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Freedom to Travel: Is the Issuance of a Passport an Individual Right or a Government Prerogative?

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I. INTRODUCTION

An individual's right to freedom of international travel has been overwhelmingly linked to his possession of a passport in the recent past.[1] The passport has thus become an increasingly important document since it was first introduced. Its importance has been further enhanced by the technological innovations which have considerably decreased the time element in travel to the point where man can virtually span the globe in a matter of hours.[2] The history of the freedom to travel has been somewhat obscure, varying from an early proclamation promoting the right of free travel to more recent instances wherein the right to free international travel has been limited for national security and foreign policy reasons.

One instance of the latter in the United States is the recent case involving Philip Agee, a U.S. citizen and former employee of the Central Intelligence Agency (CIA).[3] Agee, a resident of Hamburg, West Germany at the time the case began, was a leading critic of the CIA's clandestine operations throughout the world. He had written and spoken extensively attacking American intelligence efforts, and had purportedly exposed the identities of certain undercover CIA agents.[4] Agee had been issued a U.S. passport in 1978; however, being aware of Agee's activities, the U.S. Department of State moved to revoke it on December 23, 1979. This case

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1. D. TURACK, THE PASSPORT IN INTERNATIONAL LAW 1 (1972).

2. *Id.* at XV.

3. Agee v. Vance, 483 F. Supp. 729 (D.D.C. 1980), *aff'd sub nom.* Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980), *rev'd sub nom.* Haig v. Agee, ___ U.S. ___, 101 S.Ct. 2766 (1981).

4. 629 F.2d at 81.

brought up a number of questions concerning an individual's right to freedom of travel and whether it is protected by the U.S. Constitution. This issue and others will be discussed in this article.

II. HISTORICAL ASPECTS OF THE FREEDOM TO TRAVEL

Originally, under the writ of *Ne Exeat Regno*,[5] the British Crown could restrain a subject from leaving the realm by providing that one could leave the country only if royal permission had been granted in the form of a license. This was a means of controlling the exit of individuals from the country by the King and thereby enforcing feudal duties and services.[6] However, in 1215, clause 42 of the Magna Carta provided acknowledgement of a distinct right to travel: "It shall be lawful in the future for anyone to leave our kingdom, and to return safe and sound, by land and by water, saving the allegiance due to us, except for a short space in time of war. . . ."[7] Contrary to this acknowledgement, however, succeeding kings retained the discretionary power to issue licenses to those who wished to travel. But with the ascendance of the theory of the natural rights of the individual, the discretionary power of the King to require travel licenses diminished substantially.[8] By 1607 the writ was no longer in general use except when used as an equity instrument to insure the whereabouts of debtors and defendants.[9]

The British travel licenses required by the writ are the origins of today's passports. In the United Kingdom, the passport traditionally functioned as a letter of introduction to foreign governments identifying the bearer as a U.K. citizen. However, it now has assumed an additional function in that country by also serving as an exchange control voucher.[10] Unless a person can produce a passport, banks will not issue foreign currency to that person. Thus, severe limitations are imposed on the person not in possession of a passport.

Another historical example of the use of passports is the case of India. India's experience is quite different from that of the United Kingdom. Until very recently, India lacked any formal regulation governing the granting of passports to persons intending to leave the country, relying to a large extent on American jurisprudence for guidance.[11] Prior to 1967, a passport was not required to leave the country. But since it was and is a prerequisite for entry in other countries, a passport was a practi-

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5. Williams, *British Passports and the Right to Travel*, 23 INT'L & COMP. L.Q. 642, 644 (1975).

6. *Id.*

7. MAGNA CARTA § 42 (1215).

8. Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 VA. L. REV. 853, 867-68 (1954).

9. Note, *The Right to Travel and the Loyalty Oath:* Woodward v. Rogers, 12 COLUM. J. TRANSNAT'L L. 387, 389 (1973) [hereinafter cited as Note, *Right to Travel*].

10. Williams, *supra* note 5, at 651.

11. D. TURACK, *supra* note 1, at 7.

cal requirement to enable one to travel freely. The controversy whether a citizen of India had the right to travel was determined in 1967 when the Supreme Court of India decided that the citizen enjoyed such a right.[12] In response to this decision, the Indian government passed the Passport Act of 1967[13] which made the passport a statutory requirement for free travel and regulated the granting of passports. By this enactment, the Indian government had begun to exercise its discretion over the travel rights of individuals in its country.

The first American passport appeared on July 8, 1796, as a letter of introduction to U.S. officials abroad.[14] A passport was not required by law, but rather served as a privilege to citizens. Until World War I, the American passport was thought to serve three main purposes. First, it was evidence to both U.S. and foreign officials that the bearer was an American national. Second, it contained a request that the bearer be given aid and protection by foreign governments in case of need. Third, the national abroad who held a passport was provided greater assistance by the U.S. government than one who did not, which meant that the U.S. government was more likely to offer assistance to citizens who held a passport.[15] Today, however, only the first of these purposes remains valid since international law has recognized that diplomatic protection is not contingent upon the possession of a passport.[16]

Today, in addition to serving as a convenience to travellers, the American passport has assumed a more important role. It presently serves as an exit control mechanism and an important foreign policy instrument.[17] In exercising discretion over the issuance of passports, the U.S. government is directly able to restrict the foreign travel of American nationals since gaining entrance to another country generally requires a valid passport.

Except for a brief period during World War I when travel required possession of a passport, prior to May 27, 1941 it was not illegal for U.S. citizens to leave their country without a passport.[18] The passport requirement was intended to apply only during wartime and to end with the coming of peace. In 1941 Congress enacted legislation extending the wartime passport requirement to include "national emergencies"[19] which President Roosevelt declared to exist in the same year. Following the coming of peace in 1945, the advent of the Cold War prevented the repeal

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12. *Id.* at 8.

13. Comment, *The Right To a Passport*, 7 INDIA J. INT'L L. 526 (1968).

14. Note, *Right to Travel*, *supra* note 9, at 392.

15. Ehrlich, *Passports*, 19 STAN. L. REV. 129 (1966).

16. Turack, *Selected Aspects of International and Municipal Law Concerning Passports*, 12 WM. & MARY L. REV. 805, 818 (1971).

17. Note, *Passports and Travel: Towards a Rational Policy of Area Restriction Enforcement*, 8 HARV. J. LEGIS. 518, 527 (1971) [hereinafter cited as Note, *Passports and Travel*].

18. D. TURACK, *supra* note 1, at 9.

19. Ehrlich, *supra* note 15, at 131.

of the passport requirement. The 1941 statute was replaced in 1952 when Congress passed the Immigration and Nationality Act.[20] The Immigration and Nationality Act authorized the President to impose restrictions on travel during wartime or any national emergency and made it a criminal offense to enter or leave the U.S. without a valid passport.[21] Hence, the denial of a passport became and today continues to be synonymous with the right to travel abroad.

The Secretary of State has the power to grant or to deny the issuance of a passport and therefore has the ability to control the foreign travel of U.S. nationals.[22] The Department of State carries out the function of issuing or denying a passport through its Passport Division.[23] In the early 1950's passports were denied when the Department of State felt that the applicant's travel abroad would not be in the best interests of the United States. Frequently the applicant had no idea what the term "best interests" meant and the Secretary of State, alleging that the issuance or denial of a passport was a function of the foreign affairs power, assumed its actions were nonreviewable.[24]

Throughout the decade of the 1950's the number of passport restrictions based on national security or foreign policy grounds increased, and the Passport Division began using its discretionary power arbitrarily.[25] Since the issuance of a passport was then deemed to be a foreign policy decision, private citizens could not contest the denials.[26] Any private citizen who spoke against U.S. policies or the policies of U.S. allies risked the chance of having his passport revoked.

These arbitrary actions, based on the premise that a passport decision is a foreign policy decision, affected basic constitutional rights and therefore came under the scrutiny of the courts. In *Schachtman v. Dulles*,[27] the national chairman of the Independent Socialist League was refused a passport solely because the organization was listed as subversive by the Attorney General. The court of appeals held that the right to

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20. Immigration and Nationality Act of 1952, § 215, 8 U.S.C. §§ 1101-1503 (1976 & Supp. III 1979).

21. *Id.* § 1185 (a)-(b).

22. 44 Stat. 887 (1926), 22 U.S.C. § 211a (1980). A U.S. national is defined as "a citizen of the United States or a noncitizen owing permanent allegiance to the United States." 22 C.F.R. § 51.1(d) (1981).

23. 22 C.F.R. § 51.1-.89 (1981).

24. *See generally* Hurwitz, *Judicial Control Over Passport Policy*, 20 CLEV. ST. L. REV. 271 (1971); Note, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 170 (1952) [hereinafter cited as Note, *Passport Refusals*].

25. Hurwitz, *supra* note 24, at 271.

26. The State Department both refused to renew certain passports and revoked others in its efforts to prevent foreign travel. Ms. Beverly Hepburn's passport was not renewed because she "allegedly engag[ed] in the internal affairs of Guatemala." *Id.* at 274. Paul Robeson had his passport revoked since the Government felt "if Robeson spoke abroad against colonialism he would be a meddler in matters within the exclusive jurisdiction of the Secretary of State." *Id.*

27. 225 F.2d 938 (D.C. Cir. 1955).

travel was a

> natural right subject to the rights of others and to reasonable regulation under law. A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provision of the Fifth Amendment that '[n]o person shall be . . . deprived of . . . liberty . . . without due process of law.'[28]

Since Schachtman was granted an informal hearing prior to the passport denial, the court focused upon the substantive due process question of whether the refusal was arbitrary.[29] The court held that under the circumstances, the denial was arbitrary and thus invalid.[30]

Similarly, in *Aptheker v. Secretary of State*,[31] ranking members of the Communist party had their passports revoked under section 6 of the Subversive Activities Control Act of 1950,[32] which provided that a member of a Communist organization, which has registered or has been ordered to register, commits a crime by either applying for or attempting to use a passport. In effect, the section provided a statutory basis for the denial of passports because of political associations or beliefs. However, the Court found the section "unconstitutional on its face" in that it "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."[33] This decision effectively eliminated the State Department's ability to withhold passports from Communists and established the rule that one's political persuasion alone could not be employed to justify the Department's actions.[34]

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28. *Id.* at 941.

29. *Id.*

30. The court acknowledged that in determining whether a decision was arbitrary one must examine all the circumstances. Restraint upon travel abroad might be justified during an emergency, but not during times of normalcy. The court further explained that the mere listing of the Independent Socialist League on the Government's list of subversive groups, coupled with their refusal to justify the listing, must be seen as an arbitrary act, "without a reasonable relation to the conduct of foreign affairs." *Id.* at 943.

31. 378 U.S. 500 (1963).

32. Subversive Activities Control Act of 1950, ch. 1024, § 6, 64 Stat. 987 (1950).

33. 378 U.S. at 514. Among the reasons for their decision that the Act swept too broadly were the following: (1) the terms of the Act "apply whether or not the member actually knows or believes that he is associated with what is deemed to be a 'Communist-action' or a 'Communist-front' organization," *id.* at 509; (2) the act applies regardless of whether one believes he or she is associated with a group seeking to further the world communist movement, *id.* at 510; (3) section 6 "renders irrelevant the member's degree of activity in the organization and his commitment to its purpose . . . ," *id.* at 510; (4) the prohibition of section 6 applies without considering the reasons for which the individual wishes to travel abroad, thus prohibiting trips for medical or family reasons, *id.* at 511; (5) section 6 also applies "regardless of the security sensitivity of the areas in which [the member] wishes to travel," *id.* at 512; (6) in promulgating the Act, it is clear the Government did not even consider what less drastic methods might be available to achieve their desired goal, *id.* at 512-13.

34. Arguably, the State Department would still have the power to withhold passports from Communists. But given the criteria upon which the Court based its decision, it is doubtful that an effective act could be drafted and still be constitutional.

Further, the Supreme Court in this case ruled that it is unjustifiable to repress the travel rights of a "class of persons" for the sake of national security.[35] Therefore, although the State Department may refuse a passport and thereby restrict travel on the basis of national security considerations, its power and discretion in this area have slowly been eroded by the courts. Unless the State Department sufficiently demonstrates the danger to national security, the Department is essentially obligated to issue passports to each applicant.

The State Department has been better able to justify passport refusals on behalf of the national interest for area restrictions than for individual or class restrictions. The area restrictions apply to all travellers who desire to travel to "(1) [A] country with which the United States is at war, or (2) A country or area where armed hostilities are in progress; or (3) A country or area in which there is imminent danger to the public health or physical safety of United States travellers."[36] Area restrictions are supported by two separate policies. One is that the State Department does not want a U.S. traveller to become stranded in an area where the normal diplomatic services of the United States would not be available. Second, the restrictions prevent U.S. travellers from inadvertently touching off embarrassing foreign incidents by their presence in an area.[37]

The government's power to forbid the travel of all citizens to particular geographic areas on the basis of national security was explicitly established by the Supreme Court in *Zemel v. Rusk*.[38] In that case, the Secretary of State refused to validate appellant's passport to travel to Cuba as a tourist for the purpose of informing himself as to conditions there.[39] The Court considered whether the Passport Act of 1926 authorized the Secretary of State to refuse to validate passports of U.S. citizens for travel to Cuba and whether the exercise of the authority was constitutionally permissible. The Court upheld the action of the State Department and held that the language of the Passport Act "[was] surely broad enough to authorize area restrictions."[40] *Zemel*, as distinguished from previous cases, involved "foreign policy considerations affecting all citizens."[41] Thus, the courts have held that area restrictions are authorized but class restrictions are not.[42]

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35. 378 U.S. at 509.

36. 22 C.F.R. § 51.72(a)(1)-(3) (1981).

37. *See* Note, *Passports and Travel*, *supra* note 17, at 520.

38. 381 U.S. 1 (1965). In *Zemel*, the Court found an "administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved [area restrictions]." *Id.* at 12. In addition to the consistent administrative practice, the fact that the 1952 Immigration and Nationality Act left untouched the broad executive power in this area was further support for the Court's acceptance of area restrictions.

39. *Id.*

40. *Id.* at 8.

41. *Id.* at 13.

42. The criminal punishment for visiting a banned country is up to five years imprisonment and/or a $5,000 fine. 8 U.S.C. § 1185(c) (1980).

However, in 1967 the Supreme Court ruled that area restrictions are not criminally enforceable by the State Department. In *United States v. Laub*,[43] the petitioner was indicted for conspiracy to violate the Immigration and Nationality Act[44] by arranging for a group of citizens, all of whom possessed valid passports, to travel to Cuba. The Court decided the case solely on the statutory level and concluded that, while the Passport Act of 1926 authorized area restrictions, violation of the travel ban did not trigger criminal sanctions. The criminal provisions of the Act penalized only departures from the United States without a valid passport, and a valid passport was not rendered invalid by State Department disapproval of travel to the particular destination.[45] As long as the traveller held a valid passport upon his return, he could not be punished for violating the restrictions. Once it was determined that criminal sanctions were not allowed, the State Department turned to administrative sanctions. It threatened to revoke and to not renew an individual's passport until it was assured that the individual would not travel in violation of any restriction.[46]

This practice was declared invalid by the District of Columbia Court of Appeals in *Lynd v. Rusk*.[47] In *Lynd*, the appellant refused to give assurances that he would not travel to a restricted area without his passport.[48] The Secretary then revoked his passport. In not allowing this revocation, the court held that the "soft support" of congressional silence was insufficient authority upon which to curtail travel to nonrestricted areas "to achieve the objective of restraining travel to restricted areas."[49] The court also stated that the Secretary had sufficient "authority to control the lawful travel of the passport, even though Congress ha[d] not given sufficient authority to control the travel of the person."[50] The combined effect of the above is that the State Department is powerless to demand

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43. 385 U.S. 475 (1967).

44. 8 U.S.C. § 1185 (a)-(b) (1976).

45. 385 U.S. at 480-81.

46. 31 Fed. Reg. 13,544 (1966), *codified at* 22 C.F.R. § 51.74 (1967), states:

> Travel to, in or through a restricted country or area without a passport or without a passport specifically validated for such travel is ground for revocation or cancellation of a passport and for denial of an application for a passport or renewal of a passport until such time as the Secretary receives formal assurance and is satisfied that the person will not again travel in violation of the travel restrictions. Unauthorized travel to a restricted country or area may also be a violation of 8 U.S.C. § 1185 and/or 18 U.S.C. § 1544 and subject to penalties provided therein.

This section was subsequently repealed in 1968.

47. 389 F.2d 940 (D.C. Cir. 1967).

48. Lynd agreed not to use his passport in restricted areas but he reserved the right to travel to those areas without a passport. *Id.* at 942.

49. *Id.* at 947. It should be noted that the court sustained the Secretary's authority to deny or to revoke a passport when the sole travel intended by the citizen is to a restricted area.

50. *Id.* at 947-48. The court reached this conclusion after declaring that the passport is an official document under government seal.

that the person travelling refrain from travelling to the restricted region himself, so long as his passport remains safely behind.[51]

These cases have pointed out that to issue and to enforce criminal prohibitions, the State Department must have explicit congressional support. However, as yet, Congress is unprepared to make travel in banned countries a crime. Therefore, travellers cannot be precluded from visiting restricted areas by any punitive consequences.[52]

In summary, the authority of the President to exercise discretion over the issuance of passports was established with the passage of the Passport Act of 1926.[53] The power was narrowly interpreted until after 1941, when the State Department under the "national emergencies" exception began exercising its authority in a somewhat arbitrary fashion. A number of State Department decisions drew the attention of the courts, prompting judicial review of the Department's actions. As a result of this judicial scrutiny, the area in which the State Department can act with respect to the granting or revocation of passports has been more sharply defined. The case of Philip Agee focuses, on one level, on the power of the Secretary of State to refuse or to revoke a passport on national security grounds. On another level it deals with the right to international travel and the ways in which that right may be limited.

III. THE CASE OF PHILIP AGEE

As noted previously in this article, Philip Agee is a U.S. citizen and former employee of the CIA. He has been a leading critic of the CIA's clandestine operations throughout the world. Through his speaking engagements and various publications, Agee has repeatedly identified organizations and individuals in foreign countries as participants in undercover CIA activities or as agents.[54] The State Department informed Agee of its decision to revoke his passport in a letter which said that, because of Agee's stated intention to expose CIA activities and his extensive travel in pursuing those intentions, his actions were damaging to the national security and foreign policy of the United States.[55] On these

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51. *Id.* at 948.

52. Hurwitz, *supra* note 24, at 283.

53. 44 Stat. 887 (1926), 22 U.S.C. § 211a (1980). *See* note 22 *supra.*

54. Between 1974 and 1978, Agee had identified hundreds of persons as CIA employees. *See generally* DIRTY WORK: THE CIA IN WESTERN EUROPE (P. Agee & L. Wolf eds. 1978); P. AGEE, INSIDE THE COMPANY: CIA DIARY (1975); Agee, *"Introduction"*, in DIRTY WORK 2: THE CIA IN AFRICA (E. Ray, W. Schapp, K. Van Meter & L. Wolf eds. 1979).

55. The important part of the State Department's letter to Agee is stated below:

> 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 travelled 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 in-

grounds, the Secretary moved to revoke Agee's passport, relying on 22 C.F.R. sections 51.70(b)(4) and 51.71(a). Twenty-two C.F.R. section 51.70 (b)(4) provides: "A passport may be refused in any case in which: . . . The Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." Twenty-two C.F.R. section 51.71(a) provides: "A passport may be revoked, restricted or limited where: The national would not be entitled to issuance of a new passport under Section 51.70." Agee rejected his right to administrative review and instead filed a complaint with the district court seeking declaratory and injunctive relief.[56]

The district court held that the State Department regulation authorizing passport refusal or revocation on national security or foreign policy grounds is valid only if there is either an express or implied authorization from Congress.[57] In reaching this conclusion the court adopted substantial parts of *Kent v. Dulles*.[58] Accepting the premise that the right to travel is constitutionally protected,[59] the district court stated that "[t]he Secretary of State's power to revoke or limit a passport flows from Congress not from the President . . . . His power is no greater than Congress may choose to delegate to him."[60] Finally, since the challenged action was against a protected individual right, the court stated that any delegation must be narrowly construed.

Finding no express authorization, the court then looked for a "sufficiently substantial and consistent administrative practice" to warrant an implied approval of the challenged regulation.[61] Since its promulgation in 1968, 22 C.F.R. section 51.70(b)(4) had only been used once to revoke a passport. Accordingly, the court held that there was not a substantial and consistent administrative practice upon which an implied approval could be based.[62]

The State Department's main support for establishing a substantial and consistent prior administrative practice came from various statutes, regulations, and advisory opinions dating back to 1861. The court found this argument unpersuasive in that the examples listed by the Secretary of State concerned revocations under exigent circumstances. This, coupled with the need to construe narrowly any purported limitation on the protected right to travel, undermined any congressional support the legis-

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tention to continue such activities threatens additional damage of the same kind.

Agee v. Vance, 483 F. Supp. at 730 n.2.

56. *Id.* at 730.
57. *Id.* at 731.
58. 357 U.S. 116 (1958).
59. Agee v. Vance, 483 F. Supp. at 730.
60. *Id.* at 730.
61. *Id.* at 731.
62. *Id.*

lation might have enjoyed.[63] Further support for not finding tacit approval of such revocations was found in the failure of Congress to pass proposed legislation granting the power then in question in 1958.[64] In sum, the Court "conclude[d] that the Secretary's promulgation was without authorization from Congress"[65] and thus invalid.

On appeal, the court of appeals affirmed the district court.[66] Applying essentially the same tests as the district court, the court of appeals found no express congressional support for the regulation.[67] The court also did not find any substantial and consistent administrative practice to support the current regulation, stating that "[u]ntil Agee's case arose 22 C.F.R. Section 51.70(b)(4) was virtually unused."[68] The court did state that if Agee were indicted or otherwise charged with criminal conduct, past Supreme Court decisions would support revocation of his passport, thus providing a possible method for restraining Agee.[69]

Circuit Judge MacKinnon submitted an exhaustive dissent in which he went to great lengths to uphold the regulation and thus the revocation of Agee's passport.[70] Judge MacKinnon found the challenged regulations to be constitutional on their face.[71] He reached this conclusion by first incorporating the President's power in hostage situations under 22 U.S.C. section 1732[72] and the authority of *Zemel v. Rusk*.[73] The hostage situation

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63. *Id.*

64. *Id.* at 732 n.8. In fact two separate bills were introduced, one in 1958 and the other in 1966, which would have permitted the denial of passports to persons whose activities or presence abroad would "seriously impair the conduct of foreign relations" of the United States or would "be inimical to the security of the U.S." Both bills died in committee and were never brought to a vote on the floor. *See* S. 4110, 85th Cong., 2d Sess. (1958); H.R. 14895, 89th Cong., 2d Sess. (1966).

65. 483 F. Supp. at 732.

66. Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980).

67. *Id.* at 85-86. The Secretary's argument that the Passport Act, when combined with the President's foreign policy powers, would uphold the regulation was again rejected. The court also noted the two unsuccessful attempts by the Department of State, in 1958 and 1966, to have bills passed in Congress granting this power to the Secretary of State. *See* note 64 *supra*.

68. 629 F.2d at 86.

69. *Id.* at 87 n.10.

70. *Id.* at 87. At one point Judge MacKinnon goes so far as to include a draft indictment of Agee which could be used to allow revocation on the grounds of a criminal indictment. *Id.* at 105 n.62.

71. *Id.* at 109.

72. 22 U.S.C. § 1732 states:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative

in Iran provided the necessary crisis, and on December 17, 1979 a newspaper article reported that Agee had been invited to travel to Iran in order to participate in a "tribunal" that was to judge the U.S. hostages.[74] If it was in fact true that Agee was going to Iran, then it would appear that section 1732 of the Hostage Law could support the revocation as a measure "necessary and proper . . . to effectuate the release" of the American hostages held in Iran.

In sum, both lower court decisions considered the right to travel as a part of the liberty "of which the citizen cannot be deprived without due process of law under the Fifth Amendment."[75] If such a right is to be regulated it must be pursuant to congressional action. The requisite action must be either an express delegation or a sufficiently substantial administrative practice to warrant implicit congressional approval. Neither was found and thus 22 C.F.R. section 51.70 (b)(4) was declared invalid. The Secretary of State appealed the decision and the Supreme Court decided the case on June 29, 1981.[76]

In an opinion written by Chief Justice Burger, the Court, by a seven-to-two vote, reversed the two lower court decisions and found the regulation and the subsequent passport revocation to be valid. A brief summary of the Court's decision reveals the subtle, yet ultimately, substantial changes in the interpretation of past cases that was necessary to reverse the lower courts. The primary difference is the Supreme Court's focus on the national security and foreign policy aspects of the case at the expense of the right to travel.[77]

Chief Justice Burger begins by establishing the lack of any express statutory limitation on the Secretary of State's power to revoke a citizen's passport or to deny a passport application. The Passport Act of 1926 states only that the "Secretary of State may grant and issue passports . . . under such rules as the President shall designate. . . ."[78] Once this rather open-ended grant of authority is established, Chief Justice Burger

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thereto shall as soon as practicable be communicated by the President to Congress.

73. 381 U.S. 1 (1965).

74. N.Y. Post, Dec. 17, 1979, at 2, col. 4. Arguably, 22 U.S.C. section 1732 could apply here since there is a broad grant of power under this statute. In comparing the situation with *Zemel*, the Iranian crisis was more immediate since U.S. citizens were being held at that time. *See* Agee v. Muskie, 629 F.2d at 97. It should be noted that Agee submitted a sworn affidavit stating he was neither invited to Iran nor did he ever intend to go to Iran as long as U.S. citizens were still held hostage. The entire link to Iran flowed from the one uncorroborated article in the New York Post. *See* Brief for Appellee at 4, Haig v. Agee, 101 S. Ct. 2766 (1981).

75. Kent v. Dulles, 357 U.S. at 125.

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

77. "The question presented is whether the President, acting through the Secretary of State, has authority to revoke a passport on the ground that the holder's activities in foreign countries are causing or are likely to cause serious damage to the national security or foreign policy of the United States." *Id.* at 2769.

78. 22 U.S.C. § 211a (1976).

links this authority to the Executive's control over foreign policy and national security. The opinion also stresses the need for a "consistent administrative construction" of the Passport Act.[79]

There is an important statement, hidden in a footnote, which pervades the entire opinion and, arguably, distinguishes this opinion from the two lower court opinions. After stating that congressional silence is not to be equated with congressional disapproval, footnote twenty-one states that "[t]his case does not involve a criminal prosecution; accordingly, *strict construction against the Government is not required.*"[80] (Emphasis added.) This belief is extremely important in the outcome of the case, since absent an express congressional delegation of authority, there must be a sufficiently substantial and consistent administrative *practice* to find an implicit congressional authorization. The lower courts, applying *Kent*, stated that given the nature of the right being affected, it would "construe narrowly all delegated powers that curtail or dilute [the right to travel]."[81] The importance of this distinction becomes obvious given the basis upon which the State Department supported its argument: that there was a sufficiently substantial and consistent administrative practice to confer implicit congressional approval. If, as the majority opinion states, strict construction against the Government is not required, then it is much less of a burden on the Secretary of State to show that the required administrative practice existed. This is, in fact, what happened.

By not requiring a narrow construction[82] as dictated by *Kent*, the Court held that there was a "sufficiently substantial and consistent" administrative *policy* to conclude that Congress implicitly approved the challenged regulation.[83] This failure to require a narrow construction of the purported delegation enabled the Court to find implicit support where it might not otherwise have been found. Absent evidence of an intent to repudiate longstanding administrative construction, the Court "conclude[d] that Congress, in 1926, adopted the longstanding administrative construction of the 1856 statute."[84]

Further implicit support for the regulation was found in congres-

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79. 101 S.Ct. at 2774. The Court, citing *Zemel v. Rusk*, 381 U.S. at 17, states that "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."

80. 101 S.Ct. at 2774 n.21.

81. 357 U.S. at 129, *quoted in* Agee v. Muskie, 629 F.2d at 83.

82. *See also* Justice Brennan's dissent in *Haig* v. Agee, 101 S. Ct. at 2785.

83. *Id.* at 2781.

84. *Id.* at 2777. The Court found that the 1856 Passport Act, ch. 127, § 23, 11 Stat. 60 (1856), granted the Secretary of State wide powers, based upon the Executive's control over foreign policy. Then, citing Lorillard v. Pons, 434 U.S. 575 (1977), to the effect that Congress is presumed to be aware of administrative or judicial interpretation of a statute when it reenacts a statute without change, the Court implied that the 1926 Passport Act adopted the early broad construction.

sional silence in the face of administrative policy.[85] The cases cited by the Court[86] stand for the proposition that "acquiescence by Congress in an administrative *practice* may be an inference from silence during a period of years."[87] (Emphasis added.) The Court refused to construe this narrowly and applied their method of implicit approval to an administrative regulation that had only been invoked once in twelve years. Congressional silence can only be meaningful when there is an exercise of executive discretion, as opposed to the mere possession of the discretion.[88] By substituting the administrative policy requirement for the administrative practice requirement, the Court both strays from the holding of *Kent* and belittles the due process requirement of the Fifth Amendment.[89]

In his dissent Justice Brennan notes and criticizes the majority opinion's alteration of past cases. In response to the argument that silence can be seen as implicit approval of a regulation, he states:

> Only when Congress had maintained its silence in the face of a consistent and substantial pattern of actual passport denials or revocations—where the parties will presumably object loudly, perhaps through legal action, to the Secretary's exercise of discretion—can this Court be sure that Congress is aware of the Secretary's actions and has implicitly approved that exercise of discretion.[90]

The dissent further points out that much of the material the majority opinion uses to support its conclusion was "expressly abjured in *Kent v. Dulles*."[91]

There are certain situations, as noted by Justice Brennan in his dissent, when bad facts make bad law. Unfortunately, the law that results can reassert itself at inopportune moments and, in this situation, allow the regulation to inhibit travel of those persons who merely seek to criticize government policy.[92] Philip Agee and his purported activities influenced the majority of the Court to focus upon the national security and foreign policy issues of the case, while silently dismantling the holding in

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85. 101 S.Ct. at 2778.

86. Udall v. Tallman, 380 U.S. 1, 16-18 (1965); Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 313 (1933); Costanzo v. Tillinghast, 287 U.S. 341, 345 (1932).

87. Norwegian Nitrogen Co. v. United States, 288 U.S. at 313.

88. *See* Justice Brennan's dissent in Haig v. Agee, 101 S.Ct. at 2786. Contrary to both past cases and the underlying purpose in requiring an administrative practice as the indicator of implicit congressional support, the majority opinion stated that "if there were no occasions—or few to call the Secretary's authority into play, the absence of frequent instances of enforcement is wholly irrelevant." *Id.* at 2779.

89. Chief Justice Burger differentiates between the interstate right to travel and the right to travel internationally—the former being virtually unqualified, while the latter is considered "no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment." *Id.* at 2782. The point the Court conveniently overlooks is that the regulation of this right to international travel is limited to either express congressional limitations or the administrative practice requirement discussed above.

90. *Id.* at 2786.

91. *Id.*

92. *Id.* at 2788 n.9.

Kent.[93] While his actions could be perceived as harming the national security, the opinion, as written, has a potentially much broader application.

It is interesting to note that this particular controversy could have and probably should have been avoided altogether. *Kent* recognized that passport revocations are authorized when the applicant has engaged in and been indicted for illegal conduct.[94] As noted by Judge MacKinnon in his dissent, it appears that Agee could have been indicted for violating the Willful Communication of Defense Information Statute.[95] Agee disclosed the identity of undercover CIA agents and CIA sources and methods throughout the world. These acts were clear violations of the above statute. But since Agee was not indicted for any crime, the Court was forced to look to other methods to limit his travel. Prior to the Supreme Court's reversal of the two lower courts, it appeared that this oversight would have a substantial effect on the freedom of Philip Agee. It now appears that the Department of State actually increased its ability to act freely through its nonreliance on the criminal indictment.

IV. CONSTITUTIONAL PROTECTION OF THE RIGHT TO TRAVEL

In determining what degree of protection and what due process requirements a particular activity merits, it is necessary to consider the importance or advantages of the activity both to the individual and to the State.[96] The fact that travel is important is evidenced by the number of people it affects. As transportation methods improve, the world becomes a relatively smaller place; and as standards of living rise, more people are travelling abroad. Beyond the sheer number of people who travel abroad, the purposes behind those travels are also important.[97] An individual's occupation may require overseas travel. For example, foreign correspondents and lecturers are required to travel. Even if not necessary, it may be of great potential value in the successful conduct of an individual's profession. Businessmen and students may benefit greatly from travel abroad. These reasons suggest that free movement may be basic to any

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93. *See* Justice Blackmun's concurrence, *id.* at 2783-84.

94. 357 U.S. at 127. This point is noted and developed in Judge MacKinnon's dissent in Agee v. Muskie, 629 F.2d at 104-05.

95. 18 U.S.C. § 793(d) (1976). It states:

> Whoever, lawfully having possession of . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it . . . [s]hall be fined . . . or imprisoned . . . or both.

96. *See* Note, *Passport Refusals*, *supra* note 24, at 190.

97. *Id.* at 191.

guarantee of freedom of opportunity.[98] Reasons for travel abroad also include those closer to the core of personal life, such as marriage and reuniting families. Finally, the need for a free and fully informed society is basic to the protection of a citizen's "right to know."[99]

What transpires abroad has a definite impact on matters of domestic as well as foreign policy.[100] Freedom of mobility is essential in a democratic society. One of the first acts of any totalitarian system is to gain control of the information channels and to repress the free movement of the population in order to control and to influence what information and opinions reach its people. The denial of freedom of movement is a warning that other repressions are likely to follow.[101]

Given the importance of travel to our democratic society, it is surprising to find that nowhere in our federal constitution is there an expressed right to travel freely. Consequently, questions arose as to the nature and extent of the ordinary freedom of an American citizen to leave his country and return as he or she pleases. Controversial passport refusals on the vague basis that the intended travel would not be in the "best interests of the United States" began to receive public attention. In response to this public concern, the courts began to focus on the problem and a judicially constructed right to travel began to emerge.[102]

In *Bauer v. Acheson*,[103] a district court rejected the State Department's claim of absolute discretion in the issuance of passports. The plaintiff, an American journalist working in Paris, had her passport revoked without a hearing or notice. The Secretary of State refused to review or validate her passport except to allow her return to the United States, explaining that the plaintiff's activities were not in the best interests of the United States.[104] By connecting international travel to the liberty of the due process clause of the Fifth Amendment, the court expressed the novel view that a right to foreign travel existed in the Constitution.[105] However, the court cautioned that the right to travel abroad was not an absolute right but was subject to reasonable regulation, over which the Secretary of State had "wide", though not absolute, dis-

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98. Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6, 12 (1955).

99. Note, *The Right to Travel Abroad*, 42 FORDHAM L. REV. 838, 840 (1974) [hereinafter cited as Note, *Right to Travel Abroad*]. While the "right to know" is an important personal right, the Court in *Zemel v. Rusk* would not validate the passport of a U.S. citizen to travel to Cuba when the citizen desired to inform himself of the conditions in Cuba. The foreign policy considerations were sufficient to carry the day as the Court rejected appellant's First Amendment claims and distinguished *Kent v. Dulles*, which dealt with an individual's beliefs. *See also* notes 124-27 *infra* and accompanying text.

100. Note, *Passport Refusals*, *supra* note 24, at 191.

101. Vestal, *supra* note 98, at 13.

102. *See* Note, *Right to Travel Abroad*, *supra* note 99, at 839.

103. 106 F. Supp. 445 (D.D.C. 1952).

104. *Id.* at 448.

105. *Id.* at 451.

cretion.[106] *Bauer* thus applied the standards of procedural due process to the methods by which the federal government could restrict travel. The significance of this case was its "recognition of the . . . conflict between the right of international travel and the privilege of retaining a valid passport."[107]

The case of *Schachtman v. Dulles*,[108] whose facts were discussed earlier, considered whether a passport refusal to the national chairman of the Independent Socialist League was arbitrary, thus raising substantive due process issues.[109] In the court of appeals opinion, the judge stated that the right to travel was a "natural right" which must be accorded due process protection.[110]

The Supreme Court did not review either of the above two cases, since the Secretary of State acquiesced and granted the parties their passports. As mentioned earlier, the Supreme Court in *Kent* held that "the right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment."[111] The question left open and which the *Agee* case dealt with concerned what process was actually due and to what extent the right to travel could be regulated. Nevertheless, *Kent* did propound a rule of law sufficient to enable the Court to declare section 6 of the Subversive Activities Control Act of 1950[112] to be unconstitutional on its face in *Aptheker v. Secretary of State*.[113]

The *Aptheker* opinion has been interpreted in two different ways, differing on whether it is a First or Fifth Amendment decision. The first interpretation is that the right to travel, since it is closely linked to the personal rights of the First Amendment, deserves greater protection and a preferred status to that of other property rights protected by the Fifth Amendment. This would extend the Fifth Amendment protection for the right to travel beyond the substantive due process rule of reasonableness.[114] The second interpretation is more widely accepted and views the First Amendment rights to be related to the right to travel in only certain

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106. *Id.* at 451-52.

107. Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 GEO. L.J. 63, 85 (1952).

108. 225 F.2d 938 (D.C. Cir. 1955).

109. *Id.* at 941.

110. *Id.* While the court held that the right to travel was a natural right, it did acknowledge that such right was subject to reasonable regulation under law. Further, in determining what is arbitrary, the court said one must consider the circumstances during which the act occurs. Thus, times of national emergency could expand the boundaries of what is reasonable.

111. 357 U.S. at 125.

112. Subversive Activities Control Act of 1950, ch. 1024, § 6, 64 Stat. 987 (1950).

113. 378 U.S. 500 (1964). The Court found that the provision which made it a crime for a member of a Communist organization to apply for a passport, "swe[pt] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment." *Id.* at 514. *See notes* 34-36 *supra* and accompanying text.

114. *See Right to Travel Abroad*, *supra* note 99, at 842.

specific situations, and only in these situations would it therefore be treated as a preferred right.[116] If the right to travel in a particular case involved no First Amendment rights, it would receive no extra protection. The question becomes what would happen to travel situations which did not involve any First Amendment personal rights?

The concept of a First Amendment guarantee of the right to travel was rejected in 1965 by the Court in *Zemel v. Rusk*.[116] In rejecting Zemel's First Amendment claim, the Court distinguished *Kent* and *Aptheker* which were concerned with individual denials based on deprivation of the rights of expression and association.[117] Zemel's right to travel was a due process right and was controlled by the balancing test of the Fifth Amendment.[118] The Court found the restriction on travel to Cuba to be supported by "the weightiest considerations of national security,"[119] thus shifting the balance in favor of the State Department.

Therefore, against this backdrop of judicial opinions, the right to travel has been most frequently found within the Fifth Amendment Due Process Clause. The case of *Woodward v. Rogers*[120] reaffirms this implication. In this case, a federal district court held that the denial of a passport to the plaintiffs who refused to swear an oath of allegiance was violative of their constitutional right to travel derived from the Fifth Amendment. There must be a governmental need for instituting loyalty oaths. Where a governmental purpose is supported by an overriding and substantial national interest and does not "unduly . . . infringe upon a constitutionally protected freedom," the measure will be upheld.[121] It was the national interest which was lacking in *Woodward*. In applying the Fifth Amendment due process requirement, there must be a balance between the individual right and the governmental interest in question.

In review, prior to the decision in *Haig v. Agee*, there appeared to be substantial support for the proposition that the right to travel internationally was a right contained in and protected by the Fifth Amendment. This basic individual right could not be diminished unless done in a fashion consistent with the due process requirements of the Fifth Amendment. According to *Kent* and its progeny, any attempt to limit this right had to be construed narrowly. Yet, as shown above, *Haig v. Agee* discarded this requirement and in fact stated that since no criminal indictment was involved, strict construction against the Government was not

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115. *Id.* at 843.

116. 381 U.S. at 16.

117. *See Right to Travel Abroad, supra* note 99, at 844.

118. 381 U.S. at 14-16. The Court states that "[t]he requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity of the restriction."

119. *Id.* at 16.

120. 344 F. Supp. 974 (D.D.C. 1972). The court also held that any infringement on the right to travel will be narrowly construed as called for by *Kent v. Dulles*. *Id.* at 982.

121. Note, *Constitutional Law—Loyalty Oaths Obstructing Civil Liberties*, 19 N.Y.L.F. 185, 186 (1973).

necessary.[122] While it certainly appeared that a legitimate national interest existed in Agee's case, the decision nevertheless was reached at the expense of the right to travel when the Court found implicit approval for the regulation after considering only administrative policy and not administrative practice. Thus, the protection afforded this right was diminished.

The right to free travel is not awarded the same amount of importance in all countries. For example, in the Australian system there is no right to free international travel since there is no absolute right to a passport.[123] Other countries have adopted similar policies which restrict free travel in varying degrees. Only recently have many countries recognized the advantages of free travel between nations.[124] Some examples of those contributions to free travel follow.

V. MULTILATERAL EFFORTS AT FREE TRAVEL

Extending free travel abroad has been possible through the cooperation of different countries. An early indication of this cooperation was demonstrated in the Universal Declaration of Human Rights which was adopted by the General Assembly of the United Nations on December 10, 1948.[125] Article 13 includes the following declaration: "(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 to return to his country." The commitment of the United Nations to the goal of extending free travel was an important step towards the universal recognition of a basic right to freedom of movement.[126]

Probably the most effective example of multinational efforts at free travel is the European Economic Community (EEC). The treaty establishing this international organization was adopted in 1957.[127] The treaty's goals are economic rather than political, and consist of eliminating barriers to the free exchange of goods and promoting the free movement of persons, services, and capital. It requires member states to abandon immigration restrictions on the entry of Community workers and to

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122. *See* note 79 *supra* and accompanying text.

123. Jaconelly, *The Justice Report on Passports*, 38 MOD. L. REV. 314, 315 (1975).

124. D. TURACK, *supra* note 1, at 23.

125. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

126. Global implementation of the United Nations Universal Declaration of Human Rights has had its shortcomings although its influence is apparent in the constitutions of new states. The absence of any compulsory mechanism to guarantee the declaration's effectiveness has been one of its problems, although it has manifested a great political impact on both the international and national levels. *See* A.H. ROBERTSON, HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 290 *passim* (1968). On the status of the Universal Declaration in international law, see Sohm, *The Universal Declaration of Human Rights*, J. INT'L COMMISSION JURS. 17 (1967).

127. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, *entered into force* Jan. 1, 1958 [hereinafter cited as Treaty of Rome].

treat Community workers as nationals with respect to employment opportunities and conditions.[128] The major advantages of the EEC are the effective allocation of manpower resources in a single common market and the conditions which provide workers with a chance to improve their standard of living.[129]

However, limitations to the effectiveness of the EEC are that the treaty includes two exceptions to the principle of free movement of labor. First is that free movement is not guaranteed to "public service" employees.[130] Second is the "public policy exception" which specifies that free movement is made subject to limitations justified on grounds of public policy, public security, or public health.[131] The current interpretation of public policy by the European Court of Justice has been to allow each member state discretion in defining and applying it. This interpretation has interfered with the objectives of free movement of workers, and many critics have advocated a more restrictive interpretation.[132]

Another multilateral effort aimed at free travel occurred in 1962 when the U.N. study on the right to free travel was completed.[133] Under the sponsorship of the Commission of Human Rights, and more specifically its Sub-Commission on Prevention of Discrimination and Protection of Minorities, Dr. Inglés was appointed to prepare a study concerning the right of any person to leave and to return to his country. The study surveyed the practice of ninety states on the subject and reported that only twenty-four states constitutionally recognized the right of a national to leave his or her country, while twelve states recognized the right to judicial interpretation.[134] Dr. Inglés offered a draft of specific proposals for national and international action to ensure freedom and nondiscrimination in the enjoyment of the right of international mobility.[135]

The following year, a U.N. Conference on International Travel and Tourism was held in Rome.[136] Among other things, the Conference encouraged states to minimize requirements and simplify procedures when issuing passports.[137] On December 21, 1965, the General Assembly ap-

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128. Reisner, *National Regulation of the Movement of Workers in the European Economic Community*, 13 AM. J. COMP. L. 360 (1964).

129. Singer, *Free Movement of Workers in the European Economic Community: The Public Policy Exception*, 29 STAN. L. REV. 1283 (1977).

130. Treaty of Rome, *supra* note 127, art. 48(4).

131. *Id.* art. 48(3).

132. Singer, note 129 *supra*.

133. Inglés, Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country, U.N. Doc. E/CN.4/Sub.2/229/Rev.1 (1963).

134. *Id.* at 4.

135. Turack, *Freedom of Movement and the Travel Document*, 4 CAL. W. INT'L L. REV. 8, 12 & n.26 (1973).

136. U.N. Conference on International Travel and Tourism, Recommendations on International Travel and Tourism, U.N. E/CONF. 47/18 (1964).

137. Turack, *supra* note 135, at 12.

proved the text of the International Convention on the Elimination of All Forms of Racial Discrimination which was then opened for signature by the member states.[138] Each state which ratifies or adheres to the Convention undertakes to eliminate racial discrimination and to guarantee the right of everyone to equality before the law in the enjoyment of free travel.[139] Unlike the Universal Declaration, the International Convention is a treaty and will become legally binding on every country which ratifies it once the treaty enters into force. The machinery provided in the Convention will assure greater protection of this human right when implemented.

Another effective method of extending freedom of movement is the formation of passport unions. Under this type of agreement, the passport requirement is waived for nationals of states comprising the union, while others must present their passport for initial entry or departure from the union's territory. There are a number of conditions which are necessary for the existence of a passport union which include a common labor market, close proximity of countries, and similar immigration policies. Two of the multistate passport unions existing today are the Scandanavian Passport Union consisting of Denmark, Finland, Norway and Sweden, and the Benelux Passport Union consisting of Belgium, The Netherlands, and Luxembourg.[140]

A final application of efforts to promote free travel which will be mentioned is the Helsinki Accord of 1975[141] and the subsequent Belgrade Conference of 1977. The Helsinki Accord was a conference on security and cooperation in Europe and the Belgrade Conference was a review and assessment of the Helsinki process. The Conference established a number of principles of governmental conduct concerning freedom of transnational movement which attempted to balance the objectives of free mobility of persons and respect for the sovereign state's rights.[142]

The multilateral efforts at free travel which have been mentioned are quite varied in their effectiveness and the results they have achieved. However, they are all attempts to promote free travel for individuals between countries and they are instrumental in establishing an international recognition of a fundamental right to free travel.

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138. *Opened for signature* Mar. 7, 1966, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966).

139. *Id.* art. 5(d)(ii). *See* Turack, note 135 *supra*.

140. Turack, *supra* note 135, at 20-27 gives a brief discussion of the history behind each passport union.

141. Conference on Security and Cooperation in Europe, Final Act, Aug.1, 1975, *reprinted in* 73 DEP'T ST. BULL. 323 (1975); *also reprinted in* 14 I.L.M. 1292 (1975). *See* HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD (T. Buergenthal ed. 1977).

142. *See* Turack, *Freedom of Transnational Movement: The Helsinki Accord and Beyond*, 11 VAND. J. TRANSNAT'L L. 585 (1978).

VI. CONCLUSION

While travel and mobility have become indispensable in our society, there still exist restrictions on the exercise of that right. Now that the passport has become an essential travel document, the lack of one is a major restraint on international mobility. The State Department may now prevent a person from travelling internationally by not issuing or revoking his passport. As the State Department has exercised this power, the courts have become involved in an effort to clarify and to delineate the powers of the State Department. In the past, courts have upheld passport denials or revocations in cases involving area restrictions and when a person has been indicted for a criminal offense. Now, revocations are possible in situations where the Secretary of State determines that the person's activities "are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. . . ."[143] Since *Kent* it has been accepted judicially that the right to international travel may be regulated.[144] *Kent* also established the fact that this right is a part of the liberty protected by the Fifth Amendment and that any regulation of this right must be pursuant to either an express or implicit congressional delegation. The *Agee* case dealt with implicit authorization and, contrary to the holding in *Kent*, the Court did not construe narrowly the implied delegation. A sufficiently substantial and consistent administrative policy, not practice, was found in past State Department actions. This was so even though the challenged regulation had only been used once prior to the case.

In reaching this conclusion, the Court placed undue emphasis on the foreign policy aspect of the passport question. This increased the State Department's area of discretion at the expense of the individual's right to international travel. There is no express constitutional protection of the right to travel. The basis of this right has traditionally been found in the First and Fifth Amendments. The broadening in the balancing of the interests of the Secretary of State's discretion must then be seen as an infringement on the above-enumerated amendments. Freedom of speech and the liberty protected by the Fifth Amendment take on new meanings when seen in an international context, as these rights must be balanced against national and foreign policy interests. This balancing is in fact a limitation on the above rights.

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143. 22 C.F.R. § 51.70(b)(4) (1981).

144. It is important to reiterate that the *Agee* case deals with international travel. The Court, citing Califano v. Aznavorian, 439 U.S. 170 (1978), clearly distinguishes interstate travel from international travel. Haig v. Agee, 101 S.Ct. at 2782.