Regan v. Wald, THE SUPREME COURT DEFERS TO PRESIDENTIAL AUTHORITY IN MATTERS OF FOREIGN POLICY BY UPHOLDING TRAVEL RESTRICTIONS TO CUBA

Under the American constitutional system, both the executive and legislative branches effectuate foreign policy choices. The relationship between these two branches in international matters has traditionally been one of transition, reflecting alternating periods of congressional acquiescence and activity. In the area of foreign policy, where courts have long attempted to strike a balance of authority between the various branches of government, the decision of the Supreme Court in Regan v. Wald stands as an important indication that the Court will continue to allocate broad discretion to the President in the exercise of emergency power.

In reaching its decision in Regan v. Wald, the Supreme Court focused on the congressional intent behind two acts: the Amendments to the Trading With the Enemy Act (TWEA), and the International Emergency Economic Powers Act (IEEPA). In the resulting decision the Court mistakenly characterized the two acts as broad grants of Presidential discretion in matters of foreign policy, rather than the limiting statutes their drafters intended. The Court further reaffirmed prior decisions upholding restrictions on the freedom of Americans to travel internationally.

This Note examines the decision of the Court in Regan v. Wald as reflective of the traditional deference allowed the executive branch in matters of foreign policy by the other two branches. The effects of such deference on the freedom of American citizens to travel abroad as declared in Regan v. Wald is also considered. The Note focuses specifically on how the Supreme Court applied the TWEA and IEEPA in Wald to the respective powers of the Presi-

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1 No. 82-1690-T (D. Mass. July 22, 1982), vacated, 708 F. 2d 794 (1st Cir. 1983), rev'd, 104 S.Ct. 3026 (1984). The controversy central to the case involved whether regulations promulgated by the Reagan administration restricting general tourist travel to Cuba were improperly formulated and therefore invalid. Id. at 3029-30.
4 Wald, 104 S.Ct. at 3034.
5 See infra notes 59-78 and accompanying text.
dent and Congress in matters of foreign policy and the constitutional right to travel. In conclusion, this Note briefly suggests an amendment to the TWEA and IEEPA that would effectuate the original intent of Congress behind the acts while retaining traditional Presidential flexibility in foreign policy areas.

I. THE AMENDMENTS TO THE TWEA AND IEEPA

The statutory basis of the issue presented by the Wald case originated in section 5(b) of the Trading With the Enemy Act passed in 1917.6 Enacted six months after the United States entered World War I, the legislation provided the President broad economic powers in times of declared war,7 including the authority to impose comprehensive embargoes on foreign countries.8 The purpose of the legislation was to grant the executive branch powers necessary to react quickly to various situations as the exigencies

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* 50 U.S.C. app. §§ 1-44 (1982). In its relevant portions, § 5(b) stated:

   (b)(1) During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise

   (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

   (B) investigate, regulate, direct and compel, nullify, void, prevent, or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation, or exportation of, or dealing in, or exercising any rights, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.


7 Amending the Trading With the Enemy Act: Hearings on H.R. 7738 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. 6 (1977) (colloquy between Senator Stevenson and Assistant Treasury Secretary Fred Bergsten) [hereinafter cited as Hearings on H.R. 7738]. The provisions of the bill were to operate in times of declared war beginning at "midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war." 50 U.S.C. app. § 2 (1982), 40 Stat. 412 (1917). From the inclusion of the phrase recognizing the "existence of a state of war" one can argue forcefully that Congress specifically acknowledged the possibility of an "undeclared" war as a period when the TWEA would operate. Further, one can argue that by limiting the definition of war to only those situations in which Congress has declared war or when a state of war exists, Congress intentionally excluded the use of enhanced Presidential power in national emergencies which did not involve military hostilities, as well as national emergencies arising from domestic sources.

8 The TWEA authorized a President to restrict, regulate, or prohibit altogether "any transactions in foreign exchange, export or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form . . . and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country." 50 U.S.C. § 5(b) (1976).
surrounding any emergency required. At the end of World War I, Congress eliminated most of the wartime grants of enhanced Presidential power. The TWEA remained in existence, however, to allow continued control over foreign assets retained by the Alien Property Custodian established under the Act.

A major expansion of Presidential powers under the TWEA occurred in 1933, when President Franklin Roosevelt invoked the Act as authority for his proclamation of a national holiday closing all American banks. Congress three days later extended the TWEA to allow the President to invoke the broad spectrum of powers authorized under the Act for use in peacetime as well as wartime emergencies. In the years following President Roosevelt's proclamation and the concomitant Emergency Banking Relief Act, the TWEA served as a basis for Executive action in other emergency situations as well. In fact, under the authority of the TWEA Presidents promulgated a total of 470 orders under the pretense of ongoing national emergencies.

In the 1970's, Congress reasserted itself in areas of foreign policy where the Legislature had earlier relinquished power to the President, in response to what many perceived as an overaccumulation of powers by the executive branch under the authority of the

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13 Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, 95th Cong., 1st Sess. 16-17 (1977) [hereinafter cited as Hearings on H.R. 1560 and H.R. 2382]. At least one commentator suggests that Congress authorized President Roosevelt's action as an acknowledgement that the Presidential proclamation was not in compliance with the law but was necessary during a time of bona fide emergency. See Controls Adopted: Presidential Powers, 35 Cong. Q. 1574 (1977).
14 In 1977, when the House of Representatives undertook to revise the TWEA, four declarations of national emergency had been made authorizing Presidents to exercise broad powers: 1) President Roosevelt's declaration of a banking holiday, supra note 11; 2) President Truman's declaration of an emergency with regard to Communist aggression in Korea, Proclamation No. 2914, 3 C.F.R. 99 (1949-1953 comp.), reprinted in 64 Stat. A454 (1950); 3) President Nixon's statement of emergency regarding a strike of postal workers, Proclamation No. 3972, 3 C.F.R. 473 (1966-1970 comp.); and 4) President Nixon's emergency declaration regarding import-export imbalances, Proclamation No. 4074, 3 C.F.R. 60 (1971-1975 comp.).
To remedy this presumed imbalance, Congress enacted, *inter alia*, the National Emergencies Act of 1976 (NEA). The NEA principally separated the President’s peacetime emergency powers from those which could be exercised in wartime emergencies. The bill further terminated “as of 2 years from the date of enactment, powers and authorities possessed by the Executive as a result of existing states of national emergency.” The NEA exempted powers, which the executive branch was authorized to exercise under section 5(b) of the TWEA, from the termination of other national emergency powers. Over the years, presidents had

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18 50 U.S.C. §§ 1601-1651 (1982). Section 101(a) of the NEA reads as follows:

(a) All powers and authorities possessed by the President . . . as a result of the existence of any declaration of national emergency in effect on the date of enactment of this Act are terminated two years from the date of such enactment. Such termination shall not affect:

(1) any action taken or proceeding pending not finally concluded or determined on such date;

(2) any action or proceeding based on any act committed prior to such date; or

(3) any rights or duties that matured or penalties that were incurred prior to such date.

(b) For purposes of this section, the words “any national emergency in effect means a general declaration of emergency made by the President.”


19 50 U.S.C. § 1621 (1976). As formulated, the National Emergencies Act actually accomplished more than a mere separation of the statutory authority of the President into powers applicable during wartime emergencies, which remained part of the TWEA (codified at 50 U.S.C. app. §§ 1-44 (1982)), and Presidential powers available in times of national emergency other than war. Congress, by establishing the Act, sought to establish a framework of procedures within which the President would have to operate in future national emergencies. 50 U.S.C. § 1622(a), (d) (1982); see also S. REP. No. 1168, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2288 (report setting out the purpose of the NEA) [hereinafter cited as S. REP. No. 1168]. These guidelines were carried virtually intact the following year into the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1706 (1982)) which served to supersede the NEA as the authority for Presidential actions during peacetime emergencies. 50 U.S.C. § 1601 (1982).


22 The NEA provided that “all powers and authorities possessed by the President . . . as a result of the existence of any declaration of national emergency in effect on the date of enactment of this Act are terminated two years from the date of such enactment.” 50 U.S.C. § 1601 (1982). The motivation behind the termination of all national emergency powers existing at the time was to pare back the vast numbers of emergency powers, thereby bringing order to the “disarray” present in the area of Presidential emergency powers. S. REP. No. 1168, *supra* note 19, at 9. “By providing for a termination of powers and authorities relating to existing emergencies, the bill will make it possible for our Government to function in
established numerous embargoes and freezing programs pursuant to the power, granted by Congress under section 5(b) of the TWEA, to regulate transactions between United States persons and foreign governments or nationals. Rather than terminate these exercises of power abruptly, Congress enacted a less controversial measure by ordering its various committees and subcommittees to study section 5(b) and to suggest revisions in the law.

The congressional inquiry into Presidential emergency powers resulted in the passage of amendments to the TWEA the following year. Included in the same measure was the IEEPA, which supplemented the procedural guidelines established by the NEA. This series of acts sought to completely separate war and peacetime emergency powers, undermining what Franklin Roosevelt

accordance with regular and normal provisions of law rather than through special exceptions and procedures which were intended to be in effect for limited periods during specific emergency conditions.” H.R. Rep. No. 238, 94th Cong., 1st Sess. 2 (1975).

See, e.g., Foreign Assets Control Regulations, 31 C.F.R. § 500 (1959) (as amended, 27 Fed. Reg. 1116 (1962)) (prohibiting all foreign exchange transactions by persons within the United States, the exporting or withdrawal from the United States of gold or silver coin or bullion, currency or securities, et. seq.); Cuban Assets Control Regulations, 31 C.F.R. § 505 (1959) (prohibiting sales or purchases of strategic goods destined directly or indirectly for specified communist countries except as licensed by the Treasury Department); and the Foreign Funds Control Regulations, 31 C.F.R. § 520 (1967) (maintaining blockages of foreign assets held in the United States).


The legislation provided:

Each committee of the House of Representatives and the Senate having jurisdiction with respect to any provision of law referred to in subsection (a) of this section shall make a complete study and investigation concerning that provision of law and make a report, including any recommendations and proposed revisions such committee may have, to its respective House of Congress within two hundred and seventy days after [September 14, 1976], the date of enactment of this act. 50 U.S.C. § 1651(b) (1982).


Hearings on H.R. 7738, supra note 7, at 6 (colloquy between Senator Stevenson and Assistant Treasury Secretary Fred Bergsten). The stated purpose of the Senate in passing the two acts was to “revise and delimit the President's authority to regulate international economic transactions during wars or national emergencies.” Id. at 2. The wartime emergency powers of the President would continue under the aegis of the TWEA, while powers authorized during national emergencies short of war would be limited to the procedural
accomplished in the Emergency Banking Relief Act.

To further effectuate the separation of wartime\(^{30}\) and other national emergency powers,\(^{31}\) Congress established separate procedural guidelines for the different emergency situations. Important to the issues in *Regan v. Wald*, however, Congress chose to continue without interruption, or to grandfather, Presidential powers contained in section 5(b) of the TWEA.\(^{32}\) These provisions became guidelines set forth in the NEA and IEEPA. *Id.*

\(^{30}\) The amendments to the TWEA left the powers of the President to act during wartime virtually unchanged; however, the ability of the President to accumulate additional powers was quite restricted. Congress achieved the desired separation of wartime powers and powers available during peacetime instances of national emergency by removing the language Congress had added to the TWEA in the Emergency Banking Relief Act of 1933. Congress attained this goal by simply striking the phrase “or during any other period of national emergency declared by the President” from § 5(b)(1) of the TWEA.

Congress placed further restrictions on Presidential emergency powers during wartime by striking from the TWEA a provision allowing the President to “take other and further measures not inconsistent [with the Act] for the enforcement of this subdivision.” 50 U.S.C. app. § 5 note (1982)(amendments to the TWEA). Congress dispensed with this provision due to the vagueness of the language. Congress felt that the ability to “take other and further acts” had provided an avenue for past Presidents to accumulate extensive power to the exclusion of Congress. S. REP. No. 466, *supra* note 17, at 2. Except for these two changes, Congress left the President’s power under the TWEA as it had been and even increased the maximum criminal fine for violation of the Act to $50,000 from $10,000. 50 U.S.C. app. § 16 (1982).

\(^{31}\) Congress established the IEEPA as the repository for Presidential powers during national emergencies short of war. The IEEPA differed from the TWEA dramatically because the IEEPA required that a President follow restrictive guidelines. First, the IEEPA addressed a weakness that had existed in the TWEA by defining specifically the term “national emergency.” The IEEPA established that a national emergency triggering Presidential authority included “any unusual or extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such a threat.” 50 U.S.C. § 1701 (1982). This definition limited the scope of one avenue of potential abuse available under the TWEA by restricting a President’s ability to unilaterally define and declare national emergencies. *See The National Emergency Dilemma: Balancing the Executive’s Crisis Powers with the Need for Accountability*, 52 S. CAL. L. REV. 1453, 1455 (1979) [hereinafter cited as Note, *National Emergency Dilemma*].

Second, in addition to those steps already required by the NEA, the IEEPA required a President “in every possible instance, [to] consult with Congress before exercising any of the authorities granted by [the IEEPA] and [to] consult regularly with Congress so long as such authorities are exercised.” 50 U.S.C. § 1703 (1982). This requirement was intended to reassert “Congressional supervision over the use of . . . emergency powers.” Note, *National Emergency Dilemma*, supra at 1455.

The IEEPA further removed certain powers which had earlier been authorized under the TWEA from a President’s arsenal of available sanctions in future emergencies. 50 U.S.C. § 1702(a) (1982). For example, the President would no longer be permitted to “vest property, seize records, [nor] regulate purely domestic economic transactions.” S. REP. No. 466, *supra* note 17, at 5.

\(^{32}\) 50 U.S.C. app. § 5 note (1982). The reason espoused in Congress for the grandfathering
law when President Carter signed the legislation on December 12, 1977.33

II. TRADE RESTRICTIONS WITH CUBA

Restrictions on trade with Cuba, such as those considered by the Court in Regan v. Wald, developed gradually after being originally initiated by the Kennedy administration in 1962.34 The early mea-

of § 5(b) powers was that to examine the existing restrictions in a partisan setting would create the potential for delay of the bill's needed reforms unnecessarily. Congress hoped that bypassing a heated partisan debate over the wisdom and motivation behind specific restrictions regarding economic sanctions employed currently would expedite passage of the amended TWEA and IEEPA. H.R. Rep. No. 459, 95th Cong., 1st Sess. 9-10 (1977) [hereinafter cited as H.R. Rep. No. 459] (“Certain current uses of the authorities affected by H.R. 7738 are controversial — particularly the total U.S. trade embargoes of Cuba and Vietnam . . . [therefore] by 'grandfathering' existing uses of these powers, without endorsing or disclaiming them, H.R. 7738 adheres to the committee's decision to try to assure improved future uses rather than remedy possible past abuses.”) Id.; see also Hearings on H.R. 1560 and H.R. 2381, supra note 13, at 190-91 for a colloquy between Leonard E. Santos, attorney advisor, Office of the General Counsel, Department of the Treasury, and Rep. Jonathan B. Bingham:

Mr. Bingham: What is the state of fact with respect to Cuba?
Mr. Santos: That gets us into the merits. We would like to avoid that issue. I think, frankly, in terms of getting this bill approved and passed at some stage, to the extent it does not get into substance but limits itself to procedural issues that are clearly intended by the National Emergencies Act, that it would have a much better chance.

Mr. Bingham: I agree.
Id. (emphasis added); see also id. at 207-08.

33 President's Statement on Signing H.R. 7738, 13 WEEKLY COMP. PRES. DOC. 1940, 1941 (Dec. 28, 1977) [hereinafter cited as President's Statement] (“In approving the bill, I must note my serious concern over the provision contained in section 207(b), which would allow Congress to terminate a national emergency declared by the President by concurrent resolution.”) Id. at 1941.

Interestingly, the two branches viewed the legislation quite differently. President Carter described the bill as "largely procedural." Id. ("Its broad purpose is to differentiate between those [powers] available in time of declared national emergency.") Id.; But cf. supra note 18.)

President Carter's interpretation of the bill differed further from that of the House when he described the Act as not affecting "embargoes now being exercised against certain countries [nor as affecting] . . . the blockade of assets of those or other countries." President's Statement, supra, at 1941 (emphasis added).

34 Proclamation No. 3447, 3 C.F.R. 26-27 (1962). The initial embargo resulted from the urging of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance. The Administration cited "the subversive offensive of Sino-Soviet Communism with which the Government of Cuba [was] publicly aligned" as the cause instigating "member states . . . to take those steps that they may consider appropriate for their individual and collective self-defense." Id.

As authority for the establishment of an embargo of all trade between the United States and Cuba, President Kennedy used the Foreign Assistance Act of 1961. (Foreign Assistance
sures\textsuperscript{35} resulted from escalating tensions between Cuba and the United States and barred virtually all transactions between subjects of the United States and Cuba or Cuban nationals.\textsuperscript{36} These restrictions, as a result, served to effectively ban general tourist travel to Cuba.\textsuperscript{37}

The embargo remained in place, unaffected by the vicissitudes of United States-Cuba relations in the years following 1963. In 1977, hoping to normalize relations between the two countries,\textsuperscript{38} the Carter administration relaxed the restrictions by granting a general license authorizing Americans to enter transactions incident to general tourist travel.\textsuperscript{39} In 1982, however, in response to Cuban attempts to destabilize governments friendly to the United States in

\textsuperscript{35} The Cuban Import Regulations (CIR), formulated by the Department of the Treasury, implemented the embargo. 27 Fed. Reg. 1116 (1962) (codified as amended at 31 C.F.R. Part 515) (1984). The CIR prohibited "the importation into the United States of all goods of Cuban origin and all goods imported from or through Cuba." 31 C.F.R. § 515.201 (1984). The CIR did not contemplate, however, any prohibitions on travel to Cuba by Americans. Rather, the Treasury promulgated the CIR to augment a ban on exports to Cuba established as a response to the detention of American citizens and the seizure of American property in Cuba as well as discriminatory practices toward the United States in Cuba's trade policies. 43 Dep't St. Bull. 715, 715-16 (1960).

\textsuperscript{36} In the year following the CIR, the Kennedy administration applied more extensive sanctions against Cuba as a part of the Cuban Assets Control Regulations (CACR), 31 C.F.R. § 515 (1963). The CACR revoked the CIR in favor of more restrictive controls on financial and commercial transactions. Id. at 6975 (1963). The CACR listed the Trading With the Enemy Act as authority for the regulations, and empowered the President with a broad spectrum of available sanctions corresponding to those available under the TWEA. Compare 28 Fed. Reg. 6975 (codified at 31 C.F.R. § 515.201 (1983)) with 50 U.S.C. app. § 5 (1982).

\textsuperscript{37} See 31 C.F.R. § 515.310 (1984) (defining "transfers" which were to be prohibited).

\textsuperscript{38} The general relaxation of restrictions came about gradually as both countries had made overtures regarding the normalization of relations for many years. STATE OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, 94th Cong., 2d Sess. (1975) (impressions of conversations on major issues with Cuban officials collected by Barry Sklar of the Congressional Research Service) [hereinafter cited as Committee Print, Conversations]. For example, in the early months of 1975 the leaders of both countries issued statements indicating a willingness to foster more amicable relations. Id. at 2.

\textsuperscript{39} Attempts at normalizing relations received a boost in 1977 with the granting by the Carter administration of a general license "authorizing persons who visit Cuba to pay for their transportation and maintenance expenditures (meals, hotel bills, taxis, etc.) while in Cuba." 31 C.F.R. § 515.560 (1977).

The general license was published in a modified final form on May 18, 1977, further relaxing existing restrictions on travel-related transactions between persons within the United States and Cuba or Cuban nationals. 31 C.F.R. § 515.60 (1978). The general license, however, remained subject to regulation 805 of the CACR, which subjected the license to the limitation that "the provisions of... any... licenses... may be amended, modified, or revoked at any time." 31 C.F.R. § 515.805 (1984).
the Western Hemisphere and throughout the world, the Reagan administration tightened restrictions on travel-related transactions involving subjects of the United States by revoking the Carter administration's general license. This revocation effectively limited authorized travel to Cuba to certain specified exceptions.

Shortly after the establishment of the 1982 restrictions, a group of American citizens desiring to travel to Cuba sought a preliminary injunction against the enforcement of the new Treasury Department Regulations in the Federal District Court for the District of Massachusetts. The district court refused to grant the temporary injunction sought by complainants. On appeal, the First Circuit Court of Appeals vacated the district court's ruling and remanded the case with instructions to issue the injunction.

The court of appeals held that the travel restrictions which the

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40 The Administration cited partially as its explanation for tightening the embargo that: Since 1978, Cuba, with Soviet political, economic, and military support, has provided widespread support for armed violence and terrorism in this hemisphere. Cuba also provides and maintains close to 40,000 troops in various countries in Africa and the Middle East where these forces impede political solutions to regional problems and further Soviet foreign policy interests. It is important to U.S. national security to counter Cuban efforts to further Soviet strategic goals.

Declaration of Miles R.R. Frechette, Director, Office of Cuban Affairs, Department of State, ¶ 4, Regan v. Wald J.A., at 107 [hereinafter cited as Frechette Declaration].

Another reason behind the regulations was the “difficult” position of Cuba's hard currency reserves (Id. ¶ 17, at 107), which Cuba had sought to alleviate by actively soliciting tourism from the United States and other Western powers. Id. ¶ 7-8, at 107-08. See also Impact of Cuban-Soviet Ties in the Western Hemisphere: Hearings before the Subcomm. on Inter-American Affairs of the House Comm. on International Relations, 95th Cong., 2d Sess. 1-99 (1978).

41 The revocation of the general license was not characterized as such, but instead as only an amendment to the license. More to the point, however, the summary of the new regulation stated “[t]ransactions relating to ordinary tourist or business travel will no longer be permitted.” 31 C.F.R. § 515.560 (1982).

42 Permissible transactions under the new CACR included only those transactions incident to travel by officials of the United States government, employees of news or film making organizations in pursuit of information gathering purposes, or persons visiting close relatives in Cuba. Id. The Cuban government has since decried the Reagan administration's restrictions as an attempt to hide the truth about Cuba from the American people. N.Y. Times, Sept. 13, 1984, §A, at 5, col. 4 (Daily Ed.). In as much as the tighter restrictions did nothing to alter the freedom of news or film making organizations to visit Cuba, these assertions appear at best to be disingenious.

43 The complainants argued that the regulations were invalid in as much as they had not been published pursuant to the guidelines established in the IEEPA. Wald v. Regan, 708 F.2d 794, 795 (1st Cir. 1983).

44 Wald v. Regan, No. 82-1690-T (D. Mass. July 22, 1982). The district court held that there had not been a convincing showing presented by Wald and the other complainants that they would prevail on the merits. Id.

45 Wald, 708 F.2d at 795.
Reagan administration sought to reinstate were not properly formulated under either the provisions of the IEEPA or under the grandfather clause exception included in the NEA and subsequent measures. Since the court of appeals decided the question on statutory grounds, the court deemed it unnecessary to determine the sufficiency of Wald's constitutional claim that the travel restrictions violated his right of freedom to travel abroad.

On writ of certiorari, the Supreme Court reversed the court of appeals, holding that Presidential powers authorized by the reformed TWEA, coupled with the traditional deference conceded the Executive by the other two branches of government in matters of foreign policy, provided sufficient authorization for the enforcement of the Reagan administration's modification of the Cuban Assets Control Regulations (CACR).

The Supreme Court granted certiorari in Wald in the wake of conflicting decisions in the lower courts regarding issues arising from the revocation of the Carter general license. The Court fur-

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46 Id.
47 Id. at 796-97.
48 Id. at 794.
49 Wald, 104 S.Ct. at 3030.
50 Id. at 3035.
51 Id. at 3039.
52 See, e.g., United States v. Frade, 709 F.2d 1387 (11th Cir. 1983); Tagle v. Regan, 643 F.2d 1058 (5th Cir. 1981).

In Frade, the Eleventh Circuit Court of Appeals refused to enforce the Reagan administration's revocation of the Carter administration's general license, holding instead that the revocation was invalid under the "grandfather" clause contained in the reformed TWEA. Frade, 709 F.2d at 1397. ("While the ambiguous terms 'authorities' and 'exercised' may appear to be elastic enough to encompass the interpretation [that the revocation power was grandfathered] we agree with the recent first circuit opinion in Wald v. Regan . . . that a narrow, restrictive interpretation is compelled by the legislative history and purpose of the grandfather clause and by its function within the broader statutory scheme.") Id. at 1397-98. The court in Frade ruled that Congress, in grandfathering section 5(b) powers, intended solely and entirely to protect those regulations existing at the time the IEEPA came into effect from the legal disruption which would have been caused by termination of their statutory authorization and the diplomatic disruption which might have resulted from declaring a new state of emergency. Id. at 1399. The court, however, made no mention of the limitation that any general license granted under the CACR remained subject to revocation at any time. See supra note 39 and accompanying text.

The Eleventh Circuit's opinion in Frade, however, can be criticized for going beyond the explanation necessary to resolve the issue presented it. The court rejected the option of deciding the case on the limited grounds of construction of the word "authorities," and instead issued a sweeping invalidation of the new restrictions, writing that "[u]nlike Regulation 515.415, the existing regulations were not intended to curb travel or control the flow of immigration. The existing programs were entirely financial, and the grandfather clause was intended to be limited to such financial transactions." Id. at 1400 (emphasis added).
ther sought to delineate guidelines regulating the use of grandfathered section 5(b) powers that Presidents would be required to follow when acting pursuant to a national emergency.

Respondents argued that the government should be enjoined from enforcing the provisions of the modification on both procedural and constitutional grounds. First, respondents contended that the modification was ineffective as a restriction in that it was improperly promulgated under the IEEPA. Respondents further argued that the modification violated the constitutionally protected rights of free travel and equal protection by restricting, without due process of law, citizens' ability to travel freely outside of the country.

The government, conversely, contended that the ability to restrict travel by way of modifying a general license was authorized by the grandfather provision included in the NEA, IEEPA, and TWEA. The government argued that even though the President was not specifically employing his power to restrict tourist travel to Cuba at the time powers were grandfathered, he was exercising all authorities which had been granted to him under the TWEA. The government concluded, therefore, that the power to restrict travel-related transactions was extended through the termination period for other emergency powers not falling within the authorization of section 5(b). Second, the government argued that the foreign policy goal of limiting Cuban reserves of hard currency outweighed any constitutional concerns regarding the right to free travel.

In issuing its opinion, the Court in Wald, unlike the court of appeals, addressed the issue of the constitutional right to free travel. The Court concluded that "weighty concerns of foreign

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53 Wald, 104 S.Ct. at 3028.
54 Id. at 3029-30.
55 The government conceded that the rules were not established according to the provisions of the IEEPA. Id. at 3032. Consequently, this concession required the Administration to bring the modification under authority of the grandfather provision of the NEA, IEEPA, and TWEA. Id.
56 Id. at 3038.
57 Id.
58 Id. at 3032.
59 Id.
60 Id. at 3039; see also 31 C.F.R. § 515.560 (1983); Frechette Declaration, supra note 40, ¶ 9, at 108. See generally Tribe, American Constitutional Law § 15-15, 953-958 (1978); J. Nowak, R. Rotunda, & N. Young, Constitutional Law 802-806 (2d ed. 1983).
61 The Court subjected itself to criticism by addressing the constitutional issue of a right to travel regarding an issue that could have been decided without resort to constitutional doctrine.
policy proc. 62 protected the Reagan administration’s restrictions on the right of Americans to travel to Cuba from constitutional attack. 63

Whether a President may limit travel by American citizens to foreign countries has been considered by the Supreme Court on numerous occasions. 64 The outcome of such cases has often reflected concessions made to the Executive by the other two branches in matters of foreign policy. 65 One of the leading cases regarding the freedom to travel abroad was Kent v. Dulles, 66 in which the Court established the ability of American citizens to journey outside of the country as a constitutionally protected right. In Kent, the Supreme Court declared in dicta that American citizens could not be deprived of their freedom to travel without due process of law. 67

The Court limited the broad protections of freedom to travel abroad granted in Kent the following year in Zemel v. Rusk. 68 In Zemel, the Court distinguished 69 the rights of citizens to be free from restrictions on travel because of political beliefs, 70 and the ability of the government to restrict foreign travel due to policy considerations. 71

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62 Wald, 104 S.Ct. at 3039 (citing United States v. Laub, 385 U.S. 475 (1967)).
63 Id. at 3038-39.
65 See, e.g., Zemmel, 381 U.S. at 7-9; Agee, 453 U.S. at 280-82 (revocation of passports held authorized under the Passport Act of 1926 when the Secretary of State determined that travel of an American citizen abroad was likely to cause national security hazards).
67 Id. at 125. In dicta, the Supreme Court indicated that the right to travel was a liberty “as close to the heart of the individual as the choice of what he eats, or wears, or reads.” Id. at 126. The Supreme Court in Kent never actually decided the issue of constitutionality however. Id. at 129. Rather, the case turned on whether the Secretary of State had acted within the scope of powers delegated him. Id.

Nonetheless, the Kent Court summarized its view on the freedom to travel abroad in dicta by stating, “[w]e need not decide the extent to which [the right] can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment.” Id. at 127.
68 381 U.S. 1, 12 (1965).
69 The Court made this distinction in upholding the ability of the government to eliminate Cuba from the areas for which passports were not required. Id. at 12-13. The Zemel Court recognized, as it had in Kent, that the ability to travel unrestricted by one’s political beliefs was a right of constitutional stature. Id. at 13.
70 Such a right found its basis in the dicta of the Kent decision. See supra note 67.
71 Id. at 14-15 (“We think . . . that the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.”) Id. at 15; See also J. COOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).
The Supreme Court again considered the protection of the right to travel afforded by the Constitution in Haig v. Agee. The Agee Court reiterated the logic of the Zemel decision by reaffirming that the liberty to travel internationally "is subject to reasonable governmental regulation."73

In Regan v. Wald, the Supreme Court continued the reasoning presented in Agee by recognizing that American citizens are indeed afforded a constitutional right to travel abroad.74 The Wald Court also continued the foreign policy exception begun in Zemel75 and furthered in Agee,76 in that it allowed restrictions on travel where there is a substantial likelihood that United States national security or vital interests are threatened,77 or where such limitations are justified by the "weighty considerations of national security."78

Justice Rehnquist, writing for the majority in Wald, further dispensed with the court of appeals' rationale that the President had no power under the TWEA79 to restrict travel as "ultimately unconvincing."80 The majority cited the absence of applicable lan-

72 453 U.S. 280 (1981). The controversy presented by Agee arose when the State Department revoked the passport of an ex-CIA agent who had declared an intention "to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating [and] to seek within the United States to have the CIA abolished." Note, Clarifying the Authority Delegated to the Secretary of State for the Control of Passports: Haig v. Agee, 24 B.C.L. REV. 435, 436, n.19 (1983) (quoting Appendix E to petition for certiorari at 107(a)).

73 Agee, 453 U.S. at 306. The Court held that where "there is a substantial likelihood of 'serious damage' to national security or foreign policy as a result of a passport holder's activities in foreign countries, the Government may take action to ensure that the holder may not exploit the sponsorship of his travels by the United States." Id. at 309.

74 Wald, 104 S.Ct. at 3038.

75 381 U.S. at 15-16.

76 453 U.S. at 309.


78 Wald, 104 S.Ct. at 3039; see also Zemmel, 381 U.S. at 15-16.

79 Wald, 104 S.Ct. at 3033. The court of appeals wrote that "as a matter of common sense and common English, restricting, say, commodity purchases and restricting travel purchases would seem to be very different 'exercises' of authority — different enough at least not to count as the exercise of the same authority." Wald, 708 F.2d at 796. The court of appeals suggested that the authorities conferred on the President by § 5(b) of the Trading With the Enemy Act and grandfathered by subsequent legislation were frozen in place on July 1, 1977, and as such could not be expanded beyond the actual prohibitions in effect on that date.

80 Wald, 104 S.Ct. at 3033. The Court held that:

"Neither the legislative history nor the apparent purposes of the 1977 Act [which 'grandfathered' existing uses of power under the TWEA] sufficiently supports the contrary contention that what Congress actually intended, despite the statutory language, was to freeze existing restrictions, so that any adjustment of
guage in the amended TWEA as an indication that Congress intended to remove from the President the ability to restrict transactions incident to travel.\textsuperscript{81}

The Court also rejected the court of appeals’ argument that the Reagan administration’s ability to restrict travel had been lost since direct controls over travel were not in place when existing powers were grandfathered.\textsuperscript{82} The Court, instead, held that the Reagan administration’s travel restrictions were indeed continued under the protection of regulation 201(b)\textsuperscript{83} through the termination period included in the NEA, IEEPA, and the TWEA.\textsuperscript{84} The majority reasoned that the President was exercising authority over all transactions by choosing which to allow and which to prohibit, and, therefore, such exercise protected the President’s power over travel-related transactions from termination.\textsuperscript{85}

\textit{Id.}\textsuperscript{81} Justice Rehnquist dismissed the argument that the TWEA removed the power to regulate travel-related transactions as “frivolous.” \textit{Id.} at 3034, n.16. “For purposes of TWEA, it is clear that the authority to regulate travel-related transactions is merely part of the President’s general authority to regulate property transactions.” \textit{Id.} at 3034 (footnote omitted). The Court reiterated that the President’s authority under the TWEA and CACR included the ability to control any transaction involving any property that Cuba or a Cuban national had an interest in directly or indirectly. Justice Rehnquist concluded, therefore, that transactions incident to travel such as the payment of hotel bills, meals, and transportation fell under the President’s authority and could be regulated or even prohibited outright. \textit{Id.} at 3034 n.16.

\textsuperscript{82} Id. at 3034. The relevant portion of the NEA (set out in full in note 18 \textit{supra}) which was continued by the TWEA and IEEPA allowed the continued exercise of “[a]ll powers . . . in effect on the date of enactment of this Act” for a period of two years. 50 U.S.C. § 1601(a) (1982). The court of appeals held this provision meant that only those specific restrictions actually in place and in force on July 1, 1977, would be grandfathered. \textit{Wald}, 708 F.2d at 796. The court of appeals surmised that by granting a general license, authorizing American citizens to enter into transactions for food, lodging, and transportation, the Carter administration forfeited the ability of a future President to impose travel restrictions. As the court stated, “[t]he State Department, which had restricted travel to Cuba through passport regulations under 22 U.S.C. § 211(a), eliminated these regulations during the same month.” \textit{Id.} (emphasis added).

\textsuperscript{83} 31 C.F.R. § 515.201(b) (1984).

\textsuperscript{84} \textit{Wald}, 104 S.Ct. at 3034.

\textsuperscript{85} Regulation 201(b) (31 C.F.R. § 515.201(b) (1983)) authorized the President to regulate all transactions involving Cuban property interests. \textit{Id.} The majority held that since Regulation 201(b) was in operation before as well as after July 1, 1977, “absent an explicit license, all transactions involving Cuban property are and, at all relevant times, have been prohibited.” \textit{Wald}, 104 S.Ct. at 3034. The basis of the majority’s logic was that the largest subsection of powers grandfathered by the TWEA and IEEPA was an “authority” to act on a particular subject. \textit{See Wald}, 104 S.Ct. at 3034-35. The “authority” relevant to the instant case, according to the majority, was the power to “investigate, regulate, direct and compel,
The Court, in addition, rejected the court of appeal's interpretation of congressional intent behind the grandfathering provision. The majority wrote that the principal motivation behind the grandfathering of existing embargoes was to expedite passage through Congress of the new program of procedures Presidents must follow in future crises under the IEEPA.

Writing for the minority in Wald, Justice Blackmun argued that the Reagan administration's restrictions were not among existing uses of Presidential power grandfathered by section 101(b) of the amended TWEA and IEEPA. While the majority found congressional intent to maintain broad Presidential powers to insure flexibility in foreign policy matters, the dissent found correctly a congressional intent to diminish Presidential discretion.

The dissenters argued that Congress grandfathered the authorities existing on July 1, 1977, for two principal reasons. First, ac-
cording to the minority, Congress grandfathered powers under the amended TWEA to maintain the diplomatic status quo with countries affected by embargoes currently in place. Such grandfathering was, therefore, intended to insure a flexible bargaining position in future negotiations with embargoed countries. Second, the dissenters cited congressional desire to avoid any adverse consequences in negotiations that would result should a President be forced by termination of an embargo to declare a new national emergency with respect to a country affected by an embargo in order to maintain sanctions against that country.

III. EFFECT OF THE COURT'S DECISION

As a practical matter, the Court's decision in *Regan v. Wald* will have little effect on sanctions applied by the United States globally. The decision, conversely, will have a major impact on con-

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of § 5(b) was intentionally narrow. Justice Blackmun pointed out that Congress deleted § 101(b)(2) in an attempt to constrict the powers subject to the grandfather clause. *Id.* at 3043.

The original provision provided that existing powers would be grandfathered along with "any other authority conferred upon the President by . . . section [5(b)] (which or that) may be exercised to deal with the same set of circumstances." *Id.; see Subcommittee Working Draft of June 8, 1977, 95th Cong., 1st Sess. § 101(b).*

*Wald, 104 S.Ct. at 3042-43 (Blackmun, J., dissenting).*

Congress heard considerable testimony that it would be counterproductive to constrict a President's access to a certain sanction without first securing some reciprocal concession from a country affected by the exercise of § 5(b) powers. See, e.g., *Hearings on H.R. 1560 and H.R. 2382, supra* note 13, at 19 (statement of Prof. Lowenfeld):

The difficulty with this approach [repealing all § 5(b) powers] is that it would bring down with it a number of programs, such as the embargo on trade with Cuba, that perhaps should not be terminated, or should not be terminated just now, or should not be terminated without a quid pro quo. I say only that it would be a very awkward act (perhaps even an inappropriate interference in negotiations being carried out by the Executive [sic] branch) if the embargo were suddenly to end without any deal or understanding, just because the Executive [sic] branch in prior administrations had from time to time overstepped its bounds.

*Id. at 19; see also id. at 103, 113, 119 (statement of Assistant Treasury Secretary Bergsten); 123 CONG. REC. 22,477 (1977) (statement of Rep. Whalen).*

*Wald, 104 S.Ct. at 3043 (Blackmun, J., dissenting); see *Hearings on H.R. 1560 and H.R. 2382, supra* note 13, at 190, for a colloquy between Leonard E. Santos, Office of the General Counsel, Department of the Treasury, and Rep. Bingham:

Mr. Bingham: "I can see the problem. I personally would not argue that we should ask or expect the President to declare, for the first time an emergency with respect to Cuba." *Id.*

*The powers that were extended as a result of grandfathering § 5(b) involved few countries in terms of global significance. Included in the grandfathered powers were:

(1) the foreign assets control regulations, which block the assets of, and limit transactions with the People's Republic of China, North Korea, Vietnam, and Cambodia;

(2) the Cuban assets control regulations, which block the assets of, and limit
gressional attempts at limiting Presidential power under the IEEPA. The decision in *Wald*, however, will have its greatest impact in the area of foreign policy powers, because it is the latest installment in a long line of cases granting broad latitude to the President in matters of foreign policy.

Courts have espoused various rationales in support of this traditional deference allowed the President. One justification cites the unity of purpose present in the executive branch, where ultimate authority for policy decisions rests in one person. Another notes that unlike the legislative branch, the Executive is never in a period of recess and can, therefore, continuously effectuate policy. A final reason emphasizes the secrecy inherent in the office of the President. Taken together these reasons acknowledge that the executive branch "is the best equipped of the three branches to act with the necessary decisiveness, dispatch, and knowledge."

transactions with, Cuba;

(3) the transaction control regulations, which prohibit U.S. persons from participating in shipping strategic goods to any of the following countries: Albania, Bulgaria, People's Republic of China, Cambodia, Czechoslovakia, German Democratic Republic and East Berlin, Hungary, North Korea, Outer Mongolia, Poland and Danzig, Romania, the Soviet Union, North Vietnam, and South Vietnam;

(4) the foreign funds controls regulations, which continue World War II blockage of the assets of Czechoslovakia, Estonia, the German Democratic Republic, Latvia, Lithuania, and their nationals.


The scope of the law has further been diminished since the passage of the IEEPA and the amended TWEA by the cessation of all uses of § 5(b) authority with regard to China. *Wald*, 104 S.Ct. at 3048 (Blackmun, J., dissenting).

*See infra* notes 124-31 and accompanying text.

*See* *Dames & Moore v. Regan*, 453 U.S. 654 (1980). In *Dames & Moore*, the Court described its decision as "only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances." *Id.* at 662.


Because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."

*Id.* at 17.

*Curtiss-Wright Export Corp.*, 299 U.S. at 319-21.

*Note, Congressional Attempts to Control, supra* note 99, at 1103.

*Curtiss-Wright Export Corp.*, 299 U.S. at 320.

*Note, Congressional Attempts to Control, supra* note 99, at 1103.
quired in foreign policy matters. As such, courts have allowed the Executive broad latitude in the international arena. In fact, the Court in *Haig v. Agee* wrote that "[m]atters intimately related to foreign policy and national security are rarely proper subjects [even] for judicial intervention." Perhaps the Court issued its most definitive statement in modern times on the subject of Presidential supremacy in the realm of foreign policy in *United States v. Curtiss-Wright Export Corp.* In *Curtiss-Wright*, the Court attributed to the Executive broad powers of discretion and freedom to act in international emergencies which would be unavailable in wholly domestic matters.

The Court, however, has refused to allow the Executive unlimited emergency power. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Court demonstrated a readiness to insure that Presidential authority be exercised within parameters of constitutional controls. In perhaps the most widely cited opinion filed in

100 453 U.S. 280 (1980).
105 Id. at 292. The Court went on to cite *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), in which it states that matters relating "to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Agee*, 453 U.S. at 292 (citing *Harisiades*, 342 U.S. at 589); accord *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).
209 299 U.S. 304 (1936). The issues in *Curtiss-Wright Export Corp.* arose from a Congressional Joint Resolution which authorized the President to prohibit "the sale of arms and munitions of war" to Bolivia or Paraguay if such prohibition would "contribute to the reestablishment of peace between those countries." *Id.* at 312. The trial court had sustained Curtiss-Wright's demurrer to the charges of violating the concomitant Presidential proclamation, holding that the joint resolution was ineffective as a delegation of power to the President by Congress. *Id.* at 314. The Supreme Court reversed, and in holding lawful the delegation of power cited John Marshall while he was in the House of Representatives, 8 ANNALS OF CONG. 613 (1800) stating, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *Curtiss-Wright Export Corp.*, 299 U.S. at 319.
307 The main reasons given by the Court in finding a broad authority conceded to the President in matters of foreign policy were the President's access to confidential sources of information and secrecy. *Id.* at 320.
408 The Court went further than a mere decision on the statutory questions presented, finding among executive powers:

the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

*Id.* at 319-20.
509 343 U.S. 579 (1952). The importance of the *Youngstown Sheet & Tube Co.* decision was underscored in that all six Justices in the majority authored separate opinions. See also *Nowak, Rotunda, & Young*, supra note 60, at 214-16.
610 *Note, National Emergency Dilemma*, supra note 31, at 1494.
Youngstown, Justice Jackson established three separate categories of Presidential authority in foreign policy matters.  

The first of Justice Jackson’s scenarios concerns the action of a President “pursuant to an express or implied authorization of Congress.” This first category recognizes Presidential authority at its fullest in that this subset of power “includes all that [power which the President] possesses in his own right plus all that Congress can delegate.”  

The second category of powers arises when a President acts without congressional approval or prohibition. Justice Jackson described how the powers found in this second category exist in a “zone of twilight” where, even though the President may act in his own right, Congress may have concurrent powers to act in the same area. This second category includes situations where the distribution of authority between the two branches is unclear. As a result, in this category “the actual test of power is likely to depend on the imperatives on events and contemporary imponderables rather than on abstract theories of law.”  

The third category of Presidential acts in Justice Jackson’s scheme are those in which the President acts contrary to the expressed will of Congress. Actions taken against the will of Congress are the most likely to be overturned by courts, because they can only be supported if such actions are exclusively within the powers of the President.  

It appears that Justice Rehnquist may have been induced to reach the labored conclusion, as he did, that the legislative history of the grandfathered powers expressed an intention to delegate the

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111 Youngstown Sheet & Tube Co., 343 U.S. at 635-38 (Jackson, J., concurring).

112 Id. at 635.

113 Id. (footnote omitted). Presidential action taken according to the authority of this first category would be afforded the highest presumption of legitimacy and would be declared invalid only if the federal government as a whole lacked capacity to act. Id. at 636.

114 Id. at 637.

115 Id.

116 Id.

117 Id. (footnotes omitted).

118 Id. The acts in this category are described as those backed by the weakest authority of the President in as much as the Executive acts “upon his own constitutional powers minus any constitutional powers of Congress over the matter.” Id.

119 Id. at 637-38. In recognizing that the Executive’s powers were often not strictly defined, Justice Jackson placed the primary onus of maintaining congressional power on Congress itself. Id. at 654. (“We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”) Id.
power to act in this matter of foreign policy to the President to bring the action within the ambit of Justice Jackson's first category. By including "all authorities conferred upon the President by section 5(b) of the [TWEA]" among those powers grandfathered by the IEEPA, rather than construing only "restrictions" or "prohibitions" as those powers extended by the acts, Justice Rehnquist raised the Reagan modification of the CACR to the status of Justice Jackson's first category. The modification of the general license, since it could be brought under the statute, would therefore be supported by the highest presumption of validity.

Such an interpretation stands in stark contrast with congressional attempts to "revise" and "delimit" the power of the President in matters of foreign policy. The opinion in Wald thus confirms the proposition that even though Congress may have attempted to redefine the balance of power between the executive and legislative branches in passing the IEEPA, "it did not substantively change the [balance of] power by that redefinition."

IV. THE CONNECTION BETWEEN DAMES & MOORE AND WALD

The reversal of congressional intent to limit Presidential authority, as evidenced in Wald, underscores the primary preceden-
tial value of the case as a continuation of an attack on the IEEPA which began in the case of *Dames & Moore v. Regan* and continued through *Wald.*

In *Dames & Moore*, the Supreme Court upheld President Carter's ability to enter an agreement with Iran nullifying judgments and attachments against Iranian assets entered by American courts. Issued by an unanimous Court, the decision in *Dames & Moore* supports the broad use of executive power in foreign affairs. Through its decision in *Regan v. Wald*, coupled with the *Dames & Moore* opinion, the Supreme Court has established the IEEPA as a broad grant of Presidential peacetime power, virtually reversing the original intent of Congress in enacting the IEEPA.

Interestingly, the majority in *Wald* chose not to follow the lead of *Dames & Moore* by dispensing with the matter in controversy by mere statutory construction. In *Dames & Moore*, the Court ostensibly held that petitioner Dames & Moore, in operating under the general license issued by the Carter administration, never received any property interest in a judgment obtained against the Iranian government. In support of such a statement, the Court reasoned that the general license granted by the Carter administration allowing subjects of the United States to proceed against Iranian assets was "revocable," "contingent," and "in every sense subordinate to the President's power under the IEEPA."
The reversal of congressional intent behind the IEEPA must, therefore, have been international because the majority refused to dispose of the case by construing the Carter general license as a revocable right exercised subject to the continuing authority of the President under the CACR.\textsuperscript{136} Had the Court compared the regulations involved in \textit{Dames \\& Moore} and \textit{Wald}, it could have disposed of the case on limited grounds rather than by attacking the IEEPA directly or addressing constitutional issues. By emphasizing the retention of the power to revoke the general license, the Court could have found that President Carter retained executive control over travel-related transactions through the July 1, 1977 termination date of non-grandfathered section 5(b) powers.

Although the Court did not treat the matter as dispositive, it did explain that the President continued to regulate transactions through the cut-off period of IEEPA\textsuperscript{137} by alternately allowing and restricting travel. The Carter administration had eased travel restrictions for a period of time hoping to improve relations with Cuba,\textsuperscript{138} and the Reagan administration restricted travel once again when the Cuban government failed to respond favorably.\textsuperscript{139} In this way, the Court correctly noted that the President had, since 1963 and at all relevant time up to and through the termination of non-grandfathered powers, maintained the power and authority to regulate all transactions involving American subjects and Cuba or Cuban nationals.\textsuperscript{140} The Court reasoned that the Carter general license was not a waiver of grandfathered powers inasmuch as regulation 201(b) of the CACR was the ultimate source of authority on American-Cuban transactions. Since regulation 201(b) had been in continuous effect since 1963 "there were no separate ‘travel restric-

\textsuperscript{136} Provisions included in 31 C.F.R. § 535.805 (1980) (Iranian Assets Control Regulations involved in \textit{Dames \\& Moore}) are identical to 31 C.F.R. § 515.805 (1982) (CACR involved in \textit{Wald}) ("The provisions of this part of any rulings, licenses, authorizations, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time."). \textit{Id.}

\textsuperscript{137} \textit{Wald}, 104 S.Ct. at 3034. ("On July 1, 1977, the President was exercising his authority over travel-related transactions with Cuba and Cubans by means of a general license which exempted them from the categorical prohibition of Regulation 201(b).") \textit{Id.}

\textsuperscript{138} The President's Remarks With Reporters at the Brunswick Airport Following the First Lady's Departure, 13 \textit{WEEKLY COMP. PRES. DOC.} 833 (May 30, 1977); The President's Remarks in a Question and Answer Session with Reporters, 13 \textit{WEEKLY COMP. PRES. DOC.} 835 (May 31, 1977).

\textsuperscript{139} \textit{See} Declaration of James H. Michel, Acting Assistant Secretary of State for Inter-American Affairs, ¶ 5, \textit{Regan v. Wald} J.A., at 3 ("[T]he embargo has been used as a flexible instrument of foreign policy sensitive to the particular state of relations between the United States and Cuba."). \textit{Id.}

\textsuperscript{140} \textit{Wald}, 104 S.Ct. at 3034.
tions,' either to be repealed in 1977 or reimposed in 1982."\textsuperscript{141} The Carter general license was, consequently, not an abdication of grandfathered powers but merely a different form of transaction controls.\textsuperscript{142}

V. THE MAINTENANCE OF DIPLOMATIC BARGAINING CHIPS

Since the Court refused to treat a \textit{Dames & Moore} inspired interpretation of the grandfather clause as dispositive, it was forced to turn, intentionally or otherwise, to both the "bargaining chip" rationale cited by the court of appeals as well as to constitutional issues. Surprisingly, the Court chose to downplay the notion that Congress grandfathered embargoes currently in place in order to maintain the status quo in negotiations with respect to embargoed countries.\textsuperscript{143} This "bargaining chip" theory could have been used as an effective tool in attacking the minority's position in \textit{Wald}, because it reveals an inherent weakness in the minority's position.

As stated, the minority's position that section 5(b) powers had been waived by the Carter administration, if followed, would have a negative impact in future negotiations with currently embargoed countries\textsuperscript{144} in two ways. First, under the minority's theory,\textsuperscript{145} the United States would have no assurance that an embargoed country would continue desired behavior if grandfathered section 5(b) powers were waived.\textsuperscript{146} Second, if easing restrictions on an embargoed

\textsuperscript{141} \textit{Id.} at 3034 n.18.
\textsuperscript{142} \textit{Id.} at 3035. The majority opinion attempted to explain this distinction by pointing out that Wald was unable to visit Cuba only because transactions incident to general tourist travel were not included in the license after the 1982 amendment to the regulations. \textit{Id.}
\textsuperscript{143} The notion of the "bargaining chip" was addressed repeatedly in congressional hearings during the formative stages of the IEEPA and the amendments to the TWEA. Implicit in the concept of the "bargaining chip" is that the various asset control regulations were established to punish egregious behavior on the part of the subject state with relaxation of restrictions held out to elicit desired behavior on the part of the affected nation. Congress feared that the termination of § 5(b) powers would cause the elimination of restrictions without achieving the desired behavior on the part of the subject state, thus resulting in the abdication of a strong negotiating posture without a \textit{quid pro quo} of behavior modification. \textit{See}, e.g., \textit{Hearings on H.R. 1560 and H.R. 2382, supra note 13, at 10} (statement of Professor Andreas F. Lowenfeld); \textit{Id.} at 103 (statement of Mr. Bergsten).
\textsuperscript{144} \textit{Id.} at 103 (statement of Mr. Bergsten); \textit{see also} Note, \textit{Legal Impediments to Normalization of Trade with Cuba}, \textit{8 L. \\& Pol'y Int'l Bus.} 1007, 1053 (1976).
\textsuperscript{145} It follows from the argument put forth by the court below, \textit{Wald} 708 F.2d at 796, and by the minority, \textit{Wald} 104 S.Ct. at 3044 (Blackmun, J., dissenting) that a President eliminates restrictions by relaxing them.
\textsuperscript{146} One example where this contingency almost became a reality was the lifting of an economic blockade against Rhodesia. 31 C.F.R. § 530.440 (1971). In 1971, the United States, under the authority of the United Nations Participation Act of 1945, 22 U.S.C. § 287a-e
country would effectively eliminate such an option from a President's future consideration, he would be less likely to ease restrictions in the first place.147 Either of these two options would result in an anomaly; intrasigence in negotiation on the part of the President, therefore, would be the most certain way of maintaining the flexibility to act should the exigencies of future situations require.

Under the theory suggested by the minority, if diplomatic relations with a country once subjected to an embargo under grandfathered section 5(b) powers, soured to any great extent after the President eliminated the ability to reimpose sanctions, the President could declare a new national emergency and reapply sanctions under the procedures of the IEEPA.148 The declaration of a new national emergency, however, is not a reasonable option for a President involved in an embargo situation for several reasons. First, the IEEPA tightened the scope of subjects constituting an emergency.149 By its operation, this new, more restrictive defini-

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147 Note, National Emergency Dilemma, supra note 31, at 1461.
148 50 U.S.C. §§ 1701(b), 1703 (1982). The option of requiring a President to declare a new national emergency was debated and rejected in congressional hearings on the proposed IEEPA and amendments to the TWEA. See, e.g., Hearings on H.R. 1560 and H.R. 2382, supra note 13, at 155-75, 190.
149 Hearings on H.R. 1560 and H.R. 2382, supra note 13, at 11. The addition by the IEEPA of a definition of "national emergency" was intended to correct the supposed flaw created by the President having the undefined and unilateral power to declare a national emergency. Note, National Emergency Dilemma, supra note 31, at 1455; The National Emergencies Act: Hearings on H.R. 3884 before the Subcomm. on Administrative Law and
tion would lessen the instance of national emergency declarations because fewer international situations would include the necessary criteria. Coexistent with this restrictive definition of national emergency is a skepticism on the part of some members of Congress as to whether a national emergency exists in all but the most dire circumstances.150

Second, the counterproductive effect that the declaration of a new national emergency would have on any delicate negotiating process precludes such a declaration.151 If a President could not declare a new national emergency because of concern that such a declaration would offend the other country in a negotiating process, he would be precluded from using the full range of sanctions that should be at his disposal, without a reciprocal gesture by the other country. This scenario is exactly what the Congress and the minority in Wald sought to avoid by stating that the reason for grandfathering section 5(b) powers was to maintain "bargaining chips" when terminating outstanding states of national emergency.152

The failure of a new declaration of national emergency as an effective option in handling difficult international matters eliminates an easy solution to balancing conflicting interests of Congress and the President within the constitutional framework of American government in matters of foreign policy. What remains is the difficult issue, which the Court attempted to answer in Wald, of which branch of government will predominate in foreign affairs. The Court opted to continue a tradition of Presidential preeminence in foreign policy by blocking attempts by Congress to reverse "[the] trend toward greater Presidential initiative . . . which until recently [the Congress] had supported."153


151 See Wald, 104 S.Ct. at 3037, 3043 (Blackmun, J., dissenting) ("It would have been incongruous, in other words, for Congress to force the President to declare new emergencies in nonemergency situations simply to avoid having to end restrictions that, for negotiating reasons, the President had concluded should not be ended unilaterally.") Id. at 3043; see also Hearings on H.R. 1560 and H.R. 2382, supra note 13, at 19 (statement of Prof. Lowenfeld); id. at 191-92 (statement of Mr. Santos, Counsel Treasury Department); id. at 24 (statement of Prof. Harold G. Maier).

152 See supra notes 143-54 and accompanying text.

VI. JUSTICE REHNQUIST'S ATTACK ON THE IEEPA AND TWEA

In two Rehnquist opinions, *Dames & Moore v. Regan* and *Regan v. Wald*, the Court thwarted the movement in Congress as reflected in the IEEPA to limit the "almost dictatorial powers" of the President in matters of foreign policy. In both cases, the Court deferred to the judgment of the Executive, thereby constraining congressional power in matters of foreign policy. As such, the Court in these two cases mirrors the prevalent view that the Executive is the branch of the American government singularly adapted to predominate in matters of foreign policy.

In addition, since any requirement that a President should "seek specific authority from Congress to act in an emergency would be dangerous," the decision by the Supreme Court in *Regan v. Wald* should be recognized for its maintenance, in this one specific example, of the flexibility requisite for effective response by the President in emergency situations. The Court was able to achieve this flexibility by bringing the economic sanctions required by the Cuba-United States international situation under the authority of the grandfather clause of the amended TWEA and IEEPA. Should a similar situation arise with an embargoed country not under the provisions of the grandfather clause of the NEA, IEEPA, and TWEA, however, the President would be unable to reapply sanctions under the IEEPA unless he was willing to declare a new national emergency. Inasmuch as the declaration of a new national emergency is an unworkable solution, the failings of such a position emphasize the necessity of amending the IEEPA to provide for the reapplication of economic sanctions should the need arise during the course of a national emergency without the need to declare a new national emergency.

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155 Id.
156 Throughout the hearings on the proposed IEEPA and the amended TWEA, it was naturally assumed that all circumstances prompting declarations of national emergencies would follow a scenario whereby an initial tense period of maximum sanctions would gradually be followed by a consistent reduction of tension between the United States and the embargoed country. Hence, there was no provision made for a situation such as the Rhodesian affair where relations between the United States and an embargoed country would sour after a period of reduced tension. Congress, therefore, should amend the IEEPA to allow a President to re-apply sanctions to meet such a scenario in as much as the option of declaring a new national emergency would be counterproductive.

The ability of a President to re-apply sanctions in the situation that *Wald* presented was
The Supreme Court’s recent decision in *Regan v. Wald* stands as the latest important installment in what has become a perpetual state of tension between the power and authority of the Congress and the President in foreign policy matters. Yet, its importance in the area of allocation of foreign policy powers notwithstanding, *Wald* stands as a decision that will have only limited impact on the totality of current global applications of transaction and travel restrictions. Of important precedential value, however, is the Court’s implicit categorization of the Reagan administration’s reapplication of travel and transaction restrictions as an exercise of power specifically authorized by Congress. The *Wald* Court appeared willing to sacrifice attempted legislative constraints on the executive branch in matters of foreign policy, in favor of the traditional deference afforded by the courts to the President in such matters.

The decision in *Wald*, considered together with Justice Rehnquist’s earlier opinion in *Dames & Moore v. Regan*, also acts as a specific reversal of the congressional momentum behind the IEEPA and the amended TWEA. *Wald* restructures both the IEEPA and the amended TWEA as broad grants of authority from the Congress to the President in matters of foreign policy, instead of the restrictive devices their authors intended.

The *Wald* decision, further, makes an important statement on the current status of the constitutionally guaranteed right to travel. The Court continued a move from a policy where such freedom may only be restricted by the "weightiest concerns of foreign

established by a broad reading of the language which grandfathered powers under the NEA, IEEPA, and TWEA. The IEEPA, however, contains no such language with regard to emergencies which might occur in the future. Subsequently, the balance struck between the President and Congress by the *Wald* Court by resorting to broad construction of the word "authorities" would be precluded in future Presidential emergency power issues.

109 See *Dames & Moore*, 453 U.S. at 662.
160 See supra note 96 and accompanying text.
161 Under Justice Jackson’s scheme in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952), actions taken by the President and specifically authorized by Congress are entitled to the strongest presumptions of validity.
164 Accord Marks and Grabow, supra note 124, at 101.
165 *Hearings on H.R. 1560 and H.R. 2382*, supra note 13, at 114.
policy" to a policy of acquiescence to the political branches of government.\textsuperscript{166} Whether Congress will passively allow itself to be placed in an inferior position in the continuing struggle over foreign policy powers, or whether it will respond to the challenge issued by Justice Rehnquist\textsuperscript{167} and make its intentions in the area of Presidential emergency powers perfectly clear, therefore, remains to be seen.

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\textsuperscript{166} See supra notes 94-98 and accompanying text.

\textsuperscript{167} Wald, 104 S.Ct. at 3035.