HAIG v. AGEE: A DECISIVE VICTORY FOR GOVERNMENTAL REGULATION OF AMERICANS IN INTERNATIONAL TRAVEL

The nature of the freedom to travel abroad as a substantive constitutional right has perplexed United States' courts over the last three decades. The validity of passport legislation and State Department regulations have been challenged to no avail. Consequently, the scope and limits of the right to travel internationally have not yet been determined. In *Haig v. Agee*,[1] the Supreme Court of the United States held that the President, acting through the Secretary, has the authority to revoke a passport on the ground that the holder's activities "are causing or are likely to cause serious damage to the national security or foreign policy of the United States."[2] The result is an enhancement of the Secretary's ability to curtail the citizen's constitutional right to travel abroad. Thus, every American citizen must evaluate the reasons for which he desires to travel in expectation of the possibility that such travel might be barred. The approval of a passport, of course, will be dependent on whether the State Department is satisfied that the traveler will not cause any harm to the nation's national security or foreign policy.[3]

Following a brief discussion of the importance of travel, this Note will review the history of the use of passports and then explain why the need for judicial interpretation of the right to travel arose. It follows with an examination of two landmark United

1. 453 U.S. 280 (1981) [hereinafter cited as Agee].

2. *Id.* at 281-82.

3. A portion of the State Department's oral argument is "particularly revealing":

> Question: General McCree, supposing a person right now were to apply for a passport to go to Salvador, and when asked the purpose of his journey, to say, to denounce the United States policy in Salvador in supporting the juanta. And the Secretary of State says, I just will not issue a passport for that purpose. Do you think that he can consistently do that in the light of our previous cases?
>
> Solicitor General McCree: I would say, yes, he can. Because we have to vest these—the President of the United States and the Secretary of State working under him are charged with conducting the foreign policy of the Nation, and the freedom of speech that we enjoy domestically may be different from that that we can exercise in this context.

Agee, 453 U.S. at 319 n.9 (Brennan, J., dissenting). In response to this testimony, Justice Brennan stated "the reach of the Secretary's discretion is potentially staggering." *Id.*

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States Supreme Court decisions[4] in which the Court determined the basis upon which passports may be denied. These cases demonstrate that the denial of a passport will not be upheld unless the government can establish that it had formerly exercised the same power in a consistent fashion. Neither arbitrary nor sporadic passport refusals will withstand judicial review. This Note will further demonstrate the significant departure of the *Agee* decision from those precedent cases on which it was purportedly based.[5] Instead of relying on these prior decisions, the Court formulated a completely different standard for adjudging the validity of passport denials. Finally, this Note will indicate that the Court's analysis was inadequate in dealing with the delicate constitutional issues associated with one's right to travel. The Court essentially ignored the fact that the government's revocation of a passport for the purpose of suppressing free speech has a significant impact on the traveler's first amendment rights. The solution to this problem is the imposition of first amendment standards of review in any situation in which it is indicated that the passport holder's first amendment rights might be restrained.

I. THE *HAIG V. AGEE* SETTING

Phillip Agee, an American citizen, resided in West Germany.[6] From 1957 to 1968, he was employed by the Central Intelligence Agency (CIA), wherein he held key positions in a division responsible for intelligence gathering in foreign countries.[7] In 1974, Agee called a press conference in London to announce his "campaign to fight the United States CIA wherever it is operating."[8] Subsequently, Agee traveled extensively to carry out this campaign.[9] On

4. *See* Kent v. Dulles, 357 U.S. 116 (1958) [hereinafter cited as Kent]; Zemel v. Rusk, 381 U.S. 1 (1965) [hereinafter cited as Zemel].

5. In his dissenting opinion, Justice Brennan expressed his belief that the Court's purported reliance on prior decisions was "fundamentally misplaced." Agee, 453 U.S. at 310 (Brennan, J., dissenting).

6. *Id.* at 283.

7. *Id.*

8. The 1974 declaration stated in part:

> 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 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.

Id. at 283 n.2.

9. Agee's travels included such countries as Mexico, England, Jamaica, France, Denmark, Cuba and Germany. Additionally, Agee wrote extensively during that period expos-

December 23, 1979, the Secretary of State sent Agee a letter notifying him that his passport had been revoked under the provisions of section 51.70(b)(4) of the State Department passport regulations.[10] This provision provided for the revocation of one's passport if one's "activities were causing or were likely to cause serious damage to the national security or foreign policy of the United States."[11]

Agee did not pursue his right to an administrative hearing, but immediately filed suit against the Secretary.[12] For purposes of a summary judgment motion, Agee conceded the government's claim that his "activities were causing or were likely to cause serious damage to the national security and foreign policy."[13] Agee put forth four allegations. First, the regulation invoked by the Secretary had not been authorized by Congress and was invalid.[14] Second, the regulation was impermissibly overbroad.[15] Third, the revocation violated a fifth amendment liberty interest in the right to travel and a first amendment right to criticize government policies.[16] Fourth, the revocation violated the fifth amendment right to procedural due process in that no prior hearing was provided.[17] The district court held that the regulation exceeded the statutory authority granted to the Secretary.[18] The court of appeals affirmed and the United States Supreme Court granted certiorari.

This decision necessitates an in-depth look into the right to travel. A discussion of the evolvement of passports, and ultimately, passport regulations, will aid in an understanding of the right to travel.

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ing various CIA operations. *Id.* at 286. *See generally* P. AGEE, INSIDE THE COMPANY: CIA DIARY (1975); DIRTY WORK: THE CIA IN WESTERN EUROPE (P. Agee & L. Wolf eds. 1978).

10. The notice states in part: "The Department's action is predicated upon a determination made by the Secretary under the provisions of 22 C.F.R. § 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." Agee, 453 U.S. at 286.

11. 22 C.F.R. § 51.70(b)(4) (1981).

12. Agee, 453 U.S. at 287. For purposes of satisfying due process requirements, the passport holder is allowed to appear before the State Department Passport Board to challenge their decision.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

II. NECESSITY OF THE FREEDOM TO TRAVEL

The right to travel is indispensable in a democratic society. Except for past crime, physical detention is not permitted in such a society.[19] Also, freedom of mobility is often necessary to the earning of one's livelihood.[20] Foreign journalists, lecturers and correspondents are frequently required to travel. Scientists and scholars derive substantial benefit from interchange with foreign colleagues. Finally, a democratic society assures its citizens of a constitutionally protected "right to know."[21]

It has also been the policy of the American government to encourage its citizens to engage with other nations on a social, political and economic basis. As nations have become politically and commercially more dependent upon one another and foreign policy decisions have come to have greater impact upon the lives of our citizens, the right to travel has become correspondingly more important. This right to travel has provided a means for the private citizen or government official to obtain information vital to the making of informed decisions. As Professor Chafee stated:

> An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home.[22]

The General Assembly of the United Nations, moreover, has included a provision for the right to travel in the Universal Declaration of Human Rights.[23] The freedom to travel internationally has undeniably assumed a position of great significance. As this Note will demonstrate, a more stringent standard should be provided for determining when the right to travel abroad may be restricted.

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19. Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47, 49 (1956).

20. *Id.*

21. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 957 (1978).

22. Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 195-96 (1956).

23. G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948). Article 13 of the Declaration provides that "(1) Everyone has the right to freedom of movement and residence within the borders of each State. (2) Everyone has the right to leave any country, including his own, and return to his country."

III. HISTORICAL NATURE OF THE RIGHT TO TRAVEL

A. Judicial Recognition

Initially, it is helpful to discuss the origins of the right to travel and its final development whereby judicial control became necessary. English common law was based upon the assumption that no man possessed the personal right to leave the King's realm without permission.[24] This concept evolved from the fact that the King would otherwise be deprived of his subjects' military and feudal services.[25] This was changed by the Magna Carta in 1215 A.D., where it was asserted that every free man was allowed to leave the realm during times of peace upon his own inclination.[26] This development was further propounded by Blackstone who wrote, "Personal liberty consists in the power of locomotion, of changing situation, in moving one's person to whatsoever places one's own inclination may direct without imprisonment or restraint, unless by due course of law."[27]

Likewise, the right to travel in the United States or abroad has never been judicially questioned, with the exception of some minor reservations.[28] As early as *William v. Fears*,[29] it was stated that "Undoubtedly the right to locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, supported by Constitutional provisions."[30] Although the Court in *Fears* was considering the freedom of interstate movement, "it is difficult to see how, in principle, freedom to travel outside the United States is any less an attribute of personal liberty."[31] The predominant view is that the right to travel abroad is an aspect of liberty protected by the fifth amendment of the

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24. Boudin, *supra* note 19, at 47.

25. *Id. See also The Right To Travel: Hearings on S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess., pt. 2, 158 (1957).

26. Boudin, *supra* note 19, at 47.

27. 1 W. BLACKSTONE, COMMENTARIES *134.

28. "Persons confined in prison or released upon bond, pending trial or appeal, were an exception to the general rule." Boudin, *supra* note 19, at 52.

29. 179 U.S. 270 (1900).

30. *Id.* at 274.

31. Bauer v. Acheson, 106 F.Supp. 445, 451 (D.D.C. 1952) [hereinafter cited as Bauer]. Later cases indicated that a distinction does exist between travel interstate and international travel. In *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978) [hereinafter cited as Califano] it was stated that "[t]he constitutional right of interstate travel is virtually unqualified. By contrast the right of international travel has been considered to be no more than an aspect of the liberty protected by the Due Process Clause of the Fifth Amendment."

Constitution.[32]

Passports traditionally were seldom required for travel abroad.[33] The passport was merely a diplomatic document in which the issuing sovereign requested that other sovereigns would extend aid and protection to the passport bearer. In 1941, Congress enacted travel control legislation to cope with emergency situations surrounding World War II. As a result, the passport became a requirement for travel abroad.[34] Subsequently, the travel provisions were embodied as section 215 of the Immigration and Nationality Act of 1952,[35] and were made applicable during any period of national emergency.[36] As a consequence, no American citizen could leave the United States without a passport, the issuance of which was dependent upon permission by the executive department through the Secretary of State.[37]

Upon the enactment of section 215 of the 1952 Immigration and Nationality Act, the Secretary of State's discretion to issue passports became subject to judicial interpretation.[38] Previously, the 1856 statute, which gave the Secretary of State authority to issue passports, was generally interpreted by the State Department to vest absolute discretion in the Secretary.[39] Since passports had not been an essential element for travel, however, the Secretary's discretion could not have been considered a curtailment of a person's constitutional rights.[40] With the requirement of passports for travel abroad, it became evident that the Secretary had at his disposal the ability to prevent citizens from traveling.[41] Consequently, those persons whose right to travel was denied sought judicial relief.[42]

The first judicial test of this discretionary power came in *Bauer*

32. Annot., 58 L.Ed. 2d 904, 908 (1978).

33. *See generally* 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 194-97 (1967); Boudin, *supra* note 19, at 49.

34. *See* 6 Fed. Reg. 5821 (1941).

35. Immigration and Nationality Act, Pub. L. No. 414, § 215, 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1185 (1976)).

36. Under the 1952 statute, passports were required only during wartime or when the President had declared a national emergency.

37. Comment, *Judicial Review of the Right to Travel: A Proposal*, 42 WASH. L. REV. 873, 875 (1967).

38. *Id.*

39. *The Right To Travel: Hearings on S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess., pt. 2, 165 (1957).

40. Boudin, *supra* note 19, at 52-53.

41. Boudin, *supra* note 19, at 53.

42. *Id.*

v. Acheson.[43] *Bauer* involved an action seeking a declaratory judgment which would provide that the Secretary of State could not revoke a passport on the ground that its holder's activities are contrary to the best interests of the United States. The court held that "personal liberty includes the freedom to travel outside the United States and while this freedom is subject to reasonable regulation and control in the interest of public welfare, the fifth amendment requires due process of law and equal protection of the laws in the exercise of that control."[44] The court added that the regulation of passports could not be administered arbitrarily or capriciously.[45]

On June 23, 1955, in *Shachtman v. Dulles*,[46] the District of Columbia Court of Appeals rendered the first decision concerning the nature and sufficiency of State Department regulations for denying passports.[47] As a result, the relationship between a person's natural right to travel and the restrictions which may be imposed upon that right was clarified.[48] In that case, Max Shachtman had been denied a passport on the basis of his affiliation with the Independent Socialist League,[49] which had been placed on the Attorney General's subversive list. Shachtman argued that this affiliation was a legally insufficient basis for the denial of his passport.[50] In its decision, the court reasoned that a passport was no longer merely a political document, but had become an essential prerequisite for lawful departure from the United States.[51] Thus, the court held that due process is violated where "the listing of the League by the Attorney General as subversive was the only reason for the Secretary's refusal to issue the passport."[52] The court also provided that the deprivation of such a liberty must have a reasonable relation to the conduct of

43. Bauer, 106 F.Supp. at 445.

44. *Id.* at 450.

45. *Id.* at 452.

46. 255 F.2d 938 (D.C. Cir. 1955) [hereinafter cited as Shachtman].

47. The plaintiff in *Bauer* sought a hearing, not a passport.

48. Shachtman did not deny that the Secretary of State possessed some discretion in withholding passports. The argument advanced was that the Secretary either had not exercised it or had done so arbitrarily by accepting the Attorney General's list as conclusive. Shachtman, 255 F.2d at 940.

49. Exec. Order No. 10450, 3 C.F.R. 72 (Supp. 1953), required the Attorney General to furnish executive department heads with a list of organizations. The categories of organizations therein established are Totalitarian, Fascist, Communist, those having a policy of advocating the use of force to deprive others of constitutional rights, and those having a policy of seeking to alter the form of government of the United States by unconstitutional means. Members of such organizations were denied passports.

50. Shachtman, 225 F.2d at 940.

51. *Id.*

52. *Id.* at 943.

foreign affairs.[53] Again, the *Shachtman* court did not deny that the Secretary possessed some discretion as to passport refusals but rejected the exercise of this discretion in an arbitrary manner. This discretion results, according to the court, from the executive responsibility for the conduct of foreign affairs, and presumably an individual's right to travel might be restrained.

Thus the courts had made it clear that: (1) the Secretary of State does possess discretionary power to withhold passports; (2) the exercise of that discretion could not be arbitrary or capricious; (3) the discretion must have some relation to the conduct of foreign affairs; and, (4) the right to travel is a concept of liberty included within the fifth amendment, whereby any restraint must be within the due process clause.

B. The Emergence of a Test

Before entering a complete analysis of the *Agee* opinion, a short discussion of two prior decisions is necessary. Both cases are landmark decisions in the area of passport regulation, and in each case the Supreme Court of the United States fashioned the proper approach for determining whether the Department of State had been delegated the authority to deny a passport under the statute.[54] It will later be shown that the *Agee* Court departed from prior law, resulting in a less-rigid standard for resolving when a passport may be denied.

In *Kent v. Dulles*,[55] decided in 1958, two applicants were denied passports under section 51.135 of the regulations promulgated by the Secretary of State on the grounds that: (1) they were Communists and (2) they had maintained "a consistent and prolonged adherence to the Communist Party line."[56] The objective of this regulation was to promote the national interest by assuring that persons who support the world Communist movement could not, through the use of American passports, further that movement.[57]

53. *Id.*

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

55. Kent, 357 U.S. 116 (1958).

56. *Id.* at 117.

57. 22 C.F.R. § 51.135 provides in part:

> 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. . . .

The Court was not concerned with the extent to which travel could be curtailed, but to what extent Congress had authorized its curtailment.[58] The difficulty was that although the 1856 Passport Act had expressed the power over the issuance of passports in broad terms, the Secretary of State had exercised such power on a limited basis.[59] Upon examination of the history of passport denials, the Court concluded that there were two categories. First, the Secretary of State could deny a passport on the basis of the applicant's allegiance to the United States, for Congress had provided that "no passport shall be granted or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."[60] Second, passports could be refused on the grounds that the applicant was participating in illegal conduct, attempting to avoid prosecution, promoting passport frauds, or engaging in conduct which would violate the laws of the United States.[61] The grounds for refusal asserted in *Kent* did not relate to either allegiance or unlawful conduct.[62] There existed only inconsistent and scattered rulings of passport refusals with respect to Communists.[63] Therefore, the Court was:

> hesitant to impute to Congress when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantial reason he may choose.[64]

Zemel v. Kent,[65] decided in 1965, concerned the validity of regulations devised by the Secretary of State providing for restrictions on travel to Cuba. The Court held that the Secretary was authorized to invoke area restrictions to prevent citizens from traveling to those areas.[66] The decision rested upon the fact that the Executive

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> (b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement. . . .
>
> (c) Persons 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.

Id. at 117-18 n.1.

58. Kent, 357 U.S. at 127.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 128.
63. *Id.*
64. *Id.*
65. Zemel, 381 U.S. at 1.
66. *Id.* at 7.

had regularly imposed area restrictions, both in times of war and peace.[67]

When these two cases are read together, there emerges a test to determine the validity of passport regulations.[68] In both cases, the Court observed that the right to travel abroad is an important right included within the liberty guaranteed by the fifth amendment. Any infringement upon that liberty must be pursuant to the law-making function of Congress.[69] Any delegation to the executive branch which curtails that liberty must be construed narrowly.[70] Therefore, if the legislative branch has not explicitly authorized the revocations, implicit authorization must rest upon a substantial and consistent administrative practice which is sufficient to warrant the conclusion that it has been approved by Congress.[71] An analysis of the *Agee* decision is necessary at this point to demonstrate that the Court has changed its position with respect to the grounds required for the denial of passports.

IV. THE DECISION OF THE COURT

The first assumption in *Agee* was the Court's belief that the judiciary must adhere to a consistent administrative construction of the statute absent a compelling indication that such construction is wrong.[72] A strict statutory construction is especially required where matters of foreign policy and national security are concerned.[73] In such matters, "congressional silence was not to be equated with congressional disapproval."[74] In other words, the Court placed limitations upon its right to intervene in foreign policy.[75]

Upon this foundation, the Court reviewed the history of executive construction of the statute. As a result of "an unbroken line of

67. *Id.* at 8-10.

68. In his dissenting opinion, Justice Brennan determined that the Court had previously developed the proper approach for ascertaining the validity of passport regulations. He continued: "The analysis is hardly confusing, and I expect that had the Court faithfully applied it, today's judgment would affirm the decision below." Agee, 453 U.S. at 312 (Brennan, J., dissenting).

69. Kent, 357 U.S. at 125; Zemel, 381 U.S. at 14.

70. Kent, 357 U.S. at 129.

71. Agee, 453 U.S. at 312-14.

72. *Id.* at 291.

73. *Id.*

74. *Id.*

75. *Id.*

Executive Orders,[76] regulations,[77] instructions to consular officials,[78] and notices to passport holders,[79] the President and the Department of State left no doubt that likelihood of damage to national security or foreign policy of the United States was the single most important criterion in passport decisions."[80] This history, the Court concluded, demonstrated congressional recognition of the executive authority to withhold or revoke passports on such grounds, and the regulation was therefore valid.

An even more significant decision of the Court concerns the type of executive action pertaining to the regulations themselves which is necessary to mandate recognition by the Legislature.[81] Agee had contended that "the only way the Executive can establish implicit congressional approval is by proof of longstanding and consistent enforcement of the claimed power."[82] In other words, it must be shown that many passports had previously been revoked on grounds of national security and foreign policy. The Court dismissed this argument by specifying that Agee's contention is entirely irrelevant if the Executive encountered few instances in which such a power could be invoked.[83] Such was the case here, in light of the fact that the government cited only six cases of revocation related to the regulation challenged at bar.[84] Thus, the Court held that:

> The Secretary has construed and applied the regulations consistently, and it would be anomalous to fault the Government because there were so few occasions to exercise the announced policy and practice. Although a pattern of actual enforcement is one indicator of Executive policy, it suffices that the Executive has "openly asserted" the power at issue.[85]

76. *See* Exec. Order No. 4800 (1928); Exec. Order No. 5860 (1932); Exec. Order No. 7856, 3 Fed. Reg. 681 (1935).

77. *See* 6 Fed. Reg. 5821, 6069-70, 6349 (1941); 17 Fed. Reg. 8013 (1952); 21 Fed. Reg. 336 (1956); 22 C.F.R. § 51.136 (1958).

78. *See, e.g.*, U.S. DEP'T OF STATE, NO. 7.21 ABSTRACT OF PASSPORT LAWS AND PRECEDENTS, PASSPORT OFFICE INSTRUCTIONS (Nov. 1, 1955).

79. U.S. DEP'T OF STATE, INFORMATION FOR BEARERS OF PASSPORTS (1955). The Court in *Agee* relied on the editions published between 1948 and 1955.

80. Agee, 453 U.S. at 298.

81. It must be kept in mind that in previous decisions, the revocation of a passport had been upheld only if such exercise had been based upon a consistent administrative practice. *See supra* text accompanying notes 68-71.

82. Agee, 453 U.S. at 301.

83. *Id.*

84. *Id.* at 317 n.8 (Brennan, J., dissenting).

85. *Id.* at 303.

The Court also rejected the former proposition that illegal conduct and lack of allegiance were the only grounds upon which passports could be denied.

Finally, the Court rejected Agee's attack on constitutional grounds.[86] Agee had also argued that "(1) the revocation of his passport impermissibly burdens his freedom to travel, and (2) that the action was intended to penalize his exercise of free speech and deter his criticism of government policies and practices."[87] The Court observed that although the revocation of a passport necessarily curtails travel, "the freedom to travel abroad with a letter of introduction in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations, as such, it is subject to reasonable government regulation."[88] Moreover, the Court made it clear that the freedom to travel outside the United States was distinguishable from the freedom to travel interstate.[89] Furthermore, the Court severely questioned whether or not the first amendment protection extended beyond our national boundaries.[90] Agee's disclosures had the obvious effect of obstructing government intelligence operations. This activity, the Court declared, "is clearly not protected by the Constitution."[91]

The resultant interpretation of this case presents a threefold problem. First, the Court misinterpreted the relationship between passport legislation and the right to travel. Second, the decision was purportedly based on the *Zemel* and *Kent* decisions, but when closely scrutinized, the *Agee* decision constitutes a departure from those cases. Third, the *Agee* Court did not satisfactorily provide a basis upon which the constitutional validity of passports may be denied. The following analysis will attempt to expose the discrepancies associated with *Agee*.

V. PROBLEMS WITHIN THE *AGEE* ANALYSIS

A. Misinterpretation of Past Legislation

One major problem within the analysis of the *Agee* decision is that the Court, upon improper grounds, came to the conclusion that

86. *Id.* at 306.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 308.
91. *Id.* at 309.

Congress had adopted an administrative interpretation that the right to travel may be based on national security or foreign policy grounds. Unfortunately, the Court fails to acknowledge the fact that the greater portion of passport regulations had been devised when passports were not required for international travel.[92] Indeed, the average foreign traveler never bothered to apply for a passport.[93] Passports were not a requirement for travel, but were merely utilized to aid and facilitate travel. Thus, until 1941, any regulation promulgated in relation to passports to protect the national interest could hardly be considered an infringement upon one's constitutional right to travel.[94] Within this context, it would seem illogical to assume that over the years, Congress had acquiesced in an administrative policy to regulate travel upon the asserted grounds when the executive department possessed no such power.

A brief analysis of prior legislation will indicate that Congress never intended to authorize the Secretary of State to promulgate and enforce the regulations under attack in the *Agee* case. First, since passports were not necessary for lawful travel abroad, the enactment by Congress of the first Passport Act in 1856 was not intended to, and did not, affect the right to travel.[95] Prior to the act, various federal, state and local officials and public notaries had undertaken to issue passports.[96] This resulted in numerous instances

92. Brief for Respondent at 63, Haig v. Agee, 453 U.S. 280 (1981) [hereinafter cited as Brief for Respondent]; Boudin, *supra* note 19, at 47; Comment, *Passport Refusals for Political Reasons, Constitutional Issues and Judicial Review*, 61 YALE L.J. 171 (1952); Comment, *The Passport Puzzle*, 23 CHI. L. REV. 260 (1956); Comment, *supra* note 37, at 873.

93. 8 M. WHITEMAN, *supra* note 33, at 195. *See also* Ehrlich, *Passports*, 19 STAN. L. REV. 129, 129 (1966).

94. In 1941, Congress enacted an amended version of the Act of May 22, 1918, ch. 81, 40 Stat. 554. The new statute, Act of June 21, 1941, ch. 210, 55 Stat. 252, provided in part as follows:

> When the United States is at war or during the existence of a national emergency proclaimed by the President on May 27, 1941 . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States . . . . After such proclamation . . . it shall . . . be unlawful for any citizen of the United States to depart from or enter, the United States unless he bears a valid passport . . . .

In 1952, Congress substantially re-enacted this act with section 215 of the Immigration and Nationality Act, 66 Stat. 190 (1952) (codified as amended at 8 U.S.C. § 1185 (1976). As a practical matter, one could lawfully leave and enter the United States without a passport, except during wartime. However, travel without a passport would have been severely limited, due to passport requirements of other countries.

95. Boudin, *supra* note 19, at 52. *See also* Brief for Respondent, *supra* note 92, at 63.

96. 8 M. WHITEMAN, *supra* note 33, at 196.

of passport fraud and deceit. To alleviate this problem, the Legislature enacted the statute with the intended purpose of centralizing the issuance of passports within the executive department.[97] Nothing in the legislative history of the 1856 statute suggests that the Secretary of State had the power either to set up substantive categories of ineligibility or deny passports for the purpose of national security and foreign policy.[98] In fact, the only power that arguably was conferred upon the Secretary of State was some discretion in elaborating a procedure for issuing passports with respect to the citizenship of the applicant.[99]

The preceding discussion also applies to the 1926 Passport Act and its amendment in 1978.[100] The *Agee* Court, relying on *Zemel*, recognized that "congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy."[101] The Court went on to say that Congress, although confronted with the regulations at issue for nearly twenty-two years, enacted new legislation making it unlawful to travel without a passport, even during peacetime.[102]

The *Agee* Court, however, seems to misinterpret the congressional intent surrounding the passport statutes. First, the 1926 Passport Act was merely a re-enactment of the 1856 statute.[103] The committee hearings conducted at the time indicated that nothing in the provisions of the 1856 Act was to be changed.[104] The 1926 measure contained revisions aimed primarily at facilitating travel by enlarging the number of American diplomats who could issue passports.[105] When Congress amended the existing statute in 1978, its purpose again was the facilitation of travel.[106] In fact, the his-

97. Agee, 453 U.S. at 294.

98. Brief for Respondent, *supra* note 92, at 64-65.

99. *See* Boudin, *supra* note 19, at 52-55.

100. The Court conceded that the 1926 Amendment worked no major changes in the 1856 statute. The Court's position with respect to the original 1856 statute was that the statute had implicitly delegated to the executive department the power to deny passports on national security and foreign policy grounds. Agee, 453 U.S. at 298 & n.38.

101. *Id.* at 300.

102. *Id.*

103. *Id. See* 67 CONG. REC. 11705 (1926); *Validity of Passports: Hearings on H.R. 11947 Before the House Comm. on Foreign Affairs*, 69th Cong., 1st Sess. (1926).

104. *Validity of Passports: Hearings on H.R. 11947 Before the House Comm. on Foreign Affairs*, 69th Cong., 1st Sess. 1, 11 (1926).

105. Agee, 453 U.S. at 297 n.38.

106. Brief for Respondent, *supra* note 92, at 87; 124 CONG. REC. 4689 (daily ed. May 31, 1978); S. REP. NO. 1535, 95th Cong., 2d. Sess. (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2478; S. REP. NO. 842, 95th Cong., 2d Sess. (1978).

tory surrounding the 1978 amendment demonstrated the intent of Congress to abolish the existing statutory bases for travel controls contained in the 1952 Immigration and Nationality Act.[107] The 1978 amendment provided that:

> 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 citizens.[108]

Yet, the Court came to the conclusion that because Congress failed to limit within the amendment the broad rule-making authority contained in the earlier act, the Legislature necessarily succumbed to the longstanding view that the Executive had the power to regulate passports for purposes of national security and foreign policy.[109]

B. The Departure from Zemel and Kent

A second problem with the Court's decision is that it is not entirely clear that *Kent* and *Zemel* are distinguishable from *Agee*.[110] The dissent argued that the Court disavowed many aspects of the prior decisions while purporting to rely on them.[111] There was no dispute in *Agee* that the 1926 Passport Act did not expressly authorize the revocation of Agee's passport.[112] Under these circumstances, *Kent* made it clear that an "administrative practice sufficiently substantial and consistent" with regard to the regulation was required to warrant implicit congressional approval.[113] Justice Douglas, for the majority in *Kent*, emphasized the lack of prior restraints on travel to support the position that Congress had not implicitly authorized the administration to deny passports on the basis that the applicant was Communist.[114]

This technique for adjudging the validity of passport denials

107. Brief for Respondent, *supra* note 92, at 87, 92.

108. 22 U.S.C. § 211a (Supp. 1980).

109. Agee, 453 U.S. at 301.

110. Both cases concern the validity of passport regulations promulgated by the State Department. Also, the purpose of § 51.35 in *Kent* and § 51.70(b)(4) in *Agee* was to protect the national security or foreign policy of the United States.

111. Agee, 453 U.S. at 310.

112. *Id.* at 313.

113. Kent, 357 U.S. at 125.

114. *Id.* at 128.

was reaffirmed in *Zemel*.[115] In upholding the travel restriction to Cuba, the Court based its opinion on the historical pattern of State Department restrictions on travel to various areas. Chief Justice Warren stated that there had been a practice of imposing area restrictions both before and after the 1926 Congressional Passport Act.[116] Since this practice had not been disapproved by the Legislature in the Immigration and Nationality Act of 1952, he concluded that Congress intended in 1926 to maintain in the Executive the authority to make such restrictions.[117]

Thus in both *Kent* and *Zemel*, the Court provided that passport refusals could not be upheld unless such refusals had been exercised consistently in the past. The *Agee* Court, however, markedly changed this test of approval. Essentially, the Court no longer required that the administrative practice be demonstrated. The requirement now asserted is that there merely be a longstanding Executive policy.[118] This requirement is hardly the equivalent of the test established in *Kent* which stated:

> Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and again that the issuance of passports is "a discretionary act" on the part of the Secretary of State. The scholars, the courts, the Chief Executive, and the Attorneys General, all so said. This long-continued executive construction should be enough, it is said, to warrant the inference that Congress had adopted it . . . . But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion.[119]

Apparently, the Supreme Court today is more willing to infer congressional consent, at least in the area of travel control.

Another aspect of the *Kent* decision which this Court all but renounced is that major differences exist between those travel controls exercised in times of war and national emergency, and those exercised in times of peace. The Court in *Kent* refused to "equate the problem of statutory construction during peacetime with problems that may arise under the war power."[120] The *Agee* Court disregarded the *Kent* analysis and relied on numerous travel restrictions imposed in times of international tension and turbulence

115. Zemel, 381 U.S. at 12.
116. *Id*. at 8-11.
117. *Id*. at 12.
118. Agee, 453 U.S. at 301.
119. Kent, 357 U.S. at 124-25.
120. *Id*. at 128.

in reaching its decision.[121] Yet, during times of war, our national security becomes more vulnerable to espionage and other subversive activities. Likewise, the courts throughout history have deemed this so and acknowledged the fact that the government can assert greater control in order to protect itself.[122] Under these circumstances, one's constitutional rights might be infringed upon to an extent that would never be acceptable under normal conditions.[123] Consequently, in every instance in which passport measures were prepared for purposes of war and emergency, such measures were expressly designed to be discontinued once peace had ensued.[124]

The State Department did not easily relinquish the greater control embodied within the war measures.[125] Nevertheless, when the exigencies of war dissipated, efforts to extend emergency controls by the State Department were rejected by the Legislature.[126] The House and Senate were unwilling to enact a law which would allow the State Department to forbid a free man in a free country from leaving his own country during times of peace. Similarly, in 1958 and 1966, the executive department unsuccessfully sought the precise power asserted in the *Agee* case.[127] In 1958, the Senate refused to even consider the State Department's draft bill which would have authorized the denial of passports to persons whose travel would "seriously impair the conduct of the foreign relations of the United States" or be "inimical" to its security.[128] In 1966, the State Department again sought to enact a passport provision which would have authorized the Secretary to deny a passport on the grounds "that the applicant's activities abroad are causing or are

121. *See* 6 Fed. Reg. 5821 (1941); Immigration and Nationality Act, Pub. L. No. 414, § 215, 66 Stat. 190 (1952); 8 U.S.C. § 1185 (1964); Exec. Order No. 7856, 3 Fed. Reg. 681 (1938).

122. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Korematser v. United States, 323 U.S. 214 (1942) [hereinafter cited as Korematser].

123. Korematser, 323 U.S. at 218.

124. Brief for Respondent, *supra* note 92, at 74-77, 95-96.

125. *See* H.R. REP. No. 9782, 66th Cong., 1st Sess. (1919); 58 CONG. REC. 7301 (1919).

126. *See* H.R. REP. No. 9782, 66th Cong., 1st Sess. (1919); 58 CONG. REC. 7301 (1919).

127. *Passport Legislation: Hearings on S. 2770, S. 3998, S. 4110, S. 4137 Before the Comm. on Foreign Relations*, 85th Cong., 2d. Sess. (1958); *Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement: Hearings on H.R. 13760 Before the House Comm. on Foreign Affairs*, 85th Cong., 2d Sess. (1958); *Proposed Travel Controls: Hearings on S. 3243 Before the Subcomm. to Investigate the Administration of the Internal Security Act*, 89th Cong., 2d Sess. (1966).

128. *Passport Legislation: Hearings on S. 2770, S. 3998, S. 4110, S. 4137 Before the Comm. on Foreign Relations*, 85th Cong., 2d Sess. 4 (1958).

likely to cause serious damage to the national security or foreign policy of the United States."[129] Yet these proposals were not enacted. Ultimately, more than fifty similar passport bills were introduced in Congress between 1958 and 1963, of which none were passed.[130] The State Department's persistence in the area of passport regulation during this period is in itself indicative that the Department did not feel travel could be restricted for purposes of national security and foreign policy.

VI. CONSTITUTIONAL ASPECTS OF INTERNATIONAL TRAVEL

In previous decisions,[131] the Supreme Court never reached the constitutional issues concerning the right to travel abroad because the challenged regulations affecting this right were held to be invalid. In the present case, however, after declaring the regulations at issue valid, the Court attempted a rash and ambiguous treatment of the constitutional issues before them. The Court merely stated that the right of international travel is nothing more than an aspect of the liberty protected by the due process clause of the fifth amendment.[132] Therefore, one's right to travel can be regulated within the standards of due process.[133]

A. The Role of the First Amendment

The analysis above indicated that the *Agee* Court failed to recognize that first amendment rights might be interrelated with travel abroad. In previous cases,[134] however, the Supreme Court alluded to the proposition that first amendment rights were associated with this right. *Kent* suggested that the first amendment was at least peripheral to international travel.[135] "Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."[136] Thus, although the *Kent* Court indicated that the right to travel abroad was generally protected by the fifth amendment,

129. H.R. 14895, 89th Cong., 2d Sess. (1966).
130. Ehrlich, *supra* note 93, at 141.
131. Bauer, 106 F. Supp. 445; Shachtman, 255 F.2d 938; Kent, 357 U.S. 116.
132. Agee, 453 U.S. at 307.
133. *Id.*
134. Kent, 357 U.S. 116; Aptheker v. Secretary of State, 378 U.S. 500 (1964) [hereinafter cited as Aptheker]; Zemel, 381 U.S. 1; Califano, 439 U.S. 170.
135. Kent, 357 U.S. at 129.
136. *Id.* at 126.

the Court also recognized that first amendment rights might be infringed upon when such travel is restricted.

The underlying constitutional issues were developed in *Aptheker v. Secretary of State*.[137] The appellants, ranking members of the Communist party, had their passports revoked under section 6 of the Subversive Activities Control Act of 1950.[138] This statute provided in part that "[w]hen a Communist organization is registered or there is in effect a final order requiring such organization to register, it shall be unlawful for any member of such organization to make application for a passport, or to use or attempt to use any such passport."[139] Essentially, the act provided a similar method for denial of passports on the basis of political associations or beliefs as was found in *Kent*. The distinguishing factor was that in *Aptheker*, passports were denied on a statutory basis rather than pursuant to State Department regulations. The appellants attacked section 6 of the Subversive Activities Control Act, alleging that the section was unconstitutional as a deprivation to travel abroad in violation of the fifth amendment.[140] On the basis of *Kent*, the Court assumed the existence of the right to travel abroad and declared section 6 to be "unconstitutional on its face," in that it "sweeps too widely and too indiscriminantly across the liberty guaranteed in the Fifth Amendment."[141]

In *Aptheker*, Justice Goldberg stated that the right to travel abroad is an aspect of a citizen's liberty guaranteed by the due process clause of the fifth amendment.[142] Nevertheless, the Court emphasized that this right is a "constitutional liberty closely related to the rights of free speech and association."[143] The constitutionality of the restrictions imposed by the statute was then tested according to standards developed in prior decisions concerning infringements of the freedom of association guaranteed by the first amendment.[144]

Commentators on the *Aptheker* decision have interpreted its reasoning in two different ways. The first interpretation is that the right to travel is a fifth amendment right which must be given a

137. Aptheker, 378 U.S. 500.

138. *Id.*

139. Internal Security Act § 6, 50 U.S.C. § 785 (1976).

140. Aptheker, 378 U.S. at 503-04.

141. *Id.* at 514.

142. *Id.* at 508.

143. *Id.* at 517.

144. *Id.* at 516-17. Justice Goldberg relied on *NAACP v. Button*, 371 U.S. 415 (1963) and *Thornhill v. Alabama*, 310 U.S. 88 (1940).

preferred status because it is closely connected to rights protected under the first amendment.[145] In this context, the right to international travel is viewed as a personal right necessarily entitled to the protection afforded the rights of expression and association under the first amendment.[146] Any restrictions on travel are therefore subjected to a more stringent standard of review. The "compelling governmental interest" test rather than the "rationally related" test would be utilized.[147]

This view is supported by the *Aptheker* opinion itself, wherein Justice Goldberg referred to travel as a fifth amendment right.[148] It was then determined that the restriction was violative of substantive due process through the use of first amendment decisions.[149] The acceptance of this interpretation "would establish a standard of protection under the Fifth Amendment for the right to travel abroad beyond the rule of reasonableness normally required by substantive due process."[150]

The second and more widely accepted interpretation of the majority opinion in *Aptheker* was that the Court merely recognized first amendment rights are related to the right to travel in specific situations, and that international travel would only be treated as a preferred right in those instances.[151] International travel would not be given preferred status "on account of the infringement of the travel right itself, but rather because some other fundamental constitutional right has been invaded."[152] Under this interpretation, first amendment standards of review would be appropriate because the *Aptheker* decision actually involved freedom of association.

The latter interpretation was reinforced by subsequent cases. In *Zemel*, the Court expressly rejected the argument that the travel ban constituted a violation of the traveler's first amendment

145. L. Turner, The Right to Travel and the Problem of Unenumerated Constitutional Rights 182 (1972) (unpublished dissertation available in the University of California at Los Angeles Library).

146. Comment, *supra* note 37, at 880.

147. Under the "rationally related" test, the travel regulation merely has to be rationally related to a legitimate governmental goal. In contrast, the "compelling governmental interest" test requires the court to balance the infringement on a person's constitutional rights against the asserted governmental interest. The regulation would be held constitutionally valid only if the interest asserted on the part of the government outweighs the infringement.

148. Aptheker, 378 U.S. at 505, 508, 514.

149. *Id.* at 516-17.

150. Note, *The Right To Travel Abroad*, 42 FORDHAM L. REV. 838, 842 (1974).

151. L. Turner, *supra* note 145, at 182.

152. *Id.*

rights.[153] While conceding that the travel ban inhibited the flow of information concerning Cuba, which was a factor to be considered in determining whether the travel ban denied the individual of his substantive due process rights, the Court was not persuaded that a first amendment right was involved.[154] The Court stated, "to the extent the Secretary of State's refusal to validate passports for travel to Cuba acted as an inhibition, it constituted only an inhibition of action."[155] It was emphasized that the argument raised in *Aptheker* differed from that presented in the instant case.[156] First, the passport refusal did not result from any expression or association on the part of the applicant.[157] Second, the passport applicant was not "being forced to choose between membership in an organization and freedom to travel."[158] As a result, the *Zemel* Court found that the passport refusal did not involve any first amendment rights and therefore considered first amendment standards of review inappropriate. The decision indicates, however, that had the passport restriction infringed on any recognizable first amendment rights, the restriction would have been substantively reviewed under a first amendment test.

Califano v. Aznavorian[159] also lends support to the proposition that the right to travel abroad is not, in itself, a first amendment right. The appellant alleged that a provision of the Social Security Act depriving Supplemental Security Income recipients of benefits during months spent entirely outside the United States resulted in a denial of the right of international travel as guaranteed by the fifth amendment.[160] Although concluding that the constitutionality of the statute could be determined by applying the "rationally related" test, the Court was careful to point out that the instant statute did "not have nearly so direct an impact on the freedom to travel internationally as occurred in the *Kent*, *Aptheker*, or *Zemel* cases."[161] Since the Social Security Act did not "limit the right to travel on grounds that may be in tension with the First Amend-

153. Zemel, 381 U.S. at 16.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. Califano, 439 U.S. 170.
160. This section provides that "no individual shall be considered an eligible individual for purposes of this subchapter for any month during all of which such individual is outside the United States . . . ." 42 U.S.C. § 1382(f).
161. Califano, 439 U.S. at 177.

ment," the provision need only be rationally based.[162] The Court thus suggested that a statutory travel restriction "in tension" with first amendment rights might be subject to a higher standard of scrutiny than the rational basis test.

B. A Proposed Standard for Judicial Review

It is submitted that the *Agee* Court should have applied the method of review outlined by the second interpretation of *Aptheker*. This would assure a first amendment standard of review in any case where the passport applicant or holder is being denied the right to travel on the basis of his communicative activities or associations. Inherent within this interpretation is the premise that there are reasons for travel that have no relationship to free speech concepts.[163] Arguably, travel or conduct always involves freedom of speech. Some courts have provided, however, that travel may be merely a process enabling someone to be physically present in a certain place, rather than an exercise of speech or thought.[164] As such, travel can be distinguished from free speech as a means to the end of enjoying first amendment rights rather than such exercise itself. In those circumstances, where travel can be detached from free speech and association, first amendment standards of passport review would not be applicable.[165]

On the other hand, many situations arise whereby the fifth amendment liberty interest in travel is necessarily commingled with the first amendment. This was definitely the situation involved in *Agee*. Although the Court took the position that the right to travel is a personal liberty guaranteed by the fifth amendment, it is beyond question that in this specific situation, restraint on international travel was in conflict with Agee's first amendment rights. The revocation of Agee's passport was intended to deter him from criticizing American foreign policy and intelligence activities. Agee was therefore prevented from exercising his right to engage in political speech,[166] and the Court should have made it clear that the first

162. *Id.*

163. *See* MacEwan v. Rusk, 228 F. Supp. 306 (E.D. Pa. 1964), *aff'd*, 344 F.2d 963 (3rd Cir. 1965).

164. Zemel, 381 U.S. at 16.

165. "Travel for reasons of health, for purely commercial purposes, and for pleasure are not ideological concepts." Comment, *Executive Restriction on Travel: The Passport Cases*, 5 HOUS. L. REV. 499, 506 (1968).

166. Tribe has expressed the opinion that a court should subject any governmental act to more demanding scrutiny, whether taken by the Legislature or the Executive, which is in-

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amendment "compelling governmental interest" test was applicable.

This analysis is further supported by *Kent* and *Aptheker*, where the Court also dealt with first amendment conflicts. In both cases, the applicant's passports had been denied on the basis of their exercise of first amendment rights. The Court held that one cannot be forced to exchange the right of freedom of speech and association for the privilege to travel abroad.[167] In effect, this is what again occurred in *Agee*. If Agee were to relinquish his first amendment right to criticize government policy, there would be no need for him to forego his right to travel internationally.

In review, the suggested approach would not entirely prohibit the State Department from denying passports to travelers; it would apply a more rigorous standard of review, thereby preventing the government from restricting travel abroad merely to prevent criticism of its policies. Imminent, rather than potential, harm to the national security or foreign policy would be required before one's passport could be denied. "For if the constitutional guarantee means anything, it means that, ordinarily at least, 'the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' "[168]

VII. CONCLUSION

Until recently, the right to travel internationally had never been seriously questioned. Travel restrictions were imposed only on the basis of criminal activities or absence of allegiance to the United States. With the advent of State Department regulations governing the right to a passport, the courts were asked to promulgate standards to determine when this right could be denied. The result was the imposition of the requirement that the Executive demonstrate that it had denied passports consistently on a similar basis before it could deny a passport in the instant case. It is unfortunate that the *Agee* decision has departed from this test and now only requires a longstanding policy.

Equally unfortunate is the fact that the Court ignored the infringement upon Agee's first amendment rights. Since Agee's activ-

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tended by the government actor to control or penalize the exercise of rights of expression or association. L. TRIBE, *supra* note 21, at 580-88, 591-94.

167. Kent, 357 U.S. at 130; Aptheker, 378 U.S. at 507.

168. L. TRIBE, *supra* note 21, at 581 (quoting *Police Department of the City of Chicago* v. *Mosely*, 408 U.S. 92, 95-96 (1972)).

ities had already caused damage to the national security, the Court had no difficulty in upholding the passport revocation. This decision, however, will enable the Secretary of State to deny issuance of passports to any applicant whose activity abroad might be questionable. As this Note suggests, restrictions on the right to travel internationally, under circumstances like those in *Agee*, invade both first and fifth Amendment constitutional rights of the traveler. Consequently, the courts should employ more stringent standards for determining the validity of passport restrictions.

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