth amendment. *Id.* at 265 n.11.

133. *Id.* at 265.

134. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 856 (1970). In that note, the author explains how the 'chilling effect' operates:

[f]irst, and most obviously, a 'chilling effect' is the constitutional vice of overbroad coverage. By definition, an overbroad statute covers privileged activity [i.e. the exercise of first amendment rights], and to the extent that the statutory burden operates as a disincentive to action the result is an *in terrorem* effect on conduct within the protection of the first amendment. The reason for invalidating a substantially overbroad law is to end its deterrence of constitutionally preferred activity.

*Id.* at 853.

135. See *Barenblatt v. United States*, 360 U.S. 109, 137 (1959) (Black, J., dissenting). An overbroad statute does not discriminate between activity which may be proscribed and that which cannot be so proscribed consistent with first amendment right. *United States v. Robel*, 389 U.S. at 266. The absence of guidelines affects not only the person who, in fact, engages in non-constitutionally protected activity, but *all* persons. As Justice Black points out in his dissent in *Barenblatt*:

[A] statute broad enough to support infringement of speech [and] writings . . . against the unequivocal command of the First Amendment necessarily leaves all

regulation fails to give adequate notice to the actor of what is being proscribed.<sup>136</sup>

The rationale of the overbreadth doctrine is applicable to the regulation at issue in *Agee* because the Passport Act contains no express authorization to revoke and deny passports and Congress has established no regulations to guide its enforcement.<sup>137</sup> The Secretary himself promulgates not only the regulations and standards (in this case "serious damage to national security or foreign policy")<sup>138</sup> by which he can revoke a passport, but he also determines the cases in which he will exercise his discretion to do so.<sup>139</sup>

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persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others.

360 U.S. at 137 (footnote omitted). Thus, lacking notice of just what the overbroad law means to cover, people may confine their activities to stay within the bounds of the law. This is an illustration of the 'chilling effect'. See note 134 *supra*.

136. See note 135 *supra*. See also *Watkins v. United States*, 354 U.S. 178 (1957). In *Watkins*, the Court reversed a conviction for contempt of Congress. Watkins had been called to testify before the House Un-American Activities Committee. While he freely answered questions concerning his associations with the Communist Party, he refused to answer questions pertaining to the Communist activities of people on a list which the committee compiled and on which it sought to examine him. Therefore, the committee cited him for contempt. The Court examined the broad grant of authority to investigate un-American activities and noted that the delegation contained no standards for determining the scope of the committee's authority to make inquiries concerning un-American activities. *Id.* at 201-09. In reversing the conviction, the Court stated that the person who is compelled to make a choice between answering and not answering was entitled to knowledge on the subject to which the interrogation was pertinent and held that Watkins had been denied a fair opportunity for determining whether he was within his rights in refusing to answer the committee's questions. *Id.* at 208-209, 215.

137. The lack of legislative standards to guide the revocation of passports on grounds of national security underscores the imprudence of reading into the Passport Act congressional authorization to revoke on those grounds. See *United States v. Robel*, 389 U.S. at 274-77 (Brennan, J., concurring) and note 90 *supra*.

The Passport Act does not address the question whether the Secretary may revoke passports on the grounds of national security. The *Agee* Court's readiness to find congressional authorization to support the Secretary's revocation of *Agee*'s passport overlooks the fact that there has been no expression of congressional judgment on the *extent* to which national security considerations should curtail travel, nor any establishment of guidelines delineating the scope of the Secretary's power to revoke passports on those grounds. See *Kent v. Dulles*, 357 U.S. at 130. Thus it is premature for the Court, in dismissing *Agee*'s claim that the Secretary's regulation unconstitutionally curtails his right to travel, to state that the government's interest in national security outweighs *Agee*'s right to travel with a passport. The legislature has established no criteria as to the scope of the power to revoke passports on national security grounds by which the court could balance the interests involved. Compare 101 S. Ct. at 2781-82 with *United States v. Robel*, 389 U.S. at 263 n.20.

138. 22 C.F.R. § 51.70(b)(4) (1981).

139. See 22 C.F.R. § 51.70(b) (1981).

The problem inherent in the *Agee* Court's policy test is that even if the Passport Act did authorize passport revocation on national security grounds, Congress has not supplied guidelines for determining what is to be considered serious damage to national security. The *Agee* Court sidestepped the constitutional issue inherent in regulating travel by distinguishing between speech and action.<sup>140</sup> The Court states that speech and beliefs are only part of *Agee's* campaign to disrupt the activities of the CIA and that he has jeopardized the security of the United States.<sup>141</sup> However, the Court points to no conduct on *Agee's* part other than his speech and publications. The Court's decision reveals that serious damage to the national security or foreign policy is sustained when the holder of a passport is publishing information on United States intelligence operations.<sup>142</sup> How different is this from a determination by the Secretary that membership in the Communist Party will cause serious damage to the national security of the United States if for example the passport applicant's stated intention is to travel to the Soviet Union?<sup>143</sup> Because it is impossible for anyone to know what

140. 101 S. Ct. at 2783. The Court relied on *Zemel v. Rusk*, 381 U.S. 1 (1965), to support this distinction, stating that to the extent revocation operated to inhibit *Agee* it would inhibit only his action. 101 S. Ct. at 2783 (citing *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)). The Court's reliance on *Zemel* is, however, misplaced. While the *Zemel* Court cited *Kent's* practice test with approval, 381 U.S. at 17-18, it also emphasized that petitioner's stated purpose for travelling to Cuba—gathering of information—was not a freedom within the first amendment's protection. *Id.* at 17. For a further discussion of *Zemel v. Rusk* and of the Secretary's practice with respect to geographic restrictions on travel, see notes 14 & 88 *supra* and accompanying text.

141. 101 S. Ct. at 2783.

142. *See id.* at 2782-83.

143. In *Kent v. Dulles*, the Court struck down a regulation of the Secretary which allowed him to deny passports to Communists. 357 U.S. at 130. The present regulation, however, enables the Secretary to do just this if he determines that a member of a communist organization traveling to the U.S.S.R. would damage national security. The *Agee* Court's decision upholds the Secretary's discretion to determine what constitutes serious damage to national security without having a legislative judgment on the extent to which the Secretary may exercise that discretion. In so doing, the decision opens the door to abuse of discretion. *See* note 137 *supra*. With no guidelines as to what constitutes serious damage to national security, the Courts are not in a position to weigh the competing interests of the individual and the state. *See* 83 HARV. L. REV. at 857. *See generally* *United States v. Robel*, 389 U.S. at 277 (Brennan, J., concurring). *Cf.* *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962) where the Court held that Congress did not authorize the Postmaster General to censor obscenity when it made it a crime to send "nonmailable" material through the mails. *Id.* at 479. In his concurring opinion, Justice Brennan said that in a case where the extent of the authority delegated by Congress is unclear, and finding such authority would raise constitutional questions, it is better to find that no such authority was granted. *Id.* at 500.

activities the Secretary will deem likely to cause serious damage to national security,<sup>144</sup> a would-be traveler does not have adequate notice of what activities will cause him to risk losing his passport.<sup>145</sup>

The policy test which the Court espouses in *Agee v. Haig* makes it easier to find in any given case that Congress has authorized the Secretary to refuse to revoke passports. The Court's decision is flawed because it does not examine the standards by which the Secretary's policy is implemented.<sup>146</sup> The Court has bowed to the Secretary's discretion at the expense of a serious inquiry into the constitutional rights which may be affected by the exercise of that discretion.

### CONCLUSION

Freedom to travel abroad is a complex constitutional right which cannot be wholly distinguished from the freedoms guaranteed under the first amendment. Because the Passport Act is broadly phrased and grants no express power to revoke or deny a passport, the test which governs revocation or denial of a passport is of great import to all citizens. The practice test articulated in *Kent v. Dulles* provided a means by which a court could uphold passport revocation and at the same time assure due consideration for Constitutional rights. The policy test articulated by the Supreme Court in *Agee* removes a safeguard provided by *Kent* to ensure that those rights were being regulated and enforced with the approval of the legislature. The practice test's requirement that the Secretary show a past application of his claimed power to revoke a passport served as a check on "unbridled" administrative discretion.<sup>147</sup> The *Agee* Court's policy test, in contrast, opens the door to abuse of discretion. Moreover, the implication of national security considerations establishes a precedent which may discourage future judicial review of passport revocations.<sup>148</sup>

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144. See note 14 *supra* and accompanying text.

145. See note 13 *supra* and accompanying text.

146. See note 137 *supra* and accompanying text.

147. *Kent v. Dulles*, 357 U.S. at 129.

148. See note 143 *supra* and accompanying text.

