

In the

Supreme Court of the United States

EDMUND S. MUSKIE, SECRETARY OF
STATE,

PETITIONER,

V.

PHILIP AGEE,

RESPONDENT.

No. 80-83

Washington, D.C.
January 14, 1981

Pages 1 thru 46



1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----:
3 EDMUND S. MUSKIE, SECRETARY OF
4 STATE, :

5 Petitioner, :

6 v. :

No. 80-83

7 PHILIP AGEE, :

8 Respondent. :
9 -----:

10 Washington, D. C.

11 Wednesday, January 14, 1981

12 The above-entitled matter came on for oral ar-
13 gument before the Supreme Court of the United States
14 at 1:46 o'clock p.m.

15 APPEARANCES:

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

WADE H. McCREE, JR., ESQ.,
on behalf of the Petitioner

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MELVIN L. WULF, ESQ.,
on behalf of the Respondent

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on behalf of the Petitioner -- Rebuttal

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Muskie v. Agee.

Mr. Solicitor General, I think you may proceed when you are ready.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. McCREE: Mr. Chief Justice, and may it please the Court:

This case presents the question whether the President of the United States acting through the Secretary of State has the authority to revoke the passport of an American citizen whose international travel activities concededly have caused and will continue to cause serious damage to the national security and to the foreign policy of the United States.

The jurisdiction of this Court is found in 28 U.S.C. 2254(1), and the facts that give rise to this controversy may be succinctly stated.

For 11 years, from 1957 until 1968, respondent, an American citizen, was employed by the Central Intelligence Agency in the course of which employment he took an oath which this Court considered in *Snepp* recently, not to divulge, except upon prior approval, any information gained in the course of his employment.

1 During the course of his employment he became
2 acquainted with the techniques of intelligence gathering of
3 the Central Intelligence Agency, and learned the identities
4 of many covert operatives who were employed by or utilized
5 by that agency. Many of these persons are still employed
6 abroad by the agency. In 1974 respondent publicly announced
7 his intention to disrupt and to destroy the Central Intelli-
8 gence Agency.

9 I'd like to direct the Court's attention to Footnote
10 2 on page 3 of our brief in which, in an extraordinary press
11 release in London on October 3, 1974, he said -- and I'll
12 just mention the first paragraph:

13 "Today I announced a new campaign to fight the
14 United States CIA wherever it is operating. This
15 campaign will have two main functions: First, to
16 expose CIA officers and agents and to take the mea-
17 sures necessary to drive them out of the countries
18 where they are operating; secondly, to seek within
19 the United States to have the CIA abolished."

20 QUESTION: Is that in the record?

21 MR. McCREE: It's in an affidavit that was filed
22 with cross-motions for summary judgment in the district court.

23 QUESTION: And not controverted?

24 MR. McCREE: And not controverted.

25 QUESTION: So it is in the record.

1 QUESTION: General McCree, when was the respondent
2 issued his passport?

3 MR. McCREE: I believe his passport -- I can't
4 answer that precisely without reference to the record, but
5 his passport was issued, I believe, before he terminated his
6 employment, which would be 1968, because -- I'm not certain.

7 QUESTION: Before the issuance of the press release?

8 MR. McCREE: Before the issuance of the press
9 release. But I can't tell you specifically, Mr. Justice
10 Rehnquist. I can furnish that if it becomes relevant.

11 The respondent has traveled abroad extensively from
12 his current residence in the Federal Republic of Germany,
13 and is purported to identify CIA agents, employees, and
14 sources in several countries. These activities have resulted
15 in a number of understandable consequences, including his
16 exclusion from four West European countries because of these
17 activities.

18 On one occasion his coauthor of a book in Kingston,
19 Jamaica, identified 15 reported CIA agents whose homes -- the
20 homes of two of which were violently attacked by armed men
21 subsequent to the disclosure.

22 QUESTION: General McCree, may I ask you this ques-
23 tion, which perhaps I ought to know the answer to but don't.
24 What is the purpose of a passport? It's been my own exper-
25 ience in the couple of times I've been abroad other than in

1 the Army that you don't need a passport to get out of this
2 country.

3 MR. McCREE: A passport is currently required both
4 to enter and to leave the United States under an Act of Con-
5 gress in 1978, unless the President provides otherwise by
6 rule. And he has provided otherwise by rule with reference
7 to any country, I believe, in this hemisphere except Cuba,
8 and certain Western European countries do not require it
9 either. But there is such a statute --

10 QUESTION: And with reference, I think, to all
11 members of the Armed Services who leave the country under
12 orders, because they're ordered to.

13 MR. McCREE: And that would of course --

14 QUESTION: A soldier doesn't need a passport.

15 MR. McCREE: Of course he does not.

16 QUESTION: To be sent to West Germany.

17 MR. McCREE: And that's, of course, not inconsis-
18 tent, either, with the presidential rule which exempts non-
19 military personnel from leaving the country.

20 QUESTION: Do you think that if the President
21 should appoint Mr. X as his ambassador plenipotentiary to the
22 Middle East and direct the Secretary of State who is his
23 employee to issue a passport to him, that Congress could pro-
24 hibit the issuance of that passport?

25 MR. McCREE: I think not, and I'm confident he

1 could not, and it may be that there is a general rule which
2 would exclude a person. Certainly, the authorization vested
3 in the President in the Travel Control Act of 1978 would more
4 than cover that, because the President can exempt from the
5 operation of this statute, which forbids departure and reen-
6 try without a passport, according to rules and regulations
7 that he might promulgate.

8 There are -- to reply to Mr. Justice Rehnquist's
9 first question, the passport as I understand it serves two
10 purposes. First, the purpose of identifying the bearer as a
11 citizen or a national of the issuing nation; and second, to
12 request free passage for him from a foreign nation as well as
13 the efforts of the foreign nation to facilitate his travel.

14 QUESTION: In its origins, Mr. Solicitor General,
15 was it not in effect a letter of introduction from the
16 President of the United states?

17 MR. McCREE: It was essentially that, Mr. Chief
18 Justice.

19 QUESTION: And are there not extant passports given
20 190 and 180 years ago that were personally signed by the
21 President?

22 MR. McCREE: There very well may have been because
23 before 1856 the Congress did not enter this area of passport
24 control at all. Before 1856, the first passport act, the
25 President of the United States, the Secretary of State, and

1 indeed other persons, including governors, mayors, and in
2 some instances notaries public executed, issued passports,
3 and the purpose of the Act of 1856, as we point out in our
4 brief, was to restrict the issuance just to the Secretary of
5 State, acting under the President of the United States, under
6 such rules and regulations as he might promulgate.

7 QUESTION: But even after 1856, for many years,
8 almost a century or more, a passport was not a travel control
9 document as such, was it?

10 MR. McCREE: That's exactly right, and except in
11 time of war, there were few instances when it occurred.
12 As we show historically in our brief, in the War of 1812, for
13 example, for the first time that we could trace, a passport
14 was required for travel control, and this applied to persons
15 who had crossed the enemy lines. I think this was in 1815.

16 The second time I believe it happened was at the
17 time of the Civil War, when again a travel control statute
18 was enacted. The third time was 1918, just after the First
19 World War, when again a travel control statute was issued.

20 And part of our argument, of course, is that when
21 these travel control statutes -- and I could take the others
22 from 1918. There was 1941, and 1952, and then 1978. When
23 each of these travel control statutes was passed, they assumed
24 that the President would be issuing and refusing to issue
25 passports, because a travel control act would not make

1 sense to require a passport if it didn't emanate from some-
2 place, nor would it make sense if there was not the power to
3 revoke or, indeed, to decline its issuance.

4 And we contend that this is evidence that the
5 Congress intended the Secretary of State to have the authority
6 which we insist he possessed here to revoke respondent's
7 passport.

8 QUESTION: Well, on the other hand, you can kind of
9 turn that argument around and say that so long as a passport
10 was no more than a letter of introduction, so to speak,
11 that maybe it was in the discretion of the President not to
12 give such a letter to anybody whose morals he didn't like,
13 but it wouldn't affect that person very much.

14 MR. McCREE: That's correct, and there have been
15 instances when the President has endeavored to do that, just
16 because he didn't approve of someone's political beliefs,
17 for example.

18 QUESTION: Right.

19 MR. McCREE: And that's the Kent case, where this
20 Court without reaching the constitutional contention that
21 was made there, held that a passport could not be denied a
22 person because of his political affiliation. And later when
23 the Congress attempted to do that, in Aptheker and Dayton
24 this Court determined that it was unconstitutional to do it.

25 We're not contending for thought control, or the

1 control of associations here. We're contending that when
2 a citizen's activities, not his thoughts, abroad are causing
3 or are likely to cause serious damage to the national secu-
4 rity and the foreign policy of the United States, that the
5 President has the power not to issue the passport or, if
6 having issued it, to revoke it.

7 That's exactly what happened in this case when in
8 December, 1979, just a month after the seizure of the hostages
9 in Teheran, and after this extraordinary statement at a press
10 conference by the respondent, the Secretary of State notified
11 respondent that his passport had been revoked and told him
12 that he was entitled to a hearing under the appropriate regu-
13 lation, and offered to hold an expedited hearing in West
14 Germany where respondent lives.

15 QUESTION: And in this case the effect of the
16 revocation of the passport was to bring the man home and
17 make him stay there? To his home, back in our country?

18 MR. McCREE: This would be the purpose of it. Or
19 certainly to deprive him --

20 QUESTION: And that wouldn't have been the effect
21 of the revocation of a passport in the 19th century?

22 MR. McCREE: Without a travel control; that's cor-
23 rect.

24 QUESTION: In the 19th century?

25 MR. McCREE: Without a travel control statute,

1 concomitant travel control statute, which we say must be con-
2 sidered in pari materia with this passport control.

3 QUESTION: What, as a practical matter, happened
4 when it was revoked? Did he turn it in and did he come back
5 to the United States? Does the record tell?

6 MR. McCREE: I'm advised that he went to the con-
7 sulate where he tendered it for validation, and it was taken
8 up by the employee at the consulate, and he was given instead
9 an identification card which would permit him to return home,
10 but he cannot use for extended travels, and so physically
11 his passport has been cancelled.

12 QUESTION; But isn't the question whether he can
13 use that card for extended travel a question of whatever law
14 he, the country he seeks to travel to or from?

15 MR. McCREE: It may be, because another country
16 can of course, a sovereign country can have its own --

17 QUESTION: As far as American law is concerned, the
18 only thing that -- it doesn't prejudice his ability to come
19 back to the United States, and apparently he doesn't want to
20 do that.

21 MR. McCREE: That's -- well, he may want to do that
22 but in any event he could not --

23 QUESTION: But if he did he couldn't get out again?

24 MR. McCREE: He would not get out again. Also,
25 it does not identify him as a person who is entitled to the

1 protection of the United States in that country. And it's
2 -- anyone who's -- as of course the members of the Court have
3 done, who have traveled internationally, recognize that it's
4 better to be with a passport than without a passport. That's
5 the issue -- but that's the only sanction which has been im-
6 posed upon him for these activities here.

7 QUESTION: Mr. Solicitor General, is there a speci-
8 fic statute which permits revocation?

9 MR. McCREE: There is no specific -- there is not.
10 No, sir. There is not. In 1926, July 3, the last of the
11 series of statutes authorizing the President of the United
12 States or the Secretary of State to issue passports, in ac-
13 cordance with rules and regulations, does not contain either
14 the power to refuse or to revoke --

15 QUESTION: How long has there been a regulation
16 which permits the Secretary to revoke?

17 MR. McCREE: We -- in our --

18 QUESTION: There is now one, I take it?

19 MR. McCREE: Yes, the current one, I believe, was
20 enacted in 1968, but there have been regulations and rules
21 of the Department of State going back before the statute of
22 1856.

23 QUESTION: With respect to revocation?

24 MR. McCREE: With respect to denial and revocation.

25 QUESTION: Covering both?

1 MR. McCREE: Some of them. We have instances in
2 our brief. For example, on page 25 of our brief, where we
3 discuss the Passport Act of 1856.

4 QUESTION: Well, has -- when was the Travel Act
5 passed, 8 U.S.C. 1185?

6 MR. McCREE: The current one was July 3, 1926. But
7 it's --

8 QUESTION: And have there been, was there --

9 MR. McCREE: It's the successor of the Act of 1856.

10 QUESTION: And have there been -- has that been
11 reenacted since 1926?

12 MR. McCREE: It has not. The current Act is the
13 1926 Act, the Passport Act.

14 QUESTION: But prior to that, or at least since
15 that, there have been, you say, express regulations permit-
16 ting revocation?

17 MR. McCREE: Since that there have been several
18 regulations and rules promulgated.

19 QUESTION: And before that?

20 MR. McCREE: And before that. We set some of them
21 out on page 25 of our brief, and 26; again on page 29 and 30
22 of our brief; again on pages 35 and 36 of our brief.

23 QUESTION: And what about the 22 U.S.C. 211(a)
24 which authorizes the Secretary to grant passports? Has that
25 been reenacted recently?

1 MR. McCREE: Not since 1926. But as we show --

2 QUESTION: Has it been amended since?

3 MR. McCREE: It has not. But as we show -- it has
4 not been amended with reference to the claimed authorization
5 here. It has been amended, I believe, insofar as it pertains
6 to area, to permissible areas, where the holder of a passport
7 can go.

8 QUESTION: Well, hasn't the process, though, for
9 issuing passports been revised in the last 20 years?

10 MR. McCREE: Oh, from time to time there have been --

11 QUESTION: I mean, don't you -- didn't you used to
12 be able to get it at some district courts -- ?

13 MR. McCREE: Oh, yes, it's been changed several
14 times, and our point, and our argument is, that with the
15 changes, as Mr. Justice White has pointed out, where the
16 delegated power to be issued from courts to passport offices
17 and so forth, the Congress being aware of this practice by
18 the Secretary of State has never seen fit to withdraw the
19 power to deny the issuance on the one hand, or to deny the
20 power to revoke a passport once issued on the other, for the
21 reason involved here, and that is the national security of
22 the country, which --

23 QUESTION: Do you think that the Congress would have
24 the authority to do that? Take this hypothetical, that the
25 Congress decides that there are just too many people leaving

1 the country and traveling around and as a result we're having
2 to provide too much protection in the way of military force
3 abroad, because they're getting into trouble. So we don't
4 want anybody leaving the country and therefore we forbid the
5 issuance of passports. Do you think --

6 MR. McCREE: That would raise a constitutional
7 question, at a minimum, because this Court has held that the
8 right to international travel is a constitutionally protected
9 right, although entitled to lesser protection than intrastate
10 travel.

11 QUESTION: It's also held in Curtiss-Wright that
12 the President is the sole organ of execution in the area of
13 foreign affairs, is it not?

14 MR. McCREE: Well, that, of course, is the separa-
15 tion of powers argument, which would also be involved were
16 there to be such a situation as the Court has propounded.

17 QUESTION: Well, I gather, Mr. Solicitor General,
18 that as to the subject of revocation, insofar as there are
19 any constitutional implications, it's irrelevant that Congress
20 has not expressly given the Secretary of State power to
21 revoke?

22 MR. McCREE: Well, I would contend that. But we
23 are not claiming for the purposes of this litigation the
24 inherent power to revoke, because we --

25 QUESTION: Well, you're not suggesting either, are

1 you, that the power to revoke depends upon some statutory
2 authority?

3 MR. McCREE: Not at all, but we're willing to
4 address this question as the Court of Appeals addressed it,
5 which was to see whether the Congress impliedly granted the
6 authority to revoke when it granted the authority to grant.

7 QUESTION: And so far, at least, knowing that
8 there were such regulations, it never did anything to --

9 MR. McCREE: It never took any steps.

10 QUESTION: In any way modify or repeal them or
11 anything else?

12 MR. McCREE: It never did with reference to either
13 of these matters.

14 QUESTION: And it most recently amended the statute
15 in 1978, didn't it?

16 MR. McCREE: In 1978 it amended the Travel Control
17 Act.

18 QUESTION: And also limited the Secretary's power --

19 MR. McCREE: And limited the area --

20 QUESTION: On area restrictions.

21 MR. McCREE: And it did not do this, being fully
22 aware of these matters.

23 QUESTION: So that the statutory authority is
24 requisite; if it is at all, it's there.

25 MR. McCREE: This is certainly our contention.

1 The court below followed that analysis to see whether there
2 was congressional grant of authorization by implication, be-
3 cause concededly it is not expressly there, and it found
4 that there was not because there was not what it regarded as
5 a consistent and unequivocal practice, which we believe is
6 just blinking at the history which we set forth in our brief,
7 and which the dissenting judge on the Court of Appeals for
8 the District of Columbia set forth with great feeling in his
9 dissenting opinion.

10 The court below did not reach the constitutional
11 questions that respondent raised, and we don't think these
12 constitutional questions are substantial. Respondent here
13 is not being punished for speech or association, but for
14 activity, for, as he put it best in his own press release,
15 "for seeking to disrupt and destroy."

16 QUESTION: What would you call those activities?
17 Political activities?

18 MR. McCREE: They are political activities and
19 more. They are certainly activities creating serious danger
20 to the national security.

21 QUESTION: Incidentally, in that connection,
22 Mr. Solicitor General, I notice in Footnote 7 of
23 the Court of Appeals' opinion, a footnote at 14a which
24 recites, based on statistics supplied by the Secretary,
25 that in 1955 21 passport applications were refused, and in

1 1956 ten such applications refused because the applicants
2 were "participants in political affairs..." Is there
3 any record as to what the particular participation was in
4 those instances?

5 MR. McCREE: In some instances there are,
6 Mr. Justice Brennan. In others, there are not. There was a
7 period when what is perhaps this century's "communist" and
8 last century's syndicalist or anarchist, where passports
9 were denied for reasons of --

10 QUESTION: Well, Kent v. Dulles rather --

11 MR. McCREE: But Kent -- that's right.

12 QUESTION: Sort of required at that --

13 MR. McCREE: Kent v. Dulles, and Aptheker, and
14 Dayton, threw all of that out.

15 QUESTION: Well, does this case involve something
16 more, like Kent v. Dulles, or are the areas of restriction
17 similar?

18 MR. McCREE: No, this case involves identifying
19 a covert employee, an undercover employee of our intelligence
20 service, and leaving him to the tender mercies of whatever
21 might happen to a person so identified in a country where we
22 haven't the power to protect him.

23 QUESTION: But he did nothing other than words.

24 MR. McCREE: That's correct. He did nothing other
25 than words, but these words were as deadly as bullets.

1 In Kingston, Jamaica, after the coauthor, his coauthor of a
2 book, identified 15 agents, the homes of two of them were
3 attacked violently by armed men, and if words will precipi-
4 tate that and they're uttered with the knowledge that they
5 will --

6 QUESTION: Well, could he be charged with a crime
7 if he were in the United States and said that?

8 MR. McCREE: He might. I suppose a holdup man who
9 says, stick 'em up, and maybe doesn't brandish a gun at all --

10 QUESTION: If he doesn't have a gun, I don't know
11 what crime he committed.

12 MR. McCREE: Well, I don't know, if he puts a per-
13 son in fear of his life and extracts his wallet from him --
14 well --

15 QUESTION: I'm not willing to go that far afield.
16 I'm willing to say, if he talks over here the exact same
17 words he's charged with talking over there, you couldn't do
18 anything to him.

19 MR. McCREE: You might not. But we are not claim-
20 ing that he committed a crime that's indictable, that's an
21 indictable offense. But we're claiming that these are activi-
22 ties that go beyond pure speech. This is not --

23 QUESTION: But that are not punishable here?

24 MR. McCREE: It may not be punishable, we're not
25 contending that it's punishable here, but we're saying that

1 it creates a serious --

2 QUESTION: Then you have to say that taking his
3 passport is not punishment. Don't you have to say that?

4 MR. McCREE: It's a form of punishment, but it's
5 not criminal punishment. It's an implementation of the
6 national security. If this nation cannot have operatives
7 abroad who can keep it advised of intelligence matters that
8 may affect our security, certainly the safety of every one
9 of us is diminished.

10 QUESTION: General McCree, supposing a person
11 right now were to apply for a passport to go to Salvador, and
12 when asked the purpose of his journey, to say, to denounce
13 the United States policy in Salvador in supporting the junta.
14 And the Secretary of State says, I just will not issue a
15 passport for that purpose. Do you think that he can con-
16 sistently do that in the light of our previous cases?

17 MR. McCREE: I would say, yes, he can. Because we
18 have to vest these -- The President of the United States and
19 the Secretary of State working under him are charged with con-
20 ducting the foreign policy of the Nation, and the freedom of
21 speech that we enjoy domestically may be different from that
22 that we can exercise in this context.

23 QUESTION: Well, Kent v. Dulles involved, did it
24 not, preaching communist doctrine?

25 MR. McCREE: But that's quite different, perhaps --

1 QUESTION: I know, but that's why --

2 QUESTION: It involved membership in the Communist
3 Party, didn't it?

4 MR. McCREE: Well, it was both, as I understand it.
5 It was membership and policy --

6 QUESTION: There's a preaching aspect of it, and
7 there, I was thinking about my brother Rehnquist's hypotheti-
8 cal to you.

9 MR. McCREE: Oh, I think --

10 QUESTION: And their preaching communist doctrine
11 he said you couldn't refuse a passport to go and do that.

12 MR. McCREE: Because there was no showing, there
13 was no contention --

14 QUESTION: And the difference from going to Sal-
15 vador?

16 MR. McCREE: There was no contention made that
17 that damaged the national security. Now, if our national
18 security --

19 QUESTION: How is the Salvador one involved in this?

20 MR. McCREE: Well, it just might, because it might
21 be a provocation that would involve us militarily. For exam-
22 ple -- and I'm out of the record in answering this -- but just
23 recently two Americans have been killed in Salvador.
24 Apparently they were some kinds of undercover persons working
25 under the cover of a labor organization, and if this person

1 identified them as not being what they appeared to be but
2 as undercover operatives and it resulted in their deaths, it
3 seems to me a rule that would deprive the President of the
4 United States from --

5 QUESTION: Well, that's something a little differ-
6 ent than Justice Rehnquist's. But even if you couldn't re-
7 trieve a passport for the reason Justice Rehnquist suggests,
8 that doesn't cover this case where the threat is to the lives
9 of other American citizens.

10 MR. McCREE: That's correct, Mr. Justice White.
11 If I may, I would like to reserve the balance of my time, if
12 there is any. Thank you.

13 MR. CHIEF JUSTICE BURGER: Very well, Mr. Solicitor
14 General. Mr. Wulf.

15 ORAL ARGUMENT OF MELVIN L. WULF, ESQ.,

16 ON BEHALF OF THE RESPONDENT

17 MR. WULF: Mr. Chief Justice, and may it please
18 the Court:

19 I'm sorry Justice Rehnquist had to leave because
20 I did just want to start by specifically answering one fac-
21 tual question.

22 QUESTION: He'll be back before you finish your
23 statement.

24 MR. WULF: I just want to answer one question which
25 you asked the Solicitor General that has to do with when

1 Mr. Agee's passport was last renewed. It was last renewed
2 in 1978, which was after that press release, and after his
3 principal book was published in 1975.

4 This case involves the constitutional right to
5 travel.

6 QUESTION: You say renewed. Do you also have the
7 data on when it was issued?

8 MR. WULF: I assume it was issued five years pre-
9 viously thereto; I think five years is now the standard
10 period.

11 QUESTION: Well, your affidavit in the record says
12 it was issued March 30, '73, and expires on March 29, 1983.

13 MR. WULF: That is an error. It was issued in '73.
14 It expired in '78.--

15 QUESTION: And it's been renewed now until '83?

16 MR. WULF: And is renewed --

17 QUESTION: Well, I'm just reading from your affi-
18 davit, that's all.

19 MR. WULF: It must be a typographical error.
20 I know that his passport expired, the one that was revoked,
21 expired, was to expire in 1983. It was issued --

22 QUESTION: That's what you say.

23 MR. WULF: Yes. Oh; I'm sorry. Yes.

24 QUESTION: But you say it was issued on March 30,
25 '73? And do not suggest that it was renewed, but it was?

1 You said --

2 MR. WULF: It was renewed in '78; yes. Because
3 they're only good for five years.

4 This case does involve the constitutional right to
5 travel. According to doctrine by this Court in Kent and
6 Zemel, the power to issue passports is a power that ulti-
7 mately is within the authority of the Congress of the
8 United States, and Congress must authorize either
9 explicitly or implicitly any curtailment on the right to
10 travel. The Government, of course, concedes that there's
11 no explicit authorization in this case, and the task of this
12 Court is to see whether it can divine from the history pre-
13 sented to it by the Government and by ourselves as well whe-
14 ther there is any implicit authorization which has to be based
15 as the Court held in Kent and Zemel on a substantial and
16 consistent administrative practice.

17 I would like to just summarize our argument in a
18 nutshell and then treat each of the separate arguments indi-
19 vidually. Our first argument is that Kent itself disposes
20 of this case, because Kent, taken together with its companion
21 case Dayton, in fact was a case which dealt with matters of
22 national security and foreign policy considerations. It was
23 not merely a case confined to speech and association, as the
24 Government would have the Court see it.

25 Two, should the Court disagree with our analysis

1 about the extent of Kent, then we can show historically that
2 there is a total absence of any substantial and consistent
3 practice, which is required to find that Congress implicitly
4 authorized the regulation involved in this case.

5 Both of those arguments are supported by the fact
6 that after Kent was decided by this Court in 1958, the then
7 Administration tried very, very hard, and very, very unsuc-
8 cessfully to secure legislation which would authorize the very
9 kind of authority which it has exercised in this case against
10 Mr. Agee.

11 And finally, looking around for what the intention
12 of Congress actually is, we come to the amendments in 1978,
13 substantial amendments in 1978, of Section 211(a), which is
14 the fundamental passport authority, and Section 1185, which
15 is the lineal descendent of all of the wartime national
16 emergency provisions.

17 QUESTION: Mr. Wulf, to what extent do you think
18 that Congress can limit the President's authority to revoke
19 or grant a passport to someone whom he has previously issued
20 it to?

21 MR. WULF: According to the decision in Kent, he
22 has plenary -- Congress has plenary authority. The authority
23 resides in Congress, it does not reside in the Executive
24 Branch.

25 QUESTION: Do you think that if the President

1 appoints an ambassador to Italy and trouble comes up in
2 Italy and the President summons the ambassador home, that the
3 ambassador can simply stay in Italy and keep his passport,
4 saying I've got a right to travel and I'm not going to come
5 home?

6 MR. WULF: Well, he can certainly be deposed and --

7 QUESTION: He wouldn't be ambassador for long, I'm
8 sure, but --

9 MR. WULF: Not at all. Yes. I think he can refuse
10 to come home. In that case he would presumably have a
11 diplomatic passport; he might have to turn that one in. He'd
12 be entitled to reissuance of a standard passport if he was
13 no longer ambassador.

14 In 1978, explicitly, Congress expressed what its
15 intentions were, and its intentions there were to withdraw
16 whatever authority the Court had allowed it to exercise in
17 the area of geographical restrictions, in the Zemel case; and
18 secondly, it revoked Section 1185 of the Title VIII, which
19 was the travel control statute, and reversed the purpose of
20 that statute 180 degrees and required, although it still re-
21 quires that passports be used for entry and exit by citizens
22 of the United States, the purpose is not to allow the
23 Executive Branch to exercise travel control over citizens who
24 hold passports, but to facilitate -- and that is explicitly
25 what is in all of the congressional history relating to 1185

1 -- to facilitate travel of American citizens because of the
2 now general requirement abroad that travelers present pass-
3 ports upon entry to foreign countries.

4 QUESTION: Which of our prior cases, Mr. Wulf,
5 would you think presented conduct and acts comparable to
6 that of the respondent here?

7 MR. WULF: I think that Kent involved the same kind
8 of considerations that are involved here. That is to say --

9 QUESTION: Disclosure of national security infor-
10 mation?

11 MR. WULF: Well, the Kent decision, particularly
12 the Kent dissent; and of course we all remember the history
13 of that period when travel by American communists and commun-
14 ist sympathizers was prohibited, during the '50s. All of
15 the expressions, all of the explanations about why that was
16 being done had to do with considerations which were identical
17 to the kind of national security and foreign policy concerns
18 expressed by the Government in this case.

19 QUESTION: Did any of the people involved in any of
20 that litigation get themselves involved in releasing classi-
21 fied information of the United States?

22 MR. WULF: The party in Dayton v. United States,
23 which was a companion case to Kent, the basis on which his
24 passport was refused at that time, which led to the decision
25 here, was that it was thought that he had something to do --

1 and I quote from the charges against him -- something to do
2 with the Rosenberg espionage ring, and that he was at a
3 meeting somewhere in New York where information was prepared
4 for delivery to a foreign nation. There was no charge --

5 QUESTION: Well, that might be suspicion, founded
6 or not founded, but how does that compare with the statements
7 released by Mr. Agee in the London press conference?

8 MR. WULF: Oh, I would think they would be worse,
9 Your Honor.

10 QUESTION: Worse?

11 MR. WULF: The statements that Mr. Agee released
12 are expressions, political expressions which are protected
13 under the First Amendment. There's no First Amendment protec-
14 tion to engage in espionage or sabotage. I think the Dayton
15 case is worse than the Agee case. I don't think the Agee
16 case is bad, but I think that in the Government's terms
17 Dayton is worse.

18 Our brief essentially here today is that given the
19 Government's best case, in its brief, in terms of the histori-
20 cal information which it has provided the Court, that this
21 Court cannot confidently conclude that the Congress has im-
22 plicitly authorized the power which the Government seeks to
23 exercise here, that the Government's best case leaves it very
24 doubtful, leaves it very ambiguous, leaves it very uncertain,
25 about whether the kind of implicit authorization which is

1 required has been found, will be found in this case. And
2 that this Court ought not guess about whether there is any
3 such implicit --

4 QUESTION: Well, might I ask, Mr. Wulf, the same
5 question I asked of the Solicitor General about that informa-
6 tion in Footnote 7 of the Court of Appeals' opinion? Is that
7 the fact, do you know? It's at page 14a of the Petition for
8 Cert. It states that 21 passport applications in '55 and
9 ten passport applications in '56 were refused because the
10 applicants were "participants in political affairs abroad
11 whose activities were deemed harmful to good relations." Do
12 you know what those cases are?

13 MR. WULF: No, I don't know what they are, and
14 neither does the Government, Your Honor, because there's
15 absolutely no explanation about those in the documents where
16 they appear.

17 QUESTION: Well, wouldn't that be significant in
18 terms of the issue you're now arguing if that were so?

19 MR. WULF: I think they are insignificant, Your
20 Honor, because there's no explanation about what they mean.
21 And they're as insignificant as are the other statistics
22 which the Government has provided to the Court, because of the
23 admixture of the kinds of -- I'm looking for the -- because
24 of the different kinds of categories under which those
25 various passports were revoked, or refused. And it's in our

1 brief, what is lumped together, there were in 1955 refusal
2 of passports in six cases. At the same time there were per-
3 sons whose previous conduct abroad has been such as to bring
4 discredit on the United States and cause difficulty for other
5 Americans, gave bad checks, left unpaid debts, had diffi-
6 culties with police, et cetera. There's another category in
7 '56 which refers to --

8 QUESTION: Well, I agree with you, Mr. Wulf, that
9 we're not told how many of those 36-odd were bad check,
10 unpaid debt, difficulty with the police, and that sort of
11 thing. The reason I asked the question was to see if
12 we could find out.

13 MR. WULF: We can't find out, because they --

14 QUESTION: But that same statement says, there were
15 numerous other refusals for security reasons, in addition to
16 the ones that might be harmful to relations.

17 MR. WULF: Well, their saying it isn't proof
18 that it exists, Your Honor, and they can't produce the proof
19 because -- well, they haven't produced it; perhaps they can
20 but they haven't here, and they have to rely on the record
21 which they presented to the Court here. The fact is that I
22 think that those statistics are completely useless because
23 of the totally inadequate description of what they were all
24 about. I mean, if there are 56 such cases, 55 of them could
25 have been for bad checks and one of them might have been for

1 something related to foreign policy and national security.
2 But I think that this Court can't make a decision based upon
3 that kind of data which is just totally insufficient.

4 QUESTION: Am I disqualified to talk --

5 MR. WULF: I'm sorry?

6 QUESTION: -- because I know why one of them was,
7 am I disqualified because I know why one of them was?

8 MR. WULF: No, we won't disqualify Your Honor.

9 QUESTION: You won't?

10 QUESTION: Mr. Wulf, can I ask what your position
11 is with respect to the authority of the Secretary of State
12 to revoke a passport for matters such as writing bad checks,
13 being convicted of crimes, or something of that kind, non-
14 political in context, but is there authority for the Secretary
15 to do it?

16 MR. WULF: I think he doesn't have authority.

17 QUESTION: He does not have?

18 MR. WULF: That's right. If that was done abroad,
19 if it's not a crime within the United States -- it might be,
20 under some statute; I wouldn't want to say conclusively --
21 but if it's according to Kent, there are only two grounds
22 upon which the Executive Branch can refuse to issue passports.
23 One, whether or not the applicant is a citizen; and two, whe-
24 ther the applicant is trying to escape the foils of the law, as the
25 opinion put it. It's pretty clear that what they mean is

1 whether the applicant has committed a crime within the United
2 States.

3 QUESTION: Well, do you agree that that's a proper
4 basis for revocation of a passport, and if so, what's the
5 authority for that?

6 MR. WULF: The authority for that is that Kent
7 found that that was --

8 QUESTION: Did Kent create an authority that did
9 not previously exist?

10 MR. WULF: Kent found the authority when it hadn't
11 been previously looked for.

12 QUESTION: Where did it find it?

13 MR. WULF: In history.

14 QUESTION: In history, rather than in any written
15 regulation or statute?

16 MR. WULF: Absolutely; absolutely. Because the
17 only statute is 211(a) which broadly confers the power to
18 issue passports --

19 QUESTION: I'd sort of like to figure out where
20 the thing started. I mean, where did the original power to
21 revoke for that reason come from? There must have been a
22 first case, when there would have been no prior history to
23 justify it.

24 MR. WULF: There were first cases in the 19th
25 century which are described in one or another of the briefs

1 before the Court.

2 QUESTION: Well, did Kent involve a revocation?

3 MR. WULF: Kent was a refusal. Frankly, I lump
4 them together, Your Honor.

5 QUESTION: Well, I know, so you do say that despite
6 the absence of any express power to revoke in the Secretary,
7 the Secretary at least for some reason may revoke a passport?

8 MR. WULF: I wouldn't deny that. We haven't argued
9 that there's -- we haven't argued a distinction between a
10 refusal to issue and a revocation.

11 QUESTION: And if he can refuse for a reason he can
12 revoke for the same reason?

13 MR. WULF: We wouldn't contest that; no.

14 QUESTION: Well, are you suggesting now, Mr. Wulf,
15 as in Kent, that Mr. Agee's activities have First Amendment
16 protection?

17 MR. WULF: Yes.

18 QUESTION: Well, then you reject --

19 MR. WULF: But I go beyond that, of course, because
20 I think Kent is broader than merely a First Amendment case.
21 We believe that Kent and Dayton, taken together, involve the
22 same kind of national security-foreign relations concerns
23 which are --

24 QUESTION: I know, but what was the constitutional
25 protection for whatever the activities were that were involved

1 in Kent, wasn't it in every instance the First Amendment?

2 MR. WULF: Yes.

3 QUESTION: You reject the Court of Appeals' dis-
4 tinction, then? That although there may be authority not to
5 issue, there is no authority to revoke?

6 MR. WULF: We don't argue the distinction about
7 that, Your Honor.

8 QUESTION: Mr. Wulf, is it your position that the
9 First Amendment protects everything that Mr. Agee is said to
10 have stated in his press release in London in 1974, including
11 the exposing of CIA agents abroad?

12 MR. WULF: Yes, sir. It is our position that that
13 is --

14 QUESTION: There is no First Amendment in that
15 there's no written constitution in England.

16 MR. WULF: Oh, it's protected with respect to
17 American law.

18 QUESTION: Of course.

19 MR. WULF: Yes.

20 QUESTION: But even if exposing the agents, as the
21 Solicitor General has argued, resulted in their death, is that
22 a proper exercise of the First Amendment?

23 MR. WULF: There is no claim at all here that his
24 revelations have resulted in anybody's death. In fact,
25 there's a specific disclaimer in one of the affidavits that's

1 in the record that nothing that he has said has resulted in
2 the death or injury of any member of the CIA. And that's at
3 116a of the Petition for Cert.

4 QUESTION: I'm not suggesting that there is proof
5 of an agent dying as a result of Mr. Agee's disclosures; I
6 just don't know. But I would think the occupation is suffi-
7 ciently hazardous without having one's name publicly revealed.

8 MR. WULF: Well, as you presumably know, Your Honor,
9 there has been attempts continually being made for the last
10 year or two in Congress to adopt a statute which would make
11 it a crime to identify CIA and other covert action --

12 QUESTION: It's very difficult to draw that sort of
13 legislation.

14 MR. WULF: And the Congress has been unsuccessful
15 in doing it, and no bill has been acted on, no statute has
16 been adopted.

17 QUESTION: But if it adopted --

18 MR. WULF: Until then, if such a statute should be
19 adopted, I dare say that the question of constitutionality will
20 be here soon enough. In the meantime, I believe that that
21 kind of identification is indeed protected by the First
22 Amendment.

23 QUESTION: Well, Mr. Wulf, suppose that --

24 QUESTION: Even if the statute is otherwise valid?
25 Not void for vagueness? The First Amendment protects a right

1 to disclose publicly secret agents of the United States wher-
2 ever they may be? That's your position?

3 MR. WULF: In general that is my position.
4 In particular, I would say that Mr. Agee, like Mr. Snepp,
5 would be subject to the same terms of the secrecy agreement,
6 to the same terms of the secrecy agreement that he executed.
7 And in fact, he is now subject to that agreement. There is
8 an injunction outstanding against him, which he is complying
9 with. So whatever -- as of the past few months. So what-
10 ever may have been the case before then, he is now bound by
11 that injunction.

12 QUESTION: Mr. Wulf, suppose then that Mr. Agee or
13 somebody else applies for a passport and he says, I know I'm
14 subject to a secrecy agreement but I want to go to England
15 and reveal the names of people that I am forbidden to reveal
16 here, and if I go to England I can do it and probably get
17 away with it. But I fully intend to breach my contract by
18 going abroad. And the Secretary says, well, awfully sorry,
19 you're subject to the agreement and you're not going to get a
20 passport.

21 MR. WULF: I would think that that's not the remedy.
22 The remedy is not to deprive him of a passport. The remedy
23 is to proceed on a contempt citation against him under the
24 injunction.

25 QUESTION: Once he's in England. Once he's in

1 England.

2 MR. WULF: When he comes back, if he comes back.

3 QUESTION: Well, how can actions taken in England
4 violate the law of the United States?

5 QUESTION: Suppose he killed somebody at the press
6 conference, could he be prosecuted over here?

7 MR. WULF: No.

8 QUESTION: That's a violation of the law of Great
9 Britain.

10 MR. WULF: Yes.

11 QUESTION: Mr. Wulf, I don't think you've answered
12 Mr. Justice Stewart or Justice White.

13 MR. WULF: Well, the answer is that if he has so
14 conducted himself that he is not -- has committed a crime
15 which is only a crime by the law of a foreign state, he
16 can't be, he cannot be prosecuted here.

17 QUESTION: Well, suppose it's not a crime by the
18 law of the foreign state? I think that's Justice Stewart's
19 question.

20 MR. WULF: If it's a crime by the law of the United
21 States, he can be prosecuted here, of course.

22 QUESTION: Even though the conduct's committed
23 abroad, where it's not a crime?

24 MR. WULF: It might in some circumstances. I think
25 there are some extraterritorial problems --

1 QUESTION: Well, if it were, if Congress did pass
2 the law you referred to and made it a crime to do that, and
3 a person applied for a passport and the Secretary says,
4 what are you -- somehow the Secretary knew and he freely
5 conceded that he was going to go abroad and break that law,
6 could he refuse a passport?

7 MR. WULF: I said I do not believe so, and I believe
8 his remedy is in the criminal law, or if there's an injunc-
9 tion, for contempt.

10 QUESTION: Get an injunction before he gets on the
11 plane.

12 MR. WULF: Perhaps they can get an injunction to en-
13 force the injunction against him prohibiting him from re-
14 vealing information. But apart from that, I believe that
15 there is no authority to withhold his passport.

16 QUESTION: And you think that the in personam
17 restraint of an American court injunction would follow him in
18 London or Beirut or wherever? An in personam --

19 MR. WULF: It might well, it might well. I could
20 see that kind of an injunction which is breached abroad
21 being basis for a contempt citation here.

22 QUESTION: Mr. Wulf, putting to one side --

23 MR. WULF: That wouldn't shock me very much. I must
24 say, though, that this concentration on the facts of this
25 particular case, I beg your leave, doesn't have anything to

1 do really with the issue which is before the Court. I mean,
2 I can understand why the Government has concentrated on the
3 facts in this case in trying to make --

4 QUESTION: Mr. Wulf, let's put these facts to one
5 side for a moment and put to one side cases in which there are
6 preexisting contracts restraints or violations of law; just
7 the conduct of an American citizen while abroad. Does the
8 United States have any control over what a citizen may do
9 other than by trying to restrict his right to travel by re-
10 voking his passport? If it has any. Maybe it has none,
11 which is essentially your position --

12 MR. WULF: I think it has none unless there is an
13 extraterritorial crime has been committed.

14 QUESTION: But if it has, other than extraterri-
15 torial crime, which is a rather -- there are instances, of
16 course, but other than that, if it is to impose any meaning-
17 ful control over what our citizens abroad may do that may
18 impact on national security or anything else, it must be
19 through this device, must it not?

20 MR. WULF: Yes, it must be. But the issue today is
21 whether Congress declares that it will be. I mean, that's the
22 issue today.

23 QUESTION: Well, I know, but precisely, the issue
24 is whether the regulation issued pursuant to the statute that
25 Congress did enact was within the power of the President as

1 delegated to the Secretary of State under that statute.

2 MR. WULF: No, I disagree. The issue is, whether
3 there was any authority for the regulation at all.

4 QUESTION: The regulation purports to have been
5 issued pursuant to the statute which says, it gives the power
6 initially to the President, and he's redelegated it to the
7 Secretary of State.

8 QUESTION: Well, Mr. Wulf, you would like to put
9 Mr. Agee in the same category as any other citizen, and treat
10 him like any other citizen. I would think you might win with
11 any other citizen and still lose about Mr. Agee. The logic
12 would be because he is subject to an agreement which you agree
13 binds him.

14 MR. WULF: Well, I don't think that that has any
15 bearing at all, Your Honor.

16 QUESTION: I know you don't but he isn't, in that
17 regard he's not like just any other citizen.

18 MR. WULF: For purposes of travel I believe he is
19 like any other citizen, and I don't see how --

20 QUESTION: Well, other citizens aren't subject to
21 the agreement, though. At least you have to concede that.

22 MR. WULF: I concede that, but I also would argue
23 that that agreement is subject to independent enforcement,
24 which has no bearing on the question, the basic question here
25 about congressional authorization. I mean, obviously,

1 I would like you all to forget about the facts of the Agee
2 case, and I think that you have to and --

3 QUESTION: I suppose you'd take --

4 MR. WULF: -- in terms of what the issue is before
5 you.

6 QUESTION: I suppose you'd take the same position
7 if the secrecy agreement said, nor will I travel abroad to
8 do so?

9 MR. WULF: I might take a different position, but
10 it doesn't say that, of course, so I don't have to take any
11 position.

12 QUESTION: I take it all of your answers exclude
13 "in time of declared war"?

14 MR. WULF: We don't deny that in times of declared
15 war there can be restrictions, limitations imposed on travel
16 which would not be unconstitutional, and of course Congress
17 has adopted such legislation in 1918, 1941, and related
18 legislation in 1952. But none of that is in effect now, of
19 course, including the 1952 legislation, since that national
20 emergency is no longer in effect. There is no national
21 emergency.

22 Our second argument, of course, goes to the ques-
23 tion whether there is any proof presented, historical proof
24 presented to you by the Government which would persuade you
25 that there is the necessary consistent history of

1 administrative practice which is necessary to find authori-
2 zation.

3 QUESTION: How many times in the past have there
4 been conduct that is directly comparable to this by an
5 American passport holder? You were talking about a history,
6 so, if the events never occurred, there wouldn't be any his-
7 tory. Are there others?

8 MR. WULF: Well, the Government describes seven
9 in its brief, extending from 1906 to 1970, and then, of course,
10 it also lumps together those other --

11 QUESTION: Twenty-odd.

12 MR. WULF: Well, there were 62 in their opening
13 brief. It turns out to be 100 in their reply brief, of those
14 nondescript cases out of the statistics. Specifically they
15 refer to seven cases in the last 75 years which they claim
16 as the basis for their support of an administrative practice.
17 They're in the brief and it was only one of them, in 1970,
18 which was in fact under the same regulation. The others
19 weren't under any regulation at all, as a matter of fact. It
20 was -- they were just under the claimed discretion of the
21 Secretary of State.

22 As I said in opening, I think that these examples
23 of administrative practice presented to the Court by the
24 Government are far too ambiguous, far too uncertain a basis
25 upon which this Court ought to rest its judgment that they

1 will find implicit authorization. I think that that --

2 QUESTION: Implicit authorization to do what?

3 MR. WULF: Implicit authorization for the regula-
4 tion applied here against Mr. Agee.

5 QUESTION: You mean, to revoke for these reasons?

6 MR. WULF: To refuse passports --

7 QUESTION: Because you agree that there is a power
8 to revoke?

9 MR. WULF: Yes. Yes.

10 QUESTION: For the right reasons?

11 MR. WULF: Quite; quite right.

12 QUESTION: And there's a historical practice of
13 revoking --

14 MR. WULF: Yes.

15 QUESTION: But not for the reasons claimed?

16 MR. WULF: Precisely; yes. And with that --
17 and the Court ought not make that decision on the basis of
18 the evidence here. That decision ought to be, the Court
19 ought to require, in light of the fact that this is a consti-
20 tutional right, that Congress exclusively say what its in-
21 tentions are with respect to this kind of power which is
22 asserted in the regulation before the Court.

23 QUESTION: Well, anyway, Mr. Wulf, you would argue
24 that if there were explicit statutory authorization to re-
25 voke for this kind of conduct, the statute to that extent

1 was unconstitutional because this kind of conduct has First
2 Amendment protection?

3 MR. WULF: I would make that argument, but then we
4 would deal squarely with the constitutionality in First
5 Amendment terms of the authority which was concededly granted
6 to the Executive Branch. But today we don't believe that
7 that authority exists. I think that the 1978 amendments
8 really settle this case.

9 There Congress revoked what authority this Court
10 had given to the Government in the Zemel case regarding
11 geographical restrictions, which certainly shows an intent to
12 withdraw whatever authority the Executive Branch had with
13 respect to national security and foreign policy considera-
14 tions. We believe that the decision below should be affirmed.

15 MR. CHIEF JUSTICE BURGER: Mr. Solicitor General,
16 do you have any -- ?

17 ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

18 ON BEHALF OF THE PETITIONER -- REBUTTAL

19 MR. McCREE: Mr. Chief Justice, and may it please
20 the Court:

21 If I have 60 seconds left I'd like to call the
22 Court's attention to two matters. First, in response to
23 counsel's claim about the effect and the intent of the 1978
24 amendments, I would refer you to page 47 of our brief, where
25 we set forth the Senate report which makes it clear, and

1 I read:

2 "The Committee recognizes clearly that the
3 passport authority should not be restricted in any
4 way which would limit the President's ability to
5 control the departure of United States citizens
6 to foreign countries when such travel is inconsis-
7 tent with a greater Government interest."

8 The other matter to which I would like to direct
9 the Court's attention, if I may, is on this seven-page
10 reply memorandum that we filed to the Petition for
11 Certiorari, where we set forth the colloquy conducted by
12 the court and counsel in the district court, where counsel
13 under very careful questioning concedes that for the purpose
14 of the determination of the validity of this regulation, he
15 concedes that his client was causing or likely to cause
16 serious damage to the national security. And I suggest,
17 therefore, that he admits that he is fully within the ambit
18 of this regulation which means that this Court needn't decide
19 the question whether his conduct was within the regulation.
20 Of course, it leaves the constitutional question as well as
21 the statutory authorization question to be determined.

22 And with that, we would submit our case on the
23 briefs.

24 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen,
25 the case is submitted.

1 MR. McCREE: Thank you.

2 (Whereupon, at 2:46 o'clock p.m., the case in the
3 above-entitled matter was submitted.)
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CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-83

EDMUND S. MUSKIE, SECRETARY OF STATE

V.

PHILIP AGEE

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Will J. Wilson