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Case Comment

Authority of Secretary of State to Revoke Passports for National Security or Foreign Policy Reasons: Haig v. Agee

Beginning in 1974, Philip Agee, a former Central Intelligence Agency (CIA) employee, conducted a personal campaign against his former employers, which included publishing lists of CIA agents active in various countries.¹ The United States government did not directly respond to Agee's activities² until December 1979,³ when the Secretary of State revoked Agee's

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¹ See P. AGEE, INSIDE THE COMPANY: CIA DIARY (1975); DIRTY WORK: THE CIA IN WESTERN EUROPE (P. Agee & L. Wolf, eds. 1978). Agee was employed by the CIA as an operations officer from 1957 until he resigned in late 1968. Since his resignation Agee has revealed the identities of current and former CIA agents in an effort to incite “peoples victimized by the CIA . . . [to] bring pressure on their . . . governments to expel the CIA people.” Agee, Exposing the CIA, COUNTERSPY, Winter 1974-75, reprinted in DIRTY WORK: THE CIA IN WESTERN EUROPE, supra, at 40-43. Agee published lists of the names of those agents he knew, even though his information may have been outdated. P. AGEE, INSIDE THE COMPANY: CIA DIARY, supra, at 599-622; DIRTY WORK: THE CIA IN WESTERN EUROPE, supra, at 343-734.

² Great Britain and Holland previously deported Agee on national security grounds. DIRTY WORK: THE CIA IN WESTERN EUROPE, supra note 1, at 286, 300. Although the United States government apparently did not protest these actions, it did intervene in a separate action brought by Agee against the CIA under the Freedom of Information Act, 5 U.S.C. § 552 (1976), in which Agee sought access to all CIA files and records pertaining to himself. In that action the Government sought an injunction to enforce the Agency's contractual secrecy agreement with Agee. Relying on a recent Supreme Court decision upholding the validity of such agreements, Snepp v. United States, 444 U.S. 507 (1980), the district court issued the injunction. Agee v. CIA, 500 F. Supp. 506, 508-10 (D.D.C. 1980).

³ The government notified Agee of its passport revocation action on December 23, 1979, Agee v. Vance, 483 F. Supp. 729 (D.D.C. 1980), just six days after a New York Post article reported that Agee was at the “top” of the Iranian government’s list of candidates to participate as a judge in a trial of the American hostages taken captive during the seizure of the United States embassy in Tehran on November 4, 1979. N.Y. Post, Dec. 17, 1979, at 1, col. 1. The article did not state that Agee had accepted any offer, and Agee denied that the Iranian government made any invitation. Affidavit of Philip Agee, Joint Appendix for Writ of Certiorari at 29, Haig v. Agee, 101 S. Ct. 2766 (1981). The Supreme Court’s opinion does not discuss the exact role of the article or of the Iranian crisis generally as an impetus for the Carter administration’s actions against Agee. Undersecretary of State David Newsome, however, believed both the Iranian situation and the Post article were directly responsible for the govern-
passport, basing the action on a State Department regulation permitting the Secretary to revoke a passport when the Secretary determines that a person’s “activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States.” Agee filed suit against the Secretary of State seeking declaratory and injunctive relief. The federal district court granted Agee summary judgment and ordered the Secretary to return Agee’s passport. The Court of Appeals for the District of Columbia Circuit affirmed, holding that the Passport Act of 1926 did not grant the Executive explicit authority to revoke passports for national security reasons and that the government failed to establish the

4. The State Department notified Agee of this action, as required by 22 C.F.R. § 51.75 (1981), stating:

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 operations of the United States. In carrying out that campaign you have traveled 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.


The State Department also advised Agee of his right to an administrative hearing. See 22 C.F.R. §§ 51.80-89 (1981). Agee elected not to use this provision, filing suit in federal district court instead. 101 S. Ct. at 2771.

5. 22 C.F.R. § 51.70(b)(4) (1981). In conjunction with this regulation, the Secretary also used section 51.71(a). Section 51.70 deals with the initial denial of passports, and section 51.71(a) adds that a “passport may be revoked . . . where the national would not be entitled to issuance of a new passport under § 51.70.”

6. Agee v. Vance, 483 F. Supp. 729 (D.D.C. 1980). Agee also raised constitutional challenges to the Secretary's action. Agee contended that the revocation was an impermissible restriction on both his freedom to travel and his freedom of expression and that the lack of a prerevocation hearing violated fifth amendment due process guarantees. Id. at 730; Haig v. Agee, 101 S. Ct. 2766, 2781 (1981). See notes 52-58, 80-83 infra and accompanying text.


8. Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980). At each level of appellate court review, the name of the current Secretary of State was substituted as the party in interest.

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substantial and consistent administrative practice necessary for the court to find implicit congressional approval of the Department's regulation. The United States Supreme Court reversed, holding that the State Department's consistent construction of the Passport Act of 1926 and of the regulation allowing revocation of Agee's passport for national security reasons was sufficient to warrant implied congressional approval. Furthermore, the Court held that the revocation did not violate Agee's constitutionally protected right to travel, right of speech, or due process guarantees. *Haig v. Agee*, 101 S. Ct. 2766 (1981).

Governmental regulation of passport requirements in the United States is basically an ad hoc process. Congress passed the first national passport legislation in 1856, vesting the exclusive authority to issue passports in the executive branch. Congress eventually codified the language of this act in the Passport Act of 1926. The Passport Act did not grant specific authority to refuse or to revoke passports, but this is not surprising since Congress did not require passports for international travel by United States citizens, except during periods of

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12. See note 15 infra.

13. Although it is not known whether Agee will attempt to publish further material about the CIA without prior agency clearance, see note 2 supra, one postscript to Agee's case has emerged. Subsequent to the Supreme Court's decision in *Haig v. Agee*, the government of Grenada issued a passport to Agee, allowing him to continue his foreign travel and activities. *Philip Agee's Grenadian Passport*, NEWSWEEK, Aug. 10, 1981, at 15.

14. Act of August 18, 1856, Ch. 127, § 23, 11 Stat. 52. Prior to this time no law regulated passport issuance. Both states and local governmental units could issue passports. The main purpose behind the national law was merely to centralize the issuance of passports in one office, not to create any new authority in that position. See *Zemel v. Rusk*, 381 U.S. 1, 31-32 (1965) (Goldberg, J., dissenting).

15. Act of July 3, 1926, Pub. L. No. 493, 44 Stat. 887. The basic language of the statute has received only minor alteration since its inception in 1856. It currently states: "The Secretary of State may grant and issue passports ... under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports." 22 U.S.C. § 211a (1976). The one minor change from the original text occurred in 1874, when Congress amended the language "shall be authorized to grant and issue passports" to the present form, thus accentuating the Secretary of State's basic discretionary authority. *Kent v. Dulles*, 357 U.S. 116, 131 (1958) (Clark, J., dissenting). See also notes 36-38 infra and accompanying text.
war or national emergency, until passage of the Immigration and Nationality Act in 1952. The Secretary of State has nevertheless claimed the necessary authority under the Passport Act to deny or to revoke passports for national security or foreign policy reasons. Such authority has been based on a series of executive orders, regulations, and State Department opinions, generated through the rulemaking authority which the Passport Act gives to the Executive. Current State Department passport regulations also require United States citizens to have valid passports for travel to Cuba and to all nations beyond the Western Hemisphere. Consequently, the authority to revoke a passport can severely limit a person's ability to travel abroad legally. Nevertheless, the Secretary rarely attempts to deny or to revoke a citizen's passport on national security or foreign policy grounds, and the Court in Agee identified only one


17. The Court in Agee listed the following "unbroken line" of orders and regulations: Exec. Order No. 4800 (1928); Exec. Order No. 5860 (1932); Exec. Order No. 7855, 3 C.F.R. § 379 (1936-38); 6 Fed. Reg. 5821, 6069-70, 6349 (1941) (exception to restrictions on aliens leaving United States for travel to Panama); 17 Fed. Reg. 8013 (1952) (limitations on issuance of passports to Communists or to those likely to violate United States law); and 21 Fed. Reg. 336 (1956) (limitation on issuance of passports to those whose activities abroad are likely to violate United States law or are prejudicial to interests of the United States or the conduct of its foreign policy). Haig v. Agee, 101 S. Ct. at 2779; Agee v. Muskie, 629 F.2d 80, 99-100 (D.C. Cir. 1980) (MacKinnon, J., dissenting).

18. See note 15 supra.

19. 22 C.F.R. § 53.2(b) (1981). The pertinent part of the regulation states that a United States citizen is not required to bear a valid passport "[w]hen traveling between the United States and any country, territory, or island adjacent thereto in North, South or Central America excluding Cuba."

20. Both the Supreme Court majority opinion and Circuit Judge MacKinnon's dissent noted these instances, which included the 1948 denial of a passport to Congressman Leo Isacson, an American Labor Party member who wished to attend a Paris conference on the possibility of aiding rebels trying to overthrow the Greek government, and the 1954 passport revocation of a man supplying guns to groups abroad. Haig v. Agee, 101 S. Ct. at 2779; Agee v. Mus-
other revocation under the challenged regulation.21

The United States Supreme Court has ruled on only a few cases challenging the validity of State Department regulations promulgated under the Passport Act. In the first major court challenge, *Kent v. Dulles*,22 the Secretary of State denied the passport applications of two Communists,23 acting under a Department regulation that prohibited the issuance of passports to Communist Party members or to persons going abroad to engage in activities enhancing the Communist movement.24 The Court invalidated the regulation, ruling that the freedom to travel is a " liberty" protected by the fifth amendment25 and

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21. Sirhan v. Rogers, No. 70-3965 (S.D.N.Y. Sept. 11, 1970), *appeal dismissed*, No. 70-35394 (2d Cir. Sept. 11, 1970). In this case the mother of Sirhan Sirhan, convicted murderer of Robert F. Kennedy, and her attorney, Luke McKissack, hoped to travel to Jordan, the landing site of an airplane hijacked by the Palestine Liberation Organization. During a stopover on their route from Los Angeles, State Department officials revoked their passports at Kennedy Airport in New York under the same regulation applied to Agee. Sirhan and McKissack sought temporary relief from the action, but the federal district court denied their request, and the Second Circuit affirmed on the same day. Plaintiffs abandoned their journey at this point and did not directly challenge the regulation. The decision did not result in a written opinion. Telephone conversation with Melvin L. Wulf, New York, New York, attorney for Sirhan (October 21, 1981).

22. 357 U.S. 116 (1958). Due to the extreme distrust of Communists prevalent in America during the 1950s, and the belief that the State Department's regulation clearly had congressional approval, much of the contemporaneous discussion was critical of the decision. See, e.g., Note, *Authority of Secretary of State To Determine Standards for Issuance of Passports*, 27 FORDHAM L. REV. 416, 426-29 (1958); The Supreme Court, 1957 Term, 72 HARV. L. REV. 77, 172-76 (1959); cf. Note, *Passport Denial As A Security Measure*, 43 MINN. L. REV. 126, 136-37 (1959) (instead of denying passports to subversives, their activities can be prevented by criminal prosecution). Congress had also passed a statutory ban on issuing passports to Communists, upon which the Department based its regulation. Subversive Activities Control Act of 1950, Pub. L. No. 831, § 6, 64 Stat. 987. The Court later invalidated this section in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). See note 47 infra.

23. 357 U.S. at 117-19.


25. The freedom to travel abroad does not share the same history as the right of interstate travel. The Court has recognized that the right to travel freely between states was a necessary part of the free flow of commerce protected by the Constitution, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867), an aspect of the privileges and immunities protected by the fourteenth amendment, *Edwards v. California*, 314 U.S. 160, 197-98 (1941) (Douglas, J., concurring), and an "elementary" right inherent in the Constitution, *United States v. Guest*, 383 U.S. 745, 758 (1966). Courts require the showing of a compelling government interest to uphold government interference with the right to travel or
that any regulation of the freedom to travel must be made pursuant to the congressional lawmaking function and must therefore be narrowly construed. Since the Secretary lacked express authority to deny passports, only an administrative practice clearly adopted by Congress would allow the Court to uphold the implied delegation of its lawmaking function. The Court did not find an established administrative practice in Kent, and emphasizing that it was improper to deny a passport

an attempt to penalize that right. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). For example, one such interest which the Court upheld was the obligation to give testimony in another state. New York v. O'Neill, 359 U.S. 1, 7 (1959).

The Kent decision recognized freedom to travel abroad as a distinct part of the right to travel, although the Court did not need to decide the extent to which Congress or the Executive could curtail this right. Kent v. Dulles, 357 U.S. at 127. The Court's decision in Aptheker v. Secretary of State, 378 U.S. 500, 507-08 (1964), see note 47 infra, suggested that freedom to travel abroad deserved first amendment protection, but the Court later rejected first amendment protection of international travel in Zemel v. Rusk, 381 U.S. at 16-17, see text accompanying notes 29-35 infra. The Zemel decision, along with an earlier circuit court decision upholding area restrictions, Worthy v. Herter, 270 F.2d 905, 910 (D.C. Cir.), cert. denied, 361 U.S. 918 (1959), clearly stated that the government could subject the freedom of international travel, as derived from the fifth amendment due process clause, to some regulation. Zemel v. Rusk, 381 U.S. at 14-16.

26. 357 U.S. at 125-29.

27. Id. at 124-25, 128. The Court in Kent admitted that the Secretary of State's authority over passport issuance is broadly stated, but found that the State Department had actually interpreted this authority narrowly. Only in those areas indicated in the language of the statute—the areas of citizenship, in which the Secretary had authority to resolve questions concerning the allegiance of a passport applicant, and of criminal activity, in which the Secretary could apparently deny passports to those violating United States law or seeking to escape the law—did the Court find that Congress adopted prior administrative practice when it passed the Passport Act of 1926. The Court hesitated to impute to Congress an intent to give unbridled discretion to the Secretary of State to withhold a passport, stating that delegated congressional powers which could impinge on the freedom to travel should be narrowly construed. Id. at 127-29. The Kent Court further refused to consider passport restrictions during wartime as material, viewing them as arising under the war power of the Executive. Id. at 123.

Subsequently, courts literally followed the Kent Court's warning to construe narrowly the Executive's authority to restrict international travel. Two decisions in particular challenged the State Department's implied passport authority. In Lynd v. Rusk, 389 F.2d 940 (D.C. Cir. 1967), the court recognized the legitimacy of the area travel restrictions upheld in Zemel v. Rusk, see notes 29-35 infra and accompanying text, but held that the Department possessed no inherent or implied power to restrict a person's travel to nonrestricted countries when that person refused to provide assurances that he or she would not also travel to a restricted nation. 389 F.2d at 947-49. In Woodward v. Rogers, 344 F. Supp. 974 (D.D.C. 1972), aff'd, 486 F.2d 1317 (D.C. Cir. 1973), the court held that the State Department's requirement of an oath of allegiance to obtain a passport similarly lacked implicit congressional approval and, therefore, impermissibly interfered with the fifth amendment freedom to travel. 344 F. Supp. at 989.
solely because of a person's beliefs and associations.\(^{28}\)

Seven years later in *Zemel v. Rusk*,\(^{29}\) the Court allowed a restriction of the freedom to travel by upholding a complete ban on travel to Cuba.\(^{30}\) Applying the standard developed in *Kent*, the Court found a substantial and consistent State Department practice of restricting travel to named geographic areas, both in wartime and peacetime, sufficient to warrant a conclusion that Congress was aware of the Secretary's policy and implicitly approved of such restrictions.\(^{31}\) The *Zemel* Court dismissed constitutional challenges to the Department's regulation. Although acknowledging that fifth amendment due process guarantees protected the right to travel,\(^ {32}\) the Court reasoned that if the government could restrict travel inside the United States to protect the safety and welfare of natural disaster areas or of the nation,\(^{33}\) then the State Department could similarly restrict international travel to Cuba based on "the weightiest considerations of national security"\(^{34}\) without violating due process. Viewing this restriction as only inhibiting action, the Court also rejected the appellant's argument that the regulation abridged the appellant's first amendment rights to speak and to publish.\(^{35}\)

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28. 357 U.S. at 130.
29. 381 U.S. 1 (1965). For contemporary discussions of the decision, see The Supreme Court, 1964 Term, 79 Harv. L. Rev. 56, 123-28 (1965); Comment, Congress May Delegate Its Legislative Authority To Impose Passport Area Controls, 50 Minn. L. Rev. 977 (1966).
30. 381 U.S. at 15-16. After the Castro takeover, the United States severed diplomatic relations with Cuba. The State Department eliminated Cuba from the area for which passports were not required for United States citizens, see note 19 supra, and declared all existing United States passports invalid for travel to or in Cuba. Id. at 3.
31. Id. at 17-18 (citing Kent v. Dulles, 357 U.S. at 128). The *Zemel* Court noted, among others, restrictions imposed for Americans traveling to Belgium in 1915, to Germany and Austria after World War I, to Ethiopia in 1935, to Spain during the Spanish Civil War in 1936, to China in 1937, and to the entire Eastern European bloc of Communist nations after World War II. Id. at 8-11. The Executive imposed these restrictions either during wartime conditions or immediately afterwards, and lifted them soon thereafter, except for those involving the Communist nations.
32. Id. at 14 (citing Kent v. Dulles, 357 U.S. at 125). The *Zemel* Court stated that the requirements of due process forced it to examine not only the extent of the governmental restriction, but also the necessity for the restriction. Id. at 14. This balancing approach provided a framework for the Court to uphold the regulation and is similar to the majority's approach in *Agee*. See text accompanying notes 53-56 infra.
33. 381 U.S. at 15-16.
34. Id. at 16.
35. Id. The majority in *Agee* also used this same conduct-belief distinction. See text accompanying notes 57-58 infra. The *Zemel* Court stated that "[t]he right to speak and publish does not carry with it the unrestrained right
After Zemel, few developments occurred in the law governing passports until the Court's decision in Haig v. Agee. Congress made the most significant change in 1978, when it limited the Executive's authority to impose the area travel restrictions previously upheld in Zemel. Under this amendment to the Passport Act, the State Department may impose area restrictions only in time of war or if United States travelers are in imminent danger. Congress, however, did not make any changes in the basic authority of the Secretary of State to enact passport regulations, a fact that later influenced the Agee Court.

The United States Supreme Court in Haig v. Agee rejected the argument that only a consistent pattern of actual enforcement of the challenged regulation can establish the necessary implicit congressional approval needed to satisfy the Kent-Zemel standard. Although the Court recognized enforcement as one method of establishing congressional awareness and approval of the regulation, it stated that courts could also find approval from nothing more than congressional silence about a longstanding administrative policy. The Court concluded that

to gather information." 381 U.S. at 17. Justice Douglas, who authored the Court's opinions in Kent v. Dulles and in Aptheker v. Secretary of State, dissented in Zemel. Although Douglas agreed that the Court could uphold wartime travel restrictions or necessary bans on travel to areas of natural disaster, he did not agree with the majority's first amendment analysis. Douglas argued that the right to travel enjoyed not only fifth amendment protection, but also was peripheral to first amendment rights, and that the right "to observe social, physical, political and other phenomena abroad . . . gives meaning and substance to freedom of expression and freedom of the press." 381 U.S. at 24 (Douglas, J., dissenting). Any restrictions on the freedom to travel abroad, therefore, must be narrow and precise. Id. at 25.

36. Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. 95-426, § 124, 92 Stat. 963 (amending 22 U.S.C. § 211a (1976)). The following provision was added to the statute:

Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers [sic].


38. 101 S. Ct. at 2779. See note 70 infra.


40. 101 S. Ct. at 2778. The majority refers to four prior cases supporting this assertion: Zemel v. Rusk, 381 U.S. 1, 11 (1965); Udall v. Tallman, 380 U.S. 1, 16-18 (1965); Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 313 (1933); and Costanzo v. Tillinghast, 287 U.S. 341, 344-45 (1932). The Court's reli-
Congress had impliedly adopted the administrative construction, because Congress had not made any changes in the Executive's basic rulemaking power when passing the Immigration and Nationality Act in 1952\textsuperscript{41} or when amending the Passport Act in 1978,\textsuperscript{42} even though the legislature must have been aware of the "longstanding and officially promulgated view" of the State Department that the Executive could revoke passports for reasons of national security.\textsuperscript{43} The Court did not require frequent instances of actual enforcement. In fact, few cases requiring enforcement of the Secretary's passport revocation authority have arisen.\textsuperscript{44} Even if no enforcement occurred, the validity of the Executive's authority would not be destroyed, nor would it preclude congressional awareness of the Department's construction.\textsuperscript{45} Furthermore, the Court believed

\textsuperscript{41} See note 16 \textit{supra}.
\textsuperscript{42} See note 36 \textit{supra}.
\textsuperscript{43} 101 S. Ct. at 2778-79.
\textsuperscript{44} \textit{Id.} at 2779-80.
\textsuperscript{45} \textit{Id.}
that the Secretary used his authority in a consistent manner when faced with such situations.\textsuperscript{46}

The Supreme Court attempted to distinguish the facts in \textit{Kent v. Dulles}\textsuperscript{47} from the facts in \textit{Agee}, noting that in \textit{Kent} the State Department had inconsistently enforced the regulation denying passports to Communist Party members; consequently, no definite policy existed of which Congress could approve.\textsuperscript{48} The Court, on the other hand, stated that the Secretary had consistently, albeit infrequently, enforced the regulation involved in \textit{Agee}, allowing revocation on national security grounds.\textsuperscript{49} The majority also rejected \textit{Agee}'s argument that the two areas of administrative practice, resolving questions of citizenship and possible criminal conduct,\textsuperscript{50} which the \textit{Kent} Court upheld as having congressional statutory approval, are exclusive. The Court reasoned that the \textit{Kent} Court ruled only on passport restrictions based on belief or association and had no need to consider whether Congress had also implicitly authorized passport restrictions based on a person's national security-threatening conduct.\textsuperscript{51}

The Supreme Court also briefly dealt with \textit{Agee}'s constitutional challenges to the passport revocation.\textsuperscript{52} To counter \textit{Agee}'s fifth amendment due process argument, the Court engaged in an unexplained balancing of the interests involved.\textsuperscript{53}

\textsuperscript{46} \textit{Id}. \textit{See} notes 20-21 \textit{supra} and accompanying text.

\textsuperscript{47} \textit{See} notes 22-28 \textit{supra} and accompanying text. The Court also distinguished the facts in \textit{Agee} from the facts in \textit{Aptheker v. Secretary of State}, 378 U.S. 500 (1964). \textit{Aptheker}, like \textit{Kent v. Dulles}, involved a denial of passports to Communist Party members. While the Court decided \textit{Kent} on the grounds that Congress had not implicitly authorized the State Department regulation, \textit{Aptheker} involved an explicit statutory prohibition on the issuance of passports to Communists. \textit{See} Subversive Activities Control Act of 1950, Pub. L. No. 83-1, § 6, 64 Stat. 937. The Court invalidated this section as unconstitutionally overbroad. 378 U.S. at 514.

\textsuperscript{48} 101 S. Ct. at 2780.

\textsuperscript{49} \textit{Id}.

\textsuperscript{50} \textit{See} note 27 \textit{supra}.

\textsuperscript{51} 101 S. Ct. at 2780-81. The majority did not refer to \textit{Zemel v. Rusk} to support this reasoning, but the \textit{Zemel} Court applied a very similar analysis in concluding that the \textit{Kent} holding did not prohibit the ban on travel to Cuba. 381 U.S. at 12-13.

\textsuperscript{52} \textit{Agee} had challenged the action as an impermissible burden on his freedom to travel and a restriction on his free speech and ability to criticize the government. In addition, he claimed the failure of the State Department to provide a prerevocation hearing violated fifth amendment guarantees of due process. 101 S. Ct. at 2781-83. \textit{See} note 6 \textit{supra}.

\textsuperscript{53} The approach taken by the majority in adjudicating \textit{Agee}'s constitutional claims appears to answer the argument, raised by Justice Brennan's dissent, that \textit{Agee}'s complaint raised first amendment issues of free speech and that a balancing of this infringement against competing government interests
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stating that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."54 The Court differentiated between the freedom to travel abroad and the right to travel inside the United States.55 It acknowledged that travel within the United States is a protected constitutional right, whereas the freedom to travel abroad, though a part of the individual's liberty protected by the fifth amendment, is subordinate to national security and foreign policy considerations. The government, therefore, may regulate foreign travel within the limits of due process.56 The Court was the proper analysis. Because he did not find an implied authorization, Justice Brennan did not need to address directly the first amendment issue. See 101 S. Ct. at 2788-89 n.10 (Brennan, J., dissenting).

54. Id. at 2782 (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)).

55. The Court admitted that interstate travel is a virtually unlimited right. Although not specifically mentioned in the Constitution, courts consider it an "elementary" constitutional right also protected under the federal commerce power. See note 25 supra.

For its assertion, however, that the Executive may restrain international travel, the Court relied on Califano v. Aznovarian, 439 U.S. 170 (1978). The respondent in that case argued that the Court must judge provisions of the Supplemental Security Income (SSI) program, 42 U.S.C. § 1382(f) (1976), which provide that needy, aged, or disabled persons shall not receive benefits during months the recipient entirely spends outside the United States, under a stringent constitutional standard, because they limited the freedom to travel abroad. The Court, however, stated that the legislation involved had only an incidental effect on foreign travel and, therefore, unless wholly irrational, was constitutional. 439 U.S. at 176-77. Since the challenged SSI provision was an economic regulation, the Court had no difficulty applying a lower degree of scrutiny. The Court further noted, however, that this regulation's impact on international travel was not as great as would be the impact of a restriction which limited the availability of passports or conflicted with the first amendment, indicating that such actions might bring more important fifth amendment due process guarantees into question. Id. The majority in Agee disregarded this warning and applied the lower level of scrutiny to Agee's constitutional arguments. See also Gillers, Reasoning Not The Need, THE NATION, July 25, 1981, at 67.

56. The Court stated that due process guarantees demand no more than the offer of a prompt post revocation administrative hearing and a statement of reasons for the action. The State Department provided both to Agee. 101 S. Ct. at 2783.

The State Department regulations covering its hearing and review procedures are at 22 C.F.R. §§ 51.80-89 (1981). The Court previously indicated that a suspensory hearing was not required for government employees whose positions affected national security. Cole v. Young, 351 U.S. 536, 546 (1956). Similarly, the majority in Agee concluded that the State Department need not hold a prerevocation hearing for national security passport revocations. The Court did disregard, however, the following warning in Cole, concerning the showing of a national security threat: "In the absence of an immediate threat of harm to the 'national security,' the normal... procedures seem fully adequate and the justification for summary powers disappears." Id. at 546. See also note 73 infra.
pointed out that Agee is still free to criticize the government;\(^5\) the passport revocation restricts only Agee’s actions, not his speech.\(^6\)

Justice Brennan’s dissent\(^5\) also focused on the *Kent-Zemel* standard, but he concluded that in Agee’s case the federal district and circuit courts correctly applied the consistent enforcement test to the challenged regulation.\(^6\) Brennan accused the majority of *sub silentio* overruling the *Kent-Zemel* standard to reach its desired decision,\(^6\) because only an established practice of actual passport denials and not merely an administrative construction can assure the Court that congressional silence means congressional approval.

Justice Brennan was correct in accusing the majority of effectively overruling the *Kent-Zemel* standard by allowing a State Department construction of its own regulation to be a sufficient basis for implicit congressional approval of a passport regulation. A close reading of the Court’s decision in *Kent v. Dulles* indicates that the Court rejected a similar assertion of State Department authority as being satisfactory to warrant implicit congressional approval, holding that only an established departmental practice can convince the Court that Congress was adequately aware of the claimed authority to justify implied delegation of its legislative powers.\(^6\) The *Kent* Court believed that implicit approval was proper only for the two

\(^5\) 101 S. Ct. at 2783. The majority is apparently referring only to oral expression, because the district court previously enjoined Agee from publishing or otherwise making use of information in a manner violating his contractual secrecy agreement with the CIA, unless cleared by the Agency in advance. \*See* Agee v. CIA, 500 F. Supp. 506 (D.D.C. 1980); note 2 *supra*.

\(^6\) 101 S. Ct. at 2783. The Court stated that while the passport denial in *Kent v. Dulles* was solely based upon the beliefs and associations of Communist Party members, Agee’s situation involved conduct, not just beliefs, and therefore did not deserve the same constitutional protection. \*Id.* at 2780-81.

\(^5\) 101 S. Ct. at 2784 (Brennan, J., dissenting).

\(^6\) \*Id.*

\(^6\) \*Id.* at 2788. Even those who would restore Agee’s passport and invalidate the State Department’s regulation apparently felt little joy at championing Agee’s cause. Justice Brennan called Agee “hardly a model representative of our Nation.” \*Id.* Judge Robb, writing for the circuit court majority, admitted that “Agee’s conduct may be considered by some to border on treason,” but added that “[w]e are bound by the law as we find it.” Agee v. Muskie, 629 F.2d 80, 87 (D.C. Cir. 1980).

Justice Blackmun wrote a separate concurring opinion in which he acknowledged “some force” in Brennan’s accusation. Blackmun noted that the majority was “cutting back somewhat upon the opinions in those cases *sub silentio*” and wanted the Court to state openly that a longstanding administrative construction is probative of implicit congressional authorization. 101 S. Ct. at 2783-84 (Blackmun, J., concurring).

\(^6\) 357 U.S. at 127-28.
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statutorily defined areas where a clear regulatory practice already existed, and it hesitated to go any further.\textsuperscript{63} The State Department's national security regulation challenged by Agee could not satisfy this standard. The government cannot be faulted,\textsuperscript{64} because few opportunities have arisen requiring passport revocations under the regulation. Nevertheless, a definite pattern of actual enforcement of this regulation simply cannot emerge from only one or two applications and certainly not from a mere assertion of power without any instances of enforcement. Despite attempts to catalogue examples of administrative enforcement of the national security passport revocation power, the majority in \textit{Haig v. Agee} did not require any examples of administrative practice to uphold the regulation. The Executive's simple assertion of its possession of the requisite power was sufficient for the Court.\textsuperscript{65}

As Justice Brennan pointed out in his dissent, however, the \textit{Agee} majority's support for the Executive's construction of this regulation relied upon many of the examples previously cited by the government in \textit{Kent}, examples the \textit{Kent} Court expressly rejected as insufficient to establish congressional approval.\textsuperscript{66} Regardless of the \textit{Agee} majority's attempt to distinguish the facts from those in \textit{Kent},\textsuperscript{67} the Court in fact substituted a new standard, allowing it to find implicit congressional approval of a passport regulation either from a pattern of actual enforcement or from congressional silence in the face of a longstanding agency construction of its own regulation. This substitution effectively overrules the more rigorous enforcement standard for passport denials or revocations envisioned by the \textit{Kent} Court.

Even under the Court's new standard, congressional approval of the challenged regulation is questionable. The Court

\textsuperscript{63} Id. \textit{See} note 27 \textit{supra}.

\textsuperscript{64} Justice Brennan's dissent stressed this point in answering the majority's attempt to distinguish the facts in \textit{Agee} from those in \textit{Kent}. Brennan rejected the assertion that since the administration had so few opportunities to enforce the regulation, a consistent pattern of actual enforcement as required by the \textit{Kent-Zemel} standard is irrelevant. 101 S. Ct. at 2787-88 (Brennan, J., dissenting). Justice Brennan pointed out that although the government cannot be faulted because few occasions arose, the area of passport revocation concerns constitutional rights and, therefore, must be narrowly construed. Brennan argued that a presumption should arise against implied delegation of congressional authority and that the Court's precedents require the necessary "substantial and consistent" practice to overcome the presumption. \textit{Id.} at 2788.

\textsuperscript{65} \textit{Id.} at 2779-80.

\textsuperscript{66} \textit{Id.} at 2786 (Brennan, J., dissenting); \textit{see} \textit{Kent v. Dulles}, 357 U.S. at 124-25.

\textsuperscript{67} \textit{See} text accompanying notes 47-51 \textit{supra}.
admitted that the legislative history of the Passport Act was particularly sparse. Nevertheless, it confidently stated that "the legislative history clearly shows congressional awareness of the Executive policy." The Court also emphasized that Congress did not alter the basic rulemaking authority of the Secretary when it amended the Passport Act in 1978 and considered this absence of action indicative of Congress's approval. Yet, in 1978, Congress expressly restricted the Secretary's discretionary authority to invoke area travel restrictions, an action plainly inconsistent with the majority's contention that Congress approved of the State Department's passport revocation policy. A finding of congressional intent to narrow the Secretary's discretion based on Congress's express action in 1978 would be more convincing than the Court's finding of intent to broaden authority based on a vague legislative history.

Even if the Court were correct in discerning Congress's intent to delegate its passport rulemaking authority to the Executive, the Court's decision in *Haig v. Agee* gave the State Department extremely broad latitude to deny or to revoke passports on national security grounds. National security is a fluid term susceptible to a changing definition, and the courts

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68. 101 S. Ct. at 2777.

69. *Id.* The Court cited the House Committee on Foreign Affairs hearings on the Passport Act of 1926 as its only authority for this summary statement. *Validity of Passports: Hearings on H.R. 11947 Before the House Comm. on Foreign Affairs*, 69th Cong., 1st Sess. (1926). A careful reading of this document does not support the Court's statement on legislative history. Only the remarks of Representative Hull of Illinois support the idea that the Secretary of State must generally have discretion in the passport area. *Id.* at 5. Assistant Secretary of State Wilbur Carr presented this idea to the Committee, explaining that unforeseen circumstances demand executive discretion and that administrative action better ensures passport issuance. *Id.* Any other discussion of the State Department's authority to deny or to revoke passports for national security reasons is lacking.

70. The Court called the 1978 amendments "weighty evidence of congressional approval of the Secretary's interpretation." 101 S. Ct. at 2779. Since the Court was apparently convinced that Congress was aware of the Executive's regulatory interpretation, *see* note 69 *supra* and accompanying text, this legislative inaction did not indicate disapproval, but approval.

71. *See* note 36 *supra*.

72. *See S. REP. No. 842, 95th Cong., 2d Sess. 14 (1978).* District Judge Gessell's memorandum addressed the issue of congressional intent and of congressional approval through silence. He wrote: "Legislative silence cannot be read as implicit adoption of an obscure, virtually unused regulation . . . . This is particularly apparent where, as here, the action that Congress did take, i.e., cutting back the Executive power over area travel restrictions conferred in *Zemel*, is hardly receptive to implying additional delegated authority." *Agee v. Vance*, 483 F. Supp. 729, 732 (D.D.C. 1980).
have only been willing to interpret it on a case-by-case basis, providing little guidance for future identification of national security matters. The State Department did not define what constitutes the serious national security or foreign policy dam-

73. When faced with national security cases, courts generally avoid directly attacking the issue or drawing any clear-cut lines indicating where national security interests begin or where they are no longer relevant. The Court in Agee made no attempt to define national security, stating that "national security considerations cannot neatly be compartmentalized," but efforts to protect the secrecy of foreign intelligence operations are plainly within the Agee Court's national security parameters. 101 S. Ct. at 2782. Similarly, although the Zemel Court clearly perceived the Cuban missile crisis of October, 1962, as a sufficient example of a national security threat to uphold the State Department's travel ban to Cuba, it offered no further definition of national security. Zemel v. Rusk, 381 U.S. at 16.

The Supreme Court has endeavored to define the concept of national security in relation to prior restraints of first amendment rights. The national security exception to the prior restraint doctrine emerged from two Supreme Court decisions, Near v. Minnesota, 283 U.S. 697 (1931), and New York Times Co. v. United States, 403 U.S. 713 (1971) (the "Pentagon Papers" case). The doctrine allows governmental prior restraint of publication under certain potential national security situations. Again, no complete definition of what is sufficient to satisfy this standard exists. Dictum in Near gave as an example the attempted publication of troop strength or location during time of war, 283 U.S. at 716, while the "Pentagon Papers" case rejected a Government-sought injunction on publishing excerpts of a classified study on the origins of United States involvement in Vietnam, 403 U.S. at 714. Eight years later, the Government did obtain an injunction against the publication of an article describing the workings of the hydrogen bomb. See United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), appeal dismissed, 610 F.2d 819 (7th Cir. 1979); Knoll, National Security: The Ultimate Threat to the First Amendment, 66 Minn. L. Rev. 161 (1981); Note, The National Security Exception to the Doctrine of Prior Restraint, 60 Neb. L. Rev. 400 (1981). The district court in the Progressive case concluded that the prior restraint exception standard required a showing that the publication would cause direct, immediate, and irreparable harm to the United States. 467 F. Supp. at 996. The Court in Agee, however, made no attempt to establish that Agee's conduct surpassed this level. Arguably, the Court did not need to clarify this issue, because it remanded the case for further proceedings consistent with its decision that the State Department has national security revocation authority.

Although the Court has not been willing to limit the Executive's discretion in national security areas by any comprehensive definition, the Court has not entirely deferred to the Executive. In United States v. United States Dist. Court, 407 U.S. 297 (1972), a case denying presidential authority to employ warrantless wiretap surveillance for domestic security, Justice Powell wrote:

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Id. at 320. Powell did caution, however, that he was dealing at that time only with the domestic aspects of national security and expressed no opinion regarding security issues related to foreign powers. Id. at 321-22.

Although an imprecise standard for national security has the advantage of flexibility, the creation of a clearer threshold standard, even if less demanding than the showing of "direct, immediate, and irreparable harm" required in prior
age required by the Department's regulation to allow revocation, because Agee admitted the government's allegations against him for the summary judgment motion.\textsuperscript{74} Although the Executive undoubtedly prefers unlimited discretion to react to any conceivable emergency,\textsuperscript{75} thus far the broad language of the regulation itself is the only limit on that discretion. By failing to define the parameters of national security or the regulatory language, the \textit{Agee} Court enhanced the potential for abuse of the Executive's discretion.\textsuperscript{76}

The alleged possibility of Philip Agee's participation in threatened trials of the American hostages in Iran, although not explored by the Court,\textsuperscript{77} was arguably a real threat to United States interests as perceived during the Iranian crisis. Both the district court and the court of appeals acknowledged the importance of the trials in the government's action.\textsuperscript{78} If the Court had narrowly based its decision on the compelling security interests present in Agee's situation instead of granting the Executive broad discretion to revoke passports, the Court could have allayed fears of future abuses of discretion. Furthermore, the impact of the Supreme Court's ruling would not so precariously depend upon the amount of sound judgment used by cur-

\textsuperscript{74} 101 S. Ct. at 2772; \textit{see} note 4 \textit{supra}. Agee's concession of the government's averments was for procedural purposes only. Even if the government's accusations were true, Agee nevertheless contended that the State Department lacked the authority to revoke his passport.

\textsuperscript{75} \textit{See} note 69 \textit{supra}.\n
\textsuperscript{76} Although the Court created an unnecessarily broad national security revocation power, the Court correctly decided not to create a further absolute distinction between peacetime and wartime national security authority, a distinction made in Kent v. Dulles, 357 U.S. at 127-28. Once the Court concludes, whether rightly or wrongly, that the Secretary has discretion to revoke passports for national security reasons, then this authority should not be limited to wartime situations. Modern national security interests exist during peacetime as well as during wartime, as the impact of such "peacetime" occurrences as the Cuban missile crisis, \textit{see} text accompanying note 91 \textit{infra}, or the Iranian hostage crisis, \textit{see} note 3 \textit{supra}, indicate. If the Court, however, clearly established the level of the national security threat necessary to uphold a passport revocation, then it could have differentiated between levels for peacetime as opposed to wartime national security threats, thereby lessening the far-reaching implications of its decision.

\textsuperscript{77} The government did not claim to revoke Agee's passport on the basis of the Iranian crisis, nor on the basis of the \textit{New York Post} article. \textit{See} notes 3-4 \textit{supra}.

\textsuperscript{78} Agee v. Muskie, 629 F.2d 80, 81 (D.C. Cir. 1980); Agee v. Vance, 483 F. Supp. 729, 732 (D.D.C. 1980). \textit{See also} \textit{The Court's Final Days: The Right to Travel}, \textit{Newsweek}, July 13, 1981, at 84. If Agee had actually attempted to travel to Iran as feared, it is likely this action probably would have met the vague national security standards expressed by the courts. \textit{See} note 73 \textit{supra}.\n
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rent or future administrations. If the Executive applies its authority only upon showings of a national security risk in situations of a magnitude at least equal to that present in Agee, then perhaps these doubts may prove to be groundless.

Congress could remove many of the fears that the Haig v. Agee decision raises by enacting passport legislation that gives clear direction to the State Department on issues of national security. For example, although the Supreme Court upheld area restrictions on travel to Cuba in Zemel v. Rusk, Congress later expressly limited the State Department's future implementation of similar restrictions, except in time of war or danger to American travelers' safety. Congressional guidelines in matters of national security would help prevent any potential for abuse.

Concluding that the State Department's passport revocation regulation had congressional approval, the Supreme Court failed to assess adequately Agee's constitutional challenges to the revocation. The Court simply assumed that Agee was a national security threat and that this fact, on balance, outweighed his constitutional arguments. This cursory treatment of the constitutional issues raised by Agee is in marked contrast to the Court's careful analysis of the constitutional standards in both Kent v. Dulles and Zemel v. Rusk. Because the Kent Court held that the State Department's regulation restricting issuance of passports to Communist Party members lacked implicit congressional authorization, the Court did not need to reach the question of the regulation's constitutionality. The Court nevertheless ruled in Kent that the due process guarantees of the fifth amendment protect international travel, and that when rights such as travel are curtailed, the Court will narrowly construe any delegation of congressional power. In Zemel, the Supreme Court, having found the nec-

79. See note 36 supra.
80. 101 S. Ct. at 2781-83. See notes 52-58 supra and accompanying text.
81. This factual question was not at issue in the proceedings. See note 74 supra.
82. 357 U.S. at 125, 129-30.
83. 381 U.S. at 13-18.
84. See notes 22-28 supra and accompanying text.
85. Kent v. Dulles, 357 U.S. at 129.
86. Id. at 125. See note 25 supra.
87. Id. at 129. Justice Douglas's assertion shows the importance that he intended to place upon international travel:

As we have seen, the right of exit is a personal right included within the word "liberty" as used in the Fifth Amendment. If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the
necessary consistent administrative practice to warrant implicit congressional approval of the State Department's area travel restriction, had to address the constitutionality of the government's action, as the Court later had to do in Agee. In assessing whether a restriction is within the limits of due process, the Court stated that it must consider the extent of the necessity for the government's restriction. Emphasizing that only the "weightiest" national security considerations allowed the government to restrict travel to Cuba, the Court factually supported its conclusion that these considerations were present by noting the close proximity in time between the State Department's action and the Cuban missile crisis of 1962. The Zemel Court also rejected first amendment protection of travel, because unlike the restriction involved in Kent, restriction of travel to Cuba did not inhibit a person's beliefs and associations, only his or her actions.

Applying Zemel, the Agee majority drew a similar distinction between Agee's speech and actions, concluding again that the first amendment does not fully protect conduct. In addition, the Agee Court rejected first amendment protection for parts of the content of Agee's speech, which were also subject to national security regulation. The Agee Court did not consider the argument, raised by Justice Douglas's dissent in Zemel, that travel abroad is peripheral to first amendment rights, because the right to travel is necessary to acquire the information required to make informed judgments and to give

Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. 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.

*Id.* (citations omitted). *See also* Zemel v. Rusk, 381 U.S. at 23 (Douglas, J., dissenting); note 35 *supra.*

88. 381 U.S. at 13. *See* notes 29-35 *supra* and accompanying text.
89. 381 U.S. at 13.
90. *Id.* at 14.
91. *Id.* at 16.
92. *Id.*
93. 101 S. Ct. at 2783.
94. *Id.* The Court relied upon Near v. Minnesota, 283 U.S. 697 (1931), and its national security exception to the first amendment in prior restraint situations, as precedent that national security can support restraint of content of speech or publication. Justice Brennan's dissent considered this to be "hardly a relevant or convincing precedent to sustain the Secretary's action here," 101 S. Ct. at 2789 n.10 (Brennan, J., dissenting), since the prior restraint exception to the first amendment requires that the threat must be immediate, direct, and irreparable. The majority made no attempt to establish those requirements. *See* note 73 *supra.*
substance to free speech and a free press.\textsuperscript{95} Although this assertion on its face is valid, the \textit{Zemel} Court had plainly rejected first amendment protection to the freedom to travel abroad; therefore, precedent reasonably supports the majority's first amendment conclusion in \textit{Agee}.

The Court's apparent failure to give adequate weight to its own assertion in \textit{Kent} that delegation of congressional authority in passport cases must be narrowly construed is far less supportable. Without any reference to the unique facts in Agee's situation, the Court broadly declared that international travel is subordinate to national security interests,\textsuperscript{96} thus ignoring the narrow construction and strict review of national security interests which \textit{Kent} envisioned. Although the Court stated that national security is a compelling government interest,\textsuperscript{97} it made no specific factual showing of how Agee's situation satisfied this requirement. Even if national security situations defy the drawing of a definite threshold, the Court ought to demand a showing that the factual basis of a potential security threat is compelling given the nature of current national events and foreign policy considerations.\textsuperscript{98} To establish the government's compelling security threat, therefore, the Court should have closely analyzed Agee's conduct. Instead, the majority stated that international travel is merely subject to "reasonable governmental regulation,"\textsuperscript{99} resting this assertion only on the Court's previous treatment of international travel in the context of an economic regulation, a decision which also warned that such a reasonableness standard might not be appropriate for restrictions on passports.\textsuperscript{100} The Court left the restriction of an admittedly constitutionally protected right dependent upon the Secretary of State's broad discretion and interpretation of what constitutes a national security threat. The Court's mixing, perhaps inadvertent, of constitutional standards may further weaken the protection afforded international travel, because the Court appears willing to accept a lower constitutional standard in national security situations.\textsuperscript{101}

The United States Supreme Court's decision to uphold the

\textsuperscript{95} 381 U.S. at 23-24 (Douglas, J., dissenting). \textit{See} note 35 supra.

\textsuperscript{96} 101 S. Ct. at 2781.

\textsuperscript{97} \textit{Id.} at 2782.

\textsuperscript{98} The Court does have some experience in evaluating these factors. \textit{See}, \textit{e.g.}, \textit{Zemel v. Rusk}, 381 U.S. at 16 (national security implications surrounding the Cuban missile crisis).

\textsuperscript{99} 101 S. Ct. at 2781.


\textsuperscript{101} \textit{See} Gillers, supra note 55, at 67.
revocation of Philip Agee's passport on national security grounds gave the Secretary of State wide discretionary authority, beyond the authority required by the facts of the case. By finding implicit congressional approval of the State Department's passport regulation from congressional silence in the face of the Department's construction, and by not requiring that only an established administrative practice can indicate congressional awareness of the regulation, the Court effectively overruled the prior standard in the passport area and ignored its own requirement of narrowly construing delegated congressional power. The Agee majority also failed to assess the constitutional questions as fully as the Court had in Kent and Zemel, perhaps implying that a less strict standard of review for restrictions of constitutional rights is acceptable when a national security issue is involved. Unless Congress enacts new legislation limiting the State Department's authority, or until courts rule on future revocations, present and future Secretaries of State appear to have overly broad discretion to revoke or to deny passports when they determine that a national security threat exists. Congress must give clear guidance to the Executive in order to remove the potential for discretionary abuses by the Executive and to assure Americans of the continued vitality of their freedom to travel abroad.