

CASENOTES

Clarifying the Authority Delegated to the Secretary of State for the Control of Passports: *Haig v. Agee*¹ — Pursuant to the Passport Act of 1926,² the Secretary of State of the United States is empowered to control the granting or issuing of passports.³ Since a challenge to the power of Congress to delegate passport authority at all would probably fail,⁴ past challenges to the Secretary's denial of passports have been predicated on two grounds: the absence of a delegation of the specific authority asserted by the Secretary; and, if authorized by Congress, the invalidity of the action taken on constitutional grounds.⁵

Given the broad language of the authority delegated by Congress in the Passport Act of 1926,⁶ an express delegation of a specific authority asserted by the Secretary is rarely found.⁷ Instead, courts faced with delegation issues look to the presence or absence of factors demonstrating implicit congressional authorization of the particular action being challenged.⁸ In those cases where implied authorization is found, courts move on to consider the impact of the challenged action on the affected party's constitutional rights.⁹ Recently, in *Haig v. Agee*,¹⁰ the Supreme Court again considered the twin inquiries necessitated by a challenge to the Secretary's actions.¹¹ The Court determined that Congress implicitly had authorized the Secretary to revoke passports on the basis of perceived threats to national security.¹² The Court also concluded that constitutional considerations respecting free speech, due process and international travel were not infringed impermissibly.¹³

In *Agee*, the plaintiff, Philip Agee, worked for the Central Intelligence Agency (CIA) from 1957 to 1968.¹⁴ During the course of his employment, Agee

¹ 453 U.S. 280 (1981).

² Act of July 3, 1926, ch. 772, § 1, 44 Stat. 887 (codified as amended at 22 U.S.C. § 211a (1976 & Supp. II 1978)).

³ The statute states in relevant part:

[T]he 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, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, 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. Under Executive Order number 11,295, the President designated and empowered the Secretary to exercise the authority conferred upon the President by the Passport Act of 1926 without the approval or other action of the President. EXEC. ORDER NO. 11,295, 31 Fed. Reg. 10603 (1966).

⁴ See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.01-2.06 (1958).

⁵ See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958).

⁶ See *supra* note 3.

⁷ See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 8 (1965).

⁸ *Id.* at 8-13.

⁹ *Id.* at 13-18.

¹⁰ 453 U.S. 280 (1981).

¹¹ *Id.* at 282.

¹² *Id.* at 306.

¹³ *Id.*

¹⁴ *Id.* at 283.

worked in various positions of trust within the CIA.¹⁵ He received formal training in clandestine operations,¹⁶ and became acquainted with numerous CIA employees whose association with the CIA had not been officially acknowledged.¹⁷ It was and still is Agee's belief that the CIA intervenes in the affairs of foreign states on the side of those whose property and privilege rest upon the remnants of archaic social systems long since discredited.¹⁸ In 1974, Agee announced his intention to fight the CIA.¹⁹ As part of his campaign, Agee travelled to various foreign countries,²⁰ and with the aid of collaborators, publicly identified individuals and organizations abroad serving as CIA undercover agents, employees or sources.²¹ The identifications *may* have prejudiced American abilities to obtain intelligence,²² and provoked violence against the persons and organizations identified.²³

Five years after Agee announced his campaign against the CIA, the State Department revoked his passport.²⁴ Agee was notified in West Germany that

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Brief for Respondent at 5, *Haig v. Agee* 453 U.S. 280 (1981).

¹⁹ 453 U.S. at 283. Agee held a press conference in London to announce his campaign. *Id.* Agee's statement at the London conference was:

Today, I announced a new campaign to fight the United States CIA wherever it is operating. This campaign will have two main functions: First, to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating; secondly, to seek within the United States to have the CIA abolished.

This effort to identify CIA people in foreign countries has been going on for some time. . . . (Today's) list was compiled by a small group of Mexican comrades whom I trained to follow the comings and goings of CIA people before I left Mexico City.

Similar lists of CIA people in other countries are already being compiled and will be announced when appropriate. We invite participation in this campaign from all those who strive for social justice and national dignity.

Appendix E to Petition for Certiorari at 107a, *Haig v. Agee*, 453 U.S. 280 (1981).

²⁰ 453 U.S. at 284.

²¹ *Id.* John N. McMahon, Deputy Director for Operations of the Central Intelligence Agency, charged that Agee directly or indirectly exposed CIA employees in London, Lisbon, Sweden, Angola, Madrid, The Hague, Switzerland, LaPaz, Kingston, Australia and New Zealand. Appendix E to Petition for Certiorari at 107a-111a, *Haig v. Agee*, 453 U.S. 280 (1981).

²² 453 U.S. at 284-85.

²³ *Id.* at 285. Loren Lawrence, United States Ambassador to Jamaica, noted that Louis Wolf, who worked in collaboration with Philip Agee, held a press conference in Kingston exposing the names of several CIA employees. Appendix H to Petition for Certiorari at 125a, *Haig v. Agee*, 453 U.S. 280 (1981). Shortly thereafter attempts were made on the lives of several of these newly-exposed CIA employees. *Id.* at 125a-127a.

²⁴ 453 U.S. at 286. The State Department letter notifying Agee of the revocation read in part:

The Department's action is predicated upon a determination made by the Secretary under the provisions of [22 C.F.R.] Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence opera-

the revocation occurred because his actions had caused or were likely to cause serious damage to the national security and foreign policy of the United States.²⁵ The revocation was made under the provisions of sections 51.70(b)(4) and 51.71(a) of Title 22 of the Code of Federal Regulations.²⁶ Agee was advised of his right to a hearing²⁷ and was given the opportunity to have that hearing expedited.²⁸ Rather than pursue the administrative avenue available to him,²⁹ Agee filed suit against the Secretary of State in the United States District Court for the District of Columbia.³⁰

Agee attacked the Secretary's revocation of his passport on two grounds: first, he argued that the regulations, upon which the authority to revoke his passport was based, had not been authorized by Congress;³¹ second, Agee contended that the regulations were facially unconstitutional, claiming that they impermissibly conflicted with rights guaranteed under the first and fifth amendments to the Constitution.³² Agee petitioned the district court for declaratory and injunctive relief.³³ To facilitate his challenges to the validity of the Secretary's regulations, Agee conceded, for purposes of his summary judgment motion, that his actions were likely to cause serious damage to the national security of the United States.³⁴

tions of the United States. In carrying out that campaign you have travelled in various countries (including, among others, Mexico; the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

Appendix G to Petition for Certiorari at 120a, *Haig v. Agee*, 453 U.S. 280 (1981).

²⁵ *Id.*

²⁶ *Id.* The two regulations involved read in relevant part:

(b) A passport may be refused in any case in which: . . . (4) 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) (1980).

A passport may be revoked, restricted or limited where: (a) The national would not be entitled to issuance of new passport under § 51.70. . . .

22 C.F.R. § 51.71(a) (1980).

²⁷ 453 U.S. at 287.

²⁸ *Id.*

²⁹ *Id.* at n.10.

³⁰ *Agee v. Vance*, 483 F. Supp. 729 (D.D.C. 1980).

³¹ *Id.* at 730.

³² *Id.*

³³ *Id.*

³⁴ *Id.* By conceding this point, Agee removed all questions of fact, and presented "a pure question of law" to the court. *Id.* The transcript detailing Agee's concession reads in part:

MR. WULF: If you are saying, Your Honor, that you will not hear an overbreadth argument and that the only argument that you want to hear is the question of basic authority, we will argue just that question and we will concede the charges as they are made in the letter to Agee, which is part of the record.

THE COURT: Right.

MR. WULF: O.K. Whatever they charge, we will concede it is true.

THE COURT: For purposes of challenging the regulation.

On cross-motions for summary judgment,³⁵ the district court noted that the Secretary's authority to regulate passports can be no greater than that which Congress chose to delegate under the Passport Act of 1926.³⁶ To prove the revocation was a proper exercise of such authority, the court stated, the Secretary must demonstrate that he acted "pursuant to an explicit delegation or that he had followed 'sufficiently substantial and consistent' administrative practice to warrant the implied approval of Congress."³⁷ Turning to the first inquiry, the district court noted that the Passport Act of 1926 did not expressly empower the Secretary to deny or revoke a passport on national security grounds, and that there had been no subsequent legislation relating to passports that had expressly delegated such authority.³⁸ Finding no express delegation of authority, the court next considered whether Congress had implicitly condoned the Secretary's actions.³⁹ The court determined that there was no substantial and consistent administrative practice of passport revocations based on national security and foreign policy interests.⁴⁰ The court therefore concluded that there was no implicit congressional approval of such conduct.⁴¹ Because it concluded that the regulation lacked congressional approval, the district court did not consider the additional attacks on the regula-

MR. WULF: For purposes of challenging their authority to adopt and apply the regulation.

THE COURT: That is where I thought we were.

MR. WULF: Right. We went around a little bit. That is what I first conceded. I don't want to argue the over-breadth issue. I guess I will have to save that for another day.

Joint Appendix to Petition for Certiorari at 19, *Haig v. Agee*, 453 U.S. 280 (1981). Agee did not contest the allegations point by point since the theory of his case was that the Secretary of State has no congressional authorization to revoke passports for national security reasons under 22 C.F.R. § 51.70(b) no matter what accusations might be made against a citizen. Brief for Respondent at 1, *Haig v. Agee*, 453 U.S. 280 (1981). Agee, however, did contest the truth of a newspaper report that he had been invited to travel to Iran to participate in the hostage incident. *Id.* at 4. Agee denied having received the invitation and claims that he would not have accepted it under any circumstances. *Id.* at 4-5. Agee did state, however, that he would consider going to Iran once the American hostages were released and only at that point would he reveal any CIA names or sit upon a tribunal. See Joint Appendix to Petition for Certiorari at 29-30, *Haig v. Agee*, 453 U.S. 280 (1981).

³⁵ 483 F. Supp. at 730.

³⁶ *Id.*

³⁷ *Id.* at 731.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* In addition, the court stated that implied authority was not to be inferred from legislative inaction, especially, when—as with the instant case—the Executive had introduced a bill which would have expressly granted the Secretary the power asserted in the *Agee* case. *Id.* at 731-32 & nn. 7-8. For a discussion concerning these hearings see Note, *Passport Revocations or Denials on the Ground of National Security and Foreign Policy*, 49 *FORDHAM L. REV.* 1178, 1185-1188 (1981) [hereinafter cited as, *Passport Revocations*].

The district court also declined to find Congress' implicit adoption of the regulations in the 1978 amendment to the Passport Act of 1926, which added a provision prohibiting passport restrictions except for countries "with which the United States is at war, where armed hostilities

tion based on the first and fifth amendments.⁴² Agee's motion for summary judgment was granted,⁴³ and his passport ordered restored.⁴⁴

On appeal, the United States Court of Appeals for the District of Columbia affirmed the district court's judgment.⁴⁵ The majority opinion stated that "the Secretary of State must demonstrate that Congress has authorized 22 C.F.R. §51.70(b)(4) either by express delegation or by a 'sufficiently substantial and consistent' administrative practice to warrant finding the implied approval of Congress."⁴⁶ The decision noted first that neither the Passport Act of 1926 nor any subsequent legislation relating to passports expressly authorizes the Secretary of State to deny or revoke passports on national security or foreign policy grounds.⁴⁷ The appellate court then declared that there was no substantial and consistent administrative practice demonstrating implied congressional authorization for the challenged regulations.⁴⁸ The circuit court reasoned that "'only the clearest . . . evidence [of past administrative and legislative practice]' " would have permitted the court "'to consider Congressional silence to be a substitute for explicit and affirmative legislative action in limiting the free exercise of important rights.'" ⁴⁹ Like the district court, the circuit court majority did not address Agee's constitutional claims because of the invalidation of the regulation.⁵⁰

In dissent, Circuit Judge MacKinnon came to four conclusions contrary to the majority's reasoning. First, the judge reasoned that the President was authorized to revoke Agee's passport in a hostage situation, such as that in Iran at the time of Agee's passport revocation.⁵¹ Second, the dissent declared that

are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers." 483 F. Supp. at 732 (referring to the Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 124, 92 Stat. 963, 971 (1978) (codified at 22 U.S.C. § 211a (Supp. II 1978))).

⁴² 483 F. Supp. at 732.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Agee v. Muskie*, 629 F.2d 80, 87 (D.C. Cir. 1981). For a commentary on the opinions in *Agee v. Muskie* see 22 HARV. INT'L L.J. 187 (1981) and 56 NOTRE DAME LAW. 508 (1981). See generally Note, *Passport Revocations*, *supra* note 41.

⁴⁶ 629 F.2d at 85.

⁴⁷ *Id.* The court stated that the failure of Congress to enact legislation which would have expressly empowered the Secretary to act as he did in the instant case, does not support the Secretary's contention that Congress already delegated the power. *Id.* & n.4. Neither did the lack of mention in the 1978 amendment to the Passport Act of 1926 of the power asserted by the Secretary in the instant case support the Secretary's contention that Congress authorized the asserted power. *Id.* at 85.

⁴⁸ *Id.* at 86.

⁴⁹ *Id.* at 87 (quoting *Woodward v. Rogers*, 344 F. Supp. 974, 985 (D.D.C. 1972) *aff'd mem.*, 486 F. 2d 1317 (1973) (Requirement of oath of allegiance for all applicants for United States passports is an unconstitutional abridgement of the Fifth Amendment right to travel abroad).

⁵⁰ 629 F.2d at 87 n.9. The majority also noted that without a formal allegation of criminal activity, it was not sufficient that Agee's conduct may have been considered by some to border on treason. *Id.* at 87.

⁵¹ *Id.* at 109 (MacKinnon, J., dissenting). The dissent made reference to 22 U.S.C. §

since Agee's acts were illegal the passport could be denied.⁵² Third, he stated that passports could be denied on national security and foreign policy grounds, and that such a denial would be consistent with prior administrative practice.⁵³ Finally, the dissenting judge concluded that Congress intended to allow the Executive the right to deny passports on national security grounds when an individual's travel would be "inconsistent with a greater government interest."⁵⁴

The principal issue on appeal⁵⁵ before the Supreme Court was whether the Passport Act of 1926 authorized the regulations pursuant to which the Secretary acted in revoking Agee's passport.⁵⁶ Moreover, unlike the lower courts, the Court also addressed Agee's constitutional challenges to the regulations.⁵⁷ In a 7-2 decision written by Chief Justice Burger, the Court held that "the policy announced in the challenged regulations [was] 'sufficiently substantial and consistent' to compel the conclusion that Congress ha[d] approved it."⁵⁸ The Court also found that the revocation was not invalid on its face despite Agee's constitutional challenges. Specifically, the Court acknowledged that while the freedom to travel was curtailed, the liberty interest in international travel "is subject to reasonable governmental regulation."⁵⁹ Considerations of national security and foreign policy justified the impediment to travel.⁶⁰ Moreover, the Court found that the revocation did not unconstitutionally impinge on first amendment rights.⁶¹ Since Agee's stated purpose was to impede the American intelligence system, his disclosures did not constitute protected speech.⁶² In addition, the Court noted, by hindering Agee's ability to travel, the passport revocation curtailed only conduct, not speech.⁶³ Finally, when there is a substantial likelihood of serious damage to the national security or foreign policy resulting from a citizen's activities, the Court ruled that the government was not required to hold a prerevocation hearing.⁶⁴

1732 (1976) and to the authority of *Zemel v. Rusk*, 381 U.S. 1 (1965). Judge MacKinnon declared that § 1732 was implied in the instant case. 629 F.2d at 109 n.65 (MacKinnon, J., dissenting). The majority, however, disagreed. *Id.* at 84 n.3.

⁵² *Id.* at 110 (MacKinnon, J., dissenting). The dissent made reference to 18 U.S.C. § 793(d) (1976) and to the authority of *Kent v. Dulles*, 357 U.S. 116, 127 (1958).

⁵³ 629 F.2d at 110 (MacKinnon, J., dissenting). The dissent made reference to the authority of *Zemel v. Rusk*, 381 U.S. 1 (1965). The majority did not agree with this interpretation of the *Zemel* decision. 629 F.2d at 84 n.3.

⁵⁴ *Id.* at 110 (MacKinnon, J., dissenting).

⁵⁵ The Supreme Court granted certiorari and denied Agee's motion to vacate the stay previously entered. 449 U.S. 818 (1980).

⁵⁶ 453 U.S. at 289.

⁵⁷ *Id.* at 306.

⁵⁸ *Id.* Justice Blackmun concurred. Justice Brennan wrote the dissenting opinion in which he was joined by Justice Marshall.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 308-09.

⁶² *Id.* at 309.

⁶³ *Id.*

⁶⁴ *Id.*

Justice Brennan's dissent stated that there must be a substantial and consistent administrative practice, and not just a substantial and consistent administrative policy, to prove that Congress implicitly authorized the action of the Secretary.⁶⁵ Since Congress was not faced previously with actual instances of the regulation being invoked to permit the Secretary to revoke passports for national security reasons, Brennan reasoned that Congress' inaction did not establish an implicit authorization of the regulation.⁶⁶ Because Justice Brennan found that the Secretary's actions pursuant to the regulations were an unlawful exercise of authority by the Secretary, he did not address, except in a footnote, the constitutional issues presented in the case.⁶⁷

The Supreme Court in *Haig v. Agee* further defined its standard for determining whether actions taken by an administrative agency fall within authority implicitly delegated by Congress to the Executive. Significantly, the *Agee* decision clarifies the Supreme Court's previous holdings as to when congressional approval can be implied from a substantial and consistent administrative policy. The decision is also important because it finds that regulations which may affect the first and fifth amendments are not invalid on their face when their language permits their use only in instances of serious damage to the national security or foreign policy of the United States.

This casenote will consider the Supreme Court's decision in *Haig v. Agee* in light of its precedent and the important constitutional rights at issue. First, the casenote will discuss briefly two prior Supreme Court decisions of particular precedential importance to the *Agee* Court. The reasoning of both the majority and dissent in *Agee* with respect to the determination of whether Congress intended the Secretary to have the authority to deny or revoke passports on national security grounds will then be set forth. Next, the constitutional aspects of the decision will be considered. Thereafter, this casenote will turn to an analysis of the majority's opinion to provide an indication of the current status of the law. It will be submitted that *Agee* constitutes neither a departure from prior case law concerning congressional delegation of authority to the Executive to revoke passports, nor a limitation on the exercise of any previously recognized constitutional rights.

I. THE PRECEDENT FOR *HAIG V. AGEE*

Two earlier Supreme Court decisions were of particular precedential importance to both the majority and dissent in *Agee* in their respective attempts to determine whether implied authority existed to deny or revoke Agee's passport. *Kent v. Dulles*⁶⁸ and *Zemel v. Rusk*⁶⁹ addressed issues similar to those before the Court in *Agee*.

⁶⁵ *Id.* at 314 (Brennan, J., dissenting).

⁶⁶ *Id.* at 315-16.

⁶⁷ *Id.* at 320 n.10.

⁶⁸ 357 U.S. 116 (1958).

⁶⁹ 381 U.S. 1 (1965).

In 1958, the Court in *Kent v. Dulles* considered the dilemma of Rockwell Kent and Walter Briebl.⁷⁰ Kent desired to travel to Europe to attend a meeting of an organization known as the "World Council of Peace."⁷¹ The Director of the Passport Office stopped issuance of Kent's passport on two grounds: "(1) that he was a Communist and (2) that he had had 'a consistent and prolonged adherence to the Communist Party line.'"⁷² Briebl was also denied a passport on the ground that he was a Communist.⁷³ Both Kent and Briebl refused to supply affidavits denying membership in the Communist Party.⁷⁴ If they had stated that they were Communists, the regulation in question would have automatically denied them a passport.⁷⁵

The *Kent* Court noted that although the Secretary had discretion in granting or refusing passports, the manner in which he exercised that discretion was of prime importance.⁷⁶ The majority in *Kent* then found that "while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly."⁷⁷ So far as was relevant to the *Kent* Court, the administrative practice prior to 1926 had "jelled" only around two categories for the refusal of passports: (1) questions regarding the applicant's citizenship and his allegiance to the United States, and (2) whether the applicant was engaging in illegal conduct.⁷⁸ With respect to a third category — Communist affiliation — the *Kent* Court stated that the State Department rulings regarding Communists were infrequent and did not follow a consistent pattern.⁷⁹ The government was denying the petitioners' freedom of movement, according to the *Kent* majority, "solely because of [the petitioners'] refusal to be subjected to inquiry into their beliefs and associations."⁸⁰ The Court held that Congress had not delegated to the Secretary the authority to withhold passports on the basis of the beliefs or associations of the citizens concerned.⁸¹

In *Zemel v. Rusk*,⁸² the plaintiff was a citizen of the United States who held a valid passport and wished to visit Cuba at a time when the State Department had imposed restrictions on such travel.⁸³ The State Department denied

⁷⁰ 357 U.S. at 116-120.

⁷¹ *Id.* at 117.

⁷² *Id.* at 117-18.

⁷³ *Id.* at 119.

⁷⁴ *Id.*

⁷⁵ *Id.* at 118 n.2.

⁷⁶ *Id.* at 125.

⁷⁷ *Id.* at 127.

⁷⁸ *Id.* at 127-28. The Court did not view the petitioners as criminals, nor did the Court know if they were Communists. *Id.* at 130. Even if the petitioners were Communists, the Court noted that no law curtailing their movement had become effective. *Id.*

⁷⁹ *Id.* at 128. The Court made it clear that the manner in which the Secretary had used the discretion given him was very important. *Id.* at 125.

⁸⁰ *Id.* at 130.

⁸¹ *Id.*

⁸² 381 U.S. 1 (1965).

⁸³ *Id.* at 3.

Zemel's request to have his passport validated for travel to Cuba as a tourist.⁸⁴ Zemel challenged the Secretary's denial on the grounds of absence of congressional authorization and unconstitutionality.⁸⁵ Considering the delegation of authority issue, the Supreme Court in *Zemel* went through the history preceding the Passport Act of 1926 showing that the Executive had several times "openly asserted" the power to impose travel restrictions.⁸⁶ The Court concluded that Congress intended by the passage of the Passport Act in 1926 to continue authorizing the Executive to make such restrictions.⁸⁷ The *Zemel* Court went on to note that the post-1926 imposition of area restrictions was relevant for three reasons: (1) courts construing a statute must give weight to the interpretation of the statute by those who have the duty of administering it, (2) Congress' failure to repeal or revise the statute in the face of administrative interpretations occasionally has been held to be strong evidence that the administrative interpretation was the one intended by Congress, and (3) despite twenty-six years of interpretation by the Executive of the Passport Act as authorizing the imposition of area restrictions, Congress in 1952,⁸⁸ (while again approving legislation relating to passports) left untouched the broad rule-making authority granted earlier.⁸⁹

Turning to the constitutionality issue, the *Zemel* Court distinguished *Kent*. Since *Kent* concerned only passport refusals "based on the character of the particular applicant,"⁹⁰ the *Zemel* Court reasoned that the two categories found by the *Kent* Court to justify refusals based on character — citizenship and illegal conduct — were not the exclusive justifications for all passport refusals.⁹¹ Thus, because *Zemel* involved a refusal based on foreign policy considerations, and not upon the "beliefs and associations" grounds rejected by *Kent*, the *Zemel* Court was not bound by the categories announced in *Kent*.⁹²

In sum, *Kent* held that denials of passports based upon the character of the applicant had "jelled" only around two categories — citizenship and illegal conduct. Due to the inconsistency of the rulings concerning Communists, the

⁸⁴ *Id.* at 3-4.

⁸⁵ *Id.* at 4. The appellant requested a judgment declaring: (1) that under the Constitution and the laws of the United States he was entitled to travel to Cuba and to have his passport so validated; (2) that his travel to Cuba would not violate any law; (3) that the restrictions of the Secretary of State were invalid; (4) that the Passport Act of 1926 and § 215 of the Immigration and Nationality Act of 1952 were unconstitutional; and (5) that the refusal of the Secretary to allow appellant to travel to Cuba violated the Constitution and the United Nations Declaration of Human Rights. *Id.* A procedural claim for a formal hearing was abandoned in the district court. *Id.* & n.1.

⁸⁶ *Id.* at 8-9.

⁸⁷ *Id.* at 9.

⁸⁸ *Id.* at 12. The Court was referring to the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

⁸⁹ *Id.* at 11-12. The *Kent* Court did not feel it was necessary to look at post-1926 practice. 357 U.S. at 128.

⁹⁰ 381 U.S. at 13.

⁹¹ *Id.*

⁹² *Id.*

Kent Court rejected the contention that Congress had implicitly accepted, as a third category, Communist party membership as grounds for "bad character" denials. *Zemel* found that the authority to implement area restrictions was implied in the Passport Act of 1926, and even if it was not, the post-1926 actions by the Executive were of great importance in construing the statute, especially given the congressional silence on those actions in the 1952 legislation. In distinguishing *Kent*, the *Zemel* Court stated that the earlier decision's enumeration of only two categories for justifying refusals — citizenship and illegal conduct — were not binding in the instant case, since in *Zemel* the denial of the passport was not based on the character of the applicant. While both cases spoke of past administrative actions, neither *Kent* nor *Zemel* stated explicitly that only administrative practice and not policy would be considered in determining whether Congress had delegated authority.

II. THE OPINIONS IN *HAIG V. AGEE*

In affirming the Secretary of State's authority to revoke Philip Agee's passport, the Supreme Court considered both whether the regulation authorizing the Secretary to take such action was beyond the scope of the enabling statute, and whether the regulation was invalid on its face in the light of the first and fifth amendments. The following section juxtaposes the reasoning of the *Agee* majority on each issue against the dissent's contrary analysis.

A. Congressional Authorization of the Challenged Regulation

The *Agee* majority began its inquiry into the validity of the challenged regulation under the Passport Act of 1926 by noting that the Act expressly granted to the Secretary neither the power to deny nor revoke any passport.⁹³ Nevertheless, Chief Justice Burger's opinion for the majority stated that it was clear that the Secretary of State has the power to deny a passport for reasons not expressly stated in the statute.⁹⁴ Furthermore, Agee conceded that a valid reason to deny a passport would be a valid reason to revoke one.⁹⁵

The question presented, therefore, was not whether the Secretary had the power to revoke any passport, but whether the challenged regulations were within the scope of the revocation authority delegated by the Act. In light of the broad rule-making authority granted in the Passport Act, the Court stated, "a consistent administrative construction of that statute must be followed by the

⁹³ 453 U.S. at 290. See *supra* note 3.

⁹⁴ 453 U.S. at 290. In support of this statement, the *Agee* Court makes reference to *Kent v. Dulles*, 357 U.S. 116, 127 (1958) (finding congressional acquiescence, for example, in an Executive policy of refusing passports to applicants participating in illegal conduct), and to *Zemel v. Rusk*, 381 U.S. 1, 16 (1965) (the weightiest considerations of national security authorized travel restrictions).

⁹⁵ 453 U.S. at 291 (citing to the Transcript of Oral Argument at 33, *Haig v. Agee*, 453 U.S. 280 (1981)).

courts 'unless there are compelling indications that it is wrong.'⁹⁶ Judicial deference to such administrative constructions, the Court noted, is especially called for in areas of foreign policy and national security.⁹⁷ Under such circumstances, reasoned the Court, congressional silence cannot be equated with congressional disapproval.⁹⁸ The *Agee* Court therefore concluded that if a consistent administrative construction existed whereby the Secretary of State asserted the authority to revoke passports on foreign policy grounds, the Court should and would defer to that construction if it were authorized by Congress.⁹⁹

The *Agee* Court then determined that a consistent administrative construction to revoke passports on national security or foreign policy grounds was implicitly ratified by Congress. The majority stated that the history of passport controls from the beginning of the nation shows that Congress had recognized the authority of the Executive to withhold passports for substantial reasons of national security and foreign policy.¹⁰⁰ The *Agee* majority stated that prior to 1856 the issuance of passports was viewed as a matter left solely to Executive discretion and the Executive was presumed to exercise this power in the interests of the nation.¹⁰¹ In 1856, Congress passed legislation¹⁰² to insure that passport authority rested with the federal government as opposed to allowing

⁹⁶ *Id.* (quoting *E.I. DuPont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969))). In *Red Lion*, the Court declared "that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." 395 U.S. at 381. The *Agee* Court also quoted a passage from *Zemel v. Rusk*, 381 U.S. 1 (1965), stating:

[B]ecause 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 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.

381 U.S. at 17.

⁹⁷ 453 U.S. at 291.

⁹⁸ *Id.*

⁹⁹ *See id.* at 291-92.

¹⁰⁰ *Id.* at 293.

¹⁰¹ *Id.*

¹⁰² Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 52, 60. That statute read in relevant part:

[T]he Secretary of State shall be authorized to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and 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 any such passport; nor shall any passport be granted or issued to, or verified for, any other persons than citizens of the United States. . . .

Id. The statute was amended to allow passports to be granted to non-citizens who were liable to military duty by the laws of the United States. Act of March 3, 1863, ch. 79, § 23, 12 Stat. 744, 754. This amendment was later repealed. Act of May 30, 1866, ch. 102, 14 Stat. 54. The phrase "shall be authorized to" was replaced with "may" in a later amendment. Rev. Stat. § 4075 (1874).

state and local officials to issue passports.¹⁰³ The Court found that the 1856 Passport Act otherwise only acknowledged the authority already possessed by the Secretary of State.¹⁰⁴ The Court stated that the Executive branch consistently understood the 1856 Passport Act to preserve the Secretary's authority to withhold passports on national security or foreign policy grounds,¹⁰⁵ and noted that an emergency measure in 1861 which denied passports to persons acting in ways that were dangerous to the nation¹⁰⁶ went unchallenged by Congress.¹⁰⁷

Further evidence of the consistent interpretation given the statute by the Executive branch was found in Attorney General opinions and Executive Orders issued between 1869 and 1917.¹⁰⁸ To the *Agee* Court, these documents indicated a consistent administrative policy of denying passports for national security or foreign policy reasons.¹⁰⁹ This policy denied passports, even in times of peace, to those whose conduct abroad could embarrass the United States, as well as to those who wished to upset the relationship between the United States and the representatives of foreign governments.¹¹⁰ Congressional enactment of the first travel control statute in 1918¹¹¹ indicated to the Court a clear congressional expectation that the Executive could control a citizen's international travel in the interest of national security.¹¹²

It was in this atmosphere of broad Executive control of passports that the Passport Act of 1926 (under which the regulations *Agee* challenged were promulgated) was passed. According to the Court, the language used by Congress in 1926 was at times identical to that found in the 1856 Act as amended in 1874.¹¹³ Moreover, the Court declared that the legislative history of the Passport Act of 1926 shows Congress knew of the Executive policy under the old legislation.¹¹⁴ In the view of the Court, there was no evidence of any intent

¹⁰³ 453 U.S. at 294 & n.27.

¹⁰⁴ *Id.* at 294-95.

¹⁰⁵ *Id.* at 295.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at n.29. See also *supra* note 102.

¹⁰⁸ See 453 U.S. at 295-96. The Court noted a 1869 opinion of Attorney General Hoar, *id.* (citing 13 Op. Att'y Gen. 89, 92), and a 1901 opinion of Attorney General Knox. *Id.* (citing 23 Op. Att'y Gen. 509, 511). The Court also noted several Executive orders. *Id.* & n. 31 (citing Exec. Order No. 654 (1907), Exec. Order No. 2119-A (1915); Exec. Order No. 2362-A (1916), & Exec. Order No. 2519-A (1917)).

¹⁰⁹ 453 U.S. at 295.

¹¹⁰ *Id.* at 296.

¹¹¹ Act of May 22, 1918, ch. 81, §§ 1 & 2, 44 Stat. 559. The statute forbade any attempt to enter or leave the United States during wartime without a passport, except where the Executive so provided, when the President proclaimed that this restriction was warranted in light of the public safety. *Id.*

¹¹² 453 U.S. at 296-97.

¹¹³ See *supra* note 102.

¹¹⁴ 453 U.S. at 297 (citing *Validity of Passports: Hearings on H.R. 11947 Before the House Comm. on Foreign Affairs*, 69th Cong., 1st Sess. 5, 8, 10-11 (1926) [hereinafter, *1926 Passport Hearings*]). Of particular interest is the dialogue between Mr. Henry A. Cooper, Representative from Wisconsin, Mr. Morton D. Hull, Representative from Illinois, and Mr. Wilbur J. Carr, Assistant Secretary of State:

on the part of Congress to reject the administrative construction of the 1856 Act.¹¹⁵ The Court, therefore, concluded that Congress adopted the broad, longstanding administrative construction of the 1856 Act in the 1926 Act.¹¹⁶

Chief Justice Burger indicated that the Executive interpreted the 1926 legislation to authorize denial of passports for reasons of national security or foreign policy.¹¹⁷ This administrative construction of the Passport Act was

MR. COOPER. It is my judgment based on what I have seen of the evolution of legislation in Congress, that there is altogether too much power given to a department to prescribe rules and regulations, the violation of which amounts almost to a violation of law. Why should there not be some of these regulations printed in the statute so that they shall be a part of the law and not left to the discretion of an executive officer to prescribe?

MR. HULL. If you can foresee exactly what you want in advance, I would say that that would be true, but a lot of detail cannot be foreseen.

MR. COOPER. I do not know of any condition about the issuing of a passport that cannot be foretold. There is no prophecy about it. You do not want to make it a matter of favoritism here and favoritism there, but a rule for all individuals who ask for passports, and it ought to be incorporated in the law. There is no question, Mr. Hull, but what there has been going on a gradual accretion of power in the executive departments to make rules and regulations and the conditions ought to be in the law itself in many, many instances.

MR. HULL. That may be true.

MR. COOPER. That is so particularly in the Treasury Department.

MR. HULL. But as long as you are appointing boards and commissions, etc., without a perfectly clear foreknowledge as to the method of operation and the contingencies that may arise, it seems to me you have always got to have considerable discretion in the board, etc.

MR. COOPER. This leaves the law in an executive officer.

MR. HULL. I do not know where you could draw the line as to that. They have to have some discretionary power.

MR. COOPER. Nobody disputes that, that there has got to be some discretion, but not unlimited discretion.

MR. CARR. If I may make a suggestion, these rules are administrative rules; for instance, in regard to the rules that the President issues for the granting of passports, I would say that no human being could foresee the different things that must be provided for that will come up from time to time under different conditions, different modes of travel and various things that arise in the course of a period of time. They are such that I do not think any body of legislators or administrators could foresee, Mr. Cooper.

MR. COOPER. Can the executive foresee anything that he could not and come here and tell us about, and then make rules and regulations which really are rules and regulations, or does he leave it to an individual instance for him to exercise his discretion?

MR. CARR. The individual cases bring up the necessity for changes in the rules, or the amplification of the rules, judging from its past experience in the issuing of passports and in constantly being confronted year after year with new conditions, which must be provided for by changes in the rules, the department naturally reaches the conclusion that the only practicable method is to give the President or the Secretary of State discretion over the administrative rules.

1926 *Passport Hearings* at 5.

¹¹⁵ 453 U.S. at 297.

¹¹⁶ *Id.* at 297-98.

¹¹⁷ *Id.* at 298.

often communicated to Congress.¹¹⁸ The Court took special note¹¹⁹ of the 1978 amendments to the Passport Act¹²⁰ and the Immigration and Nationality Act.¹²¹ In those amendments the Court saw strong evidence that Congress had approved the Secretary of State's interpretation of the 1926 legislation since Congress had the opportunity to register its dissatisfaction with the construction, but refused to do so.¹²²

The *Agee* Court rejected the plaintiff's contention that for congressional approval to be found, a longstanding enforcement of the claimed power must exist.¹²³ The Court noted that there have been few situations in which a passport holder's activities posed a substantial likelihood of serious damage to the national security or foreign policy of the United States.¹²⁴ Nevertheless, the Court declared, in those situations which did arise, the Secretary of State had consistently exercised his power to deny or revoke passports.¹²⁵ The Court concluded that actual enforcement of the claimed power is not the only way to establish implicit congressional approval, but that it is enough that the Executive had "openly asserted" the power in issue.¹²⁶ The Court stated that if there were few or no occasions for the Secretary of State to use his authority, "the absence of frequent instances of enforcement [would be] wholly irrelevant."¹²⁷

By holding that an agency's longstanding assertion of power alone, in the face of congressional silence, may suffice to base a finding of implied congressional delegation of authority, the Court was confronted with a seeming obstacle posed by its holding in *Kent v. Dulles*.¹²⁸ In *Kent*, the Court addressed the Secretary's practice of denying passports on the grounds of bad character.¹²⁹ Finding no history of consistent refusals of passports to Communists for their beliefs, the *Kent* Court refused to find an implied congressional approval of the asserted authority.¹³⁰ The *Agee* Court, however, ruled that *Kent* did not foreclose congressional approval of an administrative policy rather than a practice.¹³¹ Instead, the *Agee* Court interpreted *Kent* to turn on the fact that the governmental *policy* complained of had not been enforced consistent-

¹¹⁸ *Id.* at 298-300.

¹¹⁹ *Id.* at 300-01.

¹²⁰ See *supra* note 41.

¹²¹ Foreign Relation Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 707, 92 Stat. 963, 992-93 (1978) (codified at 8 U.S.C. § 1185 (Supp. II (1978))).

¹²² 453 U.S. at 301.

¹²³ *Id.* at 301-02.

¹²⁴ *Id.* at 302.

¹²⁵ *Id.* The Court listed three instances to back this statement: (1) a denial to a Congressman who wished to travel to Greece in 1948; (2) a revocation of an arms supplier's passport, and (3) revocations to hopeful visitors of the site of an international hijacking. *Id.*

¹²⁶ *Id.* at 303 (quoting *Zemel v. Rusk*, 381 U.S. 1, 9 (1965)).

¹²⁷ *Id.* at 302.

¹²⁸ 357 U.S. 116 (1958). See *supra* notes 70-81 and accompanying text.

¹²⁹ See *supra* note 78 and accompanying text.

¹³⁰ See *supra* notes 79 and 81 and accompanying text.

¹³¹ 453 U.S. at 303.

ly.¹³² According to the Chief Justice, the *Kent* Court strongly doubted whether there was any definable and apparent policy which Congress could have acknowledged.¹³³ In contrast, the *Agee* majority declared that there was no basis for a claim that the Executive had failed to enforce its policy against passport holders whose conduct was likely to cause serious damage to the national security or foreign policy.¹³⁴

In addition, the Chief Justice stated that the *Kent* Court had not been called upon to decide whether the Executive had been authorized to revoke a passport because of conduct damaging to the national security and foreign policy of the United States.¹³⁵ The *Agee* Court thus concluded that *Kent*'s holding that only illegal conduct and problems of allegiance were grounds for revocation or denial were not exclusive.¹³⁶ According to the *Agee* majority, the denials of passports in *Kent* rested solely on the basis of political beliefs which were entitled to first amendment protection.¹³⁷ The Chief Justice stated that the protection given to beliefs is greater than that accorded conduct.¹³⁸ In the opinion of the *Agee* majority, the State Department was not making any unconstitutional presumption that *Agee*'s beliefs will endanger the security of the United States.¹³⁹ *Agee*'s passport was revoked because his conduct was a

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* The majority confronted the contention that the statements of Executive policy are only entitled to diminished weight — on the ground that many of those statements concern the powers of the Executive in wartime — by stating that the statute provides no support for that argument. *Id.* Noting that Congress occasionally considered it necessary to legislate peacetime passport restrictions which also allowed the Executive considerable discretion, *id.* at n.56, the Court stated that grave problems of national security and foreign policy are not limited to times of declared war. *Id.* at 303.

¹³⁵ 453 U.S. at 304.

¹³⁶ *Id.* The Court was referring to 357 U.S. at 127-28.

¹³⁷ 453 U.S. at 304.

¹³⁸ *See id.* at 305 (citing *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (holding unconstitutional § 6 of the Subversive Activities Control Act of 1950 which made it criminal for any member of a Communist organization which is registered or ordered to be registered to apply, renew or attempt to use a passport)).

¹³⁹ 453 U.S. at 305-06. The *Agee* Court therefore distinguished *Kent* and *Aptheker*, which found the regulations there challenged to establish an unconstitutional irrebuttable presumption that individuals who are members of Communist organizations will be dangerous to American security. *Id.* In addition, the *Agee* Court distinguished *Dayton v. Dulles*, 357 U.S. 144 (1958) on the same grounds. *Id.* at 305 n.57. In *Dayton*, the Secretary of State refused a passport to a physicist who wished to visit India. 357 U.S. at 145. The text of a letter from the Director of the Passport Office in *Dayton* stated in part: "the determining factor in the case was Mr. Dayton's association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government." *Id.* at 146. The letter also stated that "in view of certain factors of Mr. Dayton's case which I am not at liberty to discuss with him, the Department must adhere to its previous decision that it would be contrary to the best interests of the United States to provide Mr. Dayton with passport facilities at this time." *Id.* The *Dayton* Court found that the denial of Dayton's passport was impermissible under *Kent* which was decided on the same day. *Id.* at 150. The *Agee* Court failed to find a mention of Dayton's conduct as distinguished from support for the Communist movement or association with known Communists in the Appendix to the *Dayton* decision. 453 U.S. at 305 n.57.

serious danger to the national security, and thus the two *Kent* categories for denial on the basis of the applicant's character were not controlling.¹⁴⁰

In summary, the *Agee* Court recognized that in revoking passports the Executive could only exercise the authority delegated to it by Congress. Since it was undisputed that the Secretary lacked explicit authorization under the Passport Act of 1926 to revoke passports for national security, a finding of implicit authorization became necessary to justify authorization for the Secretary's action. The Court stated that a consistent administrative construction, especially in foreign policy areas, should be given great weight unless there are compelling indications that it is wrong. According to the Court, the history of passport legislation shows that the Executive policy of denial or revocation on national security grounds was longstanding and that Congress accepted this longstanding Executive construction in 1926. This administrative interpretation, the Court noted, has remained consistent, and Congress did not reject the construction when it again legislated in 1978.

Moreover, the *Agee* majority distinguished *Kent* on the ground that this earlier case concerned only the denial of passports on the basis of an applicant's character. Since *Agee* concerned the revocation of a passport because of serious damage to the national security, and not because of the applicant's character, the two valid categories for denials articulated in *Kent*, the Court reasoned, were not controlling in *Agee*. In addition, the *Agee* Court stated that any interpretation of *Kent* which would find administrative practice as the exclusive manner in which congressional authorization could be implied was wrong. Instead, administrative practice was but an indication of administrative policy. In the Court's view, if there were no opportunities for administrative practice, then instances of enforcement would not be relevant. If, however, there were several instances or occasions for administrative action and the result was an inconsistent pattern, then this inconsistent pattern would be indicative of an inconsistent policy. The *Agee* majority concluded by stating that the policy in the regulations under challenge was "'sufficiently substantial and consistent' to compel the conclusion that Congress [had] approved it."¹⁴¹

Justice Brennan's dissent in *Agee* differed sharply from the majority's opinion. According to the dissent, *Kent v. Dulles*¹⁴² and *Zemel v. Rusk*¹⁴³ stand for the proposition that the Executive's power to revoke passports must be narrowly construed, as must any delegated powers that curtail the exercise of constitutionally protected rights.¹⁴⁴ In Brennan's opinion, there was a presumption that Congress must expressly delegate to the Secretary of State the authority to

¹⁴⁰ See 453 U.S. at 304-06.

¹⁴¹ *Id.* at 306.

¹⁴² See *supra* notes 70-81 and accompanying text.

¹⁴³ See *supra* notes 82-92 and accompanying text.

¹⁴⁴ 453 U.S. at 318 (Brennan, J., dissenting). The *Kent* Court stated: "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." 357 U.S. at 129.

deny or revoke passports for foreign policy or national security reasons before he can lawfully exercise that authority.¹⁴⁵ Since it was undisputed that the Secretary lacked explicit authority under the Passport Act of 1926 to revoke or deny passports for national security or foreign policy reasons, Justice Brennan reasoned that the only remaining inquiry was whether Congress had implicitly authorized such a practice.¹⁴⁶ According to the dissent, an implied delegation could be established only by a showing of an administrative practice that is sufficiently substantial and consistent to justify the inference that Congress had implicitly approved it.¹⁴⁷ The dissent stated neither *Zemel* nor *Kent* held that a longstanding administrative policy or construction could indicate that Congress had implicitly authorized the action of the Secretary.¹⁴⁸ Justice Brennan concluded:

Only when Congress had maintained its silence in the face of a consistent and substantial pattern of actual passport denials or revocations — where the parties will presumably object loudly . . . to the Secretary's exercise of discretion — can this Court be sure that Congress is aware of the Secretary's actions and has implicitly approved that exercise of discretion.¹⁴⁹

According to the dissent, besides assuring congressional awareness of the Executive's policies, actual applications of the Executive branch's discretion are more precise than sweeping policy statements, and thus allow Congress to evaluate specific aspects of the challenged authority, not just its broad policy implications.¹⁵⁰ Justice Brennan also took exception to the majority's use in *Agee* of Executive statements concerning construction and policy which he believed the *Kent* Court had deemed irrelevant.¹⁵¹ The dissent saw the majority's use of the past constructions as resulting from the "paucity" of actual ad-

¹⁴⁵ 453 U.S. at 318 (Brennan, J., dissenting).

¹⁴⁶ *Id.* at 313-14.

¹⁴⁷ *Id.* at 318.

¹⁴⁸ *Id.* at 314. In his concurring opinion, Justice Blackmun acknowledges that there is "some force" in Justice Brennan's observations on *Kent* and *Zemel*. *Id.* at 310 (Blackmun, J., concurring). Nonetheless, Justice Blackmun does accept the majority's argument that longstanding enforcement is not the exclusive manner in determining whether there is congressional authorization. *Id.*

¹⁴⁹ *Id.* at 315 (Brennan, J., dissenting).

¹⁵⁰ *Id.* at 315-16.

¹⁵¹ *Id.* at 316-17. The quotation from *Kent* relied on by Justice Brennan reads:

Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and over again that the issuance of passports is "a discretionary act" on the part of the Secretary of State. The scholars, the courts, the Chief Executive, and the Attorney General, all so said. (footnotes omitted). This long-continued executive construction should be enough, it is said, to warrant the inference that Congress had adopted it. (citations omitted). But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion.

357 U.S. at 124-25. The precedents relied on by the *Agee* majority are mentioned *supra* at note 108.

ministrative practice.¹⁵² Finally, the dissent noted that even if the Court was correct in its use of the administrative construction of passport legislation, there was evidence that the Executive did not in fact construe the legislation to give the Secretary of State the discretionary authority exercised in *Agee*.¹⁵³

In summary, the dissent reasoned that solely by a consistent and substantial practice, not policy, could there be implied authority from Congress. Moreover, Justice Brennan questioned the use of Executive constructions which he believed the *Kent* Court found irrelevant. Finally, the dissent wondered if indeed the Executive had consistently construed the legislation as alleged. The majority and dissent also differed in their conclusions on *Agee*'s claims under the first and fifth amendments.

B. *The First and Fifth Amendments*

According to the *Agee* majority, since passport regulations apply only in cases involving the likelihood of serious damage to national security or foreign policy, *Agee*'s claims that the Secretary's actions were invalid on constitutional grounds were "without merit."¹⁵⁴ *Agee* asserted three grounds for finding the challenged regulations unconstitutional: the inhibition on his freedom to travel abroad; the infringement of his right to free speech by halting his criticism of the government; and the violation of his right to procedural due process by denying him a prerovocation hearing.¹⁵⁵

Considering the first ground, the Court made it clear that the freedom to travel abroad had to be distinguished from the right to travel within the United States.¹⁵⁶ The *Agee* majority noted that the freedom to travel outside the United States with a passport is subordinate to considerations of national security and

¹⁵² 453 U.S. at 317 (Brennan, J., dissenting).

¹⁵³ *Id.* at n.7. Justice Brennan stated that the State Department's seeking of legislation from Congress of "the sort of authority exercised in this case" suggested that the Executive did not believe it had such authority. *Id.* (citing, e.g., S. 4110, 85th Cong., 2d Sess. § 103(6) (1958)). The dissent also suggested that the Executive did not construe the Passport Act of 1926 to grant to the Executive the authority asserted here since in two opinions of the Attorney General there was reference to the unqualified rights of citizens to passports. *Id.* (citing 15 Op. Att'y Gen. 114, 117 (1876) & 13 Op. Att'y Gen. 397, 398 (1871)).

¹⁵⁴ 453 U.S. at 306.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (citing *Califano v. Aznavorian*, 439 U.S. 170 (1978)). *Aznavorian* concerned § 1611(f) of the Social Security Act (codified at 42 U.S.C. § 1382(f) (1976)) which provided in part that no person shall receive supplemental security income "for any month during all of which such individual is outside the United States." 439 U.S. at 171. The *Aznavorian* Court stated that "legislation which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel, such as durational residency requirements imposed by the states." 439 U.S. at 176-77. The *Aznavorian* Court went on to state, however, that:

The statutory provision in issue here does not have nearly so direct an impact on the freedom to travel internationally as occurred in the *Kent*, *Aptheker*, or *Zemel* cases. It does not limit the availability or validity of passports. It does not limit the right to travel on grounds that may be in tension with the First Amendment. It

foreign policy.¹⁵⁷ Thus the freedom to travel abroad is subject to reasonable governmental regulation.¹⁵⁸ The majority found it "obvious and unarguable" that the security of the United States is a compelling governmental interest,¹⁵⁹ and the protection of American foreign policy is of great importance.¹⁶⁰ The Chief Justice stated that protection of the secrecy of the government's foreign intelligence operations served these interests.¹⁶¹ The Court stated that Agee had both jeopardized the security of the United States and imperiled the interests of other countries, thus causing problems for American foreign policy.¹⁶² The majority said that restricting Agee's foreign travel was the only means by which the government could curtail his activities harmful to the United States.¹⁶³

Turning to the free speech challenge, the *Agee* majority found that even assuming *arguendo* that protections under the first amendment extended outside of the United States, Agee's first amendment claim lacked any basis.¹⁶⁴ According to the Chief Justice, since the purpose of Agee's disclosures was to impede American foreign intelligence operations, including the recruitment of intelligence personnel, the disclosures were not protected by the Constitution.¹⁶⁵ The majority said that even though Agee was contempo-

merely withdraws a governmental benefit during and shortly after an extended absence from this country. Unless the limitation imposed by Congress is wholly irrational, it is constitutional in spite of its incidental effect on international travel.

Id. at 177.

¹⁵⁷ 453 U.S. at 306.

¹⁵⁸ *Id.* *Kent* held that there was a right to travel inherent in the concept of liberty, and that the right to travel could not be abridged without due process of law. 357 U.S. at 125. The *Kent* Court then went on to add:

Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.

Id. at 126. *Zemel* noted, however, that this does not mean that it can under no circumstances be inhibited. 381 U.S. at 14.

¹⁵⁹ 453 U.S. at 307 (citing *Aptheker v. Secretary of State*, 378 U.S. 500 (1964)). See *supra* note 138. See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (Court stating that "for while the Constitution protects against invasions of individual rights, it is not a suicide pact").

¹⁶⁰ 453 U.S. at 307.

¹⁶¹ *Id.*

¹⁶² *Id.* at 308 & n.59.

¹⁶³ *Id.* at 308 & n.60.

¹⁶⁴ *Id.* at 308.

¹⁶⁵ *Id.* at 308-09. The *Agee* Court cites *Near v. Minnesota*, 283 U.S. 697 (1931). *Near* concerned a statute which would restrain, as a public nuisance, the printing of a publication which made "malicious, scandalous and defamatory" accusations. *Id.* at 701-02. The defendants in *Near* had made several charges against public officials. *Id.* at 704. The *Near* Court found the statute to be an infringement of the freedom of the press guaranteed by the first and fourteenth amendments. *Id.* at 723. The *Near* Court did state, however, that the federal government could prevent actual obstruction to its recruiting services or the publication of transport sailing dates or the location and number of troops. *Id.* at 716. Agee conceded for the purpose of his motion that

ranously criticizing the government, his conduct was not "beyond the reach of the law."¹⁶⁶ Furthermore, the Chief Justice maintained, any inhibition on Agee as a result of the revocation of his passport operated only as an inhibition of his actions rather than of his speech.¹⁶⁷

Chief Justice Burger went on to hold that based on the record, the government was not required to hold a prerevocation hearing.¹⁶⁸ The majority stated that when it is very likely that serious damage to the national security or to American foreign policy would result because of a passport holder's activities abroad, the government may ensure that the passport holder will not exploit the "sponsorship" of his travels by the United States.¹⁶⁹ Although the Court did not decide whether the procedures followed were the constitutional minima,¹⁷⁰ it did rule that a postrevocation hearing satisfied due process.¹⁷¹

In his dissenting opinion, Justice Brennan noted that because he considered the exercise of the regulations invalid, he did not need to decide the constitutional issues presented in the case.¹⁷² Nevertheless, Justice Brennan stated that several parts of the Chief Justice's treatment of Agee's constitutional claims needed comment either because they were "extreme oversimplifications of constitutional doctrine or mistaken views of the law and facts of this case."¹⁷³ Addressing first Chief Justice Burger's characterization of the

his actions fell under the regulations. This was done to challenge the validity of the regulations on their face and not their application to his case. The *Agee* majority apparently must have believed that a concession of "serious damage" was identical to the extreme factual situation of *Near* since no facts were established as to Agee's actions.

¹⁶⁶ 453 U.S. at 309.

¹⁶⁷ *Id.* In addition, the majority stated that they agreed with the district court that since Agee's conduct falls within the core of the regulation, Agee lacks standing to contend that the regulation was vague and overbroad. *Id.* at n.61. The Agee majority also noted that there was no basis for a claim that the regulation was being used to punish criticism, nor was there any foundation for a claim of discriminatory enforcement. *Id.*

¹⁶⁸ *Id.* at 309.

¹⁶⁹ *Id.* (citing *Cole v. Young*, 351 U.S. 536 (1956)). *Cole* concerned a government employee who was fired by the Secretary of Health, Education and Welfare because he allegedly was a risk to national security. 351 U.S. at 539-40. The government claimed it was empowered to so act by the Act of August 26, 1950, ch. 803, 64 Stat. 476, which gave the heads of certain federal departments and agencies "summary suspension and unreviewable dismissal powers" over employees "when deemed 'in the interest of national security.'" 351 U.S. at 538. The *Cole* Court held that the discharge of the petitioner was not authorized by the 1950 Act. *Id.* at 557. The Court declared that for summary powers to be available, the national security must be immediately threatened. *Id.* at 546. The *Cole* Court went on to state:

Indeed, in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets.

Id. at 546-47.

¹⁷⁰ 453 U.S. at n.62. The procedures which were followed were: "a statement of reasons and an opportunity for a prompt postrevocation hearing." *Id.* at 310.

¹⁷¹ *Id.* at 310.

¹⁷² *Id.* at 320 n.10 (Brennan, J., dissenting).

¹⁷³ *Id.*

regulation as affecting only Agee's conduct, not his speech, Justice Brennan stated that under such reasoning a long prison sentence imposed upon a person who criticized the government's food stamp policy would represent but an inhibition of action, since the imprisoned individual would still remain free to criticize the government of the United States, albeit from a prison cell.¹⁷⁴ For Justice Brennan, then, the conclusion that the revocation restricted speech was inescapable.

In addition, Justice Brennan took exception to the Chief Justice's conclusion that Agee's disclosures were not protected by the Constitution.¹⁷⁵ Instead the dissent stated that the disclosures were indeed protected speech and required the Court to balance the first amendment right to speak against governmental interests.¹⁷⁶ Justice Brennan said that Agee's concession in the trial court concerning his danger to the national security or foreign policy of the United States was only for the purpose of challenging the validity of the regulations on their face and not their application to Agee's case.¹⁷⁷ Thus, according to the dissent, until the facts are known,¹⁷⁸ it was not clear whether Agee's conduct was as extreme as asserted by the majority.¹⁷⁹

III. AN ANALYSIS OF *HAIG V. AGEE*

As will be shown, *Haig v. Agee* is consistent with Court precedent in its determination that a consistent and substantial administrative policy can imply congressional authorization. Moreover, the *Agee* Court was correct in finding

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 320-21 n.10. Justice Brennan declared that the test announced in *New York Times Co. v. United States*, 403 U.S. 713 (1971), was probably more applicable to the *Agee* situation than was the test in *Near v. Minnesota*, 283 U.S. 697 (1931), see *supra* note 165, which was relied on by the majority. 453 U.S. at 321 n.10 (Brennan, J., dissenting). The *New York Times* case concerned the attempt to enjoin the *New York Times* and the *Washington Post* from publishing a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." 403 U.S. at 714. The *per curiam* decision found that: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Id.* (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). "The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" 403 U.S. at 714 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). The *New York Times* Court found that the Government had not met that burden. 403 U.S. at 714.

¹⁷⁷ 453 U.S. at 321 n.10 (Brennan, J., dissenting).

¹⁷⁸ Justice Brennan thus states that the majority's use of the holding in *Near*, 453 U.S. at 308, was wrong. *Id.* at 321 n. 10 (Brennan, J., dissenting). Since Agee conceded his breach of the regulations only to challenge their facial validity, any attempt by the majority to show that Agee's first amendment claim lacked merit should have stated only that Agee's concessions may have outweighed Agee's claim to protected speech, and not that facts, which have not been fully established, be used to show a factual extreme situation. See *supra* note 165.

¹⁷⁹ 453 U.S. at 321 n.10 (Brennan, J., dissenting). See *supra* note 165 and accompanying text. The dissent also expressed a fear that the reach of the Secretary's discretion may be too great. 453 U.S. at 319 n.9. Thus Justice Brennan also dissented to the majority's statement that Agee did not have standing to contend that the regulations are vague or overbroad. *Id.* at 321 n.10.

that there was a substantial and consistent administrative policy for passport revocations on national security grounds. Additionally, Justice Brennan's statements that the majority used irrelevant factors and that the Executive did not perceive that it had the asserted authority are not persuasive. Finally, the majority's analysis of Agee's constitutional claims was correct.

A. *The Analysis of Implied Authority*

1. Consistency with the *Kent* and *Zemel* Precedent

In his determination that a "substantial and consistent" administrative policy was sufficient to imply that Congress had adopted the policy when Congress legislated in 1926 and 1978,¹⁸⁰ Chief Justice Burger did not ignore the precedents established by *Kent*¹⁸¹ and *Zemel*.¹⁸² Instead, the Chief Justice reconsidered the policy implications behind the two precedents, and then interpreted their meanings in light of the situation presented in *Agee*.¹⁸³ In *Kent*, the Court considered whether implied congressional authorization existed for the Secretary's policy denying passports to Communists.¹⁸⁴ The *Kent* Court stated that the administrative practice respecting denials of passports on the basis of character had jelled only around two categories — citizenship and illegal conduct.¹⁸⁵ Regarding the third asserted category — Communist affiliation — State Department rulings were "scattered . . . and not consistently of one pattern."¹⁸⁶ The *Kent* Court therefore refused to imply congressional

¹⁸⁰ 453 U.S. at 306. The Passport Act of 1926 does not expressly grant to the Executive the power to revoke passports in the likelihood of serious damage to the national security or foreign policy of the United States. See *supra* note 3. The Court therefore had to look for the possibility of implied authority in order to show that there were no compelling indications that the administrative construction was wrong. It has been suggested "that many judges are unaware of . . . any other . . . criterion, other than legislative intent, of decision on such issues." 2A.C. SANDS, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 45.07, at 20 (4th ed. 1973). The cited work suggests that what should be the approach of the courts is to look to the "meaning" of the statute to the person on the "receiving" end as opposed to looking at the intent of the legislative body which would be the "sending" end. *Id.* at § 45.07, 20-21.

¹⁸¹ 357 U.S. 116 (1958). See *supra* notes 70-81 and accompanying text.

¹⁸² 381 U.S. 1 (1965). See *supra* notes 82-92 and accompanying text. The Court has consistently stated that absent any compelling indications to the contrary, consistent administrative construction of a statute is to be accorded weight. See *E.I. DuPont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Zemel v. Rusk*, 381 U.S. 1, 11 (1965); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 153-54 (1946); *Costanzo v. Till- inghast*, 287 U.S. 341, 345 (1932); *Fawcus Mach. Co. v. United States*, 282 U.S. 375, 378 (1931); *Brewster v. Cage*, 280 U.S. 327, 336 (1930); *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 331 (1924); *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1920); *Logan v. Davis*, 233 U.S. 613, 627 (1914); *United States v. Moore*, 95 U.S. (5 Otto) 760, 763 (1877); *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827).

¹⁸³ 453 U.S. at 300-06.

¹⁸⁴ 357 U.S. at 117-120.

¹⁸⁵ *Id.* at 128.

¹⁸⁶ *Id.*

authorization.¹⁸⁷ Chief Justice Burger in *Agee* interpreted *Kent* to turn on the absence of a consistent administrative policy, as evidenced by the inconsistent practice regarding Communists.¹⁸⁸ Thus, the *Agee* Court concluded that *Kent* does not require a pattern of actual enforcement to imply authority.¹⁸⁹ If, however, there were instances of administrative action, an inconsistent pattern of performance would indicate an inconsistent administrative policy.¹⁹⁰

The *Zemel* Court, considering whether implied authorization existed for the Secretary's area restrictions of passports, found very few instances of area restrictions either before or after 1926.¹⁹¹ This could thus indicate a "paucity"¹⁹² of the administrative practice which Congress could have thought about when it legislated on passports in 1926 or in 1952. Thus the basis to the *Zemel* decision, arguably, could have been the existence of a substantial and consistent administrative policy asserting the power to make area restrictions which was consistently applied when needed, indicating that Congress was aware of the policy when it legislated.¹⁹³ The *Agee* Court, therefore, read *Zemel*

¹⁸⁷ *Id.*

¹⁸⁸ 453 U.S. at 303.

¹⁸⁹ *Id.*

¹⁹⁰ *See id.*

¹⁹¹ 381 U.S. at 8. The pre-1926 instances cited by the Court were (1) a 1915 restriction against going to Belgium during the famine; (2) the 1914 - WWI area restrictions; and (3) those WWI restrictions which were continued through July 1922 for Austria and Germany and through September 1923 for the Soviet Union. *Id.* The only post-1926 area restrictions were to warring nations with whom America was neutral and to Communist nations immediately after World War II. *Id.* at 9-11.

Interestingly, the area restrictions in *Zemel* could be seen to indicate an administrative policy to use passports in its conduct of foreign policy, and in particular to keep travellers from harming American policy. If an American travelling in a nation at war were killed, a response from the United States, in one degree or another, would be necessary. Such a response could become more difficult if America were trying to steer a neutral course. Thus, the government may have imposed the area restrictions noted in *Zemel* so that its foreign policy would not be disrupted. With regard to the post-1945 ban on passports to Communist nations, American confusion and fear over the power of the Soviet Union is still within memory, *see generally* E. MAY, "LESSONS" OF THE PAST: THE USE AND MISUSE OF HISTORY IN AMERICAN FOREIGN POLICY (1973), and it could have been fear of disrupting American foreign policy that the area restrictions were imposed.

¹⁹² Justice Brennan, in his dissent in *Agee*, uses this term to describe the administrative practice under discussion there. 453 U.S. at 317 (Brennan, J., dissenting).

¹⁹³ *See* 381 U.S. at 8-9. The *Zemel* Court stated "that the 1926 Act must take its content from history; it authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.'" 381 U.S. at 17-18 (quoting *Kent*, 357 U.S. at 128). The *Agee* Court implicitly agreed that the 1926 Act can take its "content" from history since Chief Justice Burger did engage in a lengthy discussion of the administrative policy. *See* 453 U.S. at 292-301. If there were frequent opportunities for passports to be revoked on the basis of a likelihood of serious damage to the national security or foreign policy and the Executive acted inconsistently, then the result reached by the majority in *Agee* arguably would have been different. *See* 453 U.S. at 303. The quotation from *Zemel* at the beginning of this footnote thus only applies if there was an administrative practice. The quotation should not be taken as making administrative practice exclusive, since administrative practice is but one indication of the underlying administrative policy. *See* 453 U.S. at 303.

to be based on the presence of a consistently enforced policy acquiesced in by congressional silence.¹⁹⁴

In his dissent, Justice Brennan argued that *Kent* and *Zemel* mandate actual enforcement of the asserted authority before courts can infer congressional awareness of and acquiescence in an administrative regulation.¹⁹⁵ Justice Brennan declared that a requirement of actual enforcement of the asserted authority was justified as the preference for the strongest possible proof that Congress acquiesced in that authority.¹⁹⁶ This strong showing of proof was necessary, reasoned the dissent, because of the presence of sensitive constitutional issues in a passport revocation situation.¹⁹⁷ In addition, Justice Brennan stated that even if Congress did approve the policy for revocations, a pattern of actual enforcements of the asserted power by the Secretary would allow Congress to register its disapproval of the way the Secretary's policy is implemented.¹⁹⁸

The dissent's insistence on an actual pattern of administrative enforcements is problematic for at least five reasons. First, it places government planning at a disadvantage, since the government would not be able to enforce regulations enacted in anticipation of future situations. Second, since Congress is not always assembled and ready to pass legislation, Justice Brennan's interpretation could render the government impotent at a time of an unprecedented national crisis.¹⁹⁹ A third problem is that the revocation of Agee's passport has heavy foreign policy overtones, and Congress will often allow for broader Executive discretion in foreign policy matters.²⁰⁰ Fourth, Justice Brennan's reliance on stronger proof of acquiescence because of the implication of constitutional issues is not warranted. Although a liberty cannot be inhibited without due process of law, this does not mean that the liberty cannot be inhibited under any circumstances.²⁰¹ Finally, Brennan's statement that actual enforcement would allow Congress to register its disapproval of the way the Secretary's policy is implemented is not undermined by Chief Justice Burger's opinion. Congress is free to remove passport revocations on national security or foreign policy grounds from the Secretary of State's discretion.

¹⁹⁴ *Id.* at 300 & 303.

¹⁹⁵ *Id.* at 314 (Brennan, J., dissenting).

¹⁹⁶ *Id.* at 315.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 315-16.

¹⁹⁹ Recognition of broader discretion on the part of the Executive when acting in the area of foreign affairs finds some authority in the decisions of the Court. *See* *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766-67 (1972) (plurality decision); *New York Times Co. v. United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring); *Id.* at 741 (Marshall, J., concurring); *Ex Parte Endo*, 323 U.S. 283, 298 (1944) (war powers); *United States v. Curtiss-Wright*, 299 U.S. 304, 319-22 (1936). *But cf.* *Baker v. Carr*, 369 U.S. 186, 211 (1962) (not every case relating to foreign affairs is beyond the reach of the courts).

²⁰⁰ *See supra* note 199 and cases cited therein.

²⁰¹ *Zemel*, 381 U.S. at 14.

2. Determination of a "Substantial and Consistent" Policy

Presupposing that a substantial and consistent policy — and not just practice — may suffice to show an implied congressional delegation of authority, the issue becomes how substantial and consistent the administrative policy must be to imply congressional authorization. Several factors would be relevant to this inquiry. For example, the length of time the policy has been asserted is very important. If the policy has been asserted only shortly before the enactment of legislation putatively demonstrating implied delegation, Congress could well have been unaware of the policy. If, however, the policy has spanned several generations, elections and political movements, the length of time is probably adequate.

Another factor in the "substantial and consistent" determination is the openness of the assertion. If a statute's subsequent legislative history makes it clear that Congress was aware of a longstanding Executive construction, then implied authority should be recognized by the courts. In addition, published proposed rules — which are adequate to give public notice — should be adequate to give Congress notice as well. In fact, if such notice were not adequate, every agency would bear the burden of having to ask Congress to specifically accept every rule. This burden would be too great for either the agency or Congress. Furthermore, actual enforcements of a policy which result in litigation by an aggrieved party, or which result in published administrative opinions, will add to the claim that the policy asserted is sufficiently open that Congress should have been aware of it. Finally, the administrative policy must remain uninterrupted and unchanged through its longstanding and open history. An interrupted and changing policy is evidence both that the administrative agency itself is unsure of whether it enjoys the implied congressional authorization claimed, and that no authorization could exist since Congress would have received no clear indication of the power asserted. As such it would be improper to imply that Congress acquiesced in any particular policy.

Applying this analysis to *Agee*, Chief Justice Burger there traced the longstanding Executive policy of controlling passports on national security and foreign policy grounds.²⁰² According to the Chief Justice, the view that the Executive should be accorded broad discretion in foreign policy was recognized as early as 1835,²⁰³ if not earlier.²⁰⁴ The policy regarding passport denials for national security reasons was openly asserted, Chief Justice Burger noted, as evidenced by several opinions of the Attorney General and Executive Orders published prior to 1926.²⁰⁵ Indeed, the majority's opinion stated that when

²⁰² 453 U.S. at 292-302.

²⁰³ *Id.* at 292-93 (citing *Urtetiqui v. D'Arcy* 34 U.S. (9 Pet.) 692, 699 (1835)).

²⁰⁴ *Id.* at 294 n.24 (citing *THE FEDERALIST* No. 64, at 392-96 (J. Jay) (Mentor ed. 1961)).

²⁰⁵ *Id.* at 295-96. See *supra* note 108.

Congress was legislating in 1926 it was aware of this Executive policy.²⁰⁶ In addition, between 1926 and the further legislation in 1978,²⁰⁷ the Executive drafted Executive Orders,²⁰⁸ regulations,²⁰⁹ instructions to consular officials,²¹⁰ notices to passport holders,²¹¹ and presentations to Congress.²¹² Moreover, in those situations in which a passport holder's activities abroad could cause serious damage to the national security or foreign policy of the United States, the Secretary had consistently used his authority and withheld the passports.²¹³ Finally, this longstanding and open policy was unaltered throughout its existence.²¹⁴

²⁰⁶ *Id.* at 297. See *supra* note 114.

²⁰⁷ See *supra* note 41.

²⁰⁸ 453 U.S. at 298 (citing Exec. Order No. 4800 (1928); Exec. Order No. 5860 (1932); Exec. Order No. 7856, 3 Fed. Reg. 681 (1938)). "Following the enactment of the 1926 Act, President Coolidge issued new passport rules in 1928. These required applicants to state the object of their trip to each country and furnish proof thereof, and authorized the Secretary to deny passports in his discretion. President Hoover's Executive Order was identical, and President Franklin D. Roosevelt's order was substantially the same." Agee v. Muskie, 629 F.2d at 99 (MacKinnon, J., dissenting).

²⁰⁹ 453 U.S. at 298-99 (citing 6 Fed. Reg. 5821, 6069-6070, 6349 (1941); 17 Fed. Reg. 8013 (1952); and 21 Fed. Reg. 336 (1956), 22 C.F.R. § 51.136 (1958)). "The regulations are instructive. The 1952 version authorized denial of passports to citizens engaged in activities which would violate laws designed to protect the security of the United States '[i]n order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference.' " *Id.* at 298-99 (quoting 17 Fed. Reg. 8013 (1952)). "The 1956 amendment of this regulation provided that passports should be denied for activities 'prejudicial to the orderly conduct of foreign relations; or . . . prejudicial to the interests of the United States.' " Agee v. Muskie, 629 F.2d at 100 (MacKinnon, J., dissenting) (quoting 21 Fed. Reg. 336 (1956)). Then "[i]n 1968 this standard was restated to authorize passport denial for an applicant whose activities abroad are causing or are likely to cause serious damage to the national security or foreign policy of the United States." 629 F.2d at 100 (MacKinnon, J., dissenting) (citing 22 C.F.R. § 51.70(b)(4) (1980)).

²¹⁰ 453 U.S. at 298 (citing *Passport Division Office Instructions of Nov. 1, 1955* (Abstract of Passport Laws and Precedents, Code No. 7.21)).

²¹¹ *Id.* (citing STATE DEPARTMENT PUBLICATION, INFORMATION FOR BEARERS OF PASSPORTS (eds. of Jan. 1, 1948 through Jan. 15, 1955)). In addition, the Passport Office Instructions of July 30, 1937 gave examples of individuals "who could be denied passports under the discretionary power of the Secretary. These included . . . 'those who wish to go abroad to take part in the political or military affairs of foreign countries in ways which would be contrary to the policy or inimical to the welfare of the United States.' " Agee v. Muskie, 629 F.2d at 99-100 (MacKinnon, J., dissenting) (quoting *Passport Division Office Instructions of July 30, 1937* (Abstract of Passport Laws and Precedents, Code No. 7.22)).

²¹² 453 U.S. at 299 (citing *Proposed Travel Controls: Hearings on S.3423 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. 72 (1966); *Hearings on Right to Travel: Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. pt. 2, 59-61 (1957); *Staff Report: Reorganization of the Passport Functions of the Department of State Before the Senate Comm. on Governmental Operations*, 86th Cong., 2d Sess. 13 (1960)). See Agee v. Muskie, 629 F.2d at 100-101 (MacKinnon, J., dissenting); Note, *Passport Revocations*, *supra* note 41, 1184-88.

²¹³ 453 U.S. at 302. See Agee v. Muskie, 629 F.2d at 101 (MacKinnon, J., dissenting) (court of appeals opinion for Haig v. Agee); *Developments in the Law - The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1150-51 n.76 (1972); Note, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L. J. 171, 174-78 (1952).

²¹⁴ 453 U.S. at 292-302.

3. Justice Brennan's Other Objections

In addition to his insistence that practice and not policy be the guiding standard to infer congressional authorization, Justice Brennan also stated (1) that the *Agee* majority used factors which the *Kent* Court deemed irrelevant,²¹⁵ and (2) that the Executive itself did not believe that it possessed the power asserted in *Agee*.²¹⁶

a. *Irrelevance of Majority's Considerations*

Turning to the first point, Justice Brennan stated that *Kent* deemed irrelevant two Attorney General opinions, published in 1869 and 1901,²¹⁷ and four Executive Orders, promulgated between 1907 and 1917.²¹⁸ Justice Brennan, however, misread *Kent* in insisting that the *Kent* Court found these items irrelevant. Instead, the *Kent* Court stated that the mere existence of an assertion of broad discretion is not enough to imply congressional authorization if the exercise of that discretion is inconsistent.²¹⁹ The opinions of the Attorney General and the Executive Orders were simply noted in *Kent* as examples of assertions of broad authority.²²⁰ The *Kent* Court then noted inconsistent exercises of authority by the Secretary.²²¹ Similarly, in *Agee* the opinions and orders there noted were meant to document the Executive's longstanding assertion to control passports on foreign policy grounds.²²² Unlike *Kent*, however, the *Agee* Court did not find evidence of inconsistent exercises of passport authority.²²³

b. *Executive's Perception of its own Authority*

Turning to his argument that the Executive itself did not construe the passport legislation as giving to it the authority asserted in *Agee*,²²⁴ Justice Brennan pointed to two opinions of the Attorney General²²⁵ and proposed legislation on this point.²²⁶ Neither of these Attorney General opinions,

²¹⁵ *Id.* at 316-17 (Brennan, J., dissenting).

²¹⁶ *Id.* at 317 n.7.

²¹⁷ *Id.* at 316 (citing 23 Op. Att'y Gen. 509, 511 (1901); 13 Op. Att'y Gen. 89, 92 (1869)).

²¹⁸ *Id.* (citing Exec. Order No. 654 (1907); Exec. Order No. 2119-A (1915); Exec. Order No. 2362-A (1916); Exec. Order No. 2519-A (1917)).

²¹⁹ See 357 U.S. at 124-25 & nn.10-11. The *Kent* Court stated, in response to statements that a longstanding Executive construction should be enough to infer that Congress has adopted it, that the answer "is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion." *Id.* at 125.

²²⁰ See 357 U.S. at 124-25 & nn.10-11.

²²¹ *Id.* at 128.

²²² 453 U.S. at 295-96.

²²³ *Id.* at 302.

²²⁴ *Id.* at 317 n.7 (Brennan, J., dissenting).

²²⁵ *Id.* (citing 15 Op. Att'y Gen. 114, 117 (1876); 13 Op. Att'y Gen. 397, 398 (1871)).

²²⁶ *Id.* (citing S. 4110, 85th Cong., 2d Sess. § 103(6) (1958); *Hearings on S. 2770, S. 3998, S. 4110, and S. 4137 Before the Senate Comm. on Foreign Relations*, 85th Cong., 2d Sess. 1, 4 (1958); H.R. 14895, § 205(e), 89th Cong., 2d Sess. (1966)).

however, supports Justice Brennan's concern that the Executive did not believe itself to be vested with broad discretion in this area. The first opinion — from 1876 — stated only that there should be no distinction between native born or naturalized citizens.²²⁷ That opinion did not concern the Executive's discretion in foreign policy. In the second opinion — from 1871 — the Attorney General was concerned solely with which citizens of the former independent Republic of Texas were to be considered citizens of the United States and thus entitled to passports.²²⁸ That opinion, as well, did not consider whether the government can control passports on national security or foreign policy grounds.

Justice Brennan's notation of the Executive's attempt to secure legislation clearly granting it the authority asserted in *Agee* does not suggest that the Executive did not think it had this authority. The seeking of the legislation does not imply, in one direction or the other, whether the Executive had the authority asserted in *Agee*.²²⁹ Indeed, in seeking the legislation the Executive may only have wished to have the *Kent* holding clarified.

In summary, the majority stayed within Court precedent — as clarified in *Agee* — when it held that a substantial and consistent administrative construction would be sufficient to find implied congressional authority. In addition, Justice Brennan's public policy arguments in favor of an administrative practice are not stronger than those which favor an administrative construction as sufficient. The issue which will face future courts will be whether the particular administrative policy being challenged is sufficiently "substantial and consistent." Presumably, the tracing of the parameters of that standard must, after *Agee*, await a case-by-case determination. Finally, Justice Brennan's two other arguments in dissent — the use of factors in *Agee* which *Kent* found "irrelevant" and the Executive not believing that it had the authority asserted in *Agee* — do not bear up under close scrutiny.

B. *Constitutional Implications of Haig v. Agee*

Finding an implied congressional delegation of the authority to deny or revoke passports on national security or foreign policy grounds, the *Agee* Court moved on to consider the constitutional implications of this authority.²³⁰ As an alternative to his non-delegation argument, *Agee* claimed that the regulation, even if authorized, was invalid on its face in light of the first and fifth amendments. *Agee* claimed his freedom to travel, freedom to speak and right to a

²²⁷ 15 Op. Att'y Gen. at 117. This opinion stated that the laws of the United States authorize the issue of passports "to all citizens, without distinction, whether native born or naturalized. . . ." *Id.*

²²⁸ 13 Op. Att'y Gen. at 398. This opinion stated that those persons who satisfied certain prerequisites based on their alleged citizenship in Texas at the time of annexation, "were citizens of the United States, and [were] entitled to passports as such." *Id.*

²²⁹ See *United States v. Board of Comm'rs of Sheffield*, 435 U.S. 110, 135 (1978); *Agee v. Muskie*, 629 F.2d at 85; Note, *Passport Revocations*, *supra* note 41, at 1187-88.

²³⁰ 453 U.S. at 306.

hearing before being deprived of a liberty had been abridged.

First, *Agee's* fifth amendment freedom of travel²³¹ was not unconstitutionally curtailed by the passport revocation, because such governmental action is subject only to a requirement of reasonableness. As the *Agee* Court pointed out, the *freedom* to travel abroad is distinguishable from the *right* to interstate travel.²³² Unlike restrictions on interstate travel, therefore, passport revocations are subject to reasonable governmental regulation.²³³ As the *Zemel* Court noted, "the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited."²³⁴ National security is a compelling interest of the United States.²³⁵ When the government is confronted with a choice between controlling a citizen's passport or ignoring the needs of the national security or foreign policy, the government should be able to restrict a citizen's freedom of international movement.²³⁶

Nor is such restriction of international travel in tension with Supreme Court precedent. In *Aptheker v. Secretary of State*,²³⁷ the Court did strike down section six of the Subversive Activities Control Act of 1950²³⁸ on the ground that it impermissibly infringed upon international travel.²³⁹ The legislation in *Aptheker*, however, is distinguishable from that in *Agee*. The legislation in *Aptheker* made it criminal for anyone affiliated with a Communist organization to obtain a passport.²⁴⁰ Since the statute ignored such relevant criteria as the in-

²³¹ The freedom of travel "is a personal right included within the word 'liberty' as used in the Fifth Amendment." *Kent*, 357 U.S. at 129. Justice Douglas has suggested that travel was also protected under the first amendment. *Zemel*, 381 U.S. at 23-24 (Douglas, J., dissenting).

²³² 453 U.S. at 306.

²³³ *Id.* One commentator has expressed the fear that passport revocations for political purposes without regard to civil liberties is reminiscent of totalitarian governments. Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L. J. 171, 202-03 (1952). *Agee* still requires at least a standard of reasonableness although the Court may look for a higher standard if the denial or revocation of the passport was in tension with the first amendment. Compare *Califano v. Aznavorian*, *supra* note 156.

²³⁴ 381 U.S. at 14.

²³⁵ See, e.g., *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam).

²³⁶ See SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *FREEDOM TO TRAVEL* 58-62 (1958) (passports could be withheld upon a showing of danger to the national security).

²³⁷ 378 U.S. 500 (1964).

²³⁸ *Id.* at 505.

²³⁹ *Id.*

²⁴⁰ Subversive Activities Control Act of 1950, ch. 1024, § 6, 64 Stat. 987, 993 (codified at 50 U.S.C. § 785 (1958)). This statute read in relevant part:

When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final —

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

Id.

dividual's knowledge of membership in a Communist organization,²⁴¹ degree of activity in and commitment to the organization,²⁴² and purposes in and places for travel,²⁴³ the Court found that the statute too broadly and indiscriminately restricted the freedom to travel.²⁴⁴ The *Aptheker* Court, however, did recognize that Congress can act to protect the national security.²⁴⁵ The *Aptheker* Court declared that a statute which is intended to protect the national security must not sweep too broadly and must be the least drastic alternative if the statute is to infringe on individual liberties.

In *Agee*, the challenged regulations do not, on their face, create any irrebuttable presumptions concerning an individual's beliefs or associations.²⁴⁶ The clear language of the regulations at issue in *Agee* only allow curtailment of a citizen's right to a passport in the case of serious damage to national security or foreign policy of the United States.²⁴⁷ Every aggrieved individual is free to rebut, in the administrative hearing granted, any allegation that he or she is a threat to the national security or foreign policy of the United States.²⁴⁸ In addition, restricting an individual's travel for the protection of national security may very well be the only avenue open to the government.²⁴⁹ Therefore, the challenged regulations are facially constitutional despite infringement on the freedom of travel abroad.

Looking at *Agee*'s claim to protection under the first amendment, there are two grounds upon which the Court was able to dismiss the claim, assuming *arguendo* that first amendment rights extended outside of the United States.²⁵⁰ Burger stated that since *Agee*'s disclosures were intended to disrupt the foreign intelligence operations and the recruitment of intelligence personnel of the United States, those disclosures were not protected.²⁵¹ Justice Brennan took exception to this declaration by the majority, stating that *Agee*'s concession was only to attack the validity of the regulations on their face and not their applica-

²⁴¹ 378 U.S. at 509-10.

²⁴² *Id.* at 510-11.

²⁴³ *Id.* at 511-12.

²⁴⁴ *Id.* at 505.

²⁴⁵ *Id.* at 509.

²⁴⁶ See *supra* note 26.

²⁴⁷ *Id.*

²⁴⁸ The procedure for the post-revocation hearing is reprinted at 22 C.F.R. §§ 51.80-51.89 (1980).

²⁴⁹ 453 U.S. at 308. Although *Agee* argued that the government should be limited to an injunction ordering him to comply with his secrecy agreement with the CIA, *Agee* conceded that such an injunction would not be enforceable outside of the United States. *Id.* at n.60.

²⁵⁰ *Id.* at 308-09. Chief Justice Burger also stated that he agreed with the district court's holding that *Agee* lacked standing to argue overbreadth and vagueness. *Id.* at 309 n.61. The district court, however, did not hold that *Agee* lacked standing to argue overbreadth and vagueness. See *supra* note 34. The district court hearing, in fact, indirectly addressed only the overbreadth argument and *Agee* reserved that argument for future consideration. *Id.* Both the overbreadth and vagueness arguments should be viewed as reserved for future consideration.

²⁵¹ 453 U.S. at 308-09 (citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931)). See *supra* note 165.

tion to him.²⁵² Nonetheless, the *Agee* majority can be understood as stating that the regulations on their face do not offend the first amendment since the language of the regulations is limited to cases of serious damage to the national security or foreign policy of the United States. A prior decision of the Court does allow for prior restraint in case of a national emergency.²⁵³ Since a threat of serious damage to national security is very similar to a national emergency, an individual's first amendment right in relation to his passport would be outweighed by the government's interest when the revocation is based on the likelihood of serious damage to the national security.

In addition to Chief Justice Burger's statement that *Agee's* disclosures were not protected by the first amendment because they were statements likely to cause serious damage to the national security, the Chief Justice also expressed the view that what was inhibited was not *Agee's* speech, but his actions.²⁵⁴ Since *Zemel* held that an unrestrained desire to gather information abroad is not protected by the first amendment,²⁵⁵ the challenged regulations in *Agee* are not unconstitutional on their face on the grounds that they thwart information gathering. A revocation of a passport, however, can restrain the desire of a citizen to speak in another nation. This contention was not before the *Zemel* Court.²⁵⁶ The *Agee* Court in its general holding that the revocation of Philip *Agee's* passport does not inhibit speech apparently must be understood as adding to the holding in *Zemel*. Thus, just as the desire for unrestrained information gathering abroad is not protected by the first amendment, neither would the unrestrained desire to speak in other nations be protected by the first amendment.²⁵⁷

Agee's claim that he was entitled to a prerevocation hearing was also correctly rejected by the Court.²⁵⁸ Since a letter was sent which included the reasons for the revocation,²⁵⁹ and the State Department's regulations included

²⁵² *Id.* at 321 n.10 (Brennan, J., dissenting).

²⁵³ *Near v. Minnesota*, 283 U.S. 697, 716 (1931). See *supra* note 165. There is some doubt, however, as to the extent of the *Near* holding. See Knoll, *National Security: The Ultimate Threat to the First Amendment*, 66 MINN. L. REV. 161 (1981).

²⁵⁴ 453 U.S. at 309 (citing *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)). Justice Brennan stated that under the majority's analysis, a prisoner serving a forty year sentence for criticizing the federal food stamp policy would not have had his freedom of speech infringed since he remains free to criticize the federal government, although from a cell. *Id.* at 320 n.10 (Brennan, J., dissenting).

²⁵⁵ 381 U.S. at 16.

²⁵⁶ *Id.* The appellant's contention in *Zemel* was solely that the travel ban to Cuba was direct interference with the individual's first amendment right to travel abroad to obtain first hand observations of the effect of the policies of the United States and of the conditions abroad which could affect those policies. *Id.*

²⁵⁷ Both the desire to gather information and that of unrestrained speaking in other nations are factors to be considered when a determination is made whether the individual had been denied due process of law. See *Zemel*, 381 U.S. at 16 (citing *Kent v. Dulles*, 357 U.S. 116, 126-27 (1958)). See also *infra* notes 258-66.

²⁵⁸ 453 U.S. at 309.

²⁵⁹ See *supra* note 24.

a method for a prompt postrevocation hearing,²⁶⁰ the *Agee* Court held that adequate deference was given to procedural due process.²⁶¹ The *Agee* Court's treatment of this issue finds support in the Court's prior holding in *Matthews v. Eldridge*.²⁶² The *Eldridge* Court found that due process requires that an opportunity to be heard must be afforded " 'at a meaningful time and in a meaningful manner,' " ²⁶³ and " 'for such procedural protections as the particular situation demands.' " ²⁶⁴ The *Eldridge* Court articulated three factors to be balanced before a citizen's rights may be infringed without a pretermination evidentiary hearing: the actual interest affected by government action; any risk of wrongful taking and the additional standards thereby necessitated; and the government's interest.²⁶⁵ Since the interest which would be deprived would be the use of a passport up until the time of the postrevocation hearing, since the regulations require notice of the reasons for the revocation, and since the national security and foreign policy are very important interests of the government, the *Eldridge* balancing test appears to be satisfied in regard to the regulations challenged in *Agee*.²⁶⁶ Other regulations provide for a full postrevocation hearing.²⁶⁷

CONCLUSION

The Supreme Court in *Agee* held that a substantial and consistent administrative policy will be sufficient to imply congressional authorization under the Passport Act of 1926. The *Agee* holding therefore rejects any interpretation of the Court's prior holdings in *Kent* and *Zemel* requiring the existence of an administrative practice to impute authorization. In future challenges to the validity of regulations promulgated under the Passport Act of 1926, courts will be asked to determine whether the policy asserted is indeed substantial and consistent. Factors courts should consider in this inquiry include the length of time the policy has been asserted, the openness of the assertion of power and the unchanging nature of the policy. With respect to the first and fifth amendment claims, the *Agee* majority was correct in finding the challenged regulations facially valid. The regulations could only be used if there was a likelihood of serious damage to the national security or foreign policy, and therefore escape constitutional infirmity. Finally, the Supreme Court in *Agee* was not confronted

²⁶⁰ See 22 C.F.R. §§ 51.80-51.89 (1980).

²⁶¹ 453 U.S. at 309-10.

²⁶² 424 U.S. 319 (1976). *Eldridge* concerned the termination of disability benefits which were being awarded under the 1956 amendments to Title II of the Social Security Act. *Id.* at 323-24.

²⁶³ *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

²⁶⁴ *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

²⁶⁵ See 424 U.S. at 335.

²⁶⁶ The challenge was to the facial validity of the regulations and thus no factual determination of "serious damage" was made.

²⁶⁷ 22 C.F.R. §§ 51.80-51.89 (1980).

with established facts of an individual's action. Therefore, the future plaintiff may be able to succeed, by using the administrative procedures available to him, in showing that his conduct was not likely to cause serious damage to the national security or foreign policy. In addition, the future plaintiff may wish to challenge regulations on the basis of overbreadth and vagueness.²⁶⁸

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²⁶⁸ See *supra* notes 167 & 250.