

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 10: The Reagan Era – Democratic Rights/Citizenship

Haig v. Agee, 453 U.S. 280 (1981)

Philip Agee was an American citizen who resided in West Germany after being deported from several other European countries. From 1957 to 1968, he worked in covert operations for the Central Intelligence Agency. In 1974, Agee began a public campaign to expose CIA officers and agents wherever they were operating. This effort included traveling to various countries to help local groups identify CIA agents in those countries and then publicizing the identity and location of those agents in various speeches and publications. Agee exposed hundreds of covert operatives and this exposure led to the murder of Richard Welch, the CIA chief in Athens, Greece. After learning in 1979 that Agee had contacted the groups holding the American embassy hostages in Iran and had offered his assistance in exposing the CIA agents among the hostages, the U.S. State Department revoked his passport and issued him identity papers that only allowed him to return to the United States. Agee filed suit against Secretary of State Alexander Haig, contending that the revocation violated his due process to a hearing and his substantive liberty to travel and to criticize the government. The district court held that the revocation exceeded the statutory authority of the secretary of state, and a divided Court of Appeals for the District of Columbia affirmed that judgment. Haig and the United States appealed to the Supreme Court of the United States.

The Supreme Court by a 7-2 vote reversed the lower federal courts and sustained the State Department's decision. Chief Justice Burger's majority opinion held the Congress and the federal government could impose reasonable restrictions on the right to travel outside of the United States. On what basis did Burger distinguish between the right to travel inside and the right to travel outside the United States? On what basis did the Chief Justice reject Agee's free speech claim? Were these reasons constitutionally sound? On what basis did Justice Brennan dissent? Was that reasoning sound?

OXFORD
UNIVERSITY PRESS

CHIEF JUSTICE BURGER delivered the opinion of the Court.

...

The principal question before us is whether the statute authorizes the action of the Secretary pursuant to the policy announced by the challenged regulation.

...

The Passport Act does not in so many words confer upon the Secretary a power to revoke a passport. Nor, for that matter, does it expressly authorize denials of passport applications. Neither, however, does any statute expressly limit those powers. It is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes. For example, in *Kent v. Dulles* (1958), the Court recognized congressional acquiescence in Executive policies of refusing passports to applicants "participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States." In *Zemel v. Rusk* (1965), the Court held that "the weightiest considerations of national security" authorized the Secretary to restrict travel to Cuba at the time of the Cuban missile crisis. . . .

. . . In *United States v. Curtiss-Wright Export Corp.* (1936), the volatile nature of problems confronting the Executive in foreign policy and national defense was underscored:

"In this vast external realm, with its important, complicated, delicate and manifold problems, the

President alone has the power to speak or listen as a representative of the nation. . . . As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'"

...
The history of passport controls since the earliest days of the Republic shows congressional recognition of Executive authority to withhold passports on the basis of substantial reasons of national security and foreign policy. Prior to 1856, when there was no statute on the subject, the common perception was that the issuance of a passport was committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security and foreign policy of the United States. This derived from the generally accepted view that foreign policy was the province and responsibility of the Executive. From the outset, Congress endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports. Early Congresses enacted statutes expressly recognizing the Executive authority with respect to passports.

...
By enactment of the first travel control statute in 1918, Congress made clear its expectation that the Executive would curtail or prevent international travel by American citizens if it was contrary to the national security. The legislative history reveals that the principal reason for the 1918 statute was fear that "renegade Americans" would travel abroad and engage in "transference of important military information" to persons not entitled to it. The 1918 statute left the power to make exceptions exclusively in the hands of the Executive, without articulating specific standards. Unless the Secretary had power to apply national security criteria in passport decisions, the purpose of the Travel Control Act would plainly have been frustrated.

...
We hold that the policy announced in the challenged regulations is "sufficiently substantial and consistent" to compel the conclusion that Congress has approved it.

Agee also attacks the Secretary's action on three constitutional grounds: first, that the revocation of his passport impermissibly 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 failure to accord him a prerevocation hearing violated his Fifth Amendment right to procedural due process.

In light of the express language of the passport regulations, which permits their application only in cases involving likelihood of "serious damage" to national security or foreign policy, these claims are without merit.

Revocation of a passport undeniably curtails travel, but 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 governmental regulation. The Court has made it plain that the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States. . . .

...
Assuming, *arguendo*, that First Amendment protections reach beyond our national boundaries, Agee's First Amendment claim has no foundation. The revocation of Agee's passport rests in part on the content of his speech: specifically, his repeated disclosures of intelligence operations and names of intelligence personnel. Long ago, however, this Court recognized that "[no] one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near v. Minnesota ex rel. Olson* (1931). . . . The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law.

...
... [W]hen there is a substantial likelihood of "serious damage" to national security or foreign policy as a result of a passport holder's activities in foreign countries, the Government may take action to

ensure that the holder may not exploit the sponsorship of his travels by the United States. “[While] the Constitution protects against invasions of individual rights, it is not a suicide pact.” *Kennedy v. Mendoza-Martinez* (1963). The Constitution’s due process guarantees call for no more than what has been accorded here: a statement of reasons and an opportunity for a prompt postrevocation hearing.

We reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

JUSTICE BLACKMUN, concurring.

...

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today the Court purports to rely on prior decisions of this Court to support the revocation of a passport by the Secretary of State. Because I believe that such reliance is fundamentally misplaced, and that the Court instead has departed from the express holdings of those decisions, I dissent.

...
This is not a complicated case. The Court has twice articulated the proper mode of analysis for determining whether Congress has delegated to the Executive Branch the authority to deny a passport under the Passport Act of 1926. *Zemel v. Rusk* (1965); *Kent v. Dulles* (1958). The analysis is hardly confusing, and I expect that had the Court faithfully applied it, today’s judgment would affirm the decision below.

In *Kent v. Dulles*, the Court reviewed a challenge to a regulation of the Secretary denying passports to applicants because of their alleged Communist beliefs and associations and their refusals to file affidavits concerning present or past membership in the Communist Party. Observing that the right to travel into and out of this country is an important personal right included within the “liberty” guaranteed by the Fifth Amendment, the Court stated that any infringement of that liberty can only “be pursuant to the law-making functions of the Congress,” and that delegations to the Executive Branch that curtail that liberty must be construed narrowly. . . .

...
[B]road statements by the Executive Branch relating to its discretion in the passport area lack the precision of definition that would follow from concrete applications of that discretion in specific cases. Although Congress might register general approval of the Executive’s overall policy, it still might disapprove of the Executive’s pattern of applying that broad rule in specific categories of cases.

...