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# ***Regan v. Wald* and the Grandfather Clause of the Trading with the Enemy Act: A Lesson in Explicit Vagueness**

## **I. Introduction**

In *Regan v. Wald*,<sup>1</sup> the Supreme Court reinstituted the Reagan Administration's curbs on travel-related transactions with Cuba. The Court decided that the Treasury Department acted with statutory authority when it issued currency control regulations designed to deprive Cuba of U.S. currency. The regulations,<sup>2</sup> issued in 1982, were challenged on the ground that the Executive failed to comply with the procedures of the International Emergency Economic Powers Act (IEEPA).<sup>3</sup> Those procedures, enacted in 1977, substantially curtailed the President's power to impose a peacetime economic embargo against another country.

Rather than lifting all existing embargoes, Congress included a grandfather clause in conjunction with the 1977 amendment to section 5(b) of the Trading with the Enemy Act of 1914 (TWEA)<sup>4</sup> that allowed the President to retain the "authorities" that "were being exercised with respect to a country on July 1, 1977."<sup>5</sup> In a five to four decision, the Court held that this grandfather clause provided an adequate statutory basis for the 1982 amendment.<sup>6</sup> This decision preserved the Executive's power to exercise authority under the TWEA.

This Note examines the Court's decision in light of the legislative history of the 1977 amendment to section 5(b) of the TWEA and the enactment of the IEEPA. Part II presents the

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1. 104 S. Ct. 3026 (1984).

2. Certain Transactions Incident to Travel to and within Cuba, 47 Fed. Reg. 17,030 (1982) (codified as amended at 31 C.F.R. § 515.560 (1984)).

3. Act of Dec. 28, 1977, Pub. L. No. 95-223, §§ 201-208, 91 Stat. 1625, 1626-29 (1977) (codified at 50 U.S.C. §§ 1701-1706 (1982)).

4. *Id.* § 101(b), 91 Stat. 1625-26, *reprinted in* 50 U.S.C. app. § 5(b) note (1982).

5. 50 U.S.C. app. § 5(b) (1982).

6. *Wald*, 104 S. Ct. at 3039.

history of the TWEA, its 1977 amendments, and the enactment of the IEEPA. It also discusses the Cuban Assets Control Regulations,<sup>7</sup> which were enacted in 1963. Part III discusses the constitutional grant of executive authority to regulate a citizen's transactions with foreign countries, noting the traditional deference given the Executive in the realm of foreign affairs. Part IV presents the decision of the court of appeals and the majority and the dissenting opinions of the Supreme Court. Part V analyzes the Court's decision, evaluating the conflicting interpretations of the scope of presidential power prescribed by the grandfather clause of the TWEA. The Note concludes that despite congressional attempts to restrict the presidential exercise of emergency economic power under section 5(b) of the TWEA, the enactment of the IEEPA did not limit the President's authority to act with respect to those countries in which the President had been exercising his section 5(b) authorities prior to July 1, 1977. The grandfather clause of the TWEA excepted the Executive regulation of travel-related economic transactions with Cuba from the procedural requirements of the IEEPA, because the President was exercising that authority by means of a general license as of July 1, 1977. The grandfather clause of the TWEA is very broad and if Congress wishes to remedy the exercise of presidential authority under antiquated declarations of national emergency, it must enact more specific statutes to carry out its intent. If there is any ambiguity, courts must give the Executive the traditional deference in the realm of foreign affairs.

## II, History of the TWEA

### A. *Section 5(b) of the TWEA*

The Trading With the Enemy Act was passed in 1917 in response to the United States entry into World War I.<sup>8</sup> Originally, section 5(b) of the TWEA authorized the President to regulate economic transactions with foreign nations only during times of war.<sup>9</sup> In 1933, however, the TWEA was amended to au-

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7. 28 Fed. Reg. 6974 (1963) (codified as amended at 31 C.F.R. §§ 515.101 to .809 (1984)).

8. See Trading with the Enemy Act of 1917, ch. 106, 40 Stat. 411 (current version at 50 U.S.C. app. § 5(b) (1982)).

9. For a brief history of the TWEA, see generally, *Revision of Trading With the*

thorize the use of section 5(b) economic powers during peacetime national emergencies.<sup>10</sup> Since its enactment in 1917, section 5(b) has been criticized for being the "catch all" authority used by Presidents when they lacked specific authority to justify their conduct in foreign affairs.<sup>11</sup> From 1933 to 1977, section 5(b) authorities were available to the President during times of war or *during any other period of national emergency declared by the President*. This broad grant conferred virtually unchecked dictatorial powers on the President without any statutory provision for congressional review.<sup>12</sup>

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*Enemy Act, Markup Before the House Comm. on International Relations* 95th Cong., 1st Sess. 5, 8-9 (1977) (prepared statement of Rep. Jonathon Bingham, Chairman of the House Subcomm. on International Economic Policy and Trade) [hereinafter cited in text as *House Markup*].

10. Act of Mar. 9, 1933, ch. 1, 48 Stat. 1 (current version at 50 U.S.C. app. § 5(b) (1982)).

In 1933 President Roosevelt declared a national emergency under § 5(b) of the TWEA, authorizing him to declare a bank holiday to prevent the hoarding of gold. The President invoked this authority, even though § 5(b) was explicitly limited by its terms to wartime use. However, Congress ratified this usage retroactively by amending § 5(b) on the first day of its 1933 session.

*House Markup*, *supra* note 9, at 8.

Presidential authority under the TWEA was delegated to the secretary of the Treasury who exercises it through the Office of Foreign Assets Control. *See* 50 U.S.C. app. § 5(b) (1982).

11. *House Markup*, *supra* note 9, at 8. *See also* S. REP. No. 1170, 93d Cong., 2d Sess. 7 (1974).

12. *See House Markup*, *supra* note 9, at 2, 5, 8-9. Representative Bingham noted that the TWEA has been subject to abuse by Presidents, stretching the powers conferred on them by the Constitution. Prior to 1977, there were four declarations of national emergency under the TWEA: (1) President Roosevelt's 1933 bank holiday declaration, Proclamation No. 2040, *reprinted in* 48 Stat. 1691 (1933); (2) President Truman's declaration of national emergency in response to the Korean conflict and the trend of Communist expansionism in the 1950's, Proclamation No. 2914, *reprinted in* Fed. Reg. 9029 (1950); (3) President Nixon's 1970 declaration concerning a Post Office strike, Proclamation No. 3972, *reprinted in* 3 C.F.R. 473 (1966 - 1970 compilation); and (4) President Nixon's 1970 declaration concerning the country's balance-of-payments crisis, Proclamation No. 4074, *reprinted in* 36 Fed. Reg. 15,724 (1971). Presently section 5(b) of the TWEA provides the authority for trade embargoes against North Korea, Vietnam, Cambodia, Cuba and the continued regulation of export controls to various East European countries. *See e.g.*, *House Markup*, *supra* note 9, at 8 (prepared statement of Rep. Jonathon Bingham) (delineating the background of the TWEA and the reason for its 1977 amendment). The trade embargo against the Peoples Republic of China has been lifted, *see infra* note 147. For a discussion concerning the need for legislation amending § 5(b) of the TWEA, *see also* H.R. REP. No. 459, 95th Cong., 1st Sess. 7-9 (1977) (available on CIS microfiche: No. H 463-14) [hereinafter cited as *HOUSE REPORT*] (statements of Prof. Stanley D. Metzger of Georgetown University Law Center; Prof. Andreas F.

Prior to its amendment in 1977, section 5(b) of the TWEA gave the President four types of power "[d]uring the time of war or during any other period of national emergency declared by the President."<sup>13</sup> First, he was given broad regulatory powers over foreign property transactions, banking transfers, the import and export of currency, and security transactions. Second, the President had the authority to regulate property in which foreign countries or nationals had an interest. Third, the Executive could vest any property or property interest of a foreign country or of a foreign national. Finally, the President had the power to administer, liquidate, freeze, sell or otherwise deal with vested property for the benefit of the United States.<sup>14</sup>

### B. *National Emergencies Act*

In theory, once the President declared a state of national emergency, the emergency officially continued until the President terminated it.<sup>15</sup> In practice, once the President declared a period of national emergency, he was slow to lift it, even if the circumstances that brought about the declaration ended. For instance, President Truman made a declaration of national emergency during the Korean War<sup>16</sup> and the Executive continued to issue regulations under this declaration in the 1970's.<sup>17</sup>

Concern about the ongoing nature of states of national emergency and the concomitant power bestowed on the President led Congress to enact the National Emergencies Act of 1976 (NEA).<sup>18</sup> The NEA provided that presidential power exercised under existing declarations of national emergency would terminate two years from September 14, 1976.<sup>19</sup>

The Act provided new procedures for the declaration, con-

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Lowenfeld of New York University Law School; and Mr. Peter Weiss, Vice President for the Center for Constitutional Rights).

13. Act of Mar. 9, 1933, ch. 1, § 2, 48 Stat. 1 (current version at 50 U.S.C. app. § 5(b) (1982)).

14. *Id.* See also HOUSE REPORT, *supra* note 12, at 2.

15. HOUSE REPORT, *supra* note 12, at 7.

16. *House Markup*, *supra* note 9, at 8-9.

17. *Id.* at 2.

18. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651 (1982)).

19. *Id.*

duct and termination of future national emergencies.<sup>20</sup> There were, however, certain emergency power statutes exempted from the provisions of the NEA due to their importance to the daily functioning of the government. Under the NEA, Congress was to study the exempted statutes to revise them to conform with the NEA without disrupting the foreign policies currently in effect under their authority.<sup>21</sup> Section 5(b) of the Trading With the Enemy Act of 1917 was one of the statutes excluded from the coverage of the NEA because Congress was concerned about terminating existing regulations authorized by section 5(b) of the TWEA.<sup>22</sup> The House Committee on International Relations and its Subcommittee on International Economic Policy and Trade had the responsibility of revising section 5(b) of the TWEA to conform with the procedural requirements of the NEA.<sup>23</sup> This Committee studied H.R. 7738,<sup>24</sup> a bill to redefine the power of the President to regulate international economic transactions during times of war or national emergency.<sup>25</sup> H.R. 7738, amended section 5(b) of the TWEA and set forth a new procedural framework for the Executive's use of peacetime economic emergency powers.<sup>26</sup>

C. *H.R. 7738, Public Law Number 95-223*

Title I of H.R. 7738,<sup>27</sup> amended section 5(b) of the TWEA, limiting the President's power to exercise section 5(b) authorities solely to times of war.<sup>28</sup> In addition, title I grandfathered those peacetime exercises of section 5(b) authorities which were being exercised on July 1, 1977. Title II of H.R. 7738, the IEEPA,<sup>29</sup> established a new set of authorities for the executive to use during peacetime national emergencies. These authorities

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20. HOUSE REPORT, *supra* note 12, at 6-7.

21. *Id.*

22. S. REP. NO. 466, 95th Cong., 1st Sess. 2-3 (1977).

23. HOUSE REPORT, *supra* note 12, at 6-7.

24. H.R. 7738, 95th Cong., 1st Sess., 122 CONG. REC. 22,473-75 (1977).

25. HOUSE REPORT, *supra* note 12, at 1.

26. *Id.* at 1-2.

27. H.R. 7738, 95th Cong., 1st Sess., 122 CONG. REC. 22,473-75 (1977).

28. Act of Dec. 28, 1977, Pub. L. No. 95-223, § 101(b), 91 Stat. 1625-26, *reprinted in* 50 U.S.C. app. § 5(b) note (1982).

29. *Id.* §§ 201-208, 91 Stat. 1625, 1626-29 (1977).

are more narrow than those under section 5(b) and are subject to various procedural limitations.<sup>30</sup> The authorities granted to the Executive in the IEEPA are basically the same as those of section 5(b) of the TWEA,<sup>31</sup> except that the IEEPA excludes: (1) the power to take title to foreign property; (2) the power to regulate purely domestic transactions; (3) the power to regulate gold and bullion and; (4) the power to seize records.<sup>32</sup> The procedural requirements of the IEEPA impose important restrictions on the President's emergency power. Under section 1701(b) of the IEEPA, the President has the authority to invoke peacetime emergency economic powers only if he declares a national emergency because of an unusual and extraordinary threat stemming, in whole or in part, from outside the United States. The threat must jeopardize the national security, foreign policy or economy of the United States.<sup>33</sup> Before exercising the IEEPA authorities, the President is required, "in every possible instance," to consult with Congress. Moreover, once his authorities have been exercised, the President must report to Congress every six months on the actions taken and any changes in the emergency situation.<sup>34</sup>

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30. HOUSE REPORT, *supra* note 12, at 2.

31. The authorities that can be exercised under the IEEPA are provided in § 1702:

At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of 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 right, 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.

50 U.S.C. § 1702(a)(1) (1982). For a discussion of the TWEA authorities, see *supra* note 14 and accompanying text.

32. HOUSE REPORT, *supra* note 12, at 14-15.

33. 50 U.S.C. § 1701 (1982).

34. *Id.* § 1703.

#### D. *Grandfather Clause of Section 5(b) of the TWEA*

Congress enacted the grandfather clause of section 5(b) of the TWEA to mitigate the adverse effect that terminating the existing exercises of section 5(b) authorities would have had. Existing economic embargoes against countries such as Cuba are an important foreign policy tool. The embargoes are a source of leverage for the United States, enabling the Executive to quickly respond to foreign actions contrary to American interests.<sup>35</sup> Thus, when it terminated existing embargoes in the NEA, Congress had two goals in mind. First, it did not want to totally disrupt the President's policies toward the affected countries by unilaterally ending the embargoes.<sup>36</sup> Second, the House Subcommittee on International Economic Policy and Trade concluded that requiring the President to publicly announce a new declaration of national emergency pursuant to the IEEPA, in order to preserve those embargo powers previously being exercised under the authority of section 5(b) of the TWEA, could have adverse foreign policy ramifications.<sup>37</sup>

In order to accomplish these goals, Congress enacted a grandfather clause that enabled the President to continue to control transactions with those countries that were subject to

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35. See Joint Appendix at 178-83, *Regan v. Wald*, 104 S. Ct. 3026 (1984) (No. 83-436) (declaration of James H. Michel). The Michel declaration provides in part:

A central source of leverage the United States has over Cuba lies in the power of the United States to prohibit persons subject to U.S. jurisdiction from engaging in various economic activities with Cuba or its nationals that would benefit Cuba

....

This program, as implemented by comprehensive regulations issued under the Trading With the Enemy Act (TWEA), has been maintained for twenty years. During this period, this regulatory scheme has proven to be a flexible and essential instrument of United States foreign policy. It enables the Executive to respond promptly to Cuban actions. In addition, through fine-tuning of the regulations, the scheme has served to buttress U.S. diplomatic initiatives.

*Id.* at 178-79.

36. See *Emergency Controls on International Economic Transactions: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 19 (1977) (statement of Prof. Andreas Lowenfeld) [hereinafter cited as *Emergency Controls Hearings*]; see also *id.* at 103, 113, 119 (statements of Assistant Treasury Secretary Bergsten).

37. *Id.* at 189-90 (remarks of Mr. Leonard E. Santos of the Treasury Department) (a new declaration of national emergency could create further tension among the affected countries in a declining political relationship).



the authorities of section 5(b) of the TWEA as of July 1, 1977.<sup>38</sup> Thus, title I of H.R. 7738 grandfathered section 5(b) authorities presently being exercised with respect to a country; further use of those authorities did not have to comply with the newly enacted IEEPA.<sup>39</sup> The Committee had decided that it would have been too difficult and divisive to revise the existing uses of section 5(b) authorities and improve procedures for future uses of international emergency economic power in a single bill. Thus, the final version of the law had a prospective nature. It contained a grandfather clause that preserved the authorities under section 5(b) of the TWEA that were being exercised on July 1, 1977, provided that the President extend those existing emergency authorities for successive one year periods beyond September 14, 1978 — the date specified by the NEA for termination of all existing emergency authorities.<sup>40</sup>

Under the grandfather clause, section 5(b) authorities may be extended if the President determines that such an extension is in the national interest. Since 1978, Presidents Carter and Reagan have determined that it is in the best interest of the United States to continue to exercise the TWEA authorities with respect to Cuba, North Korea, Vietnam, and Cambodia.<sup>41</sup>

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38. Act of Dec. 28, 1977, Pub. L. No. 95-223, § 101(b), 91 Stat. 1625, 1625, *reprinted in* 50 U.S.C. app. § 5(b) note (1982). Title I of Public Law 95-223 provides in part:

Notwithstanding the amendment made by subsection (a), the authorities conferred upon the President by section 5(b) of the Trading With The Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of the National Emergencies Act. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

*Id.*

For a discussion of section 5(b) authorities of the TWEA, see *supra* notes 13-14 and accompanying text.

39. Act of Dec. 28, 1977, Pub. L. No. 95-223, § 101(b), 91 Stat. 1625, 1625, *reprinted in* 50 U.S.C. app. § 5(b) note (1982).

40. *Id.*

41. Memorandum of Sept. 8, 1978, 45 Fed. Reg. 40,695; Memorandum of Sept. 12, 1979, 2 PUB. PAPERS 1655-56; Presidential Determination of Sept. 8, 1980, 45 Fed. Reg. 59,549; Memorandum of Sept. 10, 1981, 46 Fed. Reg. 45,321; Memorandum of Sept. 8,

The government exercises its TWEA authorities with respect to Cuba through the Cuban Assets Control Regulations.<sup>42</sup>

### E. Cuban Assets Control Regulations

The Cuban Assets Control Regulations (CACR) were enacted under the authority of the TWEA as part of an economic embargo against Cuba.<sup>43</sup> These regulations restrict Cuba's access to hard currency with the express goal of undermining its ability to finance the spread of communism to democratic allies of the United States.<sup>44</sup>

#### 1. Regulation 201(b)

In 1963, Regulation 201(b) was promulgated as part of the Cuban Assets Control Regulations<sup>45</sup> and was implemented under the authority of section 5(b) of the TWEA. Regulation 201(b) prohibits those subject to United States jurisdiction from engaging, directly or indirectly, in unauthorized economic transactions with Cuba or Cuban nationals, including transactions incident to travel to and within Cuba.<sup>46</sup> Regulation 201(b) has never been withdrawn, abrogated or amended since its enactment in 1963.<sup>47</sup>

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1982, 47 Fed. Reg. 39,797; Memorandum of Sept. 7, 1983, 48 Fed. Reg. 40,695; Memorandum of Sept. 11, 1984, 49 Fed. Reg. 35,927.

42. 28 Fed. Reg. 6974 (1963) (codified as amended at 31 C.F.R. §§ 515.101 to .809 (1984)).

43. *Wald*, 104 S. Ct. at 3030. See Cuban Assets Control Regulations, 28 Fed. Reg. 6974 (1963) (codified as amended at 31 C.F.R. §§ 515.101 to .809 (1984)).

44. See Joint Appendix at 178-79, *Wald* (No. 83-436) (declaration of James H. Michel, Assistant Secretary of State for Inter-American Affairs).

45. 31 C.F.R. § 515.201(b) (1963) (current version reprinted in 31 C.F.R. § 515.201(b) (1984)). Section 515.201(b)(1) provided:

All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States . . .

46. 31 C.F.R. § 515.201(b) (1984).

47. 31 C.F.R. § 515.201(b) (1984). See *Wald*, 104 S. Ct. at 3035.

## 2. Regulation 560, 1977 General License

On March 9, 1977, President Carter removed most travel-related economic restrictions on transactions with Cuba.<sup>48</sup> Implementing the President's proclamation, the Treasury Department added regulation 560 to the CACRs.<sup>49</sup> Regulation 560 was a general license that authorized economic transactions ordinarily incident to travel to and within Cuba.<sup>50</sup> It allowed persons visiting Cuba to pay for their transportation and living expenses, such as hotel bills and meals.<sup>51</sup> Thus, in 1977, travel-related economic transactions with Cuba were virtually unrestricted despite the continued validity of Regulation 201(b) of the CACRs. Although regulation 560 permitted essentially all travel-related economic transactions with Cuba, some of the prohibitions of section 201(b) remained. For instance, other restrictions on

48. *President Carter's News Conference of March 9*, 76 DEP'T ST. BULL. 305, 305 (1977).

49. See 31 C.F.R. § 515.560 (1977) (current version at 31 C.F.R. § 515.560 (1984)). Regulation 560 was amended on May 18, 1977 to further relax existing restrictions on travel-related economic transactions with Cuba. Cuban travel restrictions were eased in response to the Helsinki Accords, which called for freedom of international movement and communication. See *Helsinki Accords*, 73 DEP'T ST. BULL. 323 (1975).

50. Regulation 560 provided:

(a) The following transactions are authorized:

(1) All transactions ordinarily incident to travel to and from Cuba.  
 (2) All transactions ordinarily incident to travel in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed \$100 per person, for personal use only. Such merchandise may not be resold. The authorization in this subparagraph may only be used once in every six consecutive months.

(b) Persons who travel to Cuba for the purpose of gathering news, making news or documentary films, engaging in professional research or for similar activities are authorized to acquire and import into the United States, as accompanied baggage or otherwise, such photographs, films, books, magazines, newspapers, and similar publications as are directly related to their professional activities, without limitation as to value. Such merchandise may only be acquired and imported for their own professional use or that of their employers at the time of the travel, and may not be sold to other persons.

(c) Persons who traveled in Cuba after March 18, 1977, and who prior to that date were not designated nationals of Cuba, are licensed as unblocked nationals. This subparagraph does not authorize any transactions prohibited by any other section of this part.

31 C.F.R. § 515.560 (1977).

51. *Id.*

property transactions with Cuba or Cuban nationals were unaffected by the general license.<sup>52</sup> In addition, the 1977 general license was subject to an important caveat. It was continuously subject to regulation 515.805, which provided that any regulation or license issued in connection with the CACRs may be "amended, modified, or revoked" at any time.<sup>53</sup>

### 3. 1982 Amendment of Regulation 560

Declaring that Cuba continued to engage in activities hostile to the interests of the United States, the Reagan Administration amended regulation 560 in May of 1982 and revoked the general license issued in 1977.<sup>54</sup> Generally, the amendment prohibits

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52. Travellers were not permitted to purchase merchandise in Cuba with a foreign market value exceeding \$100. In addition, any merchandise that was purchased had to be for personal use and could not be resold. See 31 C.F.R. § 515.560(a)(B) (1977). Also, all scheduled air and sea travel was still prohibited, *id.* § 515.560(a)(5), and contracts between domestic credit card issuers and Cuban enterprises were also forbidden, *id.* § 515.560(a)(7).

53. See 28 Fed. Reg. 6974 (1963) (codified as amended at 31 C.F.R. § 515.805 (1984)). In addition, all persons engaging in travel-related economic transactions with Cuba were required to make "a full and accurate record of each such transaction" and retain this record for two years. See 31 C.F.R. § 515.601 (1977) (current version at 31 C.F.R. § 515.560 (1984)).

54. See 31 C.F.R. § 515.560 (1982) (current version at 31 C.F.R. § 515.560 (1984)). Regulation 560 was promulgated in response to Cuba's efforts to destabilize democratic governments in Central America. Joint Appendix at 171-72, *Wald* (No. 83-436) (declaration of Thomas O. Enders).

The 1982 amendment of regulation 560 provides in part:

(a)(1) *General license.* The transactions in paragraph (c) of this section are authorized in connection with travel to Cuba by:

(i) Persons who are officials of the United States Government or of any foreign government, or of any intergovernmental organization of which the United States is a member, and who are traveling on official business; (ii) persons who are traveling for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities; or (iii) persons, and persons traveling with them who share a common dwelling as a family with them, who are traveling to visit close relatives in Cuba.

(2) For purposes of this section, the term "close relative" means spouse, child, grandchild, parent, grandparent, great grandparent, uncle, aunt, brother, sister, nephew, niece, first cousin, or spouse, widow, or widower of any of the foregoing. The term "close relative" also means mother-in-law, father-in-law, daughter-in-law, son-in-law, sister-in-law, or brother-in-law.

(3) The general license contained in this section does not authorize transactions in connection with tourist travel to Cuba, nor does it authorize transactions in connection with business travel undertaken for any purposes other than those set forth in paragraph (a)(1) of this section.

United States citizens from engaging in transactions "incident to" ordinary business and tourist travel to Cuba.<sup>55</sup> The Reagan Administration amended the 1977 general license pursuant to section 805<sup>56</sup> of the CACRs, which was in effect on July 1, 1977. The government contended that since 1960, a major objective of United States policy with Cuba has been to deny the Cuban government the financial means for conducting a program of violence against third world countries that is adverse to the security interests of the United States.<sup>57</sup> The amendment of regulation 560 was specifically designed to thwart Cuba's plan to increase its hard currency circulation by attracting tourists from the United States.<sup>58</sup> The administration contended that Cuba had

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(b) *Specific Licenses.* Specific licenses authorizing the transactions in paragraph (c) of this section will be issued in appropriate cases to persons desiring to travel to Cuba for humanitarian reasons, or for purposes of public performances, public exhibitions, or similar activities.

(c) The following transactions are authorized in connection with travel to and within Cuba by persons licensed under paragraphs (a) and (b) of this section:

(1) All transportation-related transactions ordinarily incident to travel to and from Cuba.

(2) All transactions ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed \$100 per person. This authorization may be used only once in every six consecutive months. Single copies of publications do not count against the \$100 limit set forth in this subparagraph. For purposes of this section, the term "publications" includes books, newspapers, magazines, films, phonograph records, tapes, photographs, microfilm, microfiche, posters, and similar materials. All merchandise and publications obtained pursuant to this subparagraph shall be for noncommercial use only and shall not be resold.

31 C.F.R. § 515.560 (1982).

55. See 31 C.F.R. § 515.560(a)(3) (1984). However, specific licenses may be granted for humanitarian, cultural, or athletic purposes and events. *Id.* § 515.560(a)(1).

56. *Id.* § 515.805.

57. See Joint Appendix at 172, *Wald* (No. 83-436) (declaration of Thomas O. Enders).

58. *Id.* at 174-75. Although tourism had not been an important source of revenue for the Castro government in Cuba, tourism was a significant source of revenue prior to 1958. Data provided from hearings before the Subcommittee on Interstate and Foreign Commerce, House Interior Committee, March 28, 29, 30 and April 11, 12, 1961 provided that, in 1958 Cuba earned \$37 million from United States travellers alone, which equalled approximately two percent of its G.N.P. and almost four percent of its foreign exchange earnings. In 1958, Cuba had the highest tourist income of any country in the Caribbean. Tourism was Cuba's second largest industry and travellers from the United

rapidly expanded its tourist industry during 1981 and early 1982 and intended to increase this important source of revenue. The travel-related economic transactions were said to have the capacity to become the second most important source of convertible currency for Cuba by providing the Cuban government with a means to finance those actions contrary to the interests of the United States.<sup>59</sup>

### III. Authority of the President Under the Constitution

Determining the scope of Executive authority is not an easy task. As Justice Jackson noted in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>60</sup> "[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."<sup>61</sup>

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States constituted the largest component of this trade. The United States government recognized this fact and realized that both its proximity to Cuba, and the affluence of its population, made it a key market for Cuban tourism. Thus, in 1963, Regulation 201(b) of the Cuban Asset Control Regulations prohibited tourist-related economic transactions. *See id.*

United States travel statistics show that the 1982 amendment of the general license reactivating § 201(b) of the CACRs, which prohibited U.S. citizens from engaging in travel-related economic transactions with Cuba, did not in fact prevent travel to Cuba. Travel to Cuba has increased since the May 1982 amendment; but tourism declined. The last quarter of 1982, October through December, indicates a 45% decline in tourist travel to Cuba, compared with the same quarter in 1981. Based on these statistics, the United States contends that the 1982 amendment of regulation 560 appears to have denied Cuba the increased revenues it would have otherwise earned had the 1982 amendment not been enacted. *See id.* at 176-77.

59. *Id.* at 173-74. The United States was aware of Cuban plans to host a Conference of International Travel Agents, which was to be held in Havana in June of 1982, attracting 670 delegates from 195 tour agencies representing 28 countries, including the United States. It was also alleged that Cuba intended to build a 22 hotel tourist complex on Cayo Largo including gambling casinos and special attractions. Cayo Largo was to be a "free port," isolated from the rest of Cuba and staffed by selected personnel. *Id.*

60. 343 U.S. 579 (1952).

61. *Id.* at 634 (Jackson, J., concurring), *quoted in* *Dames & Moore v. Regan*, 453 U.S. at 660. Article II, section two of the United States Constitution enumerates the powers specifically granted to the President as chief executive of the federal government. U.S. CONST. art. II, § 2. Much of the President's power however, both domestic and foreign, is implied in the general language of article II. *See Myers v. United States*, 272 U.S. 52, 118 (1926). The Constitution gives the President substantially greater authority in the realm of foreign affairs than it does in domestic matters. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Article II, section two authorizes the President to appoint ambassadors, make treaties and command the armed forces of the

In an attempt to define the obscure nature of executive authority, Justice Jackson presented an often-cited framework for analyzing the scope of executive authority. He asserted that the President's powers were not fixed but fluctuated, depending on their disjunction or conjunction with congressional powers.<sup>62</sup> Justice Jackson contended that there were three categories of Presidential authority. First, the president's authority is at its maximum when he acts pursuant to the express or implied authorization of Congress.<sup>63</sup> Second, when the President acts without a congressional grant or denial of authority, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."<sup>64</sup> Finally, executive authority is "at its lowest ebb" when the President acts against the express or implied will of Congress.<sup>65</sup> Thus, in order to determine if the President exceeded the bounds of his power, the *Wald* Court had to decide whether the President acted in accordance with the 1977 amendments to the Trading with the Enemy Act.<sup>66</sup>

### *Legislative Grant of Executive Authority*

Concerned about the obscure scope of executive authority, yet aware of the ramifications of rashly terminating previously exercised presidential powers, Congress enacted the 1977 amendments to the TWEA and the IEEPA. By amending the TWEA and enacting the IEEPA, Congress intended to limit what was perceived as the Executive's uncurtailed authority to exercise broad powers affecting future domestic and international economic affairs.<sup>67</sup> The procedures promulgated in the

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United States. U.S. CONST. art. II, § 2.

62. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 635 (Jackson, J., concurring).

63. *Id.* at 636.

64. *Id.* at 637.

65. *Id.* at 637-38. Justice Jackson concluded that the seizure of the steel mills fell into this category and therefore was unconstitutional.

66. *See* Act of Dec. 28, 1977, Pub. L. No. 95-223, §§ 201-208, 91 Stat. 1625, 1626-29 (1977) (codified at 50 U.S.C. §§ 1701-06 (1982)).

67. *See* HOUSE REPORT, *supra* note 12, at 7 (statement of Peter Weiss, Vice President, Center for Constitutional Rights) ("The Trading with the Enemy Act is a prime example of the unchecked proliferation of Presidential power for purposes totally unforeseen by the creators of that power."). *See also* *Emergency Controls Hearings*, *supra* note

IEEPA provided Congress with a method for reviewing a President's exercise of section 5(b) authorities so that such an exercise would not proceed ad infinitum.<sup>68</sup> Nevertheless, as seen in *Dames & Moore v. Regan*,<sup>69</sup> although the IEEPA affords Congress more procedural control over the Executive's use of peacetime international emergency economic power, the IEEPA did not curtail the President's substantive exercises of such power.

In *Dames & Moore v. Regan*,<sup>70</sup> the Supreme Court announced that the legislative history and cases interpreting the TWEA indicate that when the President is acting under a statutory grant of authority, the scope of his power is to be construed broadly.<sup>71</sup> After the seizure of American citizens at the United States embassy in Tehran, President Carter declared a national emergency and used his emergency powers under the IEEPA to block Iranian assets.<sup>72</sup> Responding to the hostage crisis, the Treasury Department issued a regulation providing that "[u]nless licensed or authorized pursuant to this part . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest of Iran."<sup>73</sup> Subsequently, President Carter issued a general license authorizing those with claims against Iranians to apply for prejudgment attachment orders.<sup>74</sup> Treasury regulations specifically provided that the license could be revoked or amended.<sup>75</sup> As a part of the agreement to release the American hostages, President Carter revoked this general license and nullified previously valid court-ordered attachments.<sup>76</sup> The petitioners alleged that the actions of the President and the Treasury Department were beyond their statutory and constitutional

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36, at 13-14, 16 (reports congressional concern over unchecked Presidential emergency power).

68. See *Emergency Controls Hearings*, *supra* note 36 at 13-14.

69. 453 U.S. 654 (1981).

70. *Id.*

71. See *id.* at 672-74.

72. *Id.* at 662.

73. 31 C.F.R. § 535.203(e) (1984); see also *Dames & Moore v. Regan*, 453 U.S. at 663.

74. *Dames & Moore v. Regan*, 453 U.S. at 663.

75. *Id.* at 664.

76. *Id.* at 665-66.



powers.<sup>77</sup> The Supreme Court disagreed and concluded that the President was authorized to nullify the attachments and order the transfer of Iranian assets under section 1702(a)(1)(B) of the IEEPA, which empowered the President to “compel,” “nullify,” or “prohibit” any “transfer” with respect to, or transactions involving any property subject to the jurisdiction of the United States, in which any foreign country has an interest.<sup>78</sup>

The Court stated that nothing in the legislative history of either section 1702 of the IEEPA or section 5(b) of the TWEA from which section 1702 was drawn, requires ignoring the plain meaning of the words “transfer,” “compel,” or “nullify.” To the contrary, the Court recognized that the President had acted to place the Iranian assets at his disposal so that he could use them as a “bargaining chip” to negotiate an end to a declared national emergency.<sup>79</sup> Moreover, because the Court stated that the IEEPA specifically authorized the President’s actions, it concluded that those actions were “‘supported by the strongest of presumptions and widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack’” them.<sup>80</sup> This deference to presidential authority corresponds to the scope of executive authority traditionally given the President in the realm of foreign affairs due to the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”<sup>81</sup> The need for negotiation, plus the President’s special access to sources of confidential information, necessitated “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”<sup>82</sup>

In *Regan v. Wald*, as in *Dames & Moore v. Regan*, the Court concluded that Congress authorized the President’s actions and supported those actions with the “widest latitude of

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77. See *id.* at 667.

78. See *id.* at 669-74 (construing 50 U.S.C. § 1702(a)(1)(B) (1976)). For the text of § 1702(a)(1)(B), see *supra* note 31.

79. *Id.* at 673.

80. *Id.* at 674 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

81. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

82. See *id.*

judicial interpretation.”<sup>83</sup> The Court determined that the President was in fact exercising his authority under section 5(b) of the TWEA on July 1, 1977, by regulating travel-related economic transactions with Cuba through the 1977 general license.

#### IV. *Regan v. Wald*

##### A. *Facts*

American citizens who were prohibited from traveling to Cuba by Treasury Department regulation 560 sought a preliminary injunction to prohibit enforcement of that regulation.<sup>84</sup> The petitioners contended that the President did not have the authority to impose the 1982 restrictions on travel-related economic transactions contained in regulation 560. They argued that the prohibition had been enacted without complying with the consultative procedures of the IEEPA.<sup>85</sup> Furthermore, they claimed that the grandfather clause of the TWEA did not exempt regulation 560 from IEEPA procedures because the 1982 regulation went beyond the authorities being exercised on July 1, 1977. The petitioners also challenged regulation 560 on constitutional grounds, asserting that it violated their right to travel guaranteed by the due process clause of the fifth amendment.

##### B. *The Decisions*

###### 1. *Lower Court Decisions*

The United States District Court for the District of Massachusetts referred the petitioners' requests to a magistrate who found that the grandfather clause gave the President the authority to amend regulation 560.<sup>86</sup> The magistrate reasoned that although there were few restrictions on travel-related transactions to Cuba after President Carter amended regulation 560 in 1977, some authority was still being exercised under a general licens-

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83. See *supra* note 80 and accompanying text.

84. *Wald v. Regan*, No. 82-1690-T (D. Mass. July 16, 1982), reprinted in *Petitioner's Brief for Writ of Cert.* at 24a, *Wald* (No. 83-436).

85. *Wald v. Regan*, 708 F.2d 794 (1st Cir. 1983), *rev'd* 104 S. Ct. 3026 (1984).

86. *Wald v. Regan*, No. 82-1690-T (D. Mass. July 16, 1982), reprinted in *Petitioner's Brief for Writ of Cert.* at 24a, *Wald* (No. 83-436).

ing scheme.<sup>87</sup> Thus, the magistrate concluded that the President could modify the general license to impose tighter controls on economic transactions without following the procedural requirements of the IEEPA.<sup>88</sup> The district court accepted the magistrate's conclusions and denied the request for a preliminary injunction.<sup>89</sup>

The First Circuit Court of Appeals vacated the district court's order and remanded the case with instructions to issue a preliminary injunction.<sup>90</sup> A three-judge panel unanimously agreed that there was no statutory authority for regulation 560 because the grandfather clause of the IEEPA had not preserved the authority to promulgate new restrictions on travel-related economic transactions with Cuba.<sup>91</sup> The court advanced two lines of reasoning in support of its decision. First, it found that travel-related restrictions were not being exercised on July 1, 1977 within the meaning, intent, and purpose of the grandfather clause.<sup>92</sup> Second, the court concluded that, even if the statutory language and history of the grandfather clause were ambiguous, constitutional considerations and the intent of related contemporary statutes supported interpreting the grandfather clause in favor of the plaintiffs.<sup>93</sup>

The court of appeals presented three reasons for its decision that the "authority" to regulate travel-related economic transactions with Cuba was not "being exercised" on July 1, 1977. First, "as a matter of common sense and common English," there was a large enough difference between restricting commodity purchases and restricting travel purchases so that they do not encompass the same exercise of authority.<sup>94</sup> The First Circuit

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87. For the text of the general license, see *supra* note 50.

88. See *Wald v. Regan*, No. 82-1690-T (D. Mass. July 22, 1982), reprinted in *Petitioner's Brief for Writ of Cert.* at 35a, *Wald* (No. 83-436).

89. *Id.*

90. *Wald v. Regan*, 708 F.2d at 801.

91. *Id.* The First Circuit did not reach plaintiff's constitutional argument because it found that the challenged regulation lacked statutory authority. *Id.* at 795.

92. *Id.* at 796-800.

93. *Id.* at 800-01. To reinforce their claim that the 1982 amendment to the general license exceeded the presidential exercise of authority, the petitioners also alleged that the 1982 amendment to the general license violated the Passport Act of 1926, 22 U.S.C. § 211(a) (1982).

94. *Id.* at 796. From 1977 to 1982, regulation 560 only restricted commodity purchases. See *supra* note 43. The Reagan Administration amended regulation 560 to

contended that a restriction of commodity purchases has an appreciably different direct effect than a restriction of travel-related expenses.<sup>95</sup> The court also stated that the government's administrative practice had treated travel-related restrictions differently from other more typical TWEA rules and regulations.<sup>96</sup> Finally, the First Circuit noted that "unlike most commercial regulations, travel restrictions raise special constitutional issues, because they involve specifically protected rights of citizens."<sup>97</sup> Thus, because the court considered an "exercise" of authority to restrict travel as qualitatively different from the authority to control the influx of Cuban goods, it held the authority to restrict travel-related transactions was not grandfathered.<sup>98</sup>

The First Circuit's second reason for concluding that the power to enact regulation 560 had not been grandfathered was that the legislative history of the grandfather clause clearly indicated that it was to be narrowly construed. The grandfather clause only allowed the Executive to continue those prohibitions actually in effect on July 1, 1977.<sup>99</sup> The court pointed to committee hearings and to House and Senate reports to demonstrate that each time legislators discussed the term "authorities" in the grandfather clause, they referred to "existing uses" of TWEA authority. Administrative spokesmen for the IEEPA also interpreted the grandfather clause narrowly, representing that only existing exercises of section 5(b) authority would be preserved.<sup>100</sup> The court of appeals took careful note that the princi-

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include constraints on travel-related economic transactions as well as commodity purchases. *See supra* note 54.

95. *Id.* at 796-97. Restricting commodity purchases has the effect of keeping money and valuable commodities out of the hands of a hostile country. However, prohibiting travel-related transactions has a small economic consequence for the foreign country but in effect eliminates tourist and business travel to that country. *Id.*

96. *Id.* at 797. For many years the Departments of State and Justice did not think they had the power to control travel to and from the United States, but they regularly restricted commodity purchases. *Id.*

97. *Id.* at 797.

98. *See id.* at 796-97.

99. *Id.* at 798 (construing Act of Dec. 28, 1977, Pub. L. No. 95-223, § 101(b), 91 Stat. 1625, 1625).

100. *Id.* The court stated that Leonard E. Santos of the Treasury Department testified that the TWEA grandfathered "existing uses." Testimony from both Treasury and State Department spokesmen listed the uses of 5(b) they wanted grandfathered. Travel

pal legislative spokesman for the IEEPA rejected draft language that would have preserved presently unused authorities of the President under section 5(b) of the TWEA.<sup>101</sup> Therefore, the court of appeals concluded that Congress clearly intended the grandfather clause to save only those *specific prohibitions* in effect on July 1, 1977.<sup>102</sup>

Finally, the court of appeals reasoned that Congress enacted the grandfather clause to protect "existing trade embargoes [and] to mitigate the adverse effect that automatic repeal would have had on the President's negotiating position with respect to other countries."<sup>103</sup> To require the President to terminate an embargo without obtaining anything in return, or to force the President to declare a new national emergency to continue an existing embargo, might disrupt delicate foreign policy. The grandfather clause was enacted to avoid this type of dislocation.<sup>104</sup> However, the imposition of travel-related restrictions did not pose the kind of problem that the grandfather clause was designed to avoid, namely the disruption of foreign policy.<sup>105</sup> The First Circuit noted that the 1982 regulation had in fact, been accompanied by a public statement that declared the punitive purpose of regulation 560.<sup>106</sup>

The court of appeals also presented an alternate two-prong basis for its conclusion. Even if the language or the intent of the grandfather clause was ambiguous, it must be construed narrowly because the challenged statute implicated the constitutionally protected right to travel.<sup>107</sup> The court noted that, al-

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to Cuba was not one which was enumerated. *Id.* (citing *Emergency Controls Hearings*, *supra* note 36, at 3036 n.20).

101. *Id.* at 799 (construing *Emergency Controls Hearings*, *supra* note 36, at 167).

102. *Id.* at 798.

103. See *Wald v. Regan*, 708 F.2d at 798. To have required the President to publicly announce a new declaration of emergency to continue existing embargoes could have required him to take an action with undesirable ramifications.

104. *Id.*

105. *Id.* Regulation 560 did not involve the termination of an embargo, nor did it require the President to take an ill-advised action to retain his authority to continue the embargo. Regulation 560 involved imposing travel-related economic restrictions on travel to Cuba. *Id.*

106. See *id.* The Administration announced that the purpose of regulation 560 was to deprive Cuba of hard currency during a time when it was encouraging armed violence against U.S. allies. *Id.* at 800 (citing N.Y. Times, Apr. 20, 1982, at A1, col. 4).

107. *Id.*

though deference is usually granted to the Executive in matters of foreign policy, the Supreme Court has explicitly instructed courts to “‘construe narrowly all delegated powers that curtail or dilute’ the right to travel.”<sup>108</sup> The court’s narrow interpretation of the grandfather clause did not render the President powerless to act with respect to Cuba.<sup>109</sup> The court of appeals recognized that Congress, through the IEEPA, had “taken measures inconsistent with the President’s claim to power” and therefore, unless the President followed the procedural requirements of the IEEPA when he amended the 1977 general license, his power was at its lowest ebb.<sup>110</sup> Thus, the First Circuit applied this principle of narrow interpretation and required the President to comply with the IEEPA in order to preserve the “equilibrium” established when the IEEPA was enacted.<sup>111</sup>

The second prong of the court’s alternative basis for invalidating regulation 560 involved an analysis of contemporaneous statutes. The First Circuit noted that during the period when the IEEPA was enacted, Congress passed other statutes to restrict presidential power.<sup>112</sup> In particular, the First Circuit examined an amendment to the Passport Act that prohibited “the executive branch from imposing peacetime passport travel restrictions without the authorization of Congress except for health and safety considerations.”<sup>113</sup> The First Circuit concluded that a broad reading of the grandfather clause as applied to a travel-related restriction would negate the effect of this amendment and be in conflict with the general purpose of related statutes.<sup>114</sup>

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108. *Id.* (quoting *Kent v. Dulles*, 357 U.S. 116, 129 (1958)).

109. *Wald v. Regan*, 708 F.2d at 800.

110. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring)). For a discussion of Justice Jackson’s framework analyzing the scope of executive authority, see *supra* notes 63-65 and accompanying text.

111. *Wald v. Regan*, 708 F.2d at 800.

112. *Id.* at 800-01. The court refers to: War Powers Resolutions, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1982)); National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651 (1982)); Passport Act, Pub. L. No. 95-426, 92 Stat. 963, 971 (1978) (codified as amended at 22 U.S.C. § 211(a) (1982)).

113. *Wald v. Regan*, 708 F.2d at 801.

114. *See id.*

## 2. Supreme Court Opinions

### a. The Majority

A majority of the Supreme Court held that the 1982 regulation was consistent with both federal law and the Constitution and was "justified by the weighty concerns of foreign policy."<sup>115</sup> The Court therefore reversed the First Circuit stating that a "constricted reading of the grandfather clause does violence to the words chosen by Congress."<sup>116</sup> The majority said the clause "refers to 'authorities' being exercised on July 1, 1977, not to 'prohibitions' actually in place on that date."<sup>117</sup> Thus, the grandfather clause should be construed broadly to preserve all *authorities* being exercised on that date.<sup>118</sup>

The Court supported this conclusion by stating that travel-related restrictions are part of the general authority of the Executive to regulate property transactions.<sup>119</sup> The President was exercising his broad authority under section 5(b) of the TWEA to regulate property transactions through section 201(b) of the CACRs, which was in effect on July 1, 1977.<sup>120</sup> Section 201(b) expressly prohibited all transactions involving property in which Cuba or its nationals had an interest *unless* specifically author-

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115. 104 S. Ct. 3026 (1984). Chief Justice Burger and Justices White, Stevens and O'Connor joined in the opinion of the Court.

116. *Id.* at 3035. Because the First Circuit struck down the regulation on statutory grounds it had no need to decide whether the regulation also violated the constitutional right to travel that previous Supreme Court decisions have found implicit in the fifth amendment's due process clause. *See, e.g., Kent v. Dulles*, 357 U.S. 116 (1958). The Court held that the regulation presented no constitutional difficulty. Traditional deference to the President's authority in foreign policy provided sufficient rationale under the due process clause for restricting travel. In this instance, there was no charge that travel was being restricted based on affiliation or political belief. It is a prohibition which is applied fairly and is justified by the executive's decision to restrict the flow of hard currency to Cuba in order to inhibit that country's support of armed violence in the Western Hemisphere. *Id.* at 3037-39.

117. *Id.* at 3035.

118. *See id.* at 3035-38.

119. *Id.* at 3033-34. The Court noted that § 5(b) of the TWEA contains sweeping language authorizing the President to regulate any transactions involving property in which a foreign country or one of its nationals has an interest. *Id.* at n.16. Furthermore, the fact that the language of § 203(a) of the IEEPA, describing procedures following declaration of a national emergency, merely tracks the language of § 5(b) of the TWEA shows that Congress did not distinguish between travel-related transactions and other transactions in property. *Id.* at n.17.

120. *See id.* at 3034-35.

ized by a license.<sup>121</sup> The Court noted that the original regulation 560, a general license that was an exemption from the CACRs, was promulgated in March 1977 and in effect until 1982. The Court reasoned that the existence of this license, which permitted travel-related transactions, was an "exercise" of authority, albeit by nonrestrictive regulation.<sup>122</sup> Accordingly, because section 5(b) power was being exercised on July 1, 1977, by means of a license, it followed that the power to amend the license was one of the "authorities" grandfathered in the amendments to the TWEA.<sup>123</sup>

The Court also examined the legislative history and the purpose of the grandfather clause to support its statutory interpretation. First, the Court looked to the express language, commenting that had Congress wished to freeze existing *restrictions*, it could have done so by using that word rather than the generic term *authorities*.<sup>124</sup> Acknowledging that there was some support for a narrow interpretation of the grandfather clause,<sup>125</sup> the Court, nonetheless concluded that, even if this were the only indication of legislative intent, it would not be sufficient to overcome the "clear, generic meaning of the word authorities."<sup>126</sup>

The Court contended that oral testimony concerning draft language of the bill should not be used to alter the meaning of the language Congress officially adopted.<sup>127</sup> Instead, the Court

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121. 31 C.F.R. § 515.501(b) (1984).

122. *Wald*, 104 S. Ct. at 3032-33.

123. *See id.* at 3033-34.

124. *Id.* at 3035.

125. *Id.* at 3035-36. The Court agreed with the court of appeals that the following excerpt from Bergsten's Assistant Secretary of the Treasury testimony before Rep. Cavanaugh and the House Committee on International Relations, supported a narrow reading of the grandfather clause:

MR. CAVANAUGH. . . . First of all, Mr. Bergsten, would it be your understanding that [the grandfather clause] would strictly limit and restrict the grandfathering of powers currently being exercised under 5(b) [of TWEA] to those specific uses of the authorities granted in 5(b) being employed as of June 1, 1977.

MR. BERGSTEN. . . . Yes, sir.

MR. CAVANAUGH. And it would preclude the expansion by the President of the authorities that might be included in 5(b) but are not being employed as of June 1, 1977.

MR. BERGSTEN. That is right.

*Id.* (quoting *House Markup*, *supra* note 6, at 21-22).

126. *Id.* at 3036.

127. *Id.*



concluded that a full examination of the legislative history supported a broad reading of the grandfather clause.<sup>128</sup> "The crucial point is that the discussion, even in the excerpts [of oral testimony], is consistently carried on in terms of existing 'powers' and 'authorities,' not in terms of existing 'restrictions' or 'prohibitions.'"<sup>129</sup>

Turning to an examination of the purpose of the grandfather clause, the Court rejected the view that it was designed solely to preserve "bargaining chips" with affected countries.<sup>130</sup> The Court contended that the grandfather clause was intended to keep the IEEPA from becoming too controversial. Controversy would have delayed enactment of the IEEPA. Thus, in the majority's view, Congress decided to focus on improving procedures for future uses of emergency powers rather than revising current uses.<sup>131</sup> The Court noted that the chairman of the responsible House Subcommittee, Congressman Bingham, expressly assured Congress that the existing embargo against Cuba would not be affected by the IEEPA.<sup>132</sup> The Court concluded that limiting the President's power to modify an existing license, in response to increased tensions with Cuba, would have created the type of controversy that the grandfather clause was meant to avoid.<sup>133</sup>

#### b. *The Dissenting Opinion*

Writing for the dissent,<sup>134</sup> Justice Blackmun presented an entirely different interpretation of the history and purpose of the grandfather clause, concluding that it does not provide stat-

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128. *Id.* at 3036-37. The Court stated that the legislative history of the grandfather clause contains explicit mention that travel-related restrictions are among the authorities being exercised. *Id.* at 3037 n.22.

129. *Id.* at 3036-37.

130. *Id.* at 3037.

131. *Id.*

132. *Id.*

133. *Id.*

134. Justice Blackmun was joined by Justices Brennan, Marshall, and Powell. Justice Powell filed a separate dissenting opinion, in which he concluded that Congress clearly did not intend the grandfather clause to advance the expansion of presidential power that the 1982 amendment of regulation 560 invoked. *Wald*, 104 S. Ct. at 3049 (Powell, J., dissenting).

utory authority for the 1982 amendment of regulation 560.<sup>135</sup> Justice Blackmun began his analysis with a review of the general purpose of Public Law 95-223.<sup>136</sup> He concluded that Congress intended this statute to restrain an unwarranted expansion of executive power that had been unwittingly authorized by the Trading With the Enemy Act.<sup>137</sup>

In the context of the overall purpose of Public Law 95-223, the dissent found clear legislative intent that the grandfather clause should be construed narrowly.<sup>138</sup> According to the dissent, the grandfather clause was enacted to achieve two goals: (1) to protect the President's bargaining position with countries subject to existing embargoes; and (2) to avoid the need to declare a new state of emergency in order to continue existing embargoes.<sup>139</sup> According to the dissent, legislators who supported the amendment indicated that the grandfather clause was to be drafted and construed narrowly to achieve those purposes, rather than to justify the exercise of power to enact new restrictions.<sup>140</sup>

Justice Blackmun rejected the view that use of the term "authorities" indicated intent for a broad interpretation of the grandfather clause. He argued that such a position was discredited by legislative history that documented that Congress intended to grandfather "restrictions," "controls," "specific uses,"

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135 *Wald*, 104 S. Ct. at 3040 (Blackmun, J., dissenting).

136. Act of Dec. 28, 1977, Pub. L. No. 95-223, 91 Stat. 1625.

137. *Wald*, 104 S. Ct. at 3042 (Blackmun, J., dissenting). Justice Blackmun suggests that the TWEA intended to give a president broad powers during times of emergency. However, the TWEA did not include any provisions for terminating states of emergency once they had been declared. Thus, presidents inappropriately used emergency powers as instruments of foreign policy long after the imminent threat of any state of emergency had subsided. The national emergency most often invoked was Presidential Proclamation No. 2914, *reprinted in* 15 Fed. Reg. 9029 (1950). It was President Truman's warning about the threat of communism and was used to justify any acts related to combatting the threat of communism.

138. *Wald*, 104 S. Ct. at 3043-45 (Blackmun, J., dissenting).

139. *Id.* at 3042-43.

140. *Id.* at 3042-45. The dissent argued that a narrow interpretation was advocated by a number of legislators. Rep. Bingham opposed adopting statutory language that would preserve all the powers necessary to deal with a certain situation. Rather, he stated that the grandfather clause was to apply only to powers that had already been exercised. *Id.* at 3043-44 (quoting *Emergency Controls Hearings*, *supra* note 36, at 167). Explanations to the full House Committee emphasized that the grandfather clause only preserved § 5(b) authorities being exercised on July 1, 1977. *Id.* at 3044-45.

"prohibitions," "existing uses," and "authorities."<sup>141</sup> The dissent suggested that the word "authorities" was used rather than "prohibitions" for the simple reason that section 5(b) conferred broad authorities, some of which would not have fit within the natural meaning of "prohibitions" if used in place of "authorities."<sup>142</sup>

Justice Blackmun agreed that the grandfather clause was designed to avoid controversy but contended that the majority misunderstood which aspects of the IEEPA were potentially divisive.<sup>143</sup> He said that the grandfather clause was to preclude: (1) an examination of current controls; (2) the need to declare new emergencies when none actually existed; and, (3) ending restrictions without receiving something in return from the affected countries.<sup>144</sup> The dissent argued that the restriction of travel-related transactions did not come within any of the concerns to which the grandfather clause was addressed.<sup>145</sup>

Finally, the dissent insisted that an examination of our trade relations with China proved that it was incongruous to conclude that Congress meant the grandfather clause to preserve executive authority to modify existing embargoes.<sup>146</sup> In 1950, trade with China had been prohibited through an exercise of section 5(b) authorities.<sup>147</sup> An equally broad general license issued in 1971 abrogated this restriction. The general license authorized transactions with China after May 8, 1971, while continuing a freeze of Chinese assets that were in American hands before that date.<sup>148</sup> Despite the existence of this general license, a House report describing section 5(b) authorities in use at the time of the IEEPA concluded that the general license "had the

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141. *Id.* at 3045.

142. *Id.* at 3045-46. Justice Blackmun noted that § 5(b) authorized the President to conduct investigations as well as to freeze assets, neither of which could have been comprehended by the term "prohibition."

143. *Id.* at 3046.

144. *Id.*

145. *See id.* at 3046-47. The dissent found the Court's conclusion that Congress chose to give the President greater flexibility to respond to tensions with Cuba, than with another country to be remarkable since Congress clearly expressed its view that the situation in Cuba did not represent an emergency situation. *Id.* at 3047.

146. *Id.* at 3048.

147. 31 C.F.R. § 500.201(b) (1950), amended by 45 Fed. Reg. 7224 (1980) (current version at 31 C.F.R. § 500.201 (1984)).

148. 31 C.F.R. § 500.546 (1971), repealed by 45 Fed. Reg. 7224 (1980).

effect of lifting the U.S. trade embargo of China.”<sup>149</sup> The dissent argued that this indicated that Congress did not view a general license lifting trade restrictions to have been an exercise of section 5(b) authority.<sup>150</sup> Justice Blackmun stated that logic required a similar conclusion concerning the general license that permitted travel-related transactions with Cuba.<sup>151</sup>

## V. Analysis

The President was *regulating* travel-related economic transactions to Cuba by a general license on July 1, 1977 pursuant to section 5(b) of the TWEA. Therefore, his authority to restrict those transactions by amending the general license to prohibit travel-related economic transactions with Cuba in 1982 without consulting with Congress, was preserved by the grandfather clause.<sup>152</sup>

This statutory authority exists because the term “authorities”, as used in the grandfather clause, must be construed to support a broad exercise of executive authority. Dispute about the scope of this term in the grandfather clause is, of course, the nexus of conflict between the majority and dissent in *Regan v. Wald*.<sup>153</sup> The dissent does identify language in the congressional hearings that leads to the conclusion that there is ambiguity in the legislative history of the statute.<sup>154</sup> There is, however, also persuasive evidence that Congress intended a broad reading of the grandfather clause.<sup>155</sup> The very existence of ambiguity about presidential power in the area of foreign affairs compels the expansive construction adopted by the majority.

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149. *Wald*, 104 S. Ct. at 3048 (Blackmun, J., dissenting) (quoting HOUSE REPORT, *supra* note 12, at 6).

150. *Id.*

151. *Wald*, 104 S. Ct. at 3048-49 (Blackmun, J., dissenting).

152. *Regan v. Wald*, 104 S. Ct. 3026, 3034 (1984).

153. *Id.* at 3026.

154. *Id.* at 3044-45 (Blackmun, J., dissenting). For the Cavanaugh-Bingham exchange, see *supra* note 125.

155. *Wald*, 104 S. Ct. at 3034.

A. *The Meaning of "authorities" as used in the Grandfather Clause*

1. *Plain Meaning*

Because the grandfather clause refers to the authorities conferred upon the President by section 5(b) of the TWEA,<sup>156</sup> one must look to section 5(b) of the TWEA itself, to determine the meaning of "authorities" as used in the grandfather clause. Section 5(b) of the TWEA clearly defines the power it confers on the President acting under its authorities. Included is the *authority* to regulate through any agency designated, by means of licenses or otherwise, any transaction involving property in which any foreign country or national thereof has any interest.<sup>157</sup> Thus, for purposes of the grandfather clause, the President's authority to regulate travel-related transactions through a general license is part of the President's broad general authority to regulate property transactions.

To use the court of appeals' own language, "as a matter of common sense and common English,"<sup>158</sup> restrictions on commodity purchases and travel-related purchases *are* the exercise of the *same authority*, the authority to *regulate property transactions* pursuant to section 5(b) of the TWEA.<sup>159</sup> The court of appeals erred in asserting that the restriction on commodity purchases has a different effect than travel-related economic restrictions.<sup>160</sup> Both restrictions have the effect of interrupting the flow of American currency to Cuba. State department officials issued statements demonstrating that tourism had the potential for substantially increasing the flow of hard currency to Cuba.<sup>161</sup>

The 1982 amendment of the general license cannot be viewed as a *per se* restriction of the right to travel. Rather, it regulated property transactions incident to travel, which had a limited effect on the right to travel. It is true that *tourist* travel from the United States to Cuba declined after the 1982 amend-

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156. 50 U.S.C. app. § 5(b) (1982).

157. *See id.*

158. *Wald v. Regan*, 708 F.2d 794, 796 (1st Cir. 1983), *rev'd*, 104 S. Ct. 3026 (1984).

159. *See supra* note 119 and accompanying text.

160. For a discussion of the court of appeals' opinion, see *supra* notes 94-97 and accompanying text.

161. Joint Appendix at 174-77, *Wald* (No. 83-436) (declaration of Thomas O. Enders). *See supra* note 58.

ment to the general license; however, all forms of travel to Cuba by United States citizens, when taken together, actually increased after the amendment.<sup>162</sup> The 1982 regulation still permits many forms of travel to Cuba such as travel to visit family members, humanitarian visits, and travel for the purpose of news gathering.<sup>163</sup>

The dissent argued strenuously that the term "authorities" as it was used in the grandfather clause meant *restrictions, existing uses and prohibitions* in effect against Cuba in 1977.<sup>164</sup> It justified this interpretation by referring to statements of congressmen during debates on Public Law 95-223.<sup>165</sup> These pre-enactment colloquies are certainly less persuasive than the plain meaning of "authorities" that the dissent ignored in its treatment of the grandfather clause.<sup>166</sup> It is ironic that the dissent's explanation of why Congress chose the term "authorities" refutes its own premise that the grandfather clause was meant to be interpreted narrowly. The dissent asserts that "authorities" was used because a broad term was necessary to encompass *all* section 5(b) powers of the TWEA, including the general power to *regulate and control any property transaction with which a foreign country or national thereof has any interest*.<sup>167</sup> This negates the contention that Congress intended the grandfather clause to be narrowly construed to save only those specific prohibitions in effect as of July 1. Because section 5(b) of the TWEA provided the authority to *regulate property transactions by way of licenses* that allow transactions incident to travel, it is inapposite to assert that a grandfather clause preserving those "authorities" would only preserve "authorities" regulating property transactions by way of prohibition.<sup>168</sup> As the majority pointed out, had Congress wished to draft a narrow grandfather clause it could easily have used the terms "prohibitions or

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162. Joint Appendix at 176-77, *Wald* (No. 83-436) (declaration of Thomas O. Enders). See *supra* note 58.

163. C.F.R. § 515.560 (1984). For the text of regulation 560, see *supra* note 54.

164. *Wald*, 104 S. Ct. at 3045-46 (Blackmun, J., dissenting).

165. Act of Dec 28, 1977, Pub. L. No. 95-223, 91 Stat. 1625.

166. *Id.* The dissent ignored the fact that § 5(b) of the TWEA defines "authorities" in the text of the statute itself. See *Wald*, 104 S. Ct. at 3045-46 (Blackmun, J., dissenting).

167. *Id.* at 3045-46.

168. *Id.* at 3045-46.

restrictions".<sup>169</sup>

## 2. *The Legislative History of the Grandfather Clause*

The majority and dissent both agreed that the legislative history contains statements suggesting that Congress wished to grandfather "restrictions", "controls", "specific uses", "prohibitions", "existing uses" and "authorities."<sup>170</sup> However, an examination of the congressional hearings does not support the interpretation that the grandfather clause was intended only to preserve *restrictions* existing as of July 1, 1977.

There is some legislative history that supports a narrow interpretation of the grandfather clause; however, that alone is not enough to overcome the plain meaning of the word "authorities" in the statute itself.<sup>171</sup> A congressional subcommittee did delete a subsection of a draft of the grandfather clause that would have preserved section 5(b) authorities of the TWEA not being exercised on July 1, 1977. Congressman Bingham, chief architect of the 1977 amendment to the TWEA, did state that if, as of July 1, 1977, the President was not using some authority under section 5(b), the right to use that power should not be preserved by the grandfather clause.<sup>172</sup> Nevertheless the Congressman's concern does not necessarily mean that Congress intended a narrow interpretation of the clause, preserving only specific restrictions in effect on July 1, 1977.<sup>173</sup> The subcommittee's action is at best

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169. See *supra* note 124 and accompanying text.

170. See *Wald*, 104 S. Ct. at 3035-36; *id.* at 3045-46 (Blackmun, J., dissenting).

171. *Accord Wald*, 104 S. Ct. at 3036.

172. *Id.* Rep. Bingham stated: "[I]f the President has not up to now used some authority that he has under section 5(b) in connection with those cases where 5(b) has been applied, I don't know why it should be necessary to give him authority to expand what has already been done." *Emergency Controls Hearings*, *supra* note 36, at 167.

173. *Wald*, 104 S. Ct. at 3036-37. As Justice Blackmun noted, the early version of the grandfather clause contained two subparts that read:

(1) Any authority conferred upon the President by section 5(b) of the Trading With the Enemy Act, which is being exercised with respect to a set of circumstances on the date of enactment of the Act as a result of a national emergency declared by the President before such date of enactment, may continue to be exercised with respect to each set of circumstances; and

(2) Any other authority conferred upon the President by that section may be exercised to deal with the same set of circumstances.

*Id.* at 3043 (quoting Working Draft of H.R. 7738, June 8, 1977, 95th Cong., 1st Sess., § 101(b)) (emphasis Justice Blackmun).

ambiguous. As the majority noted, the subsection may have been deleted as "surplusage."<sup>174</sup> Language preserving unused TWEA authorities was unnecessary. As of July 1, 1977, the President was in fact exercising all of the authorities provided by section 5(b) of the TWEA.<sup>175</sup>

Congressman Bingham defined the "authorities" of section 5(b) of the TWEA that would come within the purview of the grandfather clause. He described them as the authority to investigate, regulate or prohibit foreign exchange transactions, the import or export of currency and foreign property under United States jurisdiction.<sup>176</sup> Congressman Bingham also stated that these authorities were being used to implement trade embargoes, including complete embargoes like the one with respect to Cuba.<sup>177</sup> The 1982 amendment of regulation 560 represents an exercise of precisely the type of authority described by the congressman. By prohibiting United States citizens from engaging in travel-related economic transactions with Cuba, the President was prohibiting the export of United States currency to Cuba in support of the purpose of the trade embargo against that country. The prohibition in amended regulation 560 is simply a modification of the manner in which the President was *regulating property transactions* with Cuba on July 1, 1977. It clearly comes within the scope of a reasonable interpretation of the statute in light of its legislative history. Absent definitive, unambiguous legislative history to the contrary, courts must defer to the plain meaning of the statute itself.<sup>178</sup>

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174. *Wald*, 104 S. Ct. at 3036 n.20.

175. See *Emergency Controls Hearings*, *supra* note 36, at 188 (remarks of Leonard E. Santos, Attorney Advisor, Treasury Department). Mr. Santos testified that the language in a subcommittee's working draft, which would have expressly grandfathered presently unused authorities of the President under section 5(b) of TWEA, as long as they related to an already declared national emergency, was unnecessary. Mr. Santos stated: "We have reviewed the powers conferred under this draft. Frankly we believe that all the powers conferred are exercised and that there are no additional powers that could be exercised that are not already exercised." *Id.*

176. See *House Markup*, *supra* note 9, at 8 (prepared statement of Rep. Bingham).

177. *Id.*

178. See *Dames & Moore v. Regan*, 453 U.S. 654, 671-73 (1981).



### 3. Policy Considerations Underlying Wald's Statutory Interpretation

*Dames & Moore v. Regan*<sup>179</sup> is sound precedent for two of the most important conclusions of the majority in *Regan v. Wald*. First, when there is conflicting legislative history about the meaning of a statute, the Court must rely on its plain meaning.<sup>180</sup> Second, a broad interpretation of the language of the grandfather clause is mandated because the IEEPA and the TWEA give the President flexibility to change the scope and form of regulations to respond to changes in foreign policy and national security.<sup>181</sup>

The Court, in *Wald* and *Dames & Moore*, faced remarkably similar tasks of construing statutory language. The *Wald* Court was confronted with defining the scope of the term "authorities" as it was used in the grandfather clause of the amendment to the TWEA. Analogously, the petitioners in *Dames & Moore* challenged the extent of executive authority conferred by the IEEPA. They asserted that language that gave the power to nullify transactions involving any property in which any foreign country or a national thereof has any interest must be construed very narrowly.<sup>182</sup> Petitioners argued that the language of the IEEPA did not permit the President to dispose of frozen assets or to invalidate a judicial remedy such as attachment.<sup>183</sup> But the *Dames & Moore* Court did not ignore the plain meaning of the word "nullify" in section 1702(a)(1)(B) of the IEEPA. Even though the IEEPA did not authorize the President to take title to foreign owned assets, *Dames & Moore* held that the power to nullify allowed the President to permanently dispose of those assets by nullifying the court-ordered attachments.<sup>184</sup> The Court stated that the plain language of the statute contradicted an assertion that the only power granted by section 1702 of the

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179. 453 U.S. 654 (1981).

180. See *id.* at 671-73. The *Dames & Moore* Court refused to ignore the plain language of § 5(b) of the TWEA and § 1702(a)(1)(B) of the IEEPA, because the legislative history of these acts are contrary to the plain language of the statutes.

181. *Id.* at 672.

182. See *id.*

183. See *id.* at 672 n.5.

184. *Id.* at 675.

IEEPA was the power to temporarily freeze assets.<sup>185</sup> Although section 1702 of the IEEPA did not expressly authorize the President to dissolve attachments of foreign owned assets per se, it specifically authorized the President to "nullify" property transactions subject to United States jurisdiction involving foreign countries. This authority over property transactions is broad enough to allow *Dames & Moore* to encompass court-ordered attachments of Iranian property.

Similarly, in *Regan v. Wald* it was not necessary for the grandfather clause of section 5(b) of the TWEA to expressly preserve the power to control travel-related economic transactions with Cuba. The broad authority to *regulate property transactions* in which Cuba or Cuban nationals had an interest was specifically grandfathered, if that power was being exercised on July 1, 1977.

*Dames & Moore* also interpreted the legislative history of the IEEPA. Its analysis has genuine precedential value for *Regan v. Wald* because the IEEPA was part of the same bill that included the grandfather clause to the TWEA. Furthermore, the analysis in *Dames & Moore* is particularly relevant because the Court defined the meaning of section 1702 of the IEEPA, which had been drawn directly from section 5(b) of the TWEA.<sup>186</sup>

The Court, in *Dames & Moore* noted that the language of the IEEPA is "sweeping and unqualified."<sup>187</sup> The Court concluded that "the legislative history and cases interpreting the TWEA fully sustained the broad authority of the Executive when acting under this congressional grant of power."<sup>188</sup> The Court acknowledged that Congress had enacted this legislation to curtail the President's power in peacetime.<sup>189</sup> Nonetheless,

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185. The TWEA gave the President the power to: (1) temporarily freeze or block the transfer of foreign owned assets; and (2) seize and vest title to foreign owned assets. The *Dames & Moore* petitioners asserted that it was the *vesting* provision of the TWEA that authorized the President to permanently dispose of assets. Thus, because Congress excluded the *vesting* provision from the IEEPA, they argued that Congress did not wish the President to have the authority to dispose of foreign-owned assets under the IEEPA. *Id.* at 672 n.5.

186. *See id.* at 671-72 (construing 50 U.S.C. § 1702(a)(1)(B) (1982)).

187. *See id.* at 671 (quoting *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 807 (1st Cir. 1981)).

188. *Id.* at 672.

189. *Id.* at 672-73.

this does not require that statutory language be given a narrow literal construction that would rob the Executive of the flexibility in foreign affairs that Congress meant to preserve.

Thus, *Dames & Moore v. Regan* supports the proposition that courts must not ignore the plain language of a statutory provision such as the grandfather clause of the TWEA.<sup>190</sup> Absent substantial proof of a contrary legislative intent, plain meaning prevails. *Dames v. Moore* suggests that this mandate is all the more compelling when the Executive acts pursuant to a congressional grant of power under the IEEPA or TWEA.<sup>191</sup> This affords the Executive broad authority to exercise his international emergency economic powers.

The traditional deference given to the President in the field of foreign affairs is a final and particularly cogent reason that supports the result in *Regan v. Wald*.<sup>192</sup> When there is ambiguity in the legislative history of a statute pertaining to the President's authority in foreign affairs, it must be construed to support a grant of authority.<sup>193</sup> Although this is a recognized maxim of statutory construction, it is particularly applicable when construing the Trading with the Enemies Act. The TWEA has been consistently construed by the courts as a means of granting the Executive great flexibility in the realm of foreign affairs.<sup>194</sup> Any conclusion that Congress intended a different result when enacting a provision to preserve Presidential authority requires clear unequivocal proof — not evidence of ambiguity.

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190. Even though *Dames & Moore* cautioned that it did not attempt to lay down any guidelines covering situations not involved in the case, it did not affect its precedential value for interpreting principles of law and statutes such as the IEEPA and § 5(b) of the TWEA. Although the particular decision at hand may not be indicative of future solutions to similar problems, the reasoning for its decision has value.

191. See generally *id.* at 671-72. Because the petitioner did not find substantial, unambiguous proof in the legislative history of § 5(b) of the TWEA and § 1702 of the IEEPA that contradicted the plain meaning of the statute, authorizing the Executive to "nullify" the attachments, the Court upheld the plain meaning of the statute. *Id.* at 672.

192. 104 S. Ct. 3026 (1984).

193. See *id.* at 671-72.

194. *Id.* at 672.

*B. Travel-Related Economic Transactions with Cuba Were Being Regulated on July 1, 1977*

Although Congress intended that the grandfather clause preserve the full range of section 5(b) authorities, it is equally clear that the President's authority to exercise those powers during peacetime under the TWEA was confined to the authorities being exercised on July 1, 1977.<sup>195</sup> A careful examination of the purpose of the grandfather clause and of the nature of regulation 560 demonstrates that the power to control travel-related transactions was being exercised on the appropriate date.

*1. The Purpose of the Grandfather Clause*

The purpose of the grandfather clause can be fulfilled only if it is read to preserve *all* section 5(b) authorities being exercised on July 1, 1977, along with all of the specific methods Presidents have used to implement each of those generic powers. Economic embargoes against foreign countries have important foreign policy consequences. Thus, Congress, when it amended the TWEA, decided that it would have been too difficult and too divisive to revise section 5(b) authorities already being exercised.<sup>196</sup> It specifically foreswore any intention of affecting the embargoes by confining the bill's purpose to improving future uses of section 5(b) authorities.<sup>197</sup> This purpose is reflected in the *Wald* decision. The Supreme Court noted that the prime reason for preserving the authority to continue existing embargoes, while restricting the President's use of peacetime international emergency economic powers, was to avoid controversy that would endanger the bill.<sup>198</sup> If Congress did not intend the grandfather clause to authorize the President to modify the manner in which he was exercising one of the broad section 5(b) authorities, it would have "sparked just the sort of controversy the grandfather clause was designed to avoid."<sup>199</sup>

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195. See 50 U.S.C. app. § 5(b) (1982).

196. See HOUSE REPORT, *supra* note 12, at 9-10.

197. See *supra* note 37 and accompanying text.

198. *Wald*, 104 S. Ct. at 3037.

199. *Id.* It is clear from the House Report that Congress tried to take a noncontroversial approach. The Report states:

Certain current uses of the authorities affected by H.R. 7738 are controver-

The dissent correctly acknowledged that the grandfather clause meant to preserve current embargoes being exercised pursuant to section 5(b) of the TWEA.<sup>200</sup> It erred, however, in concluding that the purposes of the grandfather clause could be fulfilled without preserving the right to restrict travel-related transactions within the context of the existing Cuban embargo merely because those specific restrictions were not in place on July 1, 1977. The dissent reached an impermissibly narrow interpretation because it did not fully appreciate the purposes of the clause.

Congressman Bingham categorically assured the members of the House that, as a result of the grandfather clause, the amendments to the TWEA would not in any way affect existing embargoes.<sup>201</sup> There is evidence from the hearings that, in addition to minimizing the controversial aspects of the bill, Congress enacted the grandfather clause to protect the President's exercise of foreign policy in two important ways. First, in order to continue an embargo, the executive branch would not be required to declare a new state of emergency that might jeopardize sensitive foreign relationships.<sup>202</sup> Second, the President would not be required to give up any existing sanctions against another nation because they might serve as bargaining chips in future negotiations.<sup>203</sup> These purposes would be subverted if the current exercise of the power "to regulate property transactions" were not

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sial — particularly the total U.S. trade embargoes of Cuba and Vietnam. The committee considered carefully whether to revise, or encourage the President to revise, such existing uses of international economic transaction controls, and thereby the policies they reflect, in this legislation. The committee decided that to revise current uses, and to improve policies and procedures that will govern future uses, in a single bill would be difficult and divisive. Committee members concluded that improved procedures for future uses of emergency international economic powers should take precedence over changing existing uses. By "grandfathering" existing uses of these powers, without either 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.

HOUSE REPORT, *supra* note 12, at 9-10.

200. *Wald*, 104 S. Ct. at 3046. *See supra* note 145 and accompanying text.

201. *Id.* at 3037 (quoting remarks of Rep. Jonathan Bingham, 123 CONG. REC. 38, 166 (1977)).

202. *Wald*, 104 S. Ct. at 3031-32 (quoting Pub. L. No. 95-223, § 101(b), 91 Stat. 1625, 1625-26, reprinted in 50 U.S.C. app. § 5(b) note (1982)).

203. *See Emergency Controls Hearings*, *supra* note 36, at 19, 103, 113, 119.

being viewed to include authority, withdrawing permission to engage in travel-related transactions. Since an embargo against Cuba was in effect on July 1, 1977, the President would not be able to freely use it as a negotiating tool without the authority to modify its terms.

2. *Travel Restrictions Were Being Exercised with Respect to Cuba on July 1, 1977*

Executive authority to amend regulation 560 existed, not only because it was inherent in the grandfathered power to regulate property transactions, but also because specific restrictions on travel-related transactions were in place on July 1, 1977.<sup>204</sup> On that date, "all transactions ordinarily incident to travel to and from Cuba" were being exempted from the prohibition of 201(b) of the Cuban Assets Control Regulations.<sup>205</sup> However, it is critically important to recognize that some travel restrictions existed on July 1, 1977. There was a one-hundred dollar per person limit on the amount of merchandise that a person could purchase in Cuba and import as accompanied baggage. In addition, the merchandise authorization was restricted to goods for personal use.<sup>206</sup> This limited permission to purchase goods could only be used once every six months.<sup>207</sup> All persons who engaged in travel-related transactions were required to make a "full and accurate record of each such transaction" and keep those records available for a two-year minimum span.<sup>208</sup> The existence of these specific restrictions alone clearly rebuts the dissent's position that restrictions on travel-related transactions were not being exercised on July 1, 1977.

3. *Chinese Embargo Distinguished from Cuban Embargo*

The dissent in *Regan v. Wald* examined our trade relations with China to prove that it was unthinkable that the existence

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204. See *supra* note 50 and accompanying text (setting forth the provisions of regulation 560).

205. 31 C.F.R. § 515.560 (1977) (amended 1982) (current version reprinted in 31 C.F.R. § 560 (1984)).

206. See *supra* note 37 and accompanying text.

207. 31 C.F.R. § 515.560(a)(3) (1984).

208. 31 C.F.R. § 515.601 (1984).

of a general license authorizing trade constituted a legitimate basis for reinstituting trade restrictions without complying with IEEPA procedures.<sup>209</sup> The dissent pointed to a House report that stated that a 1971 general license, which eliminated almost all restriction on trade with China had the effect of lifting the trade embargo against that country.<sup>210</sup> According to Justice Blackmun, "in eyes of Congress, the President was no longer exercising § 5 (b) authorities with respect to trade with China even though a nullified general prohibition was still in place."<sup>211</sup> Thus, the dissent argued that all subsequent controls on trade with China would be subject to the new IEEPA procedures.<sup>212</sup> However, the dissent reached this conclusion without any concrete support; the legislative history is at best ambiguous.

The majority in *Regan v. Wald* did not deal with this argument, presumably because the issue of whether the President could have reinstated the Chinese embargo under the grandfather clause was moot because the President ended the use of section 5(b) authorities of the TWEA against China in 1980.<sup>213</sup> Nevertheless, the status of the general license altering the Chinese embargo is distinguishable from the license that implemented the trade embargo with Cuba. These differences are so substantial that little can be inferred from a comparison of our trade relations with China and the exercise of section 5(b) authority against Cuba.

First, United States relations with China were vastly different from relations with Cuba. The purpose of the TWEA was to prevent the United States from aiding its enemies by keeping currency or property of any kind held in the United States from reaching the enemy.<sup>214</sup> Although United States relations with China normalized throughout the last decade, relations with Cuba have remained strained and, in fact, have further deteriorated due to increased Cuban efforts to destabilize governments throughout the Western Hemisphere.<sup>215</sup> Thus, the President did

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209. See *Wald*, 104 S. Ct. at 3048 (Blackmun, J., dissenting).

210. *Id.* (quoting HOUSE REPORT, *supra* note 12, at 6).

211. *Id.*

212. *Id.*

213. *Id.* at 3048 n.7.

214. 55 CONG. REC. 4858 (1917) (remarks of Rep. Snook).

215. See Joint Appendix at 178-79, *Wald* (No. 83-436) (declaration of James H.

not have any reason to use the TWEA to reinstitute a complete trade embargo against China.

Second, the license authorizing travel-related transactions with Cuba did not have the effect of removing all section 5(b) regulation of property transactions with that country.<sup>216</sup> On July 1, 1977, those transactions were still subject to the general prohibition of Regulation 201(b).<sup>217</sup> However, on July 1, 1977 most property-related transactions with China were exempt from the general prohibition of trade with China.<sup>218</sup> There was a limited exception to this situation of virtual free trade. Chinese assets under United States jurisdiction before May 8, 1971, continued to be blocked.<sup>219</sup> However, this restriction was miniscule when compared with those in effect against Cuba.

Finally, in the case of Cuba the authority to *regulate* travel-related economic transactions was being exercised on July 1, 1977. Restrictions on travel-related transactions with China were nonexistent.<sup>220</sup> Thus, the United States trade embargo with China is distinguishable from the trade embargo with Cuba and does not support a narrow reading of the grandfather clause, which would indicate that the authority to *regulate* travel-related economic transactions with Cuba was not grandfathered.

#### 4. *Deference Is Accorded to the Executive in the Realm of Foreign Affairs*

Because the President's authority to regulate travel-related economic transactions with Cuba was grandfathered<sup>221</sup> his authority was at its maximum; the President acted pursuant to the express authorization of Congress under section 5(b) of the TWEA.<sup>222</sup> The dissent erred when it stated that the President's

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216. For a brief discussion of the regulations that remained in effect, see *supra* note 50.

217. For the text of regulation 201(b), see *supra* note 28.

218. 31 C.F.R. §500.546(b) (1977), *removed*, 45 Fed. Reg. 7224 (1980).

219. *Wald*, 104 S. Ct. at 3048 (Blackmun, J., dissenting) (quoting HOUSE REPORT, *supra* note 12, at 6).

220. *Id.*

221. *Wald*, 104 S. Ct. at 3034-35; 50 U.S.C. app. § 5(b) (1982).

222. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).



exercise of authority fell within Justice Jackson's third category mentioned in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>223</sup> When the President acts pursuant to the express or implied will of Congress, as he did in *Regan v. Wald* and *Dames & Moore v. Regan*, his authority is at its fullest and the Court must give him great deference.<sup>224</sup> The President exercised his section 5(b) authorities in response to the increased tensions between the United States and Cuba when he revoked the 1977 general license, which had allowed United States citizens to engage in travel-related economic transactions with Cuba.<sup>225</sup> Applying Justice Jackson's analysis, the Court must give the executive branch the usual deference it generally receives in the realm of foreign affairs.<sup>226</sup>

Although the prohibition of travel-related economic transactions with Cuba in *Regan v. Wald* may coincidentally infringe on the right to travel, it does not obliterate the petitioner's right to travel.<sup>227</sup> Thus, revoking the general license that permitted travel-related economic transactions with Cuba did not violate the petitioners' right to travel under the due process clause of the fifth amendment.<sup>228</sup> Rather, this action was simply an exercise of executive authority to regulate property transactions with a foreign country. Thus, it is not surprising that absent explicit unambiguous Congressional intent to the contrary, the *Wald* Court deferred to the Executive's judgment in a matter concerning foreign affairs. Petitioners' evidence fell far short of meeting the burden to overcome the latitude given executive authority in the realm of foreign affairs.

## VI. Conclusion

In *Regan v. Wald*,<sup>229</sup> the Supreme Court held that because the grandfather clause of section 5(b) of the TWEA authorized

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223. *Id.* at 637-38.

224. *See id.* at 635.

225. *See* Joint Appendix at 107, *Wald* (No.83-436) (declaration of Myles R. Frechette, Director, Office of Cuban Affairs, Department of State).

226. *See* *Dames & Moore v. Regan*, 453 U.S. at 672; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

227. 31 C.F.R. § 515.560(a)(1) (1984). *See supra* note 55.

228. *Wald*, 104 S. Ct. at 3039-40.

229. 104 S. Ct. 3026 (1984).

the President to amend the 1977 general license, thus prohibiting certain travel-related economic transactions with Cuba, the Executive branch did not exceed the bounds of its authority with the 1982 amendment of regulation 560, even though the amendment was not promulgated in accordance with the IEEPA.<sup>230</sup>

*Regan v. Wald* demonstrates that the IEEPA did not severely limit the President's authority to invoke peacetime emergency economic sanctions upon foreign countries already subject to existing embargoes under the authority of section 5(b) of the TWEA. The grandfather clause served its purpose by neutralizing the foreign policy implications of prematurely terminating previously declared national emergencies.<sup>231</sup> If Congress wants to gain more control of executive authority in foreign affairs, Congress must enact more specific statutes that clearly define the scope of executive authority, even though doing so may embroil them in controversy.<sup>232</sup> Unless the executive branch acts contrary to its constitutional limitations, the Supreme Court will be obliged to give the executive branch the traditional deference in the realm of foreign affairs.

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230. *Id.*

231. See *supra* notes 36-37 and accompanying text.

232. One of the primary motives for the enactment of the grandfather clause was to eliminate the controversy that a blanket termination of all national emergency powers might cause. The Committee decided that it would be wiser to improve procedures for future uses of economic emergency powers than to try to also revise current uses as well. To do both in a single bill would be divisive and difficult. Congress must not, however, in an attempt to avoid controversy, enact such explicitly vague statutes that they leave it to the courts to legislate.

Thus, a subsequent attempt to read into a statute an exact meaning when exactness was purposefully avoided can only be described as a legal fiction. Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents As Extrinsic Aids to Statutory Interpretation: A Re-Examination*, 9 CAL. W.L. REV. 128, 131-135 (1972).