

The Burger Court Opinion Writing Database

Haig v. Agee

453 U.S. 280 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

MEMORANDUM OF
THE CHIEF JUSTICE

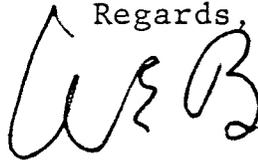
May 27, 1981

RE: 80-83 - Haig v. Agee

MEMORANDUM TO THE CONFERENCE:

Enclosed is typescript draft of the opinion.
Some of the extensive footnote material may possibly be
trimmed out after you see that there is support for the
statements made.

Regards,

A handwritten signature in dark ink, appearing to be 'W B B', written in a cursive style.

0\$0083A

5/27/81

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 27 1981

Recirculated: _____

1st Draft

80-83, Haig v. Agee

CHIEF JUSTICE BURGER delivered the opinion of the Court.

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 to the foreign policy of the United States.

Supreme Court of the United States
Washington, D. C. 20543

CLERK OF
THE CHIEF JUSTICE

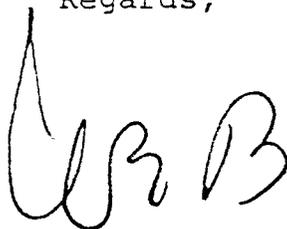
May 29, 1981

MEMORANDUM TO THE CONFERENCE

80-83, Haig v. Agee

Since Byron, Harry, Lewis, and Bill Rehnquist have expressed a preference that we dispose of the constitutional claims, I am preparing a short additional section doing so.

Regards,

A handwritten signature in black ink, consisting of a large, stylized 'W' followed by 'B. B.' in a cursive script.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 3, 1981

80-83 - Haig v. Agee

MEMORANDUM TO: Justice Stewart
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

I continue to have serious doubts about
deciding the Constitutional issues when

(a) there is a statutory basis for
decision; and

(b) the Court of Appeals did not decide the
Constitutional issues.

Is "saving of judicial time" a sufficient basis
for departing from long-standing practice?

Regards,

WRB

The CJ is wrong!

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

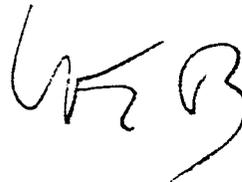
June 3, 1981

MEMORANDUM TO THE CONFERENCE

80-83, Haig v. Aese

Enclosed is a draft of a new section III
which will be added at the end of the opinion.

Regards,

Handwritten signature in cursive, appearing to be 'WKB'.

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

80-83, Haig v. Agee - INSERT

06/03/81

From: The Chief Justice

Circulated: JUN 3 1981

Recirculated: _____

III

Agee also attacks the Secretary's action on three constitutional grounds: first, that the revocation of his passport impermissibly burdens his right 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 pre-revocation 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 right to travel abroad with a "letter of introduction" in the form of a passport issued by the sovereign has never been regarded as a fundamental right; it is at all times subordinate to national security and foreign policy considerations, and it is subject to reasonable governmental regulation. It is "obvious and unarguable" that no governmental interest is more compelling than the security of the nation. Aptheker v. Secretary of State, 378 U.S., at 509; accord Cole v. Young, 351 U.S. 536, 546

2-14, 16-18, 20-25, 27;
STYLISTIC CHANGES;
FOOTNOTES REMEMBERED

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 5 1981

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-83

| | |
|--|---|
| Alexander M. Haig, Jr., Secretary of State of the United States, Petitioner, | } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, |
| v. | |
| Philip Agee. | |

[June —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

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.

I

A

Philip Agee, an American citizen, currently resides in West Germany.¹ From 1957 to 1968, he was employed by the Central Intelligence Agency. He held key positions in the division of the Agency that is responsible for covert intelligence gathering in foreign countries. In the course of his duties at the Agency, Agee received training in clandestine operations, including the methods used to protect the identities of intelligence employees and sources of the United States overseas. He served in undercover assignments abroad and came to know many Government employees and

¹ Agee has been deported from Great Britain, France, and the Netherlands. P. Agee & L. Wolf, eds., *Dirty Work: The CIA in Western Europe* 286-300 (1978).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1981

No. 80-93, Haig v. Agee

Dear John:

Although I am generally in agreement with the views in paragraphs 2, 3, and 4 of Lewis's letter of June 5, my first printed draft includes changes on pages 21 and 24 in response to your letter of June 1 and Byron's letter of June 4. I intend also to replace footnote 57 with "See pp. 1-5 and nn. 1-8, supra."

If a majority is committed to decide the constitutional issues, it would make sense to strike the text between footnote 57 and the end of that paragraph on page 24, and move it to the constitutional section. Specifically, I would strike the Snepp cite at the bottom of page 25 and insert the following after the first sentence in the third full paragraph on page 25:

Thus, in Snepp v. United States, 444 U.S. 507, 509, n.3 (1980), we held that "[t]he Government has a compelling interest in protecting both the secrecy of information so important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." See also id., at 511-513.

Regards,



Justice Stevens

Copies to the Conference

24-27 and stylistic

[Faint, illegible text]

JUN 11 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-83

Alexander M. Haig, Jr., Secretary of State of the United States, Petitioner.
v.
Philip Agee.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.
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.

¶
A

Philip Agee, an American citizen, currently resides in West Germany.¹ From 1957 to 1968, he was employed by the Central Intelligence Agency. He held key positions in the division of the Agency that is responsible for covert intelligence gathering in foreign countries. In the course of his duties at the Agency, Agee received training in clandestine operations, including the methods used to protect the identities of intelligence employees and sources of the United States overseas. He served in undercover assignments abroad and came to know many Government employees and

¹ Agee has been deported from Great Britain, France, and the Netherlands. P. Agee & L. Wolf, eds., *Dirty Work: The CIA in Western Europe* 286-300 (1978).

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

4, 7, 12, 26, 27
 FOOTNOTES (RENUMBERED)

To: Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 17 1981

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-83

| | | |
|--|---|---|
| Alexander M. Haig, Jr., Secretary of State of the United States, Petitioner, v. Philip Agee. | } | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. |
|--|---|---|

[June —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

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.

I

A

Philip Agee, an American citizen, currently resides in West Germany.¹ From 1957 to 1968, he was employed by the Central Intelligence Agency. He held key positions in the division of the Agency that is responsible for covert intelligence gathering in foreign countries. In the course of his duties at the Agency, Agee received training in clandestine operations, including the methods used to protect the identities of intelligence employees and sources of the United States overseas. He served in undercover assignments abroad and came to know many Government employees and

¹ Agee has been deported from Great Britain, France, and the Netherlands. P. Agee & L. Wolf, eds., *Dirty Work: The CIA in Western Europe* 286-300 (1978).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1981

MEMORANDUM TO THE CONFERENCE

No. 80-83, Haig v. Agee

I propose to add the following at the beginning of the second full paragraph on page 26:

"Agee's First Amendment claim has no foundation. His repeated disclosures of intelligence operations and names of intelligence personnel are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law."

I also intend to strike the final sentence of footnote 61 since it is included in the above insert.

Regards,

W B

Supreme Court of the United States
Washington, D. C. 20543

June 19, 1981

CHAMBERS OF
THE CHIEF JUSTICE

No. 80-83, Haig v. Agee

Personal

Dear Harry:

In my view, we are at most trimming some loose dicta from Kent. If it would satisfy you, I would have no objection to making it clear that to the extent Kent may be read to limit inquiry to actual enforcement actions, Kent is overruled. I would do this by making three changes:

(1) Insert in place of the second sentence in the third full paragraph on page 21:

In Kent, 357 U.S., at 124-125, the Court noted that

"Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State. The scholars, the courts, the Chief Executive, and the Attorneys General, all so said. This long-continued executive construction should be enough, it is said, to warrant the inference that Congress had adopted it. See Allen v. Grand Central Aircraft Co., 347 U.S. 535, 544-545; United States v. Allen-Bradley Co., 352 U.S. 306, 310. But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion."

We do not read this passage to preclude reliance on the Executive's publicly announced policy in the present case. In the first place, the gravamen of the decision in Kent was that the claimed governmental policy had not been enforced consistently.

(2) Add the following in text preceding the sentence that begins on line 7 of page 22:

Second, the crucial question is whether Congress has acquiesced. The evidence of such acquiescence necessarily varies in

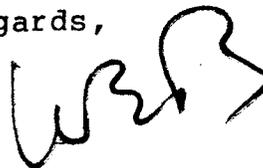
accordance with the kind of power claimed and the frequency of occasions for the exercise of the asserted authority.

(3) Add the following just after footnote 55 on the same page:

To the extent that the [dicta in] Kent might be read to hold that evidence of longstanding Executive policy or construction is not probative of congressional acquiescence, Kent is hereby modified.

I will not make any of these changes until I have heard from you, and I will then know whether to consult with my "joins" on these changes.

Regards,



Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 22, 1981

Re: No. 80-83 - Haig v. Agee

Dear Harry:

Many thanks for your note of June 22.

On balance, given the date, I think I'll let it stand.

Regards,

A handwritten signature in black ink, appearing to be 'W. B.', written in a cursive style.

Justice Blackmun

26, 27

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Sotomayor
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 22 1981

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-83

Alexander M. Haig, Jr., Secretary of State of the United States, Petitioner,
v.
Philip Agee. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.
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.

I
A

Philip Agee, an American citizen, currently resides in West Germany.¹ From 1957 to 1968, he was employed by the Central Intelligence Agency. He held key positions in the division of the Agency that is responsible for covert intelligence gathering in foreign countries. In the course of his duties at the Agency, Agee received training in clandestine operations, including the methods used to protect the identities of intelligence employees and sources of the United States overseas. He served in undercover assignments abroad and came to know many Government employees and

¹ Agee has been deported from Great Britain, France, and the Netherlands. P. Agee & L. Wolf, eds., Dirty Work: The CIA in Western Europe 286-300 (1978).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 22, 1981

MEMORANDUM TO THE CONFERENCE

No. 80-83, Haig v. Agee

Attached are pages 24 and 25 of my 4th draft with some changes I intend to make and an insert for page 25. These changes were, of course, prompted by Potter's helpful suggestions today.

Regards,

Handwritten signature in black ink, appearing to be "W S D" with a long horizontal stroke extending to the right.

80-83—OPINION

24

HAIG v. AGEE

was not the least restrictive alternative available: "The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe." *Id.*, at 514.

Speech is but one component of Agee's "campaign to fight the United States CIA." In that sense, this case contrasts markedly with the facts in *Kent* and *Aptheker*.⁵⁷ No presumptions, rebuttable or otherwise, are involved, for Agee's conduct in foreign countries presents a serious danger to American officials abroad and serious danger to the national security.⁵⁸

We hold that the policy announced in the challenged regulations is "sufficiently substantial and consistent" to compel the conclusion that Congress has approved it. See *Zemel*, 381 U. S., at 12.

III

Agee also attacks the Secretary's action on three constitutional grounds: first, that the revocation of his passport impermissibly burdens his freedom right to travel; second, that the

⁵⁷ The same is true of *Dayton v. Dulles*, 357 U. S. 144 (1958), the companion case to *Kent*. In *Dayton*, the Secretary refused to issue a passport to a physicist who sought to go to India to engage in experimental research. The Secretary relied on the applicant's "connection with the Science for Victory Committee and his association at that time with various communists," and on his "association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government." *Id.*, at 146. Although reserving the question of "[w]hether there are undisclosed grounds adequate to sustain the Secretary's action," this Court held that the Secretary's "Decision and Findings" showed "only a denial of a passport for reasons which we have today held to be impermissible," citing *Kent*. *Id.*, at 150. The "Decision and Findings," set out in the Appendix to the Court's opinion, *id.*, at 150-154, does not cite a single instance of Dayton's conduct, as distinguished from mere support for "the Communist movement" or association with known Communists.

⁵⁸ See pp. 1-5, and nn. 1-8, *supra*.

pp. 24-27
and stylistic changes

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

5th DRAFT From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 80-83

Recirculated: JUN 25 1981

| | | |
|--|---|---|
| Alexander M. Haig, Jr., Secretary of State of the United States, Petitioner, v. Philip Agee. | } | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. |
|--|---|---|

[June —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

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.

I

A

Philip Agee, an American citizen, currently resides in West Germany.¹ From 1957 to 1968, he was employed by the Central Intelligence Agency. He held key positions in the division of the Agency that is responsible for covert intelligence gathering in foreign countries. In the course of his duties at the Agency, Agee received training in clandestine operations, including the methods used to protect the identities of intelligence employees and sources of the United States overseas. He served in undercover assignments abroad and came to know many Government employees and

¹ Agee has been deported from Great Britain, France, and the Netherlands. P. Agee & L. Wolf, eds., *Dirty Work: The CIA in Western Europe* 286-300 (1978).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

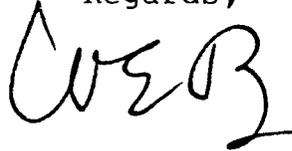
June 26, 1981

MEMORANDUM TO THE CONFERENCE

No. 80-83, Haig v. Agee

I do not intend to make any changes in response to Bill Brennan's changes circulated today. Absent dissent, this case will come down Monday.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 27, 1981

RE: No. 80-83 Muskie v. Agee

Dear Potter and Thurgood:

Potter passed at conference and Thurgood and I voted to affirm. I plan to write to affirm after the Chief circulates for the Court.

Sincerely,

Bill

Mr. Justice Stewart

Mr. Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

June 2, 1981

RE: No. 80-83 Haig v. Agee

Dear Chief:

I expect that I'll be writing in dissent in the
above but I will not attempt one until you recirculate.

Sincerely,



The Chief Justice
cc: The Conference

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

Haig v. Agee, No. 80-83

From: Mr. Justice Brennan

Circulated: JUN 18 1981

JUSTICE BRENNAN, dissenting:

Recirculated: _____

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 rather has departed from the express holdings of those decisions, I dissent.

I

Respondent Philip Agee, a United States citizen residing in West Germany, is a former employee and current critic of the Central Intelligence Agency (CIA). Respondent writes and speaks out extensively on United States clandestine intelligence operations, with the stated goal of abolishing the CIA. Part of his activity apparently involves the identification of United States undercover personnel situated throughout the world.

On December 23, 1979, the United States Consul General in Hamburg, West Germany, delivered a letter¹ to respondent

¹ The letter stated in pertinent part:

"The Department's action is predicated upon a determination made by the Secretary under the provisions of Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious

✓

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

1, 110-12

Mr. Justice Brennan
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From Mr. Justice Brennan
Circuit Court
District of Columbia

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-88

| | | |
|---|---|---|
| Alexander M. Haig, Jr., Secretary of State of the United States, Petitioner, <i>v.</i> Philip Agee. | } | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. |
|---|---|---|

[June —, 1981]

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.

I

Respondent Philip Agee, a United States citizen residing in West Germany, is a former employee and current critic of the Central Intelligence Agency (CIA). Respondent writes and speaks out extensively on United States clandestine intelligence operations, with the stated goal of abolishing the CIA. Part of his activity apparently involves the identification of United States undercover personnel situated throughout the world.

On December 23, 1979, the United States Consul General in Hamburg, West Germany, delivered a letter¹ to respond-

¹ The letter stated in pertinent part:
 "The Department's action is predicated upon a determination made by the Secretary under the provisions of Section 51.70 (b) (4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early

✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 26, 1981

RE: Haig v. Agee, No. 80-83

MEMORANDUM TO THE CONFERENCE

I have sent the following substitution for the last footnote in my dissent to the printer, in response to the Chief's changes.

Bill

The Conference

NEW FOOTNOTE

Because I conclude that the regulations are invalid as an unlawful exercise of authority by the Secretary under the Passport Act of 1926, I need not decide the important constitutional issues presented in this case. However, several parts of the Court's whirlwind treatment of Agee's constitutional claims merit comment, either because they are extreme oversimplifications of constitutional doctrine or mistaken views of the law and facts of this case.

First, the Court states:

"To the extent the revocation of his passport operates to inhibit Agee, 'it is an inhibition of action,' rather than of speech....Agee is as free to criticize the United States Government as he was when he held a passport--always subject, of course, to express limits on certain rights by virtue of his contract with the Government." Ante, at 27-28 (footnote omitted).

Under the Court's rationale, I would suppose that a 40-year prison sentence imposed upon a person who criticized the Government's food stamp policy would represent only an "inhibition of action." After all, the individual would remain free to criticize the United States Government, albeit from a jail cell.

Respondent argues that the revocation of his passport "was intended to harass, penalize, and deter his criticism of United States policies and practices, in violation of the First Amendment. Brief for Respondent, at 112. The Court answers:

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 23, 1981

Re: No. 80-83, Haig v. Agee

Dear Chief,

Heretofore the Court has taken pains to make clear that while there is a constitutional "right" to interstate travel, there is no such right to international travel. See, e.g., Califano v. Aznavorian, 439 U.S. 170, 176. There is only a constitutional "freedom" to travel internationally--a freedom that may be curtailed within the contours of due process of law.

While I certainly would not insist that this point be made again in the constitutional discussion contained in Part III of your opinion for the Court, I would hope that at least the word "freedom" could be substituted for the word "right" in the last line on page 24 and the second line of the second full paragraph on page 25. If these minor changes are made, I shall be glad to join your opinion for the Court.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 25, 1981

Re: 80-83 - Haig v. Agee

Dear Chief:

This will confirm that I am glad to
join your opinion for the Court.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 29, 1981

Re: 80-83 - Haig v. Agee

Dear Chief,

I have given your circulating draft a preliminary reading, and I thought I should say at this juncture that I had hoped you would also address the constitutional claims that Agee presents in support of the judgment. My notes indicate that several of us, perhaps as many as five, indicated that both statutory and constitutional issues should be dealt with. Having looked at the briefs again, I still feel this way.

Sincerely yours,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 4, 1981

Re: 80-83 - Haig v. Agee

Dear Chief,

I am inclined to agree with John Stevens that we should not decide the sufficiency of the case against Agee apart from his concession which was made for purposes of the motion for summary judgment.

Sincerely yours,



The Chief Justice
Copies to the Conference
cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1981

Re: 80-83 - Haig v. Agee

Dear Chief,

Please join me.

Sincerely yours,

Byron

The Chief Justice
Copies to the Conference
cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 2, 1981

Re: No. 80-83 - Haig v. Agee

Dear Chief:

I await the dissent.

Sincerely,



T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 18, 1981

Re: No. 80-83 - Haig v. Agee

Dear Bill:

Please join me in your dissent.

Sincerely,

JM

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

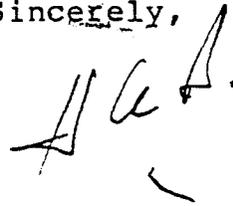
May 29, 1981

Re: No. 80-83 - Haig, Secretary v. Agee

Dear Chief:

I, too, feel that we should address the constitutional claims.

Sincerely,

A handwritten signature in black ink, appearing to be 'H. A. Blackmun', written in a cursive style.

The Chief Justice

cc: The Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 19 1981

Recirculated: _____

No. 80-83 - Haig v. Agee

JUSTICE BLACKMUN, concurring.

There is some force, I feel, in JUSTICE BRENNAN's observations, post at _____, that today's decision cannot be reconciled fully with all the reasoning of Zemel v. Rusk, 381 U.S. 1 (1965), and, particularly, of Kent v. Dulles, 357 U.S. 116 (1958), and that the Court is cutting back somewhat upon the opinions in those cases sub silentio. I would have preferred to have the Court disavow forthrightly the aspects of Zemel and Kent that may suggest that evidence of a long-standing Executive policy or construction in this area is not probative of the issue of congressional authorization. Nonetheless, believing this is what the Court in effect has done, I join its opinion.

4
June 22, 1981

Re: No. 80-83 - Haig v. Agee

Dear Chief:

This is in response to your letter of June 19. I do appreciate your willingness to accommodate my concerns. You, however, already have a Court, and I have no way of knowing whether the proposed changes would be acceptable to those who have joined you. In addition, I am not convinced that the language in Kent is dicta, and thus I am somewhat reluctant to join the proposed addition to footnote 55 describing it as dicta.

I am willing to have the opinion come down in the form circulated on June 17 together with my little concurrence. After all, I do join the opinion. On the other hand, if you wish to make the proposed changes outlined in your letter of June 19, you will probably force Bill Brennan to revise his dissent somewhat.

Sincerely,

HAB

The Chief Justice

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Powell
 Mr. Justice Blackmun
 Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: _____ 22 1981

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-83

Alexander M. Haig, Jr., Secretary of State of the United States, Petitioner,
 v.
 Philip Agee.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1981]

JUSTICE BLACKMUN, concurring.

There is some force, I feel, in JUSTICE BRENNAN's observations, *post*, at —, that today's decision cannot be reconciled fully with all the reasoning of *Zemel v. Rusk*, 381 U. S. 1 (1965), and, particularly, of *Kent v. Dulles*, 357 U. S. 116 (1958), and that the Court is cutting back somewhat upon the opinions in those cases *sub silentio*. I would have preferred to have the Court disavow forthrightly the aspects of *Zemel* and *Kent* that may suggest that evidence of a long-standing Executive policy or construction in this area is not probative of the issue of congressional authorization. Nonetheless, believing this is what the Court in effect has done, I join its opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 29, 1981

80-83 Haig v. Agee

Dear Chief:

I agree with Byron that we should address the constitutional issues.

My notes also indicate that five of us indicated at Conference that both the statutory and constitutional issues should be decided. The petition for cert presented only the statutory question, and the courts below did not reach the constitutional question because they decided in favor of Agee on the statutory issue. Yet, Agee's brief here in opposition to the granting of cert, and his brief on the merits, both relied on the First and Fifth Amendments. The Solicitor General also argued these issues.

The issues therefore are properly here and there was a Court to decide them for the government.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1981

No. 80-83 Muskie v. Agee

Dear Chief:

I am with you both on the statutory and constitutional issues.

It seems to me that the change suggested by John, and endorsed by Byron, is unnecessary. The affidavits submitted for and against the summary judgment motion afford - at least for me - more than enough evidence to revoke Agee's passport. See the affidavits of Under Secretary of State for Political Affairs, David D. Newsome; John N. McMahan, Deputy Director for Operations of the CIA, and affidavits in support of Motion for Stay by McMahan and Loren Lawrence, former Ambassador to Jamaica. These affidavits are in the Appendix to the petition for cert.

None of the material facts in the affidavits is refuted or denied. Moreover, counsel for Agee conceded, in an exchange with the District Court, that "Agee was causing or likely to cause serious damage to the national security", and that "there were no facts in dispute." Appendix, 11.

The possibility of a trial resulting in Agee proving, despite his concession, that his conduct had not caused - and indeed was not intended to cause - serious damage to the foreign policy and national security of the United States, is so unlikely as to be deminimis. In view of the undenied documented facts, his concession was

inevitable. I therefore would prefer not to omit language that might bring this litigation to a conclusion.

As to the constitutional issue, I agree with your Part III. I am in favor of brevity (especially at this season of the year), but the treatment of the issue is somewhat more summary than I would have expected.

Sincerely,

Lewis

The Chief Justice

LFP/lab

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 12, 1981

80-83 Haig v. Agee

Dear Chief:

This will confirm that I join your opinion.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 9, 1981

Re: No. 80-83 Haig v. Agee

Dear Chief:

Please join me in your Court opinion circulated
June 5, 1981.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 19, 1981

Re: No. 80-83 Haig v. Agee

Dear Chief:

Your proposed changes indicated in your letter of June 18th are agreeable to me.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 1, 1981

Re: 80-83 - Haig v. Agee

Dear Chief:

Although I obviously cannot comment on the constitutional issue until you circulate your additional writing, I am prepared to join your treatment of the statutory issue with two rather minor qualifications.

In the second sentence in the paragraph in the middle of page 26, you imply that an open assertion of the power at issue by the Executive is essential to a decision in his favor. Frankly, although I agree that the fact that there has been such repeated publication of the policy is helpful, I would decide the case in the same way even without the "openly asserted" element. I would therefore hope you would consider making a modification that omitted the word "essential."

On page 30, I think it may be unwise to decide the sufficiency of the case against Agee apart from his concession for purposes of the motion for summary judgment. You may well be correct that his admission of a breach of the agreement with the CIA would be sufficient, but I should think it would be much more appropriate to reserve judgment on that issue until it has been argued and is necessary for decision. Moreover, I have some lingering doubts about the scope of the holding in Snapp insofar as it relates to this

case. I would therefore hope you would consider omitting the portion of page 30 that follows footnote 60 to the end of that paragraph.

Otherwise, I think the opinion is most persuasive.

Respectfully,

A handwritten signature in cursive script, appearing to be 'J. M.' or similar, written in dark ink.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 11, 1981

Re: 80-83 - Haig v. Agee

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: 11/22/81

Recirculated: _____

80-83 - Haig v. Agee

JUSTICE STEVENS, concurring.

My concurrence in the Court's disposition of Agee's First Amendment claim is based on my understanding that the revocation of his passport rests in part on the Government's disapproval of his "disclosures of intelligence operations and names of intelligence personnel," see ante, at 26. This is a content-based restriction and it is not justified as a "time, place, or manner" restriction. It is, however, sufficiently comparable to the wartime "publication of the sailing dates of transports or the number and location of troops," see Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716, to be unworthy of the protection of the First Amendment. See Young v. American Mini Theatres, 427 U.S. 50, 65-66 (Opinion of STEVENS, J.).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 25, 1981

Re: 80-83 - Haig v. Agee

Dear Chief:

As I am sure you understand, I have joined your most recent circulation and I have withdrawn my separate statement.

Respectfully,



The Chief Justice

Copies to the Conference