1-1-1982


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Recommended Citation
CONSTITUTIONAL LAW—INTERNATIONAL TRAVEL RESTRICTIONS & THE FIRST AMENDMENT: TO SPEAK OR NOT TO SPEAK? 


I. INTRODUCTION

The United States Constitution jealously guards the individual liberties that its drafters deemed essential to the operation of a democratic society. Individual liberties such as speech, religion, press, and assembly, are set out expressly in the text of the first amendment.1 Other rights, such as privacy and personhood,2 have been included in the list of individual liberties, not through direct expression in the Constitution but by judicial interpretation.3

The right to travel, both domestically and internationally, is one right not given direct expression in a constitutional amendment.4 The tests that the United States Supreme Court will apply to determine the extent of protection afforded an individual's right to travel will depend upon whether one is traveling domestically or internationally. For example, the Supreme Court has long held that there is a constitutional right to domestic interstate travel,5 and that the right is virtually unqualified.6 On the other hand, the Court has yet to make an absolute determination of the degree of constitutional pro-

1. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

2. The labels “privacy” and “personhood” have been employed generically by Professor Tribe in his discussions of the right to education, free choice of vocation, sexual preference, travel, and control over one's own body. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 886-1135 (1978) [hereinafter cited as L. TRIBE].

3. E.g., Roe v. Wade, 410 U.S. 113 (1973) (statute prohibiting abortion except when necessary to save the life of the mother struck down as an infringement on a woman's right to privacy); Boddie v. Connecticut, 401 U.S. 371 (1971) (persons seeking a divorce but who are unable to pay court fees cannot be denied access to state courts); Griswold v. Connecticut, 381 U.S. 479 (1965) (statute restricting the right of married persons to use contraceptive devices struck down); see J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 476-689 (1978) [hereinafter cited as J. NOWAK].

4. J. NOWAK, supra note 3, at 666; L. TRIBE, supra note 2, at 953.


tection to be afforded persons who travel beyond the political boundaries of the United States.⁷

In Haig v. Agee,⁸ the Supreme Court was confronted with the question of what degree of constitutional protection should be afforded a former Central Intelligence Agency (CIA) officer’s right to travel throughout the world when the object of his travel was to disseminate information critical of, and possibly damaging to, CIA operations.⁹ This question was summarily addressed by the Court in Agee after the Court had affirmatively decided that the President, acting through the Secretary of State (Secretary), has the authority to revoke a passport on the ground that the holder’s activities abroad are causing or are likely to cause serious damage to the national security or foreign policy of the United States.¹⁰

This note will focus on the constitutional questions raised by the revocation of Philip Agee’s passport for his activities in foreign countries. In the context of the constitutional questions raised in Agee, it becomes clear that the constitutional right of an American citizen to travel abroad must inevitably compete with the broad power of the national government in the international arena.¹¹ The Court’s holding in Agee is based on an analysis of three prior passport cases: Zemel v. Rusk,¹² Aptheker v. Secretary of State,¹³ and Kent v. Dulles.

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⁷ In both Zemel v. Rusk, 381 U.S. 1 (1965) and Kent v. Dulles, 357 U.S. 116 (1958), the Court intimated that international travel is to be afforded the protection of the fifth amendment, while in Aptheker v. Secretary of State, 378 U.S. 500 (1964), the Court suggested that in certain situations, the right to international travel may be afforded first amendment protection. See notes 75-143 infra and accompanying text for a full discussion of Zemel, Kent, and Aptheker.
⁹ Respondent Philip Agee’s disclosures of CIA operatives and agents have appeared in a variety of forms. Agee’s first book, Inside the Company: CIA Diary (1975), is a detailed account of his years as a CIA agent operating undercover in Latin America. In two later publications, Agee, in collaboration with others, detailed the operations of the CIA in Western Europe and Africa by including in his books a “Who’s Who” section complete with names, biographies, locations, covers, and assignments. Dirty Work: The CIA in Western Europe (P. Agee & L. Wolf eds. 1978); Dirty Work 2: The CIA in Africa (E. Ray, W. Schapp, K. Van Meter, & L. Wolf eds. 1979).

Agee also held several news conferences similar to the one held in Havana, Cuba during July 1978, where Agee said that he and others would set up a global research group to scrutinize all CIA activities. N.Y. Times, July 30, 1978, at 7, col. 1. Finally, the editor of the British journal Time Out indicated that Philip Agee “worked with them preparing a series of articles identifying and publishing names of ‘senior’ spies at the American Embassy in London.” N.Y. Times, Jan. 15, 1976, at 3, col. 1.
¹⁰ 453 U.S. at 306.
¹¹ J. Nowak, supra note 3, at 666.
¹² 381 U.S. 1 (1965).
les,\footnote{14} each of which involved the overlapping rights of speech or association and travel.

The Court attempted to minimize the impact of \textit{Agee} by rooting its decision in the administrative law issue concerning the extent to which power may be delegated by Congress to the Secretary.\footnote{15} Agee's passport, however, was revoked because of the threat to national security posed by his speech and publications: two areas traditionally afforded protection by the first amendment.\footnote{16} The question to be considered is whether the Court erred in failing to address all first amendment aspects of \textit{Agee}.

This note also will address the question of whether, at minimum, the Court should have explored the possibility of affording the injured individual greater constitutional protection in situations in which the right to free speech has been violated under the pretext of regulating the right to travel abroad. The \textit{Agee} Court's failure to give adequate consideration to these issues has granted to the Secretary virtually unlimited authority to revoke or deny passports.\footnote{17} The exercise of such authority not only interferes with the right to travel, but also infringes upon the first amendment rights of speech, press, and association.

\section*{II. \textit{Agee}}

\subsection*{A. Facts and Procedural History}

The facts of \textit{Agee} were not in dispute.\footnote{18} Between 1957 and 1968, Agee held a position of trust with the CIA.\footnote{19} Agee's position required him to receive training in covert intelligence gathering and in methods used to protect identities of intelligence operatives and sources working for the United States.\footnote{20} While serving in undercover assignments abroad, Agee developed highly confidential relationships with persons responsible for supplying the CIA with intelligence information on a continual basis; many of these operatives still are functioning as sources for the CIA.\footnote{21}

The twelve years Agee spent in the employ of the CIA had a

\footnotesize{\begin{itemize}
\item \textit{Id.} Throughout Agee's clandestine career in Latin America he was employed
\end{itemize}}
profound effect on his attitudes toward the role of the United States and the CIA in the Third World. Agee initially favored the CIA's policies and methods in Latin America because the articulated purpose was to enable reform minded governments to gain a foothold.22 But Agee gradually came to the conclusion that the CIA's policies perpetuated the division between the rich and the poor, in some instances to the distinct advantage of United States businesses.23 Agee's disillusionment with the policies of the CIA continued until finally, on October 3, 1974, he conducted the first of a series of press conferences designed to inform the world of his campaign to disrupt and destroy the CIA.24 At the last of these conferences orchestrated

by the American Institute for Free Labor Development, an arm of the AFL-CIO. N.Y. Times, July 9, 1974, at 27, col. 1.

As a prerequisite to employment with the CIA, Agee signed a contract which required that he not discuss or publish, without prior approval, "any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment. . . . " Brief for Petitioner at 3, supra note 19.

Agee's employment contract with the CIA was identical to the contract which the Court examined in Snepp v. United States, 444 U.S. 507 (1980). In Snepp, the question was the validity of a constructive trust imposed on the profits of Snepp's book which told of his experiences while in the employ of the CIA. See also Agee v. CIA, 500 F. Supp. 506 (D.D.C. 1980).

Although the civil action against Agee for disseminating CIA information produced a decision which enjoined any future uncensored writing, id. at 509, Agee was subsequently informed by the Justice Department that criminal prosecution under the Espionage Act, 18 U.S.C. §§ 792-799 (1976), would not be forthcoming because no ground for prosecution could be found. N.Y. Times, Mar. 21, 1977, at 7, col. 1.

22. Id. Agee's disillusionment was fostered by the belief that the CIA's main role was to "keep the lid" on fledgling counter-insurgency movements in Latin America and on the more prominent counter-insurgency movements in Vietnam. Agee's analysis of the CIA's role led him to believe that the liberal reform theories espoused by the CIA were merely rhetoric; a disguise for "American imperialism." Id. For a more detailed account of Agee's ideological transformation, see P. Agee, Inside the Company: CIA Diary (1975).

24. The text of the first press release from London read:

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.

by Agee, Louis Wolf, one of Agee's collaborators, named fifteen individuals as CIA agents operating in Jamaica. One week after Wolf's publicized announcement, the homes of two named individuals were attacked.

To carry out his program of disruption, it was necessary for Agee to travel to several countries. He first singled out a target country and, upon arrival, consulted with sources and contacts known to him from his prior service in the CIA. Thereafter, Agee began a recruitment and training program to acquaint his sympathizers with CIA techniques and clandestine operations. Agee's avowed purpose for using these techniques was to expose the "cover" of CIA employees and sources.

In December 1979, pursuant to sections 51.70(b)(4) and 51.71(a) to title 22 of the Code of Federal Regulations, the Secretary revoked Agee's passport by delivering an explanatory notice to Agee in West Germany. Agee waived his right to a hearing and, in-

25. Brief for Petitioner at 125a, supra note 19.
26. Id.
27. Id. at 126a-27a.
28. 453 U.S. at 284.
29. Id. CIA Deputy Director for Operations, John N. McMahon, indicated that "Mr. Agee . . . is perceived abroad as a highly credible source. Thus Mr. Agee's efforts to use this privileged information . . . disrupted the activities of the CIA. If he continues these efforts it will certainly place the lives and safety of American officials in jeopardy." Brief for Petitioner at 112a, supra note 19.
30. The regulations state that: "A passport may be refused in any case in which . . . the Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or foreign policy of the United States." 22 C.F.R. § 51.70(b)(4) (1981). In addition, "A passport may be revoked, restricted, or limited where . . . the national would not be entitled to issuance of a new passport under § 51.70." 22 C.F.R. § 51.71(a) (1981).
31. The notice read in part:
   The Department of State has requested the Consulate to inform you that the Department has revoked Passport No. Z3007741 issued to you on March 30, 1978 under the provisions of Section 51.71(a) of Title 22, Code of Federal Regulations.
   The Department's action is predicated upon a determination made by the Secretary under the provisions of 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. . . . Your stated intention to continue such activities threatens additional damage of the same kind.
   You are advised of your right to a hearing under Sections 51.80 through 51.105 of the Regulations.
   Petitioner's Brief at 120a, supra note 19.
32. 453 U.S. at 286. Agee took up residence in West Germany after his deportation from Great Britain, France, and the Netherlands. See DIRTY WORK: THE CIA IN WESTERN EUROPE, supra note 9, at 286-300.
33. 453 U.S. at 287. The State Department was prepared to hold an administrative
stead, filed suit against the Secretary in the United States District Court for the District of Columbia.\textsuperscript{34} Agee alleged, \textit{inter alia}, that section 51.70(b)(4) was impermissibly overbroad and that the revocation of his passport violated both his fifth amendment liberty interest in the right to travel abroad and his first amendment right to criticize the government.\textsuperscript{35} Agee moved for summary judgment on the question of the Secretary's authority to promulgate the regulations and on the constitutional claims.\textsuperscript{36} Solely for the purposes of the motion, Agee conceded the Government's factual averments\textsuperscript{37} and the claim that his activities were causing or were likely to cause damage to the national security or foreign policy of the United States.\textsuperscript{38} After an analysis of \textit{Kent, Zemel}, and the Passport Act of 1926,\textsuperscript{39} Judge Gesell determined that the Passport Act does not grant the Secretary unbridled discretion to revoke or deny passports.\textsuperscript{40} In addition, Judge Gesell found that Congress had neither expressly nor impliedly authorized the Secretary to promulgate the challenged regulation.\textsuperscript{41} The Court granted Agee's motion for summary judgment and, in doing so, found it unnecessary to consider the constitutional questions.\textsuperscript{42}

The district court's decision was affirmed in \textit{Agee v. Muskie}.\textsuperscript{43}
Again finding it unnecessary to reach the constitutional question, the United States Court of Appeals for the District of Columbia held that section 51.70(b)(4) was promulgated by the Secretary and enforced against Agee without congressional authorization.

The Supreme Court reversed the lower court's decision and held that the policy announced in the challenged regulation was "sufficiently substantial and consistent" with past administrative practice to conclude that Congress tacitly approved it. As a result, the Court concluded that the constitutional claims were without merit.

B. Rationale

Prior to determining the validity of Agee's constitutional claims, Chief Justice Burger, writing for the majority, focused on the Secretary's authority to promulgate sections 51.70(b)(4) and 51.71(a) in light of the Passport Act. The Passport Act does not expressly grant the Secretary the authority to deny or revoke passports. Therefore, in order to find the Secretary's regulation valid, the Court had to find implied congressional approval. To do so in the face of congressional silence, it was necessary to find an "administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had [acquiesced to the practice and] implicitly approved it." In Agee, the Court reformulated the test and found

44. 629 F.2d at 87 n.9.
45. Id. at 87. The court did not find it necessary to uphold the regulation on the ground that some people may consider Agee's conduct to border on treason. The court said, "We are bound by the law as we find it." Id.
47. 453 U.S. at 306.
48. Id.
49. See note 30 supra.
50. 453 U.S. at 289-306.
51. Id. at 290. See note 39 supra.
52. Zemel v. Rusk, 381 U.S. 1, 12 (1965). The sufficiently substantial and consistent administrative practice test was first enunciated in Zemel. This author has found no other case law which defines these terms, nor has the Burger Court had occasion to pass on its validity. See Case Comment, supra note 43, at 514.
that the policy announced in the challenged regulation had im-
pliedly been approved by Congress.53

The "sufficiently substantial and consistent" administrative
practice test, first articulated in Zemel, was given content by an ex-
amination of prior passport cases and legislative history.54 Although
the court of appeals and the Supreme Court reviewed the same cases
and legislative history to determine whether the Passport Act im-
pliedly granted the Secretary authority to promulgate the challenged
regulation, the courts came to different conclusions.55 This divergent
reading of the passport cases evidently was based on other consider-
ations not articulated in either opinion. The Supreme Court major-
ity in Agee held that the Secretary's passport regulations were
impliedly consented to by Congress,56 thus, it apparently did not find
troublesome the task of gleaning intention from congressional si-

53. 453 U.S. at 306. In his dissent, Justice Brennan points out that the sufficiently
substantial and consistent test as set out in Zemel requires that it relate to an administra-
tive practice and not an administrative policy or construction as was determined by the
majority. Id. at 314 (Brennan, J., dissenting). Apparently this means that the Govern-
ment's burden is lighter if it has to demonstrate that a policy or construction of a statute
or regulation has been consistently adhered to as opposed to the necessity of demonstrat-
ing that the policy was given content by showing a consistent practice.

Justice Brennan goes on to state that "Kent unequivocally states that mere construc-
tion by the Executive—no matter how longstanding and consistent—is not sufficient." Id.
(emphasis in original). The test requires more than acquired discretion on the part of
the Secretary; it requires exercise of the discretion. Id. at 315.

The majority contends that "it would be anomalous to fault the Government be-
cause there were so few occasions to exercise the announced policy and practice . . . it
suffices that the Executive has 'openly asserted' the power at issue." Id. at 303.

Justice Brennan responded by stating that:

[N]o one is 'faulting' the Government because there are only a few occasions
when it has been fit to deny or revoke passports for foreign policy or national
security reasons, . . . [but] the Executive's authority to revoke passports touches
an area fraught with important Constitutional rights, and that the Court should
therefore 'construe narrowly all delegated powers that curtail or dilute them.'
Id. at 318 (Brennan, J., dissenting) (quoting Kent v. Dulles, 357 U.S. at 129). See Ex
parte Endo, 323 U.S. 283, 301-02 (1944).

54. 453 U.S. at 291-306.
56. 453 U.S. at 306. In another passport case the Secretary of State sought to deny
passports to five United States citizens who desired to go on fact-finding trips through
China, Cuba, North Korea, North Vietnam, and Syria. The court, in attempting to
determine the extent of the Secretary's authority in light of congressional silence in the
Passport Act said that "[g]leaning intention from Congressional silence is under the best
of circumstances an elusive task . . . the soft support of silence from Congress does not
permit an inference that it has authorized executive curtailment of the constitutionally
protected 'liberty' of travel to non-restricted areas. . . ." Lynd v. Rusk, 389 F.2d 940,
946-47 (D.C. Cir. 1967).
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lence.\textsuperscript{57} Once the Court determined that it was within the Secretary's authority to apply his regulation to Agee, the Court then was obliged to respond to Agee's allegations that he was denied his constitutional rights.\textsuperscript{58}

The Court based its constitutional holding on the premise that Agee's \textit{conduct} was damaging to the national security and foreign policy of the United States.\textsuperscript{59} While it is true that Agee's conduct included traveling from country to country and recruiting foreign personnel for anti-CIA operations, the Court also chose to focus on Agee's disclosures at press conferences and in print.\textsuperscript{60} Speaking at a press conference or writing an article or book may well be considered conduct, but this conduct is inextricably tied to speech and press rights that fall under the first amendment.\textsuperscript{61} The Court, however, refused to consider this argument and, instead, held that the revocation of Agee's passport was clearly an "inhibition of [his] 'action' rather than of [his] speech."\textsuperscript{62} This proposition appears inconsistent with the Court's finding that the revocation of Agee's passport rested in part on the content of his disclosures of intelligence operations and undercover personnel.\textsuperscript{63} By raising this point, the Court undercut its determination that the Secretary attempted solely to restrict conduct. The Court apparently raised the question of Agee's speech in dicta to analogize the facts of \textit{Agee} to a hypothetical situation presented in \textit{Near v. Minnesota}.\textsuperscript{64} In \textit{Near}, the Court determined that the Government could prohibit publication of the sailing dates of transport ships and the location of American troops\textsuperscript{65} because the publication could be damaging to national security.\textsuperscript{66}

\textsuperscript{57} In trying to mold the historical evidence to show congressional acquiescence in the form of congressional silence, the Supreme Court has impliedly set out a principle which states that "only the clearest of such evidence will permit this Court to consider Congressional silence to be a substitute for explicit and affirmative legislative action in limiting the free exercise of important [constitutional] rights." Woodward v. Rogers, 344 F. Supp. 974, 985 (D.D.C. 1972), aff'd, 486 F.2d 1317 (D.C. Cir. 1973). See, e.g., Greene v. McElroy, 360 U.S. 474 (1959); Kent v. Dulles, 357 U.S. 116 (1958); \textit{Ex parte Endo}, 323 U.S. 283 (1944).

\textsuperscript{58} \textit{See} note 42 \textit{supra} and accompanying text.

\textsuperscript{59} 453 U.S. at 304-05.

\textsuperscript{60} \textit{Id.} at 308.

\textsuperscript{61} \textit{See generally} J. \textit{Nowak, supra} note 3, at 688-817.

\textsuperscript{62} 453 U.S. at 309 (quoting Zemel v. Rusk, 381 U.S. at 16). \textit{See} notes 183-92 \textit{infra} and accompanying text.

\textsuperscript{63} 453 U.S. at 308.

\textsuperscript{64} 283 U.S. 697 (1931).

\textsuperscript{65} \textit{Id.} at 716 (noting exceptions to the principle that prohibits prior restraint).

\textsuperscript{66} There is a serious question, however, as to whether the prior restraint exception noted in \textit{Near} is applicable to \textit{Agee}. The prior restraint discussion in \textit{Near} was part of a
Having disposed of the need for a first amendment analysis that would have required support from *Aptheker v. Secretary of State*, the Court proceeded to find that the right of international travel, when not tied to other constitutional rights, is no more than a "liberty" interest which may be regulated within the bounds of fifth amendment due process.

In applying the fifth amendment standard of review, the Court found that restricting Agee's travel by revoking his passport was the only avenue open to the government to limit his activities. Without other alternatives, this method was rationally related to the "[p]rotection of the foreign policy of the United States . . . a gov-

larger discussion by the Court as to whether a publication known as "The Saturday Press" could continue to print articles charging that a Jewish gangster was in control of various organized crime activities in Minnesota. *Id.* at 704. Chief Justice Hughes employed the "troop movement" hypothetical to illustrate that there are extreme situations in which prior restraint is constitutionally permissible. He concluded that the exception was not applicable in *Near*. *Id.* at 716.

In his dissent in *Agee*, Justice Brennan pointed out that *Near* is only applicable when the activity "must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." 453 U.S. at 320, n.10 (Brennan, J., dissenting) (quoting New York Times Co. v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring)). One might also question whether Agee's publications and press conferences during a time when the United States was not involved in a war is analogous to the hypothetical situation in *Near*, since the publication of troop movements during a time of war would have an extreme and immediate impact.

Justice Brennan also argued that Agee's concessions to the Government's factual averments were merely for the purpose of challenging the facial validity of the Secretary's regulation and not for establishing their application to this case. It is only when the facts are established that the Court can determine whether they fall within the class of cases which follow the *Near* exception. *Id.*

Furthermore, in New York Times Co. v. United States, 403 U.S. 713 (1971), the Court noted that the extremely narrow class of cases where the first amendment ban on prior restraint may be overridden can arise only when the nation "is at war." *Id.* at 726 (Brennan, J., concurring) (quoting Schenk v. United States, 249 U.S. 47, 52 (1919)). When Agee's passport was revoked the United States was not officially "at war" although the Iranian hostage crisis was well under way.

67. 378 U.S. 500 (1964). *Aptheker* was a travel restriction case in which the Court employed a first amendment analysis because of the infringement on associational rights created by the travel restriction. *See* text accompanying notes 97-126 infra.

68. 453 U.S. at 307. *See* Califano v. Aznavorian, 439 U.S. 170, 175-76 (1978); Califano v. Torres, 435 U.S. 1, 4 n.6 (1978); Shapiro v. Thompson, 394 U.S. 618, 643 n.1, 666 n.23 (1968) (Stewart, J., concurring); *id.* at 666 n.23 (Harlan, J., dissenting); United States v. Laub, 385 U.S. 475, 481 (1967); Zemel v. Rusk, 381 U.S. 1, 14 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964); Kent v. Dulles, 357 U.S. 116, 125-27 (1958). *But cf.* United States v. Davis, 482 F.2d 893, 912 & n.55 (9th Cir. 1973) (stating that the "freedom to travel at home and abroad without unreasonable governmental restriction is a fundamental constitutional right of every American citizen" although the "constitutional source of the right is not yet settled").

69. 453 U.S. at 308.
ernmental interest of great importance."\(^{70}\)

The crux of the constitutional problem, however, is brought forth in Justice Brennan's dissent.\(^{71}\) While conceding that Agee is hardly a model representative of our nation, Justice Brennan stressed that the majority's decision applied not only to Agee, whose activities could be perceived as harmful to national security, but also to other citizens who may disagree with national foreign policy and express their views.\(^{72}\) Justice Brennan did not undertake a full analysis of the constitutional problem because he would have upheld the decision of the lower courts on the administrative issue.\(^{73}\) Wishing, however, to have his position fully understood, he said, "[t]he Court seems to misunderstand the prior precedents of this Court, for Agee's speech is undoubtedly protected by the Constitution."\(^{74}\) It is open to speculation whether the outcome of this case would have been different had the Court engaged in a first amendment analysis. The question to be asked here is whether the Court should have addressed Agee's situation from a first amendment rather than a fifth amendment perspective.

\(^{70}\) Id. at 307. The Court also indicated the need to maintain confidentiality of diplomatic, consular, and other officials who provide foreign policy and national security information to the President. Id. See United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936); accord, Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); The Federalist No. 64, at 432, 434-35 (J. Jay) (J. Cooke ed. 1961).

\(^{71}\) 453 U.S. at 310 (Brennan, J., dissenting).

\(^{72}\) Id. at 319. At oral argument, Justice Brennan elicited a response from Solicitor General McCree which led Justice Brennan to conclude that the "reach of the Secretary's discretion is potentially staggering." Id. at 319 n.9. Justice Brennan asked whether the Secretary could refuse to issue a passport to an American citizen who wished to travel to El Salvador if it were determined that the trip's sole purpose was to denounce the United States policy in support of the ruling junta. McCree responded in the affirmative, adding that the "freedom of speech that we enjoy domestically may be different from that that we can exercise in this [international] context." Id.

In addition, the Secretary's regulatory power can be triggered upon fear of possible harm to national security or foreign policy. Obviously, there is a significant difference between the concepts with "foreign policy" being much broader in scope. In general, "national security" may be defined as the ability of a nation to protect its internal values from external threats. It is generally considered to be a more specialized subarea of a country's overall foreign policy. See generally 11 International Encyclopedia of the Social Sciences 40-45 (D. Sills ed. reprint 1972). On the other hand, "foreign policy" is a generic term encompassing the institutional and individual behavior of a government in its political, economic, social, and military relations with other governments. See generally 5 Id. at 530-35. See also 2 Encyclopedia of American Foreign Policy 623-34 (A. DeConde ed. 1978) for a series of essays covering a variety of specific topics under the foreign policy heading including "national security."

\(^{73}\) 453 U.S. at 320 n.10 (Brennan, J., dissenting).

\(^{74}\) Id. While Justice Brennan's unequivocal statement may be open to argument, it does raise the valid point that there is an important first amendment problem in this case that should have been discussed in full by the majority.
III. The Passport Restriction Cases

A. Travel—A Fifth Amendment Right?

Kent, Aptheker, and Zemel\(^75\) represent the foundation of what has become a mountain of litigation in the lower courts\(^76\) concerning an American citizen's ability to travel outside the political boundaries of the United States. Prior to Kent, the Supreme Court had not confronted the question of what limits should be imposed on the use of passports to protect the interests of the United States from the activities of citizens traveling abroad.

In Kent v. Dulles,\(^77\) the Court was confronted with a situation involving two American citizens, Rockwell Kent and Dr. Walter Briehl,\(^78\) both alleged members of the Communist Party. Shortly after Kent applied for a passport to attend a conference in Helsinki, Finland, he was informed that the issuance of a passport to him was precluded by section 51.135 to title 22 of the Code of Federal Regulations.\(^79\) The Secretary charged that Kent was a Communist with a

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75. See notes 12-14 supra. In each of these cases, the fifth amendment is discussed either in dicta or as a basis for the decision.

76. Since the focus here is restricted to the constitutional issues raised by Agee, it is beyond the scope of this note to engage in a full discussion of all the lower court right to travel cases, although where relevant, selected cases will be discussed. See generally Berrigan v. Sigler, 499 F.2d 514 (D.C. Cir. 1974); Lynd v. Rusk, 389 F.2d 940 (D.C. Cir. 1967); Worthy v. United States, 328 F.2d 386 (5th Cir. 1964); Worthy v. Herter, 270 F.2d 905 (D.C. Cir.), cert. denied, 361 U.S. 918 (1959); Reyes v. United States, 258 F.2d 774 (9th Cir. 1958); Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955); Woodward v. Rogers, 344 F. Supp. 974 (D.D.C. 1972); MacEwan v. Rusk, 228 F. Supp. 306 (E.D. Pa. 1964), aff'd, 344 F.2d 963 (3d Cir. 1965); United States v. Eradjian, 155 F. Supp. 914 (S.D. Cal. 1957); Boudin v. Dulles, 136 F. Supp. 218 (D.D.C. 1955); Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952).


78. The facts relating to Briehl are identical to those relating to Kent. Briehl, a psychiatrist, applied for a passport, but like Kent, was denied when he refused to supply an affidavit pertaining to his alleged membership in the Communist Party. Kent v. Dulles, 357 U.S. 116, 120-21 (1958). The Supreme Court granted a writ of certiorari and heard both cases together. Kent v. Dulles, 355 U.S. 881 (1957) (grant of certiorari).

79. 357 U.S. at 117. The Kent Court set out the relevant portions of 22 C.F.R. § 51.135 which states:

In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

(b) Persons, regardless of the formal state of their affiliation with the
consistent and prolonged adherence to the Communist Party line. In accordance with the regulation, Kent was required to submit an affidavit stating whether he was a Communist.\footnote{357 U.S. at 118-19.}

Kent refused to submit the affidavit on the ground that the requirement was unconstitutional.\footnote{Id. at 119.} Upon receiving Kent’s response, the State Department determined that it would take no further action on Kent’s passport application until the required affidavit was submitted.\footnote{Id. at 119.}

The Court invalidated the Secretary’s action, analogizing it to past administrative practice cases relating to travel restrictions. The review of past administrative practice revealed that unless the passport applicant participated in illegal conduct or was either not a citizen of or not loyal to the United States, there could be no restriction.\footnote{Id. at 127.} Absent an express delegation of power to the Secretary from Congress authorizing passport denials or revocations,\footnote{See note 39 supra.} the Court did not wish to impute this motive to Congress without a longstanding administrative practice. The Court felt that to do so would give the Secretary unbridled discretion over travel regulation, thus allowing him to deny, grant, or revoke passports for any substantive reason he may choose.\footnote{357 U.S. at 128.}

Having found that the Secretary had gone beyond his authority

Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

357 U.S. at 117-18 n.1. See also Agee v. Muskie, 629 F.2d at 84 n.3 (regulation was struck down by Supreme Court in Kent).

80. 357 U.S. at 118-19.

81. Id. Like Kent, Briehl also refused to submit an affidavit charging: (1) that his political affiliation was irrelevant to his right to a passport; (2) that "every American citizen has the right to travel regardless of politics"; and (3) that the burden was on the State Department to prove illegal activities by Briehl. Id. at 120.

82. Id. at 119.

83. Id. at 127. The Court found that past administrative practice relating to Communists was scattered and not consistently of one pattern. Id. at 128. It must be borne in mind that Philip Agee’s citizenship was not disputed, nor were there grounds to charge him with criminal activity. See text accompanying notes 28-29 supra.

84. See note 39 supra.

85. 357 U.S. at 128. In effect this is what Justice Brennan believed was the result of the Court’s decision in Agee. 453 U.S. at 319 (Brennan, J., dissenting).
in denying passports to Kent and Briehl, the Court was precluded from considering the constitutional questions lying beneath the surface. This did not prevent Justice Douglas from setting out in dicta the relationship between the right to travel abroad and specific provisions of the Constitution. Justice Douglas expressly connected the right to travel abroad to the liberty interest protected by the due process clause of the fifth amendment. Thus, any restriction on the right to travel abroad is subject to a test of "reasonableness" in light of the important state interest the restriction is designed to protect.

Other language in Justice Douglas' opinion pointed to the possibility of placing the right to travel abroad at the periphery of the first amendment when the situation so requires. Justice Douglas noted that freedom of movement has larger social values. In Kent, the Court was confronted with more than a travel restriction case because the parties' beliefs and associations were involved. Freedom of movement was restricted solely because Kent and Briehl refused to allow inquiries into their beliefs and associations. Justice Douglas' allusion to possible first amendment violations when travel abroad is restricted was more clearly articulated and developed in later opinions, but the groundwork for a first amendment analysis was established in Kent.

B. Travel—A First Amendment Right?

By deciding in favor of Kent and Briehl on the administrative issue, the Court in Kent was able to avoid the difficult constitutional issues that finally surfaced in Aptheker. In Aptheker, the Court was confronted with a challenge to the constitutionality of section 6 of the Subversive Activities Control Act. Appellants Elizabeth Gur-
ley Flynn and Herbert Eugene Aptheker, were native citizens of the United States holding valid United States passports. On January 22, 1962, the Secretary revoked appellants' passports based solely on the findings of the Board of Passport Appeals.

Appellants asked that the statute be declared unconstitutional because, inter alia, it infringed on their constitutional liberty to travel abroad in violation of the fifth amendment, and it abridged their freedom of speech, press, and assembly in violation of the first amendment.

Justice Goldberg expressly affirmed the dicta from Kent which unequivocally stated that the right to travel abroad is an important aspect of a citizen's liberty and therefore is guaranteed by the fifth amendment. To decide whether the restrictions on travel set out in section 6 were too broad, the Court enunciated a four-part inquiry. First, the Court must determine whether the person knows or believes that the organization to which he belongs is a "Communist action" or "Communist front" organization. Second, the level of the member's commitment to the organization must be scrutinized. If the member lacks a firm commitment, there is no guarantee that his travels will produce the activity Congress sought to control. Third, there must be an inquiry into the purpose of the individual's

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

Id. at 502.

93. 378 U.S. at 502.

94. Id. at 503. The Board of Passport Appeals found that "at all material times [appellants were members] of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act" and therefore were in violation of section 6 of the Act. Id. (quoting the final order of the Board of Passport Appeals).

95. Id. at 503-04.

96. Id. at 505.

97. Id. at 509-10. For support, the Court cited Wieman v. Updegraff, 344 U.S. 183 (1952), a case in which the state attempted to bar disloyal persons from its employ solely on the basis of organizational membership without regard to their knowledge concerning the organization to which they belonged. The Wieman Court concluded that to inhibit freedom of movement is to stifle the flow of democratic expression at its source. The Court reasoned that indiscriminate classification of innocent activity must fall as an arbitrary assertion of power. Id. at 191.

98. 378 U.S. at 510. In Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), Justice Black said, "assuming that some members of the Communist Party . . . had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct." Id. at 246.

One of the objections raised in Aptheker to section 6 of the Subversive Activities Control Act is that it establishes an irrebuttable presumption that one who belongs to a given organization will at all times adhere to and advance that organization's philosophy. 378 U.S. at 511.
travel plans. Under section 6, not only is it a crime for a Communist organization member to apply for a passport so that he may participate in subversive activities, but it is also a crime for a Communist organization member to apply for a passport so that he may visit a sick relative, receive medical treatment, or travel abroad for any innocent purpose. Finally, the Court must inquire into the congressional decisionmaking process to determine whether Congress chose the least drastic means to achieve the objective of protecting national security.

In responding to the Government's contention that one could regain his passport by giving up his association with the organization in question, Justice Goldberg announced that the first amendment freedom of association was implicated and held that section 6 was unconstitutional on its face. In doing so, Justice Goldberg engaged in a first amendment "overbreadth" analysis, which seeks to insure that when the government attempts to control or prevent activities that constitutionally may be regulated, the regulation does not sweep unnecessarily broadly, thereby invading the area of protected freedoms.

The Court in *Aptheker* chose to apply the overbreadth analysis in an international travel case. Until this point, international travel cases had required only a fifth amendment due process analysis, thus, as a result of *Aptheker*, there was reason to believe that in considering future international travel cases in which a regulation impinged on first amendment rights the Court would apply a strict first amendment standard. One commentator concluded that in situations in which a traveler's first amendment right is restricted, the Court automatically should afford the traveler a higher degree of protection under the first amendment.

Justice Goldberg's rationale in *Aptheker*, that freedom to travel is closely related to freedom of speech and association, is based on his view that a personal, rather than a property right is infringed upon by the statute. Justice Goldberg cited both *NAACP v. But-
ton\textsuperscript{106} and Thornhill v. Alabama\textsuperscript{107} in his discussion of how to approach overbroad legislation that curtails a personal first amendment right. Both Button and Thornhill indicated that when a statute sweeps too broadly, thereby infringing on first amendment rights in an attempt to regulate activities within the permissible scope of government regulation, that statute may be struck down as overbroad.\textsuperscript{108} Thus in Aptheker, the irrebuttable presumption\textsuperscript{109} created by the statute that all members of an organization necessarily adhere to and advance the organization’s philosophy,\textsuperscript{110} invalidated the statute. Justice Goldberg further indicated that if a member of a suspect organization applied for a passport to visit a sick relative abroad, he would be guilty of a crime based merely upon his membership in the suspect organization.\textsuperscript{111} In Aptheker, it was within the scope of the fifth amendment due process clause for the Government to regulate travel abroad, but in finding that the facts in Aptheker

\textsuperscript{106} 371 U.S. 415 (1963). Button involved a challenge by the NAACP to a Virginia statute which made it an offense for an organization such as the NAACP, its members, and its staff lawyers to associate for the purpose of defending those persons who had claims relating to the infringement of their constitutional rights. \textit{Id.} at 428. The Court applied the first amendment overbreadth doctrine in reversing the Virginia Supreme Court of Appeals’ endorsement of the statute. The overbreadth doctrine was employed to point out that a statute, if not narrowly drawn, may infringe upon or deter the exercise of first amendment rights by those who are not the direct object of the regulation. \textit{Id.} at 433-34.

\textsuperscript{107} 310 U.S. 88 (1940). Thornhill, convicted for violating an Alabama statute that made it a misdemeanor to loiter at a place of business without just cause, or to picket a place of business for the purpose of hindering, delaying or interfering with such business, challenged the statute on the ground that it deprived him of the “right of peaceful assemblage,” “the right of freedom of speech,” and “the right to petition for redress.” \textit{Id.} at 91-93.

The Court stated that the statute did not aim specifically at evils within an allowable area of state control, but swept within its ambit many activities which under ordinary circumstances would constitute an exercise of freedom of speech or the press. “The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.” \textit{Id.} at 97-98.

\textsuperscript{108} NAACP v. Button, 371 U.S. at 432-33; Thornhill v. Alabama, 310 U.S. at 97.

\textsuperscript{109} Section 6 of the Subversive Activities Control Act establishes an irrebuttable presumption that if members of a specified organization are given passports, they will necessarily engage in activity detrimental to the security of the United States. 378 U.S. at 511. The statute in Aptheker could not be limited in a fashion similar to the statute in Scales v. United States, 367 U.S. 203, 221 (1961) in which the Court interpreted a statute imposing criminal penalties on organization members to apply only to “active members.” 378 U.S. at 511 n.9. The Aptheker Court indicated that neither the words nor the legislative history of section 6 allows such a construction. \textit{Id.}

\textsuperscript{110} See note 92 supra.

\textsuperscript{111} 378 U.S. at 511. See note 98 supra.
created a situation in which the travel restriction infringed upon a first amendment right, the Court employed a first amendment, rather than a fifth amendment, standard to invalidate the statute.

Justice Black concurred in the majority holding, but refused to recognize that the due process clause of the fifth amendment alone confers an unabridged constitutional right to travel. Rather, he would have invalidated section 6 on three grounds. The third ground was that it denied freedom of speech, press, and association as guaranteed by the first amendment.

Justice Douglas, also concurring, noted the importance of freedom of domestic and international movement to the individual’s cultural, social, political, and economic activities. He considered freedom of movement the essence of a free society; therefore, if one restricts travel, other first amendment rights may suffer.

C. Travel—Cutting Back on Constitutional Protection?

Prior to Zemel v. Rusk, the Cuban missile crisis necessitated that the Secretary declare invalid all outstanding passports for travel to Cuba; passports held by persons already in Cuba were excepted. Similar to the Court in Kent, the Zemel Court confronted a challenge to an action by the Secretary allegedly authorized by the broadly worded Passport Act. The Court was faced with the question of whether there was a sufficiently substantial and consistent administrative practice to warrant the conclusion that Congress had implicitly approved the invalidation. In distinguishing Kent, the Court noted that in Kent, the Secretary refused to invalidate a pass-

112. 378 U.S. at 517 (Black, J., concurring).
113. Id. at 518.
114. The first ground was that the Act was a bill of attainder, and the second, that it violates the fourth, fifth, and sixth amendment procedural protections. Id.
115. Id.
116. Id. at 519 (Douglas, J., concurring).
117. Id. at 519-20.
118. Id. In a dissenting opinion, Justice Clark argued that granting standing to attack the statute on its face was improper because the standing exception applies only to first amendment cases. Id. at 521-22 (Clark, J., dissenting). See note 166 infra. Obviously Justice Clark is of the opinion that a first amendment analysis is inapposite to questions concerning the right to travel abroad. He also felt that even if standing was properly granted, section 6 of the Act was valid on its face because the remedy adopted by Congress to control the spread of Communism and subversive ideas by restricting travel was reasonable in relation to the Government’s objective. 378 U.S. at 527 (Clark, J., dissenting).
119. 381 U.S. 1 (1965).
120. See note 39 supra.
121. 381 U.S. at 12.
port because of characteristics peculiar to the appellant, while in *Zemel*, the restriction was based on foreign policy considerations affecting all citizens. After a review of past administrative practice, the majority concluded that the Secretary had validly exercised his authority to restrict travel to selected areas of the world.

Having reached this conclusion, the Court was obliged to consider the constitutionality of the Secretary's action. Chief Justice Warren, writing for the majority, acknowledged the position taken in *Kent*, reaffirmed in *Aptheker*, that the right to travel abroad deserves protection as a liberty interest under the fifth amendment due process clause. But he added a caveat indicating that there are circumstances wherein this liberty interest could be inhibited. Chief Justice Warren weighed the government interests and concluded that where a travel restriction is "supported by the weightiest considerations of national security," the travel restriction does not violate the fifth amendment.

The *Zemel* Court also rejected appellant's argument that the restriction violated his first amendment rights to gather and disseminate information. Chief Justice Warren distinguished both *Kent* and *Aptheker* on the ground that the restrictions imposed on travel in those cases were based on an individual's association with the Communist Party, thus implying that the restriction on the right of association deserves greater scrutiny than the speech restriction in *Zemel*. While the Court recognized that restricting travel to Cuba

122. *Id.* at 13.
123. *Id.* at 7-12.

Area restrictions are implemented to achieve three objectives: "(1) to seal off an area because of peculiar, short term circumstances; (2) to promote national security; and (3) to facilitate foreign relations." *Comment, Judicial Review of the Right to Travel*, 42 *WASH. L. REV.* 873, 892 (1967).
125. 381 U.S. at 14.
126. *Id.*
127. *Id.* at 14-15. These interests were: (1) that Cuba was the only Communist controlled territory in the Western Hemisphere; (2) that the goal of the Cuban government is to export its Communist revolution to the rest of Latin America; (3) that the United States must act to protect the safety of its nationals traveling abroad. *Id.*
128. *Id.* at 16.
129. *Id.* at 15.
130. *Id.* at 16.
131. This may be an implicit recognition by the Court that where a restriction on
limited appellant's access to information and his ability to disseminate that information upon his return to the United States, the restriction in Zemel was labeled an "inhibition of action" not protected by the first amendment as opposed to an inhibition of speech, which is protected by the first amendment.\textsuperscript{132} Therefore, while the Court continued to recognize that a fifth amendment test must be applied in factual situations similar to Zemel, it refused to interpret the facts of the case to show an inhibition of rights falling within the first amendment.\textsuperscript{133}

Chief Justice Warren concluded the discussion of the Secretary's authority to impose restrictions on travel to certain parts of the world by citing United States v. Curtiss-Wright Export Corp.\textsuperscript{134} for the proposition that there have been numerous occasions where Congress has chosen to allow the executive branch to exercise its unrestricted judgment, or has permitted the executive branch to operate under standards that are more general than ordinarily required.\textsuperscript{135} Chief Justice Warren reasoned that this is especially true in the area of foreign affairs where "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than it customarily wields in domestic areas."\textsuperscript{136} As the Passport Act does not grant to the executive unlimited authority in the area of foreign affairs relative to passports, the Passport Act must take its content from the history of the administrative practice associated with passport denials and revocations.\textsuperscript{137}

\textsuperscript{132} 381 U.S. at 15. This dichotomy was the basis for rejecting the first amendment challenge in Agee. 453 U.S. at 304-06.

\textsuperscript{133} See notes 183-92 infra and accompanying text. One might suggest that both Zemel and Agee were highly result-oriented due to the sensitive nature of the national security issue involved, but the use of the conduct/speech dichotomy in Zemel, and in Agee, does not offer a satisfying rationale for dismissing the first amendment issue. \textit{Id.}

\textsuperscript{134} 299 U.S. 304 (1936).

\textsuperscript{135} 381 U.S. at 17.

\textsuperscript{136} \textit{Id. Contra}, Kent v. Dulles, 357 U.S. at 129. Regulation of "liberty" under the fifth amendment must be pursuant to the law-making function of Congress, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-89 (1952), and when activities such as travel are involved, powers delegated by Congress to the Executive which curtail these activities will be construed narrowly. \textit{Ex parte Endo}, 323 U.S. 283, 301-02 (1944).

While Congress may ordinarily delegate power under broad standards, the delegation must necessarily be narrow when fundamental rights are involved because deficiencies connected with legislative directives to executive officers are more serious when liberty and fundamental rights are at stake. United States v. Robel, 389 U.S. 258, 274-75 (1967) (Brennan, J., concurring).

\textsuperscript{137} 381 U.S. at 17-18.
In *Zemel*, the Court found that past administrative practice was sufficient to validate the action of the Secretary.\(^\text{138}\)

Justice Douglas, in his dissent,\(^\text{139}\) stated that a government official cannot approve and disapprove of one’s travel simply because ideas please or offend the official or because some political objective is served by restricting movement.\(^\text{140}\) He further stated that allowing Congress to paint with a “broad brush” ignores the principle adopted in *NAACP v. Alabama*,\(^\text{141}\) that government regulation may not be achieved by unnecessarily broad means that invade the area of protected freedoms.\(^\text{142}\)

The dissenting opinion of Justice Douglas in *Zemel* and the first amendment analysis used in *Aptheker* support the proposition that there are certain situations in which the right to travel is closely tied to the first amendment and, if restricted, may unconstitutionally infringe upon rights acknowledged to fall within the protection of the first amendment.\(^\text{143}\)

IV. THE NEED FOR A FIRST AMENDMENT ANALYSIS

Although Agee is not an exemplary member of our society, this factor should not necessitate the automatic dismissal of his constitutional rights. Justice Brennan cautioned that “bad facts make bad law,”\(^\text{144}\) and that any attempt to fashion a decision on “bad facts” always should take into consideration the potential ramifications of tailoring a decision only to those facts.\(^\text{145}\) In discussing the conflict between the Government’s need to act decisively to safeguard the national security and the individual’s rights that may be infringed upon by government action, the court of appeals indicated that when the Government attempts to prevent a danger to society by restricting individual rights, the security gained is illusory. This is because the security is purchased at the cost of the surrender of protections

\(^{138}\) Id. at 18.

\(^{139}\) Id. at 23 (Douglas, J., dissenting).

\(^{140}\) Id. at 26.

\(^{141}\) 377 U.S. 288 (1964).

\(^{142}\) 381 U.S. at 26.

\(^{143}\) Justice Douglas also reaffirmed the position he had taken in *Kent*, that the right to converse with others, to observe social, physical, political, and other phenomena abroad is inextricably tied to freedom of movement. Thus, he argued that freedom of movement has “large social values.” Id. at 24 (quoting Kent v. Dulles, 357 U.S. at 126 (dicta)).


\(^{145}\) Id. See notes 18-34 supra and accompanying text.
afforded individual rights. While national security is an indispensible concern of the Government, individual liberties should not be lightly disregarded.

The Supreme Court may have erred by not discussing fully the arguments that Agee's first amendment freedoms of speech and press were violated. This is not to say that the outcome necessarily would have been different if a strict first amendment standard of review had been applied: By avoiding the issue, however, the Court left the door open for arbitrary action by the Secretary under section 51.70(b)(4). As a result of Agee, the Secretary now has absolute discretion to determine when activities are "causing or are likely to cause serious damage to the national security or foreign policy of the United States." Agee's first amendment argument was based in part on Aptheker, in which the Court invalidated an administrative regulation that was overbroad on its face. An overbroad regulation is one that could be employed by the Secretary not only at times when there is documented proof of damage, but in any instance that may fall within the Secretary's definition of danger to national security or foreign policy. The Court responded to Agee's argument by relying on Califano v. Aznavorian, in which it declared that the right to travel abroad should be judged by a "rational basis test" that requires the regulation to be upheld so long as the travel restriction it creates is not arbitrary, capricious, or unreasonable. The Agee Court's reliance on Aznavorian for the proposition that all travel restriction cases are governed by the fifth amendment rather than the first amendment was misplaced.

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147. This is not to say that there are only a few situations where national security interests should be paramount to individual rights. This statement is merely in response to the Court's extreme view implicit in Agee that national security interests will always outweigh individual rights.


149. 22 C.F.R. § 51.70(b)(4). See note 40 supra. The effects of this regulation are not limited to activities that might harm national security, but also include the broader area of foreign policy. See note 63 supra and accompanying text.


151. See text accompanying notes 158-81 infra.


153. Id. at 174.

154. The Aznavorian Court distinguished Kent, Zemel, and Aptheker: "The statu-
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of a welfare recipient who was denied her statutory benefits because she had traveled to Mexico and, due to an illness, remained there for a period longer than allowed by the statute. In Aznavorian, there was no indication that the statutory limitation on international travel infringed on a right protected by the first amendment. In Agee, however, the fact that Agee's writing was curtailed raised a first amendment issue.

The Court successfully avoided a first amendment analysis in Agee by assuming that the rationale in Aznavorian was applicable simply because both cases involved international travel. But the facts in Aznavorian are inapposite to the facts in Agee. Thus, by avoiding a first amendment analysis in Agee, the Court did not have to demonstrate why the Secretary's regulation was not overbroad on its face. As a result, a potentially overbroad regulation was allowed to stand.

A. Overbreadth Analysis

Overbreadth analysis attempts to remedy a situation wherein a statute, regulation, or ordinance on its face sweeps beyond the conduct that it may properly regulate and begins to infringe upon rights protected by the Constitution. It is important to note that in overbreadth analysis the constitutional rights of the person challenging the statute need not have been violated. In Thornhill v. Alabama, relied on in Aptheker to invalidate section 6 of the Subversive Activities Control Act, the Court said that a statute prohibiting all peaceful picketing "does not aim specifically at evils

155. Id. at 171-72.
156. Indeed, the Aznavorian Court implied that the statute in question had only an incidental effect on international travel for "[i]t does not limit the availability or validity of passports." Id. at 177; Note, Califano v. Aznavorian: Social Security Residence Requirement Does Not Impair Right of International Travel, 6 N.C. J. INT'L L. & COM. REG. 101, 107 (1980). The statute in Aznavorian was designed to insure that an individual's residence in the United States is genuine by denying welfare benefits to individuals who have been out of the country for more than thirty consecutive days. 439 U.S. at 178. On the other hand, the regulation in Agee was specifically designed to restrict travel with the potential concomitant effect of infringing on other rights inextricably tied to travel.

157. See text accompanying notes 155-56 supra and notes 18-48 supra.
158. L. TRIBE, supra note 2, at 710-12.
159. See note 166 infra and accompanying text.
160. 310 U.S. 88 (1940).
161. 378 U.S. at 516 (citing Thornhill v. Alabama, 310 U.S. 88 (1940)).
within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of speech or the press." 162

Agee attacked the Secretary's regulation on overbreadth grounds. 163 He argued that his right to speak and publish was infringed upon by the application of a regulation aimed at controlling his conduct abroad. Agee alleged that passport revocation was only a vehicle to reach the actual target, his media activity exposing CIA operatives, and that revocation was intended to deter him from attacking the policies of the Government and the CIA. He argued that the regulation, drafted to curtail travel conduct, was so broad that it could be used to infringe upon first amendment rights of others. Agee further alleged that the regulation infringed upon his own first amendment rights. 164

Factually, the situation in Agee is analogous to Aptheker because in Aptheker the travel restriction also was employed as a means to prevent certain individuals from exercising their rights of association. 165 The restriction in Aptheker was overbroad because it could have been used to deny passports to those whose travel abroad was not a threat to the nation. The same is true of the regulation in Agee. In addition, Aptheker also stands for the proposition that Agee has standing to challenge the validity of the Secretary's regulation on overbreadth grounds. 166 Therefore, the issue the Court should have reached in Agee was whether Agee's allegation of overbreadth could be asserted validly in light of recent first amendment

162. 310 U.S. at 97.
163. 453 U.S. at 287.
164. Id. at 306.
165. See text accompanying notes 91-111 supra.
166. A unique feature of Aptheker relates to the problem of standing to raise a constitutional challenge to the facial validity of the Subversive Activities Control Act. Generally, in non-first amendment cases, a person cannot claim standing in a federal court to adjudicate the constitutional rights of a third party. Barrows v. Jackson, 346 U.S. 249, 255 (1953). In most instances, the court will not allow one to attack a statute which is constitutional when applied to the challenger on the ground that its application might be unconstitutional against another person or in another situation. United States v. Raines, 362 U.S. 17, 21 (1960). See also Yazoo & Miss. R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219-20 (1912). First amendment challenges appear to be the exception to this rule. Comment, supra note 124, at 879.

The rationale behind this exception for the first amendment cases is that the overbroad statute, while properly restricting the individual before the Court, might also apply to others not before the Court who are engaging in protected activity that the law appears to outlaw. J. Nowak, supra note 3, at 722. See Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 424 (1974).
cases limiting the application of the overbreadth doctrine.\textsuperscript{167}

In \textit{Broadrick v. Oklahoma},\textsuperscript{168} a revised view of the overbreadth doctrine was expressly adopted by the Court.\textsuperscript{169} Justice White analyzed a constitutional attack on an Oklahoma statute prohibiting all civil service employees from engaging in any form of political activity except for those activities involving the right to express privately an opinion and to cast a vote.\textsuperscript{170} The Court, in recognizing that the overbreadth doctrine is an exception to traditional rules of practice,\textsuperscript{171} formulated a new, stricter standard. The Court determined that in situations wherein both conduct and speech are involved, the overbreadth of the statute must be both real and substantial in relation to the legitimate sweep of the statute.\textsuperscript{172} \textit{Broadrick} restricted the overbreadth doctrine, and thus eased the burden on the Government, which, under traditional overbreadth analysis had the heavy burden to show that the statute did not infringe upon a protected first amendment right.\textsuperscript{173}

In light of \textit{Broadrick}, the question in \textit{Agee} becomes whether the overbreadth of the Secretary's regulation\textsuperscript{174} is real and substantial in relation to the Secretary's legitimate authority to regulate travel within the bounds of due process. \textit{Agee} submitted an affidavit to the court of appeals in which he indicated that if he could not speak or

\textsuperscript{167} One could argue that the Supreme Court's refusal to raise the overbreadth issue in \textit{Agee}, even though it was discussed at length in both parties' briefs, may have been in effect a sub silentio disaffirmance of the doctrine. It is also puzzling that \textit{Agee}'s attorneys made no mention of the cases which revised the overbreadth doctrine for clearly this is an obstacle which must be overcome before the analysis will apply.

\textsuperscript{168} 413 U.S. 601 (1973).

\textsuperscript{169} \textit{Id.} at 615. The revised view of the overbreadth doctrine first appeared several years earlier in the dissenting opinion to \textit{Coates v. City of Cincinnati}, 402 U.S. 611, 617-21 (1971) (White, J., dissenting).

\textsuperscript{170} 413 U.S. at 602-07 & 603 n.1.

\textsuperscript{171} \textit{Id.} at 615.

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} See L. Tribe, supra note 2, at 710-12. More recently, the Court in \textit{Arnett v. Kennedy}, 416 U.S. 134 (1974), held that a federal statute authorizing the removal or suspension without pay of tenured government employees "for such cause as will promote the efficiency of the service" was not overbroad. \textit{Id.} at 162.

Justice Marshall, dissenting, noted that the uncertainty of the scope of the statute would have a "chilling effect." \textit{Id.} at 230. Employees would limit their behavior to that which is unquestionably safe, for "the threat of dismissal from public employment is . . . a potent means of inhibiting speech . . . . The dismissal standard hangs over their heads like a sword of Damocles, threatening them with dismissal for any speech that might impair the 'efficiency of service.' " \textit{Id.} at 231 (Marshall, J., dissenting) (citation omitted).

\textsuperscript{174} 22 C.F.R. § 51.70(b)(4) (1981). See note 30 supra.
write about the CIA he could not work. Therefore, as a result of the restriction on his ability to travel, Agee believed that his ability to exercise his profession had been severely curtailed. The abuse that Agee claimed he suffered resulted from the application of section 51.70(b)(4), which permits passport revocation if the Secretary determines that the individual is “likely to cause serious damage to the national security or foreign policy of the United States.”

The judgment the Secretary will exercise in determining whether a traveler has damaged foreign policy or national security may often be based on political opinion or commitment to a rigid viewpoint, as opposed to an objective evaluation of the traveler's activities and their effect on foreign policy or national security. Thus, under the present regulation, the passports of American journalists attempting to gather information about the Bay of Pigs incident or the Vietnam War justifiably could have been revoked. In addition, the regulation could prevent other critics of national foreign policy from traveling abroad to influence international opinion on a number of policy questions. This is the kind of information that should reach the ears of the national populace in order to allow it to intelligently undertake the responsibilities of citizenship.

Broadrick clearly set out heightened requirements for overbreadth analysis where both conduct and speech are involved, thus it is arguable whether the Court would have invalidated the Secretary's regulation following Broadrick's overbreadth analysis. The Court's sub rosa treatment of this important issue, however, may have a chilling effect on those who wish to exercise their right to criticize the government while traveling outside the political boundaries of the United States.

176. See note 72 supra.
177. Brief for Respondent at 106, supra note 150.
178. The Secretary of State made a judgment as to whether journalists' reporting on the Bay of Pigs and the Vietnam War would endanger national security, and as history shows, the Secretary did not prohibit reporting. Id. at 107-08. On the other hand, the Secretary did believe that it was necessary to prevent Louis Zemel from traveling to Cuba following the missile crisis. 381 U.S. at 14-16. In each instance, posterity will determine whether the Secretary appropriately exercised his judgment.
179. Brief for Respondent at 106, supra note 150.
180. See text accompanying notes 168-76 supra.
181. While it is true that Agee's action appears to be far more damaging to the national security of the United States than mere criticism could be, there is no reason why the Court could not have either engaged in an overbreadth analysis or limited the holding to the specific facts of the case. By doing neither, those travelers who merely
B. The Conduct-Speech Dichotomy

The Court employed the dichotomy between conduct and speech in an attempt to show that only Agee's travel conduct was inhibited by the revocation of his passport. By introducing this dichotomy into their analysis, the Court was able to avoid raising the issues of first amendment violation. The question is whether this dichotomy is a valid analytical tool, or merely a vehicle to enable the Court to reach a desired result.

The conduct-speech dichotomy has had an inconsistent development in first amendment analysis. The Court first applied this distinction with divergent results in the labor picketing cases. Professor Tribe argues that this dichotomy has no real content, for all communication involves conduct to some degree. The means or medium of expression, the conduct aspect, is inextricably tied to the ability of one to communicate. As a majority of cases in this area involve a mixed conduct-speech situation, the Court has been reluctant to set out a firm basis for severing the component parts.

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182. See notes 132-33 supra and accompanying text.
184. Lawrence Tribe is a Professor of Law at Harvard University.
185. L. Tribe, supra note 2, at 599.
186. Id.
187. The Court has set no standard for situations in which there is a mixed conduct-speech situation except that one must look to the nature of the conduct involved and to the factual context and environment in which it was undertaken. Spence v. Washington, 418 U.S. 405, 409-10 (1974).

In Spence, the Court found that a large peace symbol fashioned from removable tape and temporarily affixed to an American flag was a form of speech protected under the first amendment and not conduct. Id. at 415. But in United States v. O'Brien, 391 U.S. 367 (1968), the Court held that the burning of a draft card was not protected "symbolic speech" but rather conduct which could be regulated. Id. at 382. Apparently the motives of both Spence and O'Brien were to protest against government policies both at home and abroad.

Finally, in a situation theoretically analogous to Agee, the Court struck down on first amendment grounds a statute which penalized individuals who expressed their opposition to organized government by displaying "a red flag, . . . as an invitation or stimulus to anarchistic action." Stromberg v. California, 283 U.S. 361 (1931). The statute discussed in Stromberg was aimed at suppressing communication and "could not be sustained as a regulation of noncommunicative conduct." 391 U.S. at 382. One could argue that the regulation in Agee, while not aimed at communication, does in fact restrict com-
This has led Professor Tribe to the conclusion that the conduct-speech dichotomy is not a valid analytical tool for the Court to employ in a situation wherein a restriction on conduct also infringes upon protected first amendment rights.\textsuperscript{188}

Use of this result oriented analysis enabled the \textit{Agee} majority to declare that Agee's travel was merely conduct and, therefore, was subject to regulation within the bounds of fifth amendment due process. Having made the decision to sever Agee's travel conduct from his speech, the Court then properly argued that only a fifth amendment "reasonableness" test need be applied. But the Court's concession that "the revocation of Agee's passport rests in part on the content of his speech"\textsuperscript{189} undercuts this position. This statement does not support the argument that conduct and speech can be cleanly separated; the statement clearly implies that they overlap. Recognition that the content of Agee's speech was partially involved in the decision to revoke his passport should automatically have triggered a first amendment analysis.

If it were solely Agee's travel that the Secretary sought to enjoin, the fifth amendment standard would have been proper. But the Court implied that restricting Agee's travel was only a means employed to stifle his speech. It is unlikely that Agee's freedom of movement would have been restricted if he had been traveling throughout Europe extolling the virtues of the CIA. Therefore, one may draw the conclusion that had it not been for Agee's outspoken hostility toward the CIA and the Government, the Secretary would not have had grounds to revoke Agee's passport. Agee did not seek

\textsuperscript{188.} L. Tribe, \textit{supra} note 2, at 600. The Court employed this dichotomy in \textit{Cox v. Louisiana}, 379 U.S. 559 (1965) (Cox II) and in \textit{Edwards v. South Carolina}, 372 U.S. 229 (1963). Both cases involved mass protests by black students in a public place. In each case there was a large crowd of white onlookers together with a sizable police contingent. After a lengthy period of surveillance, the police in both cases disbanded the crowds. While there are significant differences in terms of time and place, the style of the expression was similar; they were ceremonials of protest, not riots. Kelven, \textit{The Concept of the Public Forum: Cox v. Louisiana}, 1965 \textit{SUP. CT. REV.} 1, 4-6.

Noting the similarities in the facts, the Court characterized the \textit{Edwards} protest as a pure exercise of first amendment rights, 372 U.S. at 235-36, while the \textit{Cox} Court found that the protest was akin to "mob rule," 379 U.S. at 562. Finding the characterization of the two courses of conduct to be "strikingly inconsistent," Tribe notes that the distinction between speech and conduct at best announces a conclusion rather than the analytic process the Court employed to reach that conclusion. L. Tribe, \textit{supra} note 2, at 600.

\textsuperscript{189.} 453 U.S. at 308. See text accompanying notes 59-66 \textit{supra}. 

to escape the law or to violate it. Nor is there a law that specifically curtails the activity engaged in by Agee. There is only a vague regulation enforceable by the Secretary at his discretion.

This is not to say that Agee's speech is absolutely protected by the first amendment, for the Government's interest in protecting national security undoubtedly would weigh heavily against Agee even under a first amendment analysis. On the other hand, the implications of avoiding a plenary discussion of the first amendment question are far-reaching. The Court has set no standard to limit the sweep of the Secretary's authority under section 51.70(b)(4). The potential for abuse thus is present as a consequence of tailoring a decision to fit the difficult facts presented.

V. Conclusion

Many Americans have strong beliefs about the role of CIA operations at home and abroad. Some may think that Agee's form of housecleaning is necessary to maintain the integrity and credibility of the United States in the international arena, while many others believe that Agee and other former CIA agents who have followed a similar path are not loyal American citizens. While avoiding any value judgment, this note has attempted to demonstrate that it is vitally important from a legal standpoint to discuss fully the doctrines that any factual situation brings into issue.

In *Haig v. Agee*, facts indicated that the revocation of Agee's passport pursuant to a regulation promulgated by the Secretary may have been merely a means to stifle his communicative behavior. If this is so, *Agee* should have been decided on first amendment grounds because there is authority indicating that the constitutional analysis to be afforded an individual whose first amendment rights have been violated must be more exacting than the analysis employed when only travel is involved.

The Court avoided the first amendment question by returning

190. In fact the Justice Department determined that there were insufficient grounds for prosecution. See note 21 supra.
192. See notes 176-78 supra and accompanying text.
to a dichotomy between speech and conduct and, in doing so, concluded that the restriction imposed on Agee affected only his conduct. Therefore, no first amendment right was violated. The Court has impliedly given the Secretary an unlimited grant of authority under his regulation. The Secretary now may rely on *Agee* as a signal from the Court that it will not interfere in a substantial way when the Secretary chooses to exercise his discretionary authority in the area of international travel. Undoubtedly, this at least will diminish some speech by Americans traveling abroad because the threat of passport revocation will be present. A full discussion of the first amendment issue might not have altered the result in *Agee*, but it would have provided a safeguard for the American traveler in the event the Secretary abused his authority to regulate international travel by American citizens. *Agee* provides no safeguards against such potential abuse.

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