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Passport Revocation: Balancing Constitutional Freedoms with National Security Concerns

Richard Ansbacher

In contrast to its previously pro-plaintiff attitude in construing antitrust legislation,[132] the Supreme Court has, in recent years, evinced a more moderate stance.[133] While removing the inequities inherent in the recovery of automatic damages, the instant Court's requirement of actual injury moves toward a stricter view of causation in determining Robinson-Patman Act injuries.[134] The instant case thus serves to limit the scope of the antitrust laws,[135] often placing an insurmountable obstacle before antitrust plaintiffs and hampering private antitrust enforcement.[136]

MAUREEN LEFEBVRE

PASSPORT REVOCATION: BALANCING CONSTITUTIONAL FREEDOMS WITH NATIONAL SECURITY CONCERNS

Haig v. Agee, 101 S. Ct. 2766 (1981)

Respondent, a former agent for the Central Intelligence Agency (CIA), had been residing in West Germany.[1] In 1974, respondent publicly announced his intention to interfere with and expose CIA operations abroad.[2] Respondent

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See Seplaki, *supra* note 90, at 186. There is also authority that private enforcement and treble damages serve a useful function. Some commentators consider large treble damages judgments greater deterrents to wrong-doers than any government action. *See, e.g.*, Seplaki, *supra* note 90, at 186; Barber, *supra* note 55, at 183-84. As well, section 4 of the Clayton Act has been interpreted as a congressional policy mandating private enforcement of the antitrust laws. See note 13 *supra*. If proof of injury impedes effective private enforcement of the Robinson-Patman Act, as many commentators believe, then requiring proof of actual injury will serve to hamper the enforcement of the Act through private damage suits. *See generally*, Barber, *supra* note 55; Seplaki, *supra* note 90. On the subject of damages and proof of injury, see Blair, *supra* note 126; Page, *supra* note 74; Seplaki, *supra* note 90; Weinberg, *supra* note 16.

132. *See* Page, *supra* note 74, at 467-68; Posner, *supra* note 115, at 819-21.

133. See note 132 *supra*.

134. *See generally* Rez, *supra* note 56; Weinberg, *supra* note 25.

135. *Brunswick* was seen as an effective step by the Court in overhauling antitrust doctrine. One commentator stated, "if the Court adheres to its [*Brunswick*] holding . . . the case will have far-reaching consequences . . . the courts inevitably will become aware that large portions of present antitrust doctrine prohibit conduct which is not anticompetitive at all." Baxter, *Placing the Burger Court in Historical Perspective*, 47 ANTITRUST L.J. 803, 816 (1979). The Court in the instant case adhered to its *Brunswick* decision. It could well have far-reaching consequences on the antitrust plaintiff's ability to prove injury. *Compare* notes 127-131 *supra with* Cox, *supra* note 78.

136. See notes 126-131 *supra*.

1. 101 S. Ct. 2766, 2769-70 (1981). Phillip Agee, an American citizen, was a CIA employee from 1957 to 1968. During that time he held key positions in the CIA and was responsible for gathering covert intelligence in foreign countries. *Id.*

2. *Id.* The press release from London stated: "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.

subsequently engaged in various other activities intended to disrupt the CIA.[3] In 1979, respondent's passport was revoked[4] pursuant to a federal regulation granting the Department of State authority to refuse passports where national security was at stake.[5] Consequently, respondent brought suit in federal district court alleging the passport revocation violated his constitutional rights and that the regulation had not been authorized by Congress.[6] Without reaching the constitutional issues,[7] the district court granted summary judgment for the

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"This effort to identify CIA people in foreign countries has been going on for some time .... [Today's] list was complied 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." Petition for Writ of Certiorari at 107a, Haig v. Agee, 101 S. Ct. 2766 (1981). *See also* P. AGEE, INSIDE THE COMPANY: CIA DIARY (1975); P. AGEE & L. WOLF, DIRTY WORKS: THE CIA IN WESTERN EUROPE (1978). There was some evidence that these publications which identified hundreds of CIA personnel had been followed by acts of violence directed against the individuals named by respondent. However, the government made no assertion that respondent had directly caused these violent acts nor that the published material directly incited anyone to violence. Petition for Writ of Certiorari at 111a, 116a-118a, App., Haig v. Agee, 101 S. Ct. 2766 (1981).

3. Respondent allegedly went to several target countries and recruited collaborators who were trained to expose CIA operations. See note 2 *supra*. On December 17, 1979 the NEW YORK POST reported respondent had contact with the militants who were holding fifty American hostages in Iran. The article reported that respondent had agreed to interpret CIA documents which had been found in the captured embassy in exchange for release of the hostages. Respondent's affidavit stated that he had no contact with Iran and had no intention of travelling there, at least until the hostages would be released. The majority cited to a government affidavit which mentioned an earlier report that the respondent had been invited to Iran in order to participate in a "Revolutionary Tribunal." 101 S. Ct. at 2771 n.8. However, the report referred to was the above *New York Post* article, and the government declined to vouch for its veracity. Petition for Writ of Certiorari at 116a-117a, Haig v. Agee, 101 S. Ct. 2766 (1981). *See also* Agee v. Muskie, 629 F.2d 80, 81 (D.C. Cir. 1980).

4. 101 S. Ct. at 2771. The notice stated in part: "The Department's action is predicated upon a determination made by the Secretary under the provisions of [22 C.F.R.] Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have traveled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind." *Id.*

5. 22 C.F.R. §51.70(b)(4) (1979) provides: "A passport may be refused in any case in which: The Secretary determines that the national's activities are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." Respondent conceded that any reason sufficient to deny an applicant a passport would also be sufficient to revoke a passport. 101 S. Ct. at 2773-74. *See* 22 C.F.R. §51.71(a) (1980). Recently respondent was granted a passport from Grenada. *Newsweek*, August 10, 1981, at 15.

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

7. *Id.* at 730. Respondent's complaint challenged the revocation of his passport on five grounds: (1) that 22 C.F.R. §51.70(b)(4) had not been authorized by Congress and was therefore invalid; (2) that 22 C.F.R. §51.70(b)(4) is impermissibly vague and overbroad; (3) that

respondent.[8] The Circuit Court of Appeals for the District of Columbia affirmed.[9] On certiorari, the United States Supreme Court reversed, and HELD, that the passport revocation did not violate respondent's constitutional rights.[10]

Although passports were generally unnecessary prior to World War I,[11] they are now required for travel abroad.[12] The Passport Act of 1926 vested control over the issuance of passports in the Secretary of State.[13] Consequently, the executive branch acquired discretionary authority to limit individual travel. The Secretary of State often purported to use this power to protect national security.[14] Until the 1950's, however, there were virtually no discernable standards for justifying passport denials.[15]

In early incidents of passport refusals, denied applicants were merely informed that their travel abroad would be contrary to the best interests of the United States.[16] In *Kent v. Dulles*,[17] however, the Supreme Court placed re-

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the revocation of his passport prior to a hearing violated his fifth amendment right to procedural due process; (4) that the revocation of his passport violated his right to travel—a liberty interest protected by the fifth amendment; and (5) that his passport was revoked in order to punish him and suppress his criticism of government policy in violation of the first amendment. 629 F.2d at 82.

8. Agee v. Vance, 483 F. Supp. 729, 732 (D.D.C. 1980). The district court found that the challenged regulation was invalid because it had not been either explicitly or impliedly authorized by Congress. *Id.*

9. Agee v. Muskie, 629 F.2d 80, 87 (D.C. Cir. 1980). A divided panel found that congressional legislation did not expressly authorize the Secretary to deny or revoke a passport for national security or foreign policy grounds, nor had Congress by its inaction impliedly assented to such executive action. *Id.* at 85, 87. Accordingly, the constitutional attacks on the regulation were not considered. *Id.* at 87 n.9. *See generally* 22 HARV. INT'L L.J. 187 (1981); 56 NOTRE DAME LAW. 508 (1981).

10. 101 S. Ct. at 2783.

11. The passport, although not necessary for ingress and egress, was perceived as serving three purposes: (1) it was evidence of the bearer's United States citizenship; (2) it contained a request to the host country to aid and protect the bearer; and (3) it was believed that the United States government would take greater interest in the protection of a citizen bearing a passport. Ehrlich, *Passports*, 19 STAN. L. REV. 129, 129 (1966). For a general history of United States passport policies, see 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 435-52 (1942); Gould, *The Right to Travel and National Security*, 1961 WASH. U.L.Q. 334, 334-39.

12. *See* 8 U.S.C. §1185(b) (Supp. III 1979) which makes it unlawful for a citizen to enter or leave the United States without a valid passport.

13. 22 U.S.C. §211a (1976). The Act begins: "The Secretary of State *may* grant and issue passports. . . ." *Id.* The use of the word "may" has been construed as conferring discretionary authority to grant passports upon the Secretary, rather than for the Secretary to be merely an issuing agent for efficiency reasons. Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171, 172-73 (1952).

14. See note 19 *infra*. For a discussion of executive restrictions on entry of alien subversives into the United States, see, *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1153-60 (1972) [hereinafter cited as *Developments*].

15. Ehrlich, *supra* note 13, at 131. *See also* Comment, *supra* note 13, at 173-74.

16. In 1947, Dr. Martin Kamen applied for a passport to accept an invitation to lecture at the Weizmann Institute of Science in Israel. His application was denied because he had been previously investigated by the House Committee on UnAmerican Activities even though that Committee had found no connection between him and any subversive organizations. In 1948, Leo Isaacson, a United States Congressman, was denied a passport to attend an international conference in Paris. The purpose of his trip was to gain first-hand information about

straints upon the use of such broad executive discretion. In *Kent*, two applicants were denied passports under a federal regulation prohibiting the issuance of passports to Communists.[18] The applicants were informed that submission of affidavits disproving their Communist Party memberships was a prerequisite to their obtaining passports.[19] The Court invalidated the regulation without analyzing the constitutional issues raised by the passport denial.[20] In dictum, however, the Court noted that the right to international travel is an essential component of the liberty interest protected by the fifth amendment.[21] Furthermore, the Court refused to infer that Congress had given the Secretary of State unbridled discretion to deny passports when a constitutionally protected right was at issue.[22] Rather, the *Kent* court suggested it would closely examine any governmental denial of the freedom to travel that was based on an individual's exercise of first amendment rights.[23]

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activities in Greece so that he could reinforce his opposition to a bill giving aid to the Greek government. In 1950, Paul Robeson had his passport revoked prior to his scheduled speaking and concert tours in Europe. In each of these instances, the only official explanation given was that his "travel abroad at this time would be contrary to the best interests of the United States." Comment, *supra* note 13, at 173-77. These cases are indicative of the State Department's willingness to consider an applicant's political view, activities and associations when denying a passport on the grounds of the national security. *Id.* at 178.

17. 357 U.S. 116 (1958).

18. *Id.* at 117-18 & n.1. The federal regulations essentially forbade a passport to anyone who had had any contact with the Communist movement. 22 C.F.R. §51.135 (1957).

19. 357 U.S. at 118-20. Any applicant who stated he was a Communist was automatically foreclosed from receiving a passport, with no right to an administrative appeal. 22 C.F.R. §51.142 (1958). During the same term as *Kent*, the Court specifically identified the interest in non-disclosure as a part of the freedom of association, in NAACP v. Alabama *ex rel* Patterson, 357 U.S. 499 (1958).

20. 357 U.S. at 129. Section 51.135 was invalidated because the Court found that the Secretary had not been delegated the authority to withhold a passport based on the applicant's beliefs and associations. The Court concluded that only two categories of denials had been authorized by Congress: (1) criminal or unlawful conduct, and (2) non-allegiance. *Id.* at 127. *See also* 22 U.S.C. §212 (1976).

21. 357 U.S. at 125. Finding that the freedom of travel was part of the fifth amendment was unnecessary to the Court's decision and therefore lacked the force of a holding. This observation has been used so pervasively by the Supreme Court, however, that there is no doubt international travel is constitutionally protected. Comment, *Executive Restriction on Travel: The Passport Cases*, 5 HOUS. L. REV. 499, 507 (1968). *See also* 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, 505-06, 516 (1964). It is noteworthy that the majority in *Kent* did not distinguish between interstate and international travel. Later, however, the two were distinguished, the former being characterized as a fundamental right, with the latter being considered only a constitutional "freedom." Therefore, each evoked a different level of constitutional review. *See* Califano v. Torres, 435 U.S. 1, 6 (1978); Shapiro v. Thompson, 399 U.S. 618, 622 (1969). *See generally* L. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION (1956).

22. 357 U.S. at 129.

23. *Id.* at 130. Although freedom of association is not mentioned in the text of the Constitution, the Supreme Court has recognized that this freedom is implicit in the first amendment. The Court has construed this concept as embracing the right to join with others in exercising, as a group, those liberties which are protected by the first amendment if exercised separately. The associational rights of groups formed for political advocacy, such as the Communist Party, have been consistently afforded stringent protection. *See, e.g.*, Cousins v. Wigoda, 419 U.S. 477, 478-79 (1975).

The Court subsequently employed the *Kent* analysis in *Aptheker v. Secretary of State*.[24] In *Aptheker*, plaintiffs, high ranking officials of the Communist Party,[25] argued that a federal act[26] which made it unlawful for any member of a Communist organization to apply for or use a passport was unconstitutionally overbroad. The Court, however, stated that while the purpose of the statute was legitimate, the means employed to achieve that purpose infringed upon plaintiff's right of association.[27] Because less drastic methods of effecting the purpose of the statute were available and because obviously relevant considerations in determining whether a passport should be issued were excluded by the statute, the Court declared it overbroad and unconstitutional on its face.[28] Moreover, the Court rejected the government's argument that even if the statute was unconstitutional on its face, it was constitutional as applied because the national security interest clearly outweighed the plaintiff's liberty interests.[29] Recognizing that the freedom of travel was akin to the rights of free speech and association, the Court refused to require individuals to assume the burden of disproving a facially unconstitutional statute.[30] To do so, according to the court,

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24. 378 U.S. 500 (1964).

25. *Id.* at 515. Plaintiff Aptheker was editor of *Political Affairs*, known as the "theoretical organ" of the Party. Plaintiff Flynn was chairman of the Party. *Id.*

26. Section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. §785 (1976), provides in pertinent part: "(a) When a Communist organization . . . is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or (2) to use or attempt to use any such passport."

27. 378 U.S. at 514. There was no distinction made between a member of the Communist Party who only espoused its ideas and philosophies, and one who had the intention of instigating an unlawful overthrow of the government. *Id.* at 509-10. *Cf.* Wieman v. Updegraff, 344 U.S. 183, 191 (1952) (invalidating a mandatory non-Communist oath for public employment). The section was also invalidated because it set up "an irrebutable presumption that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States." 378 U.S. at 511. Such stigmatizations of classes of persons have been consistently struck down by the Supreme Court because they impose a burden without due process. *See* United States v. Brown, 381 U.S. 437, 454 n.29 (1965); Carrington v. Rash, 380 U.S. 89, 96 (1965); Skinner v. Oklahoma, 316 U.S. 535, 544-45 (1942) (Stone, C.J., concurring in result).

28. 378 U.S. at 515.

29. *Id.* The government asked that the traditional rules of standing be applied, and that plaintiffs not be allowed to assert the rights of third parties not presently before the Court. For policies supporting this "as applied" method of analysis, *see* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 847-52 (1970).

30. 378 U.S. at 517. The majority's statement that "freedom of travel is a constitutional liberty closely related to rights of free speech and association" led some commentators to believe the Court was placing international travel on par with other fundamental rights. *See, e.g.*, United States v. Davis, 482 F.2d 893, 912 (9th Cir. 1973); Comment, *Judicial Review of the Right to Travel: A Proposal*, 42 WASH. L. REV. 873, 878-81 (1967). However, in light of later passport cases, the more widely accepted interpretation of the above quote is that international travel receives the preferred treatment when a fundamental right has been implicated by the government's travel restriction. *See* Note, *The Right to Travel Abroad*, 42 FORDHAM L. REV. 838, 843 (1974).

would potentially chill the exercise of constitutional freedoms by individuals within the purview of the statute.[31]

The Supreme Court permitted governmental restrictions on international travel in *Zemel v. Rusk*.[32] The appellant in *Zemel* sought to have his passport validated in order to travel to Cuba to gather information about that country. Because of national security concerns,[33] however, the Secretary of State had imposed an area restriction on travel to Cuba.[34] In upholding the Secretary's refusal to validate the passport, the Court determined the area restriction did not violate appellant's constitutional rights.[35] The *Kent* and *Aptheker* decisions were distinguished on two major grounds. First, *Zemel* involved an area restriction directly resulting from foreign policy considerations which affected all citizens. In contrast, the two earlier cases involved restrictions based upon the individual activities of the applicants.[36] Second, the passport refusal in

31. 378 U.S. at 515-17. This potential chilling effect is the primary policy supporting the use of the overbreadth doctrine rather than the "as applied" method. See note 27 *supra*. Even if the plaintiffs in *Aptheker* posed an actual threat to national security, the wording of the statute prescribed punishment for a substantial number of persons validly exercising their fundamental rights. By upholding the statute, not only would the fear of punishment inhibit the free exercise of first amendment freedoms, but the burden would be on one so punished to bring suit to have the law invalidated. See Note, *supra* note 29, at 852-55. *Cf.* United States v. Robel, 389 U.S. 258 (1967) (denial of employment to Communist in defense facilities); Kunz v. New York, 340 U.S. 290 (1951) (invalidating a city ordinance which required a permit for street worship meetings). *But cf.* Parker v. Levy, 417 U.S. 733 (1974) (upholding a court martial based on a code proscribing ungentlemanly conduct); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (upholding a statute forbidding civil service employees from engaging in active politicking).

32. 381 U.S. 1, *rehearing denied*, 382 U.S. 873 (1965).

33. The Cuban Missile Crisis of October, 1962, preceded the filing of the applicant's complaint by less than two months. Agee v. Muskie, 629 F.2d at 84 n.3.

34. 381 U.S. at 3. After breaking diplomatic relations with Cuba, the State Department declared all outstanding passports invalid for travel to Cuba unless specially endorsed. Endorsements were available to newsmen, businessmen with previously established business interests, or other persons whose travel the government deemed to be in the best interests of the United States. *Id.* The area restriction was imposed in Department of State Public Notice 179, 26 Fed. Reg. 492 (1961): "In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest."

35. 381 U.S. at 13-17. Before reaching the constitutional issues, the Court first needed congressional authorization for the Secretary's power to impose area restrictions. As in *Kent*, the Court discovered no explicit authorization. See note 21 *supra*. However, the Court did find an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved of executive-designated area restrictions. 381 U.S. at 8.

36. 381 U.S. at 13. The Court's primary purpose in making this distinction was to validate the Secretary of State's authority. See note 35 *supra*. The Court in *Kent* had found only two types of authorized passport restrictions based on a history of past administrative action. 357 U.S. at 127. See note 20 *supra*. Because the restriction in *Zemel* related to neither of these, the Court developed a separate history of area restrictions, consistent enough to find a proper delegation of authority. *But see* Ehrlich, *supra* note 11, at 143, where it is suggested that the Court's reliance on the history of area restrictions might have been misplaced. This distinction, however, is also a necessary step in the Court's finding that no fundamental rights were involved. See note 37 *infra*.

Zemel was not predicated upon any expression or association protected as a fundamental right.[37] Although the Court acknowledged the constitutional basis of both the fifth amendment liberty to travel[38] and the right to gather information,[39] those interests were not accorded the same constitutional status as the first amendment guarantees.[40]

In a subsequent non-passport case,[41] members of the Court expressed divergent views concerning the proper balance between the right to free speech and the preservation of national security. Two Justices determined that the first amendment right was absolute and that no governmental interest could be sufficient to justify a prior restraint of speech.[42] The other Justices envisaged

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37. 381 U.S. at 16. The Court distinguished plaintiffs' claim from those raised in *Kent* and *Aptheker*; the plaintiff in *Zemel* was not forced to choose between a fundamental right and the freedom to travel.

38. *Id.* at 14. The Court quoted from *Kent*, giving further import to the statement that the right to travel is a liberty protected by the fifth amendment. *Id.* See note 21 *supra*.

39. 381 U.S. at 16. Plaintiff had alleged that the travel ban directly interfered with "the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies." *Id.* The Court admitted that the area restriction did inhibit this flow of information, but that it did not involve a first amendment right. *Id. See* note 42 *infra*.

40. 381 U.S. at 14-16. The Court took this opportunity to dispel any doubts about the status of the freedom of international travel. After the Court in *Aptheker* had used a first amendment analysis of the right to travel, *supra* note 30, the *Zemel* Court emphasized that this freedom was protected only by due process. Thus, the Court laid to rest any notions that international travel is a fundamental right when it approved the Secretary's determination that travel to Cuba *might* involve the nation in dangerous international incidents. The Court held the Secretary's determination sufficient to constitutionally justify an abridgment of travel. 381 U.S. at 14-16. See Note, *supra* note 30, at 843.

Dismissing the right to gather information as a first amendment right, the Court explained that any restriction of information gathering is an inhibition of action rather than speech. The Court justified this position by stating that there are few restrictions of action in which it could not be argued that the flow of information was being decreased. 381 U.S. at 16. This explanation has been highly criticized as insufficient to warrant a denial of fundamental right status. *See* Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 846 (1971); Note, *Travel and the First Amendment*: Zemel v. Rusk, 13 U.C.L.A. L. REV. 470, 473 (1966).

41. New York Times v. United States, 403 U.S. 713 (1971). The government wished to suppress publication of the Pentagon Papers, a classified study on United States policy making in Vietnam. *Id.* at 714. The government claimed publication of the documents would prolong the Vietnam war by providing the enemy with helpful information and would embarrass the United States in the conduct of its diplomacy. The *per curiam* decision held only that the government's interest was insufficient to overcome the heavy burden of a prior restraint on political speech. The decision, although short and unrevealing, appeared to reaffirm the Court's previous statement of aversion to prior restraint. Becker, *The Supreme Court's Recent "National Security" Decisions: Which Interests Are Being Protected?*, 40 TENN. L. REV. 1, 17 (1972).

42. 403 U.S. at 715, 719. Justices Black and Douglas expressed that the right was absolute. Justice Black stated: "In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment." *Id.* at 715. These opinions follow the absolutist interpretations of the first amendment, typical of Justices Black and Douglas. *See* Garrison v. Louisiana, 379 U.S. 64, 80 (1964) (Douglas, J., concurring); New York Times Co. v. Sullivan,

circumstances where such prior restraints would be constitutionally permissible.[43] Nevertheless, those Justices would have required the government to show that the exercise of first amendment freedoms would have a "direct, immediate and irreparable effect" on the national security.[44]

The instant case presented the Court with another opportunity to balance national security interests against the freedoms of speech and travel. The Court initially determined that the federal regulation which permitted the Secretary of State to refuse passports was impliedly authorized by Congress.[45] In addressing respondent's constitutional arguments, the Court rejected the respondent's claim that his freedom to travel had been impermissibly burdened.[46]

376 U.S. 254, 293 (1964) (Black, J., concurring); Yates v. United States, 354 U.S. 298, 339 (1957) (Black, J., concurring); Beauharnais v. Illinois, 343 U.S. 250, 267 (1952) (Black, J., dissenting).

43. Justice Brennan's viewpoint fell somewhere between Justices Black and Douglas' absolutist views, and the opinions of the other concurring Justices. Although his view was almost absolute in effect, he found a prior restraint could be effected if the government could prove that the publication would "inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea. . . ." 403 U.S. at 726-27. (Brennan, J., concurring).

Justices Stewart and White found the government's interest more substantial than had Brennan and recognized instances where a prior restraint could be justified by national defense and foreign affairs demands. However, neither justice found that the government in that instance had met the very heavy burden needed to allow a prior restraint. *Id.* at 727-30 (Stewart, J., concurring, with whom White, J., joined). Justice Stewart articulated this burden by stating that the disclosure can be restrained if it will "surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730. (Stewart, J., concurring).

Justice Marshall based his concurrence on the absence of Congressional authorization for prior restraint in that situation. *Id.* at 747. (Marshall, J., concurring). He did recognize that the prohibition was not absolute, but did not prescribe a test for when a prior restraint would be allowed. *Id.* at 742. (Marshall, J., concurring). *See also* Becker, *supra* note 41, at 17-18; *Developments, supra* note 14, at 1329-40.

44. 403 U.S. at 730. This is the test articulated by Justice Stewart. Here it is considered the test of the concurring justices because it is the least burdensome of those given.

45. 101 S. Ct. at 2781. Indeed, most of the Court's opinion was concerned with whether the Secretary of State had the authority to invoke 22 C.F.R. §51.70(b)(4) (1980). The Secretary claimed authorization under 22 U.S.C. §211a. See note 13 *supra*. Because there was no explicit delegation under that statute, the Court sought to find implied authorization by using the historical analysis test as developed in *Kent* and *Zemel*. The test consists of finding a prior administrative practice sufficiently substantial and consistent to warrant the implied approval of Congress. Agee v. Vance, 483 F. Supp. 729, 731 (D.D.C. 1980). The major disagreement between the majority and the dissent was over the application of the word "practice" in the above test. 101 S. Ct. at 2785 (Brennan, J., dissenting). The majority admitted that there was not a sufficient administrative practice, but attributed this to the lack of situations which involved a passport holder causing serious damage to national security. *Id.* at 2786. Nevertheless, the majority claimed that the validity of the power was not lost through its non-use; the policy of protecting national security through passport control had been sufficiently established to find that congressional silence was implied authorization. *Id.*

The dissent argued that not only did the word "practice" mean practice, but that *Kent* specifically stated that mere policy construction by the Executive was insufficient. *Id.* at 2786 (Brennan, J., dissenting). Justice Blackmun, although joining the majority's opinion, stated in a concurring opinion that the dissent's interpretation was correct and that the majority was *sub silentis* overruling the test as outlined in *Zemel* and *Kent*. *Id.* at 2783-84 (Blackmun, J., concurring).

46. 101 S. Ct. at 2781. The Court phrased the respondent's constitutional attacks as:

The Court distinguished the freedom to travel outside the United States from the fundamental right to travel within the United States.[47] The freedom to travel abroad is a "liberty" protected by the due process clause. Therefore, it is subject to reasonable governmental regulation.[48] Accordingly, the Court determined that the passport revocation in the instant case was a reasonable means to nullify the respondent's threat to national security.[49]

In dismissing respondent's first amendment claim,[50] the Court acknowledged that he had been engaged in political criticism and that the revocation of his passport was partially based on the content of this criticism.[51] However, because respondent's disclosures of agents' names and locations were made with the stated purpose of obstructing intelligence operations and the recruitment of intelligence personnel, they were "clearly not protected by the Constitution."[52] Additionally, any incidental restrictions on respondent's freedoms were justified as inhibitions of action rather than of speech.[53] Furthermore, the Court reasoned that even though respondent's passport was revoked, he still retained his constitutional right to criticize the government.[54] Finally, the Court dismissed respondent's contention that the revocation of his passport was a punishment for his attack on governmental practices and policies.[55] The Court asserted that the federal regulation authorized passport denials only where there was a likelihood of serious damage to national security and, therefore, adequate standards for the protection of respondent's constitutional rights were provided.[56]

"first, that the revocation of his passport impermissably burdens his freedom to travel; second, that the action was intended to penalize his exercise of free speech and deter his criticism of government policies and practices; and third, that the failure to accord him a prerevocation hearing violated his Fifth Amendment right to procedural due process." *Id.*

47. *Id.* (citing Califano v. Aznavorian, 439 U.S. 170, 176 (1978)).

48. The Court admitted that passport revocation curtailed travel, but because it was a freedom protected only by due process, "it is subject to 'reasonable' governmental regulation." 101 S. Ct. at 2781-82. *See generally*, Note, 19 Va. J. Int'l. L. 707 (1979).

49. 101 S. Ct. at 2782.

50. The Court first assumed, *arguendo,* that first amendment protections reached outside the United States. *Id.* at 2783.

51. *Id.*

52. *Id.* The Court denied respondent's activity constitutional protection even though he was engaged in political criticism. Although this is normally a highly protected constitutional activity, the Court found that the disclosures fit within the exception derived from Near v. Minnesota, 283 U.S. 697 (1931). That case stated, "No one would question but that a government might prevent actual obstruction to its recruiting service on the publication of the sailing dates of transports or the number and location of troops." *Id.* at 716, citing CHAFEE, FREEDOM OF SPEECH 10 (1920). The Court then favorably compared respondent's disclosures of agents and its declared purpose of obstructing intelligence operations. 101 S. Ct. at 2783.

53. 100 S. Ct. at 2783 (citing *Zemel,* 381 U.S. at 16-17).

54. *Id.* The Court also mentioned the additional restrictions of respondent's contractual limitation. Respondent, as a condition of his employment, had signed a secrecy agreement which obliged him never to reveal any classified information or any secret information concerning the CIA without the express consent of the Director of Central Intelligence. *Id.* The validity of such agreements was upheld in Snepp v. United States, 444 U.S. 507 (1980).

55. *Id.* at 2783, n.61.

56. *Id.*

The two dissenting Justices stated that consideration of the constitutional issues was unnecessary because the regulation authorizing passport refusal was invalidly adopted.[57] Nevertheless, the dissent rejected the majority's treatment of the respondent's constitutional claims as oversimplifications or as errors of law and fact.[58] The dissent stated that although respondent's speech was undoubtedly protected, respondent's first amendment rights might be outweighed by national security interests. Therefore, the dissent reasoned that the Court must balance these interests to determine whether the interest in national security should prevail over first amendment rights.[59] The dissent was also concerned that the instant decision could lead to future passport invalidations based solely on the traveler's expressed foreign policy views.[60] Consequently, the dissenting Justices implied that the majority should have permitted respondent, on behalf of other travelers, to argue that the regulation was void as overbroad.[61] Finally, the dissent feared that through the receipt of such broad discretionary powers the executive branch had acquired a quasi-lawmaking function.[62]

The guarantee of free speech has been foremost among those freedoms vigorously defended by the Court.[63] Nevertheless, the instant Court displayed

57. *Id.* at 2788 n.10 (Brennan, J., dissenting). The dissent asserted that the majority had failed to properly apply the threshold test announced in *Kent* and *Zemel*. That is, there is a presumption that Congress must expressly delegate authority to deny passports for national security reasons. To overcome this presumption, the government must show "an administrative practice sufficiently substantial and consistent" as to suggest that Congress had condoned such authority. *Id.* at 2788-89.

58. *Id.* at 2789 n.10. The dissent stressed that respondent's concessions at trial were solely for the purpose of challenging the facial validity of the regulation. *Id.* The dissent suggested that until the facts were settled, the court could not properly determine whether respondent's conduct justified passport refusal.

59. *Id.* at 2788.

60. *Id.*

61. *Id.* at 2783 n.61 (citing Parker v. Levy, 417 U.S. 733, 755-56 (1974)). The majority credited the district court as holding that respondent had no standing to argue the overbreadth issue because respondent fell clearly within the core of the regulation.

62. *Id.* at 2788 n.9. The dissent was particularly concerned by statements made during the oral arguments: "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 junta. 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." Transcript of Oral Argument at 20, Haig v. Agee, 101 S. Ct. 2766 (1981).

63. *See, e.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (under the Constitution, free speech is not a right to be given only to be so circumscribed that it exists in principle but not in fact); Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967) (freedom of speech is the indispensible condition of nearly every other form of freedom); American Federation of Labor v. Swing, 312 U.S. 321 (1941) (the constitutional right to free discussion must be jealously guarded). *See generally* Meiklejohn, *Free Speech and its Relation to Self Government, reprinted in* MEIKLEJOHN, POLITICAL FREEDOM (1960).

untenable deference to the executive branch's determination that national security interests outweighed respondent's fundamental rights. Moreover, because the majority refused to recognize that respondent's right to free speech had been infringed upon,[64] no balancing of interests was actually performed. By refusing to require the government to show that the damage to national security outweighed the exercise of a fundamental right, the Court has set a precedent which could lead to a similar result in cases where the balance clearly favored the individual.

If the instant case had not involved a violation of fundamental rights, the Court would have been correct in using the reasonableness standard in reviewing abridgements of the freedom to travel.[65] Respondent's passport was invalidated, however, because of his speech.[66] Rather than concentrating on the validity of passport revocation itself, the proper focus should have centered on the reasons for the revocation and the intended effect of the travel restriction.[67] This approach was used in *Aptheker*, where the denial of appellant's passport because of his Communist associations prompted the Court to apply the strict level of review appropriate for first amendment violations.[68] Similarly, because the passport revocation in the instant case resulted from the content of past speech and was intended to deter future expression, the Court should have required a compelling reason for the government's action. Moreover, under this approach, even if respondent's right to free speech was outweighed by national security interests, the federal regulation authorizing such revocation might be invalid on overbreadth grounds.[69]

Generally, the Court will not allow a complainant to challenge laws on the grounds that they may be unconstitutional as applied to others.[70] Nonetheless,

64. 101 S. Ct. at 2783. After describing respondent's actions, the court stated that "they are clearly not protected by the Constitution." *Id.* The dissent noted the fallacy of even this brief statement by the majority. Respondent's activities, because they were political speech, are protected by the Constitution. However, after a careful balance, it might be found that they are outweighed by the governmental interest. *Id.* at 2788 n.10.

65. *See, e.g.*, Califano v. Aznavorian, 439 U.S. 170 (1978) (validity of a statute depriving Social Security benefits when abroad was to be judged by whether provisions could be found to be rationally based); MacEwan v. Rusk, 228 F. Supp. 306 (E.D. Pa. 1964), *aff'd*, 344 F.2d 963 (3d Cir. 1965) (the constitutional right to travel abroad is not unlimited in time, space, or circumstances, but is subject to appropriate and reasonable regulation); Worthy v. United States, 328 F.2d 386 (5th Cir. 1964) (Congress having the power to declare policy with respect to foreign affairs, likewise has the authority to impose reasonable restrictions on travel in foreign countries).

66. 101 S. Ct. at 2783.

67. The Supreme Court has not been hesitant to examine the motives underlying executive or administrative decisions. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Griffin v. County School Bd., 377 U.S. 218 (1964); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

68. 378 U.S. at 517. See note 29 *supra*. Also see Comment, *Executive Restriction on Travel: The Passport Cases*, 5 HOUS. L. REV. 499, 507-08 (1968).

69. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972).

70. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844 (1970). This is also known as the "as applied" method of review because the constitutionality of an overbroad statute is judged only in light of its application to the case at bar. *Id. See generally* Sedler, *Standing to Assert Constitutional Jus* Tertii *in the Supreme Court*, 71 YALE L.J. 599, 599-626 (1962); Note, *Who May Test the Constitutionality of a Statute in the Supreme Court*, 47 HARV. L. REV. 677 (1934).

in the area of first amendment rights, the overbreadth doctrine has long provided an exception.[71] Typically, the overbreadth doctrine invalidates legislation designed to regulate unprotected activities but which inadvertently burdens first amendment rights. If the law has a "real and substantial" chilling effect on legitimate speech,[72] and it cannot be narrowly construed by the courts, it may be declared invalid on its face.[73] The *Aptheker* decision suggested that the threat of passport revocation has an adverse effect on the freedom to express one's convictions.[74] Similarly, the dissent in the instant case asserted that passport revocations may have a substantial chilling effect on other citizens who express views on foreign policy.[75] Given the apparent chilling effect on the first amendment rights of all international travelers, the respondent might have been able to successfully argue that the regulation was overbroad. The Court, however, has been reluctant to use overbreadth analysis,[76] because such analysis might weaken the executive branch's traditionally powerful role in foreign affairs.[77]

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71. *See* NAACP v. Button, 371 U.S. 415 (1963), where Justice Brennan explained: "[T]he instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *Id.* at 432. *See also* Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967); NAACP v. Alabama, 377 U.S. 288, 307 (1964); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940). For a complete discussion of all the issues and policies concerning overbreadth analysis, see generally, Note, *supra* note 75.

72. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). This standard was also restated as "when the flaw is a substantial concern in the context of the statute as a whole." *Id.* at 616 n.14. In the present discussion, "real" means the effect is not imaginary, that is, that where the impact of the law is felt, the burden on protected activity is significant. "Substantiality" is deemed present when a sufficient number of people will be affected by this "real" burden.

73. *Id.* at 613. *See also* Dombrowski v. Pfister, 380 U.S. 479, 491 (1965); Cox v. New Hampshire, 312 U.S. 569 (1941).

Therefore, a regulation which has been narrowly drawn so as to provide a close tie between the means chosen and a proper governmental end, will not be found unconstitutionally overbroad although an occasional application against protected activity might occur. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559 (1965) (Cox II).

74. *See* Aptheker, 378 U.S. at 507. See note 31 *supra.*

75. 101 S. Ct. at 2788 and n.9. See note 62 *supra.*

76. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 712-14 (1978). This reluctance stems from the court's continuing refusal to recognize the actual chilling effects of overbroad laws not facially directed at pure speech. *Id. See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972); Laird v. Tatum, 408 U.S. 1 (1972).

The Court refused to grant respondent standing to argue the overbreadth issue. If the majority had allowed the respondent *jus tertii* standing, the Court would have been forced to balance the national security interest against the claimed first amendment rights of all those affected. The Court would have had to define the government's interest so as to minimize infringement of protected expression. Reaching this stage, there would have been no choice but to realize that any passport denial or revocation which is intended to deter future expression must be considered a prior restraint of political speech. *See* Comment, *supra* note 13, at 193.

77. *See, e.g.*, Dames & Moore v. Regan, 49 U.S.L.W. 4969 (1981); Goldwater v. Carter, 100 S. Ct. 533 (1979) (mem.); First Nat'l City Bank v. Vanco Nacional de Cuba, 406 U.S. 759 (1972); New York Times v. United States, 403 U.S. 713 (1971).

A narrow construction of the federal regulation in dispute[78] could have protected the rights of future travelers. This approach would check administrative abuses of discretion and reduce any chilling effect on protected expression. Nevertheless, the majority stated that there was adequate protection against abuse because the government had adopted a narrow construction of the term national security[79] which limited the application of the regulation to only those activities directly affecting national security.[80] It is unclear, however, whether the government's construction would be sufficient to allay the potential chilling impact on the free speech rights of other travellers.

As part of the protection afforded fundamental rights, the Court has required that the government employ the least restrictive means capable of serving the governmental interest.[81] Therefore, if the Secretary of State could have protected the national security without burdening the respondent's freedom of speech, the passport should not have been invalidated. Accordingly, several less intrusive means of protecting national security were available, including an order enjoining respondent's publications,[82] revocation of the passport after a formal charge of committing a felony,[83] or placing area restriction on certain hostile countries.[84] These alternative remedies would have satisfied the govern-

78. Possible narrowing constructions include the "direct and immediate consequence" standard from *New York Times*. Another possibility is to limit the proscribable conduct to those activities typically punishable by criminal statutes. *See generally* 629 F.2d at 110-17 (Appendix to dissenting opinion).

79. 101 S. Ct. at 2783 n.61. Answering respondent's charge that the passport revocation was being used as punishment for unpopular criticism, the Court found the government's use of the term "serious danger to national security" consistent with previous constructions of that phrase. *Id.* (citing Cole v. Young, 351 U.S. 536 (1956)).

80. *See* Cole v. Young, 351 U.S. 538, 544 (1956).

81. *See generally* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

82. This method has been used against other CIA agents who have violated their secrecy agreements. *See* Snepp v. United States, 100 S. Ct. 763 (1980); United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). Injunctions are preferable because the niche which has been carved out of the first amendment by this type of prior restraint is definite and limited. The majority, however, found this method ineffective as long as respondent resides abroad. 101 S. Ct. at 2782 n.60.

83. This alternative is based on the notion that a passport is not intended to be an instrument to limit personal freedoms. *See* Comment, *supra* note 13. In discussing passport removal for speech reasons it was suggested, "If the government has insufficient evidence to indict an individual on an attempt or conspiracy count, it has no power to restrict his freedom on the basis of its suspicion. If it has sufficient evidence it should be forced to fish or cut bait, rather than inflict the punishment of passport denial without the safeguards of criminal procedure." *Id.* at 198. *See also* Erhlich, *supra* note 11, at 140; *Developments, supra* note 14, at 1152.

84. Respondent announced his intention to disrupt CIA operations in 1974. Since then, he has published two books, divulged the names of many alleged agents and has been accused of instigating acts of violence. However, it was not until one week after an article appeared, linking respondent with Iran and the "Hostage Crisis" did the executive branch take any action. See text accompanying notes 3 & 4 *supra*. In light of the chronology, the government's intention becomes clear. An area restriction on Iran, either in general or applied only to the respondent, would have served the government's purpose while remaining solidly within the constitutional limits as drawn by the Court in *Zemel*. *See generally*, Zemel v. Rusk, 381 U.S. 1 (1965).