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Constitutional Law--International Travel--Restrictions on Travel-Related Transactions Under the Cuban Embargo--Regan v. Wald

CONSTITUTIONAL LAW—INTERNATIONAL TRAVEL—RESTRICTIONS ON TRAVEL-RELATED TRANSACTIONS UNDER THE CUBAN EMBARGO—*Regan v. Wald* — Presidential power to impose area restrictions[1] on international travel during times of peace has been restrained since 1978,[2] when Congress amended the Passport Act[3] to limit presidential imposition of area restrictions to times of war, armed hostilities, or imminent danger to the public health.[4] Despite this congressional mandate, travel to Cuba is now severely and lawfully inhibited through the Supreme Court's upholding, in *Regan v. Wald*,[5] of presidential power to restrict travel-related economic transactions with Cuba.[6] The Court,

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1. Area restrictions constitute an across-the-board denial of passports valid for travel to designated countries or areas by the State Department. For a comprehensive study of the history and origins of area restrictions, see generally Rauh & Pollitt, *Restrictions on the Right to Travel*, 13 CASE W. RES. L. REV. 128, 132 (1961); Note, *Constitutional Law: Right to Travel versus Power to Conduct Foreign Affairs: Area Restrictions on Passports:* Zemel v. Rusk, 50 CORNELL L.Q. 262, 271-74 (1964).

2. Prior to 1978, the Passport Act of 1926, ch. 772, § 1, 44 Stat. 887 (codified as amended at 22 U.S.C. § 211(a) (1982)), provided in pertinent part that "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States . . . ." *Id.* Pursuant to this Act, the President could, at his discretion, recommend to the Secretary of State that passports be restricted for travel to or for use in a particular country. *Id.* The power to prescribe rules was subsequently delegated by the President to the Secretary of State. Exec. Order No. 11,295, 3 C.F.R. 570 (1966-1970 comp.), *reprinted in* OFFICE OF THE FEDERAL REGISTER, CODIFICATION OF PRESIDENTIAL PROCLAMATIONS AND EXECUTIVE ORDERS 281 (1979).

3. Foreign Relations Authorization Act of 1978, Pub. L. No. 95-426, tit. I, § 124, 92 Stat. 971 (codified as amended at 22 U.S.C. § 211(a) (1982)). The amendment provides that:

> Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

Id.

4. This amendment to the Passport Act was enacted in the spirit of the Final Act of the Conference of Security and Cooperation in Europe (August 1, 1975) (popularly known and hereinafter referred to as the "Helsinki Accords"), which called for freedom of international travel and communication. For the text of the Helsinki Accords, see 73 DEP'T ST. BULL. 323, 336-37 (1975). In its recommendation for passage of the amendment, the Senate Commitee on Foreign Relations stated that "the freedom-of-travel principle is sufficiently important that it should be a matter of law and not dependent upon a particular Administration's policy." S. REP. No. 842, 95th Cong., 2d Sess. 14 (1978).

5. 104 S. Ct. 3026 (1984).

6. American travel to Cuba was initially banned, pursuant to the Passport Act, on January 16, 1961, after the Cuban missile crisis. Exec. Order No. 10,909, 3 C.F.R. 437 (1959-1963 comp.). In 1977, President Carter instructed the Secretary of State to remove

through a joint reading of section 5(b) of the Trading With the Enemy Act ("TWEA")[7] and section 101(b) of Public Law No. 95-223 (the "grandfather clause"),[8] held that restrictions on travel-related transac-

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all restrictions on travel to Cuba in order to fulfill his pledge of United States compliance with the Helsinki Accords. President's News Conference of March 9, 1977, 13 WEEKLY COMP. PRES. DOC. 328-29 (March 14, 1977). Pursuant to the President's instructions, the State Department allowed its own semi-annual geographic travel restrictions to expire on March 18, 1977, and assumed responsibility for the removal of ancillary and subsidiary restraints on the right to travel implemented by other departments. 76 DEP'T ST. BULL. 346 (1977). *See infra* note 48.

7. 50 U.S.C. app. §§ 1-44 (1982 & Supp. I 1983). Section 5(b)(1) reads:

> During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
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> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
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> (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,
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> by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

Id. § 5(b)(1) (1982).

8. Extension and Termination of National Emergency Powers Under the Trading With the Enemy Act, Pub. L. No. 95-223, § 101(b), 91 Stat. 1625 (1977) (codified at 50 U.S.C. app. at 181 (1982)). The grandfather clause, enacted in 1977, provides, in pertinent part, that:

> [T]he authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act [subsection (b) of this section], which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency

tions with Cuba are valid.[9] The Court further held that while such regulations do infringe on a citizen's constitutionally guaranteed right to travel,[10] that right must give way in the face of serious foreign policy concerns.[11] The Supreme Court's finding supports the traditional policy of giving deference to the executive when dealing in foreign affairs,[12] thereby thwarting congressional efforts to narrow the President's unilateral power to impose restrictions on international trade or travel during times of "national emergency."

The TWEA was first enacted in 1917[13] as a response to the exigencies of World War I.[14] Its stated purpose was to "define, regulate and punish trading with the enemy"[15] in war time.[16] In 1933, Congress amended section 5(b), thereby extending the President's authority under the TWEA[17] to all periods of presidentially declared national

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declared by the President before such date, may continue to be exercised with respect to such country. . . .

Id.

9. 104 S. Ct. at 3039.

10. *Id.* at 3038-39. For a discussion of the constitutional status of the right to travel, see *infra* text accompanying notes 118-51.

11. 104 S. Ct. at 3038-39. The President's avowed aim in restricting travel-related transactions with Cuba was to curtail the flow, to Cuba, of United States currency which might then be used in support of Cuban adventurism. *Id.* at 3032. For the text and a discussion of President Reagan's 1982 amendment restricting travel-related transactions in Cuba, see *infra* note 49 and accompanying text.

12. Legislative deference to executive decisions in foreign affairs was first enunciated in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), in which the Court confronted the congressional delegation of foreign affairs power to the President. The Court found that the control of foreign affairs was appropriately placed with the executive and that therefore Congress could broadly delegate supplementary authority to the President. *Id.* at 319-20, 329; *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 158-60 (1978). Professor Tribe noted, however, that the President's power in foreign affairs is not unlimited. *Curtiss-Wright* did not obligate Congress to delegate its foreign relations power, it simply permitted it to do so. Thus, according to Professor Tribe, Congress "retains the power to limit executive action in areas which were previously wholly discretionary with the executive." *Id.* at 161. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 208-16, 274-75 (1972).

13. Act of Oct. 6, 1917, Pub. L. No. 91, 40 Stat. 411 (1917) (codified at 50 U.S.C. app. §§ 1-44 (1982 & Supp. I 1983)). For a brief history of the TWEA, see 104 S. Ct. at 3030 n.2.

14. *Note—Trading With the Enemy Act of 1917*, 93d Cong., 2d Sess., 120 CONG. REC. 34,015-16 (1974) (statement of Senator Mathias).

15. Act of Oct. 6, 1917, Pub. L. No. 91, 40 Stat. 411 (1917) (codified at 50 U.S.C. app. §§ 1-44 (1982 & Supp. I 1983)).

16. *See* 55 CONG. REC. 4908 (1917), which reflects through congressional debate the influence of World War I on the TWEA's passage.

17. The TWEA presently confers upon the President four groups of authority:

(a) regulatory powers with respect to foreign exchange, banking transfers, coin, bullion, currency, and securities;

(b) regulatory powers with respect to "any property" in which "any for-

emergency.[18] Section 5(b) has since been used as the statutory foundation for executive control over both domestic and international financial transactions in various situations of declared emergency.[19] Since

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eign country or a national thereof has any interest";

(c) the power to vest "any property or interest of any foreign country or national thereof"; and

(d) the powers to hold, use, administer, liquidate, sell, or otherwise deal with "such interest or property" in the interest of and for the benefit of the United States.

Emergency Controls on International Economic Transactions: Hearings Before the Subcomm. on Int'l Policy and Trade of the House Comm. on Int'l Relations, 95th Cong., 1st Sess. 1 (1977) (prepared statement of Irving Jaffe, Deputy Assistant Attorney General Civil Div., Dep't of Justice) [hereinafter cited as *Emergency Controls Hearings*]. For the text of § 5(b), see *supra* note 7.

18. 48 Stat. 1 (1933) (codified as amended at 50 U.S.C. app. § 5 (1982)). On March 6, 1933, President Roosevelt declared a national emergency and invoked § 5(b) of the TWEA as authority for his proclamation 2039, *repealed by* Exec. Order No. 6073, *reprinted in* 2 PUB. PAPERS 54-56 (1938) (public papers and addresses of President Franklin D. Roosevelt), closing all banks for four days. The proclamation was clearly not within the literal terms and purposes of the TWEA. Congress, in light of the then-existing desperate economic circumstances, amended § 5(b) to include times of declared national emergencies. Emergency Banking Relief Act of 1933, ch. 1, § 52, 48 Stat. 1 (1933) (codified at 12 U.S.C. §§ 95-95b (1982)); *see also Note—Trading With the Enemy Act of 1917*, 93d Cong., 2d Sess., 120 CONG. REC. 34,015-16 (1974) (statement of Senator Mathias) (a comprehensive note summarizing the evolution of the TWEA into a broad source of emergency law).

19. President Franklin Roosevelt was the first to use the powers granted under § 5(b) of the TWEA. In 1933 he used the section to proclaim extensions of bank holidays designed to prevent the hoarding of gold and silver coins at the height of the Great Depression. Proclamation No. 2040, 48 Stat. 1691 (1933), *terminated by* Exec. Order No. 6073, *reprinted in* 2 PUB. PAPERS 54-56 (1938) (public papers and addresses of President Franklin D. Roosevelt). After the German invasion of Norway and Denmark, President Roosevelt once again used § 5(b) pursuant to the previously declared national emergency, established in order to strengthen national defense in response to the wartime situation, Proclamation No. 2352, 3 C.F.R. 114 (1938-1943 comp.), *terminated by* Proclamation No. 2974, 3 C.F.R. 158 (1949-1953 comp.), *reprinted in* 50 U.S.C. app. at 172 (1982) (notes preceeding § 1), in order to freeze United States-held assets of those nations. Exec. Order No. 8389, 3 C.F.R. 645 (1938-1943 comp.), *reprinted in* 12 U.S.C. § 95a app. at 569-71 (1982) (regulating transactions in foreign exchange and foreign-owned property, providing for the reporting of all foreign-owned property). Four months before the United States entered World War II, the President used § 5(b) as authority for the consumer credit controls instituted in 1941 as a means to fight inflation. Exec. Order No. 8843, 3 C.F.R. 976 (1938-1943 comp.). This order was issued pursuant to an unlimited national emergency declared by President Roosevelt designed to prepare the country for threats of aggression from abroad. Proclamation No. 2487, 3 C.F.R. 234 (1938-1943 comp.), *terminated by* Proclamation No. 2974, 3 C.F.R. 158 (1949-1953 comp.), *reprinted in* 50 U.S.C. app. at 172 (1982) (notes preceeding § 1). Section 5(b) then lay dormant until President Johnson invoked its powers, pursuant to a national emergency declared during the Korean War, due to world communist agression, Proclamation No. 2914, 3 C.F.R. 99 (1949-1953 comp.), *reprinted in* 50 U.S.C. app. at 171-72 (1982) (notes preceeding § 1), in order to impose foreign direct investment controls on American inves-

the TWEA contained no provisions for congressional review,[20] section 5(b) evolved into a virtually unlimited grant of authority for the President to exercise his powers.[21] So long as there existed an unterminated declaration of national emergency, the powers granted by section 5(b) could be invoked.[22] Thus, for example, as of 1985 there were four different restrictions still in effect under section 5(b),[23] pursuant to a national emergency declared by President Truman in 1950 in response to the Korean War.[24]

In 1974, a Senate committee study[25] found that the TWEA was

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tors. Exec. Order No. 11,387, 3 C.F.R. 702 (1966-1970 comp.), *reprinted in* 12 U.S.C. § 95a app. at 571-72 (1982) (governing certain capital transfers abroad). President Nixon relied on § 5(b) in 1971 when he imposed, pursuant to a national emergency arising out of the balance of payments crisis, Proclamation No. 4074, 3 C.F.R. 80 (1971 comp.), a surcharge on exports. Exec. Order No. 11,677, 3A C.F.R. 197 (1972 comp.), *revoked by* Exec. Order No. 11,683, 3A C.F.R. 202 (1972 comp.); *see also* 120 CONG. REC. 34,016-17 (1974) (a concise summary of the application of § 5(b)).

20. *See* 50 U.S.C. app. §§ 1-44 (1982 & Supp. I 1983).

21. *See* 122 CONG. REC. 28,225 (1976) ("In large measure, these laws were written by the executive branch and sent to the Congress in a crisis atmosphere.").

22. "[Section 5(b)] powers may be exercised . . . whether or not the situation with respect to which the emergency was declared bears any relationship to the situation with respect to which the President is using the authorities." H.R. REP. No. 459, 95th Cong., 1st Sess. 7 (1977).

23. The following regulations, instituted under § 5(b) of the TWEA, pursuant to an emergency declared by President Truman in response to the Korean War, are still in effect:

(1) the Foreign Assets Control Regulations, 31 C.F.R. §§ 500.101-500.901 (1985) (blocking the assets of and limiting transactions with North Korea, Vietnam, and Cambodia);
(2) the Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101-515.901 (1985) (blocking the assets of and limiting transactions with Cuba);
(3) the Transaction Control Regulations, 31 C.F.R. §§ 505.01-505.60 (1985) (prohibiting anyone in the United States from purchasing from any foreign country strategic commodities destined for a Communist country); and,
(4) the Foreign Funds Control Regulations, 31 C.F.R. §§ 520.01-520.901 (1985) (continuing World War II blockage of the assets of East Germany, Czechoslovakia, Latvia, Lithuania, and Estonia, pending settlement of claims concerning property confiscated by those countries).

24. Proclamation No. 2914, 3 C.F.R. 99 (1949-1953 comp.), *reprinted in* 50 U.S.C. app. at 171-72 (1982) (notes preceeding § 1). During congressional floor debates concerning reform of the TWEA, Representative Bingham remarked: "None of these uses of section 5(b) respond to any existing emergency; they are justified on the basis of emergencies long past. In short, these authorities are used because they are convenient—because they are there." 123 CONG. REC. 22,475 (1977).

25. SPECIAL COMMITTEE ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, A RECOMMENDED NATIONAL EMERGENCIES ACT, INTERIM REPORT, S. REP. No. 1170, 93d Cong., 2d Sess. 1974, *reprinted in* COMMITTEE ON GOVERNMENT OPERATIONS AND THE SPECIAL COMMITTEE ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, 94TH CONG., 2D SESS., THE NATIONAL EMERGENCIES ACT (P.L. 94-412) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS (Comm. Print 1976) [hereinafter cited

just one of 470 statutes[26] that the President had at his disposal simply by citing to one of the still existing,[27] though perhaps no longer valid, states of national emergency.[28] These emergency statutes provided the President with "virtually dictatorial power, ready for use as he desire[d]."[29] Congressional recognition of this highly unbalanced state of affairs led to the enactment, in 1976, of the National Emergencies Act,[30] which, in essence, terminated powers available to the executive as a result of all the national emergencies then in force and provided

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as NATIONAL EMERGENCIES REPORT].

26. The Senate Committee gave the following examples of emergency power statutes in its NATIONAL EMERGENCIES REPORT, *supra* note 25:

> Under 10 U.S.C. 333, the President can use the militia or armed forces to suppress "conspiracy," if it is likely that "any part" of the people in a state will be deprived of some constitutional right, and the state itself refuses to act. Under this statute, the President conceivably could circumvent Article IV, Section 4, of the Constitution even before waiting for state legislatures or state executives to request Federal troops.
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> Under 18 U.S.C. 1383, the President has authority to declare any part or all of the United States military zones. People in such zones can be jailed for a year for violating any "executive order of the President." Would these arrests be reviewable in court? It is not clear. Judicial review of agency actions is guaranteed in 5 U.S.C. 702, but 5 U.S.C. 701 excludes actions taken under declarations of martial law.
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> A President could make use of Public Law 733, which expresses the determination of the United States to prevent "by whatever means may be necessary including the use of arms," any "subversive" activities by the government of Cuba.

Id. at 20-21; *see also National Emergencies Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 24-25 (1975) [hereinafter cited as *National Emergencies Act Hearings*], *reprinted in* 122 CONG. REC. 28,225 (1976). For a discussion of the National Emergencies Act, see *infra* notes 30-33 and accompanying text.

27. For example, in 1977, the national emergency declared by President Roosevelt in 1933 was still in effect. *See supra* note 18. So too, was the emergency declared August 15, 1971, by President Nixon in response to the balance of payments crisis. Proclamation No. 4074, 3 C.F.R. 80 (1971 comp.).

28. Speaking in support of the National Emergencies Act, Senator Church stated: "For more-than four decades, this Nation has been governed, in part, by emergency law." *National Emergencies Act Hearings, supra* note 26, at 28,226.

29. *Id.* Senator Church also stated:

> The President has power under the authority delegated to him by emergency statutes to: seize property; organize and control and means of production; . . . institute martial law; seize and control all transportation and communication; regulate the operation of private enterprise; restrict travel; and, in a host of other ways, regulate the lives of all American citizens. And the President can exercise all these extraordinary powers without so much as asking leave of the Congress.

Id.

30. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601-1651 (1982)).

for congressional review of future declarations of national emergencies.[31] Powers exercised pursuant to section 5(b) of the TWEA were exempted, however, from the terms of the National Emergencies Act because section 5(b) provided the statutory basis for a number of ongoing foreign policy programs[32] that Congress did not wish to disrupt. Nevertheless, the provisions of the National Emergencies Act directed the Committee on International Relations to provide a careful study of the TWEA in order to determine how it could be revised in accordance with the intent of the National Emergencies Act without upsetting policies in effect under its authority.[33]

Accordingly, Congress enacted Public Law No. 95-223,[34] which removed executive power during a national emergency from under the TWEA and provided, through the International Emergency Economic Powers Act ("IEEPA"),[35] for a new set of authorities for use in times

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31. 50 U.S.C. § 1601(a) (1982) provides in pertinent part that "[a]ll powers and authorities possessed by the President . . . as a result of the existence of any declaration of national emergency in effect on September 14, 1976, are terminated. . . ." *Id.* Section 1621(a) provides, in pertinent part, that "[s]uch [emergency] proclamation shall immediately be transmitted to the Congress," *id.* § 1621(a), and § 1622(a) provides, in pertinent part, that "[a]ny national emergency declared by the President in accordance with [§§ 1621 and 1622] shall terminate if (1) Congress terminates the emergency by concurrent resolutions; or (2) the President issues a proclamation terminating the emergency." *Id.* § 1622(a).

32. 50 U.S.C. § 1651(a)(1) (1982). For a list of some of the ongoing foreign policy programs that are based on § 5(b) authority, see *supra* note 23. For a summary of the reasons why § 5(b) was exempted from the National Emergencies Act, see S. REP. No. 466, 95th Cong., 1st Sess. 1-2 (1976).

33. 50 U.S.C. § 1651(b) (1982) provides that:

> Each committee of the House of Representatives and the Senate having jurisdiction with respect to any provision of law referred to in subsection (a) of this section shall make a complete study and investigation concerning that provision of law and make a report, including any recommendations and proposed revisions such committee may have, to its respective House of Congress within two hundred and seventy days after September 14, 1976.

Id.

34. Title I—Amendments to the Trading With the Enemy Act, Pub. L. No. 95-223, § 101(a), 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. app. § 5 (b)(1) (1982)).

35. International Emergency Economic Powers Act, §§ 202-208, Pub. L. No. 95-223, §§ 202-208 (codified at 50 U.S.C. § 1701-06 (1982)). The IEEPA regulates the President's authority to exercise financial restrictions during a peacetime crisis, described in the statute as any "unusual and extraordinary" threat, by requiring him to declare a national emergency before imposing restrictions, 50 U.S.C. § 1701, and requiring him to report to Congress every six months as to the state of the emergency, 50 U.S.C. § 1703(c). The IEEPA also allows Congress to vote by concurrent resolutions to overturn the President's determination of emergency, 50 U.S.C. § 1706(b). *See generally* Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102 (1983) (discussing the IEEPA's success in preventing the loss of congressional power and its role in the conflict between executive flexibility and political accountability).

of future national emergency.[36] Those authorities that were being exercised pursuant to section 5(b) on July 1, 1977[37] were, however, pursuant to the grandfather clause, preserved under this new legislation,[38] provided that the President made a fresh determination each year[39] that an extension of such authorities with respect to a specific country was in the national interest.[40] Congress thus fulfilled, via the grandfather clause, its responsibility under the National Emergencies Act to maintain the status quo in American foreign policy.

Crucial to the *Wald* case is the fact that the Cuban Assets Control Regulations ("CACRs"),[41] implemented under section 5(b) in 1963, were still in effect on July 1, 1977. The CACRs constitute a commercial and financial embargo on trade with Cuba.[42] They were implemented shortly after the Cuban missile crisis, in response to "the subversive offensive of Sino-Soviet Communism with which the government of Cuba is publicly aligned."[43] Regulation 201(b) of the CACRs prohibits any transaction involving property in which Cuba, or any national thereof, has "any interest of any nature whatsoever, direct or indi-

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36. The word "authorities," as it is used in the grandfather clause, lies at the heart of the controversy in *Wald*. *See infra* notes 59-66, 93-100 & 185-94 and accompanying text.

37. *See infra* text accompanying notes 41-48.

38. Extension and Termination of National Emergency Powers Under the Trading With the Enemy Act, 50 U.S.C. app. at 181 (1982). For the relevant text of this legislation, see *supra* note 8.

39. Presidents Carter and Reagan, in each of the years since the TWEA was amended, have determined that the continued exercise of § 5(b) authorities with respect to Cuba was in the national interest. *See* 49 Fed. Reg. 35,927 (1984); 48 Fed. Reg. 40,695 (1983); 47 Fed. Reg. 39,979 (1982); 46 Fed. Reg. 45,321 (1981); 45 Fed. Reg. 59,549 (1980); 44 Fed. Reg. 53,153 (1979); 43 Fed. Reg. 40,449 (1978) (where the President authorized the continuation of the Act through presidential memoranda).

40. 50 U.S.C. app. at 181 (1982). The relevant part of § 101(b), Pub. L. No. 95-223, reads as follows: "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.*

41. 31 C.F.R. §§ 515.101-515.901 (1985).

42. *Id.* § 515.201(b)(1). This section prohibits "[a]ll 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" unless the transactions were specifically authorized by the Secretary of the Treasury. *Id.*

43. Proclamation No. 3447, 3 C.F.R. 157 (1959-1963 comp.), *reprinted in* 22 U.S.C. § 2370 app. at 463 (1982). This proclamation, issued by President Kennedy, called for an embargo upon trade with Cuba under § 620(a) of the Foreign Assistance Act of 1961, Pub. L. No. 94-329, 75 Stat. 445 (codified as amended at 22 U.S.C. § 2371 (1982)). Known as the Cuban Import Regulations, this original embargo was replaced with the CACRs on July 9, 1963. 28 Fed. Reg. 6974 (1963) (codified as amended at 31 C.F.R. §§ 515.101-515.901 (1985)).

rect."[44] On July 1, 1977, however, restrictions on travel-related transactions under the CACRs, while not abolished, were not actively in effect.[45] Pursuant to President Carter's 1977 instructions that all travel restrictions be lifted,[46] the Treasury Department issued a general license[47] exempting, with some limitations, travel-related transactions with Cuba from the regulation 201(b) prohibition.[48] In 1982, the Reagan administration amended this general license to remove authorization for transactions in connection with tourist or business travel.[49]

Plaintiffs in *Regan v. Wald* were American citizens who stated a desire to travel to Cuba for educational, political and religious reasons.[50] They were prevented from doing so by the 1982 amendment to the general license.[51] They claimed that the restrictive amendment to the general license violated the 1978 Passport Act,[52] that it exceeded

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44. 31 C.F.R. § 515.201(b) (1985).

45. The CACRs made no mention of travel-related transactions until 1977, *see* 31 C.F.R. §§ 515.101-515.901 (1985), when the Treasury Department issued a general license allowing such transactions under the CACRs. *See infra* notes 46-48 and accompanying text. This general license was undoubtedly issued in order to protect against any possible travel restrictions under the CACRs, thereby ensuring full compliance with President Carter's instructions that all travel restrictions be removed. *See supra* note 5 and accompanying text.

46. For a discussion of President Carter's removal of travel restrictions, see *supra* note 5.

47. 31 C.F.R. § 515.560 (1985). Section 515.317 defines general license as "any license or authorization the terms of which are set forth in this part." *Id.* § 515.317.

48. *Id.* § 515.560 (a)(1). On March 18, 1977, the State Department issued a press release stating that "[r]evisions of the Department of the Treasury licensing procedures affecting the expenditure of funds in the aforementioned countries are in preparation." 76 DEP'T ST. BULL. 346 (1977). The Treasury Department then advised the public on March 29, 1977 that transactions incidental to travel were not subject to governmental regulation or control. 42 Fed. Reg. 16,621 (1977).

49. *See* 31 C.F.R. § 515.560(a)(3) (1985). As amended, § 515.560 provides that the general license to engage in travel-related transactions is limited to persons engaged in official travel, visits to close relatives, "fully sponsored or hosted" travel, and travel relating to news-gathering, professional research, or similar activities. The amendment specifically withdraws authorization for transactions incident to business or tourist travel and provides that specific license may be granted when travel to Cuba is for humanitarian reasons or for purposes of public performance in connection with cultural or sports events in Cuba. *Id.*

50. "It is undisputed that respondents' purpose was neither business nor holiday travel, but rather to learn about Cuba, its people and culture, and to establish political contact with the Cuban people." Brief for Respondents at 6, Regan v. Wald, 104 S. Ct. 3026 (1984) (footnote omitted).

51. *See supra* note 49 and accompanying text.

52. 104 S. Ct. at 3032 n.13. Respondents claimed that since the 1978 amendment "repealed the mechanism previously relied on by the executive for every travel restriction imposed during our nation's history, including those issued from 1963 to 1977 to bar travel to Cuba," any authority the President had under the TWEA to regulate travel-related transactions were similarly removed by the amendment. Brief for Respondents at

the authority conferred by the TWEA (as amended) and the IEEPA,[53] and that it violated their first[54] and fifth[55] amendment rights. Accordingly, they sought an injunction against its enforcement.[56] The District Court for the District of Massachusetts held that the plaintiffs had not demonstrated a substantial likelihood of success on the merits[57] and refused to issue an injunction.[58]

In the court of appeals,[59] the government contended that statutory authority for the 1982 amendment restricting tourist travel rests on a joint reading of section 5(b)[60] and the grandfather clause.[61] While conceding that in promulgating the 1982 amendment it did not follow the

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5, 104 S. Ct. 3026 (1984). The Supreme Court rejected this argument, saying that the amendment made no mention of and had nothing to do with executive authority under the TWEA. 104 S. Ct. at 3034 n.16. For a discussion of the 1978 Passport Act, see *supra* notes 2-4 and accompanying text.

53. 104 S. Ct. at 3032 n.13. For the reasoning behind this claim, see *infra* notes 64-66 and accompanying text. For a discussion of the TWEA and the IEEPA, see *supra* notes 13-40 and accompanying text.

54. 104 S. Ct. at 3032 n.13. Respondents based this claim on the Supreme Court's holding in Kent v. Dulles, 357 U.S. 116, 125 (1958) and Aptheker v. Secretary of State, 378 U.S. 500 (1964), that international travel is a constitutional right, with first amendment implications, protected by the due process clause of the fifth amendment. 104 S. Ct. at 3038. For a discussion of the *Kent* decision, see *infra* notes 118-28 and accompanying text. The decision in *Kent* acknowledged that a first amendment interest lies in the fact that foreign travel provides unique access to information, which enables citizens to evaluate their government's policies first hand. 357 U.S. at 127 (quoting CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 195-96 (1956)). The *Wald* Court did not reach the first amendment claim, finding that the ban in this case only implicated the fifth amendment and that the infringement on respondents' fifth amendment right was justified. 104 S. Ct. at 3038-39.

55. 104 S. Ct. at 3032 n.13. Respondents claimed that infringement on their fifth amendment right to travel abroad could not be justified within the meaning of Zemel v. Rusk, 381 U.S. 1 (1965), which held that passport restrictions on travel to Cuba were justified in light of a serious foreign policy concern that existed because of the Cuban Missile Crisis. 104 S. Ct. at 3038-39. For a discussion of *Zemel*, see *infra* notes 132-52 and accompanying text. For a further discussion of the fifth amendment right to travel, see *infra* notes 119-21 and accompanying text.

56. 104 S. Ct. at 3029-30.

57. In deciding whether to grant a preliminary injunction, a court will consider whether plaintiffs will suffer irreparable injury if the injunction is denied, whether such injury outweighs any harm that the injunction relief would cause the defendants, whether plaintiffs have a likelihood of success on the merits, and whether the public interest would not be harmed by a preliminary injunction. Wald v. Regan, 708 F.2d 794, 801 (1st Cir. 1983) (citing Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029, 1034 (1st Cir. 1982) and Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981)), *rev'd*, 104 S. Ct. 3026 (1984).

58. 104 S. Ct. at 3030.

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

60. *Id.* at 796. For the relevant portion of § 5(b), see *supra* note 7.

61. 708 F.2d at 796. For the relevant portion of the grandfather clause, see *supra* note 8.

procedures set out by the IEEPA for instituting new travel restrictions,[62] the government asserted that TWEA " 'authorities . . . were being exercised' with respect to Cuba 'on July 1, 1977,' " within the meaning of the grandfather clause.[63] The TWEA authorities were therefore preserved according to the terms of that clause, thereby negating any need to apply IEEPA procedures.[64] Plaintiffs, on the other hand, claimed that Congress intended to "grandfather" only those specific restrictions that were actually being exercised on July 1, 1977.[65] Because, by virtue of the general license, tourist travel was permitted on July 1, 1977,[66] its subsequent 1982 restriction was not authorized under the grandfather clause.[67] Hence, any new restrictions sought by the government should have been implemented under the IEEPA. The First Circuit, deciding only the issue of statutory authority, found the amendment to be without such authority[68] and granted a preliminary injunction.[69] The Supreme Court, in a five to four decision mirroring the contentions of the government and the plaintiffs respectively, reversed the court of appeals.[70]

The Supreme Court focused primarily on the court of appeals' interpretation of the legislative history, purpose, and language of the grandfather clause. Justice Rehnquist, writing for the Court, began his analysis with the court of appeals' finding that since restrictions on travel purchases differ substantially from restrictions on other commodity purchases,[71] each is subject to a different exercise of authority. Therefore, according to the court of appeals, although many transactions with Cuba were barred on the relevant date, the "authority" to

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62. 708 F.2d at 796. *See* 50 U.S.C. §§ 1701-06 (1982). For a discussion of the procedures mandated by the IEEPA, see *supra* note 35.

63. 708 F.2d at 796.

64. *Id.*

65. Brief for Respondents at 32-46, 104 S. Ct. 3026 (1984).

66. *See supra* notes 47-48 and accompanying text.

67. Brief for Respondents at 32-46, 104 S. Ct. 3026 (1984).

68. 708 F.2d at 795. The only other circuit court to consider this issue also found the amendment to be without statutory authority. *See* United States v. Frade, 709 F.2d 1387 (11th Cir. 1983). In *Frade*, the court confronted a violation of the restrictions on travel-related transactions that occurred in connection with the Mariel boatlift. The court agreed with the decision in Wald v. Regan, 708 F.2d 794 (1st Cir. 1983), *rev'd*, 104 S. Ct. 3026 (1984), finding that the restrictions on travel-related transactions were invalid. 709 F.2d at 1397-98.

69. 708 F.2d at 801. The court found it unnecessary to reach the constitutional issue because it concluded that the amendment was without statutory authority. *Id.* at 804.

70. Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Stevens, and O'Connor joined. Justice Blackmun wrote a dissenting opinion, which was joined by Justices Brennan, Marshall, and Powell. 104 S. Ct. at 3040 (Blackmun, J., dissenting). Justice Powell also filed a dissenting opinion. 104 S. Ct. at 3049 (Powell, J., dissenting).

71. 708 F.2d at 796. *See infra* notes 73-75 and accompanying text.

restrict travel-related transactions was not being exercised on July 1, 1977.[72] The court of appeals supported this reasoning by pointing out that restrictions on travel-related purchases have different effects than restrictions on commodities,[73] that the government has historically treated travel restrictions differently from other TWEA rules and regulations,[74] and that since restrictions on travel raise constitutional issues, they are inherently different from most regulations on commercial activity.[75] Furthermore, the court of appeals noted that all of the above was supported by the Passport Act amendment of 1978, which significantly curtailed executive power to impose travel restrictions.[76] The court concluded that to allow restrictions on travel under the CACRs "would make the Passport Act amendment meaningless in terms of Cuba."[77]

Justice Rehnquist dismissed all of the lower court's reasoning with a simple glance at the language of the TWEA, finding that restrictions on travel purchases do fall within its purview. The TWEA, he wrote, did not draw any distinction between travel-related transactions and other property transactions.[78] "The President is authorized [under section 5(b)] to regulate 'any' transaction involving 'any' property in which a foreign country . . . has 'any' interest."[79] Travel-related transactions were found to fall within the realm of property transactions

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72. 708 F.2d at 796. This is clearly demonstrated by the fact that travel is typically restricted through passport use whereas § 5(b) has traditionally been directed only at commercial and mercantile transactions. Indeed, § 5(b) contains a comprehensive list of commercial transactions subject to regulation yet makes no mention of regulations of travel-related transactions. *See* 50 U.S.C. app. § 5(b) (1982). For further discussion of the distinction between commercial transactions and travel-related transactions, see *infra* notes 212-23 and accompanying text.

73. 708 F.2d at 796-97. The court reasoned that restrictions on travel transactions effectively eliminated travel, unlike most commercial restrictions, which resulted only in a curtailment of funds to the designated country. *Id.*

74. *Id.* at 797. The court of appeals stated that:

> The Justice Department and the State Department for many years after the enactment of the TWEA did not even consider TWEA an important source of "travel restrictions" power. The Justice Department consistently told Congress that the President did *not have* the power to control travel by Americans to and from the United States.

Id. (citation omitted).

75. *Id.* Travel restrictions, unlike commercial regulations, involve constitutionally protected rights of citizens. *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969); United States v. Laub, 385 U.S. 475, 481 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964) (*discussed infra* notes 124-28 and accompanying text); and Kent v. Dulles, 357 U.S. 116, 125-26 (1958) (*discussed infra* notes 118-23 and accompanying text).

76. 708 F.2d at 801. For a discussion of the 1978 Passport Act amendment, see *supra* text accompanying notes 3-4.

77. 708 F.2d at 801.

78. 104 S. Ct. at 3034. For the relevant text of the TWEA, see *supra* note 7.

79. 104 S. Ct. at 3034 n.16.

since payments for meals, lodging, and transportation in Cuba involve property in which Cuba has an interest.[80] Justice Rehnquist stated that there was simply no basis for the court of appeals' conclusion in light of the actual language of the TWEA.[81] He added that the 1978 amendment to the Passport Act "has nothing to do with, and makes no mention of, the President's authority to regulate transactions under [the] TWEA."[82] He did not comment on any of the other distinctions noted in the lower court decision,[83] pointing instead to the fact that the relevant language of the new IEEPA is the same as that in section 5(b).[84] This, he stated, served as "[f]urther proof that Congress did not distinguish between travel-related transactions involving foreign property and other property transactions."[85] The President, he concluded, was exercising his authority to restrict travel-related transactions on July 1, 1977 by virtue of the general license[86] then in effect, which allowed such transactions under the CACRs.[87] The general license, in his view, did not remove the President's own authority over travel under regulation 201(b); it merely qualified it, amounting simply to the President's revocable determination that at that time he would not exercise his authority.[88] Justice Rehnquist supported this conclusion by citing two other travel-related purchase restrictions under the CACRs that were in effect on July 1, 1977[89] and by pointing to a CACR clause[90] allowing for amendment to the general license.[91]

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80. *Id.* at 3034. Justice Rehnquist decided that travel-related transactions "fall naturally within the statutory language" of the TWEA and that because Congress did not specifically mention such transactions in its amendment to the TWEA, it did not intend for them to be removed from presidential regulation. *Id.* While travel-related transactions may fall within the language of § 5(b), the legislative history of the TWEA, *discussed infra* notes 212-23 and accompanying text, along with its past use, *discussed supra* notes 23 & 74, clearly indicate that it was never intended to be used for the regulation of travel transactions. Congress, therefore, had no reason to mention such transactions in amending the TWEA as they were never part of TWEA authority.

81. 104 S. Ct. at 3034.

82. *Id.* at 3034 n.16.

83. *Id.* at 3033-34.

84. *Id.* at 3034 n.17.

85. *Id.* at 3034.

86. *Id.* For a discussion of the general license allowing travel to Cuba, see *supra* notes 45-48 and accompanying text.

87. For the relevant sections and a discussion of the CACRs, see *supra* notes 41-44 and accompanying text.

88. 104 S. Ct. at 3034.

89. *Id.* at 3034. 31 C.F.R. § 515.601 (1985) requires persons subject to the provisions of the CACRs to keep records of their transactions, and 31 C.F.R. § 515.560(c)(3) (1985) restricts personal expenditures on merchandise to $100.

90. 104 S. Ct. at 3034-35. 31 C.F.R. § 515.805 (1985) subjects the provisions of part 515 and "any rulings, licenses, authorizations, instructions, orders, or forms issued thereunder" to revocation, amendment, or modification "at any time." *Id.*

91. 104 S. Ct. at 3035. The Court relied on its decision in Dames & Moore v. Regan,

Justice Rehnquist next examined the court of appeals' interpretation of the legislative history behind the grandfather clause.[92] The lower court had found that legislators and administrators, when referring to the grandfather clause, consistently spoke in terms of "existing uses of authority."[93] This interpretation would indeed seem to be supported by the following colloquy before a congressional committee between Representative Cavanaugh and Mr. Bergsten of the Treasury Department, relied upon by the court of appeals in its decision:[94]

> 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 the 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.[95]

The court of appeals had further relied upon the fact that the subcommittee's working draft of the grandfather clause originally contained a

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453 U.S. 653 (1983), in which it held that "[t]he President was authorized to nullify the attachments and order the transfer of Iranian assets" under the IEEPA. The plaintiff in *Dames & Moore* claimed that the IEEPA was not intended to give the President the extensive power of nullification of attachments but only the power to temporarily freeze assets. The Court, in finding against the plaintiff's claim, noted that pursuant to the initial freeze of Iranian assets, the Treasury Department issued regulations providing that "unless licensed," any attachment is null and void. *See* 31 C.F.R. § 535.203(e) (1985). Furthermore, under the statute, all licenses "may be amended, modified, or revoked at any time." *Id.* § 535.805. The plaintiff's attachments were therefore, according to the Court, "specifically made subordinate to further actions which the President might take under the IEEPA." 453 U.S. at 673. Justice Rehnquist claimed that the general license allowing travel transactions under the CACRs was similarly "made subordinate" to further action by the President, since it too was subject to revocation, amendment, or modification "at any time." *See supra* note 90. Justice Rehnquist's reasoning fails, however, when examined in the context of the legislative history of the National Emergencies Act and the IEEPA. For a summary of the legislative history of these statutes, see *supra* notes 25-36 and accompanying text. Both of the above statutes were directed towards the removal of presidential power to revoke, amend, or modify regulations instituted under the old national emergency TWEA power. *See supra* notes 17-22 and accompanying text.

92. 104 S. Ct. at 3035-37.

93. 708 F.2d at 798 (referring to existing uses of § 5(b) of the TWEA authorities).

94. *Id.*; *see also* 104 S. Ct. at 3035-36.

95. *Revision of Trading With the Enemy Act: Markup Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 21 (1977), *quoted in* 708 F.2d at 798.

section that would have preserved TWEA powers, with respect to a country, which were not then being exercised.[96] This section was, significantly, dropped from the final bill.[97]

Justice Rehnquist found both of the above accounts unconvincing in light of what he characterized as "the clear generic meaning of the word 'authorities.' "[98] "Oral testimony of witnesses and individual Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself."[99] On this basis, Justice Rehnquist concluded that the legislative history does not support the assertion that Congress meant existing "restrictions" when it used the word "authorities."[100]

The Court's third criticism was directed at the court of appeals' opinion regarding the purpose of the grandfather clause.[101] The court of appeals, after referring to the subcommittee hearings,[102] found that the purpose underlying the clause was to spare the President from having to declare a new national emergency under the IEEPA in order to continue existing embargoes.[103] Any such new declarations would inevitably harm the United States' bargaining position with respect to ongoing foreign policy decisions.[104] Yet, since travel restrictions under the CACRs were not in effect in 1977, the court of appeals concluded that any "grandfathering" of authority to implement them would have no connection with the above stated purpose.[105]

While the Supreme Court found this proposition supportable,[106] it decided that the main reason section 5(b) authorities were

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96. 708 F.2d at 799. *See Emergency Controls Hearings, supra* note 17, at 166-67 (remarks of Subcommittee Staff Director Majak).

97. 708 F.2d at 799. Congressman Bingham, the bill's sponsor, discovered draft language that would have allowed a broader reading of the grandfather clause. *Emergency Controls Hearings, supra* note 17, at 167. As Subcommittee Staff Director Majak explained, "I think it boils down to a question of whether we are grandfathering the particular situation, . . . or whether we are grandfathering the particular authorities themselves and their usage." *Id.* Congressman Bingham "objected to this draft, making clear that he did not want to grandfather the former—the situation. Rather, he wanted to grandfather only the latter, namely the particular existing uses of those powers." 708 F.2d at 799.

98. 104 S. Ct. at 3035.

99. *Id.* at 3036.

100. *Id.* at 3037.

101. *Id.* at 3037-38.

102. 708 F.2d at 798 (citing *Emergency Controls Hearings, supra* note 17).

103. 708 F.2d at 798 (citing *Emergency Controls Hearings, supra* note 17, at 152, 181-82, 211).

104. 708 F.2d at 799. *See Emergency Controls Hearings, supra* note 17, at 103.

105. 708 F.2d at 799. The lower court also noted that the reimposition of travel restrictions in 1982 "required public declaration with political impact *anyway*." *Id.*

106. 104 S. Ct. at 3037.

"grandfathered" was to ward off controversy between congressmen[107] and thus ensure the passage of the IEEPA.[108] The Court supported this by quoting a long passage from a House report on legislation reforming the TWEA,[109] which speaks to the problems of revising existing uses of international economic transaction controls:

> Certain current uses of the authorities affected by H.R. 7738 are controversial—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 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.[110]

In presenting the bill[111] to the Senate, the Committee Chairman reported that the existing section 5(b) embargoes, including the one against Cuba, were "grandfathered" so that "they are not affected in any way by the new legislation."[112] The Supreme Court interpreted this congressional refusal to revise existing uses as an implicit license for the President to modify existing uses in response to changes in the United States' relations with the affected countries.[113] This approach is only tenable if based on the assumption that restrictions on travel-related transactions existed on July 1, 1977 as an "existing use" of authority.[114] Because the Court had already found this to be a valid as-

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107. *Id.* Congress concluded that any examination made of existing controls, to determine their validity with regard to a particular situation, would undoubtedly arouse controversy. H.R. REP. No. 459, 95th Cong., 1st Sess. 9-10 (1977).

108. 104 S. Ct. at 3037. Justice Rehnquist stated that "[m]embers of the subcommittee feared that if current embargoes were implicated the bill would bog down in partisan disputes, thereby delaying implementation of the new procedures of IEEPA." *Id.*

109. *Id.* at 3037.

110. H.R. REP. No. 459, 95th Cong., 1st Sess. 9-10 (1977).

111. H.R. 7738, 95th Cong., 1st Sess. (1977).

112. 123 CONG. REC. 38,166 (1977) (statement of Rep. Bingham).

113. 104 S. Ct. at 3037.

114. For the majority's reasoning in finding that travel-related transactions were an "existing use" of authority on July 1, 1977, see *supra* notes 86-88 and accompanying text.

sumption,[115] it was unhindered in finding that the restrictions on travel-related transactions conformed with the purpose of the grandfather clause.[116]

The plaintiffs' constitutional claim[117] would have easily been supported by early case law concerning the right to international travel. International travel was first held to be a constitutionally protected freedom, guaranteed by the due process clause of the fifth amendment, in *Kent v. Dulles.*[118] In *Kent,* the Supreme Court limited the extent of the Secretary of State's authority to withhold a passport,[119] concluding that the right to travel is "a personal right included in the word 'liberty' as used in the Fifth Amendment,"[120] and that "[i]f that 'liberty' is to be regulated it must be pursuant to the lawmaking functions of the Congress."[121] In reaching this conclusion, the Court pointed out that the freedom to travel involves basic social values[122] and declared that "where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."[123] The *Kent* holding was reinforced by *Aptheker v. Secretary of State,*[124] in which the Court confronted a statute expressly prohibiting the issuance of passports to members of Communist organizations.[125] The Court held that the statute restricted the freedom to travel guaranteed by the fifth amendment too broadly and indiscriminately, and was therefore "unconstitutional on its face."[126] The holding in *Aptheker* went further, however, spelling out what the Court had only touched

115. 104 S. Ct. at 3034-35.

116. *Id.* at 3037.

117. For a discussion of plaintiffs' constitutional claim, see *supra* notes 54-55 and accompanying text.

118. 357 U.S. 116 (1958). In *Kent,* the Secretary of State denied passports to petitioners because of their alleged communist beliefs and associations as well as their refusal to file affidavits concerning past or present membership in a communist organization. *Id.* at 117-18.

119. For the text of the Passport Act as it existed at the time of *Kent,* see *supra* note 2.

120. 357 U.S. at 129.

121. *Id.*

122. *Id.* at 126. Justice Douglas found that "[f]reedom of movement is basic in our scheme of values." *Id.*

123. *Id.* at 129.

124. 378 U.S. 500 (1964).

125. Section 6 of the Subversive Activities Control Act of 1950, ch. 1024, § 6, 64 Stat. 993 (codified at 50 U.S.C. § 785 (1982)), made it unlawful for any member of a communist organization, who had registered or had been ordered to register, to apply for or attempt to use a passport.

126. 378 U.S. at 514. The Court further concluded that § 6 of the Subversive Activities Control Act swept "too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment." *Id.*

on in *Kent*.[127] The freedom to travel abroad, stated the Court, not only involves fifth amendment interests, but also "is a constitutional liberty closely related to the rights of free speech and association" embodied in the first amendment.[128]

After *Aptheker*, the government ceased its policy of restricting foreign travel on the basis of citizens' political beliefs and associations.[129] The use of area restrictions, however, continued[130] and in 1965, a challenge to a ban on travel to Cuba, imposed under the Passport Act,[131] was heard in the Supreme Court in *Zemel v. Rusk*.[132] The plaintiff in *Zemel* wanted to travel to Cuba in order "to satisfy [his] curiosity about the state of affairs in Cuba and to make [himself] a better informed citizen."[133] His application for passport validation was denied by the State Department[134] and he brought suit, claiming that the Secretary's restrictions were invalid,[135] that the statutes authorizing the Secretary to restrict travel were unconstitutional,[136] and that the Secretary's denial of his passport violated both his first and fifth

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127. The *Kent* decision was based upon fifth amendment concerns, yet the Court intimated through a discussion of the social values involved in travel that first amendment concerns were involved. The Court identified freedom of movement with the need to gather information and the ability to be with family and associate with friends. *See* 357 U.S. at 126-27.

128. 378 U.S. at 517.

129. The State Department regulations authorizing denial of passports under the Subversive Activities Control Act were withdrawn in 1968. 31 Fed. Reg. 13,540 (1968).

130. *See* Rauh & Pollitt, *Restrictions on the Right to Travel*, 13 CASE W. RES. L. REV. 128, 132-40 (1961) (criticizing the use of area restrictions as discriminatory, arbitrary, lacking in congressional support, and contrary to American democratic traditions); *see also* Note, *The Right to Travel Abroad*, 42 FORDHAM L. REV. 838 (1974) (detailed discussion of the first and fifth amendment implications involved with the government's use of area restrictions).

131. For a discussion of the history of the American ban on passports valid for travel to Cuba, see *supra* note 5.

132. 381 U.S. 1 (1965). For a discussion of the fifth amendment challenge to the ban on travel to Cuba, see *supra* note 5.

133. 381 U.S. at 4.

134. *Id.*

135. *Id.* The *Zemel* Court, however, found that the Secretary did have the power to impose area restrictions under the 1926 Passport Act despite the fact that the language of the Act does not explicitly authorize area restrictions. *See* 22 U.S.C. § 211(a) (1982). For a discussion of the Act's general clause relied upon by the President to implement area restrictions, see *supra* note 2. Chief Justice Warren stated that area restrictions constitute "an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it." 381 U.S. at 12. The Court further observed that because of the mercurial nature of international relations and the executive's unique capacity to swiftly obtain, evaluate, and act upon information, grants of authority to the executive in matters of foreign affairs must contain broad language. *Id.* at 17.

136. 381 U.S. at 4.

amendment rights.[137] Summary judgment in favor of the Secretary was granted by a three-judge district court and the action was dismissed.[138] On appeal, Chief Justice Warren, writing for the Court, upheld the travel restrictions,[139] distinguishing *Kent* and *Aptheker* on the grounds that *Zemel* involved "foreign policy considerations affecting all citizens"[140] rather than a denial based on an individual's beliefs or associations.[141] Thus, while recognizing the constitutional status of travel first enunciated in *Kent*,[142] the *Zemel* Court nevertheless noted that due process requires a balancing of the individual's rights and the government's interest. Attention must therefore be paid to both the extent of and the necessity for the particular restriction.[143] The *Zemel* Court found that the foreign policy justifications for the area restriction at issue outweighed any infringement on the appellant's fifth amendment right to travel.[144] As the Court stated, "that the restriction which is challenged in this case is supported by the weightiest considerations of national security is perhaps best pointed up by recalling that the Cuban missile crisis of October, 1962, preceded the filing of the appel-

137. *Id.* This claim was dropped at the trial level, and was not argued on appeal. 381 U.S. at 4 n.1.

Appellant's complaint also attacked the validity of § 215(b) of the Immigration and Nationality Act of 1952, Pub. L. No. 95-426, 66 Stat. 190 (codified at 8 U.S.C. § 1185(b) (1982)). This statute declares it "unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." The *Zemel* Court declined review of this issue, 381 U.S. at 18-20, but the question reappeared in United States v. Laub, 385 U.S. 475 (1967). In *Laub*, the Court held that geographic restrictions on passports (area restrictions) were not criminally enforceable. The Court relied upon its earlier holding in *Kent*, which held that the statute was not criminally enforceable. For a discussion of *Kent*, see *supra* notes 118-23 and accompanying text.

138. 228 F. Supp. 65 (D. Conn. 1964).

139. 381 U.S. at 3.

140. *Id.* at 13. The Court stated that travel between Cuba, the only communist country in the Western Hemisphere, and other countries in the Western Hemisphere aided in the spread of subversion. The Court further noted that travel to Cuba could involve the United States in "dangerous international incidents" because American citizens in Cuba had been imprisoned without charges during the early days of the Castro regime. *Id.* at 14-15.

141. *Id.* at 13.

142. For a discussion of *Kent*, see *supra* notes 118-23 and accompanying text.

143. 381 U.S. at 14.

144. *Id.* at 14-16. The Court said:

> We think, particularly in view of the President's statutory obligation to "use such means, not amounting to acts of war, as he may think necessary and proper" to secure the release of an American citizen unjustly deprived of his liberty by a foreign government that the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.

Id. at 15 (footnote omitted).

lant's complaint by less than two months."[145]

The first amendment claim in *Zemel* was that the restriction interfered with plaintiff's ability to gather information.[146] While conceding that the travel restrictions did interfere with the free flow of information about Cuba,[147] the Court found that such interference involves only fifth amendment considerations.[148] According to the Court, this travel restriction resulted only in an inhibition of action, and the inhibition of action is not covered by the first amendment.[149] To illustrate this point, the Court stated:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.[150]

This denial of Zemel's first amendment claim limited the right to travel to the "liberty" of the fifth amendment, thereby denying it the greater protection it would have received under a first amendment analysis.[151] Since Zemel's reason for wanting to travel to Cuba was to

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145. *Id.* at 16. The Court used the example of the Cuban missile crisis to illustrate the principle that international travel that would "directly and materially interfere with the safety and welfare of . . . the Nation" could be restricted. *Id.* at 15-16.

146. *Id.* at 16. Plaintiff claimed that under Aptheker v. Secretary of State, 378 U.S. 500, 507 (1964), which held that the freedom to travel abroad is closely related to the first amendment rights of free speech and association, his right to gather information was protected by the first amendment. For a discussion of *Aptheker*, see *supra* notes 124-28 and accompanying text.

147. 381 U.S. at 16.

148. *See id.*

149. *Id.* at 16-17. Although the Court did not refer to specific cases in support of its proposition, the Court noted that its holding in *Kent* was based upon the fifth amendment. *Id.* at 14, 16. The *Kent* decision made no mention of a first amendment claim. *See* 357 U.S. 116. For a discussion of *Kent*, see *supra* notes 118-23 and accompanying text.

150. 381 U.S. at 17. One commentator has noted that "[o]bviously one does not have an 'unrestrained right to gather information.' The right to speak is not unrestrained, but limitation does not disqualify it as a first amendment right." Note, *Travel and the First Amendment: Zemel v. Rusk*, 13 U.C.L.A. L. REV. 470, 473 (1966).

151. Under a first amendment analysis, the right to travel would have been subjected to the "preferred right" doctrine of the first amendment. Under this doctrine, certain rights that are considered fundamental to freedom are identified as "preferred rights" and are afforded virtually absolute protection from governmental intrusion. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 953-58 (1978). *See also* Note, *supra* note 150, at 470.

inform himself as to conditions there, the result of the decision is that Americans have no first amendment right to go to particular countries in order to witness either conditions in those countries or the effects of American foreign policy in those countries.[152]

Justice Rehnquist, in finding against the plaintiffs' constitutional claim in *Wald*,[153] relied on *Zemel*,[154] holding that any threat to an American citizen's right to travel was both outweighed and justified by concerns of foreign policy:[155]

> We see no reason to differentiate between the travel restrictions imposed by the President in the present case and the passport restrictions imposed by the Secretary of State in *Zemel*. Both have the practical effect of preventing travel to Cuba by most American citizens and both are justified by weighty concerns of foreign policy.[156]

In response to the plaintiffs' argument that *Zemel*, decided in the wake of the Cuban missile crisis, controls only in extraordinary situations,[157] the Court stated that interference in foreign policy is not within the judicial realm.[158] Justice Rehnquist found the decision in *Zemel* to be independent of that Court's foreign policy analysis and stated that *Zemel* "was merely an example of this classical deference to the political branches in matters of foreign policy."[159]

Justice Blackmun delivered a sharp, if not angry dissent, pointing to blatant oversights and discrepancies in the majority's argument.[160] His first quarrel was with the Court's superficial portrayal of the history behind the grandfather clause. As did the court of appeals,[161] Jus-

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152. *See generally* Velvel, *Geographical Restrictions on Travel: The Real World and the First Amendment*, 15 U. KAN. L. REV. 35 (1966) (discussing the ramifications of *Zemel*, particularly in light of the existing government practice of withholding significant information about foreign affairs).

153. 104 S. Ct. at 3039.

154. *Id.* at 3038-39. Justice Rehnquist stated that the holding in *Zemel* was simply an example of judicial deference to the decisions of the political branches, a "classical" practice in foreign policy matters. *Id.* at 3039. For a discussion of deference to the political branches, see *supra* note 12.

155. 104 S. Ct. at 3039.

156. *Id.* at 3038-39.

157. *See* Brief for Respondents at 54-55, Regan v. Wald, 104 S. Ct. 3026 (1984) (quoting Professor Tribe's suggestion that "the power approved in *Zemel* must be limited to the most extraordinary situations." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 957 n.22 (1978)).

158. 104 S. Ct. at 3039. The Court reasoned that foreign policy matters were entrusted to the political branches of the government. *Id.* (citing Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)).

159. 104 S. Ct. at 3039.

160. *Id.* at 3040 (Blackmun, J., dissenting).

161. 708 F.2d at 796; *see supra* notes 71-77, 93-97 & 102-05 and accompanying text.

tice Blackmun went beyond simply reiterating the language of the various relevant statutes and interpreted the grandfather clause in the full context of its enactment. The original intent of the TWEA, he noted, had become clouded by a subsequent history of declarations of national emergencies[162] that had never been terminated, despite the fact that the conditions giving rise to those declarations no longer existed. The TWEA's broad grant of authority was never intended for peacetime use and Congress, through the National Emergencies Act[163] and the subsequent 1977 amendment of the TWEA,[164] sought to correct this problem.[165] Justice Blackmun also asserted that congressional records clearly indicated that Congress was not convinced that the national emergencies under which the TWEA powers were invoked were, in fact, still valid.[166] He concluded that "[i]t is clear that Congress intended to curtail the discretionary authority over foreign affairs that the President had accumulated because of past 'emergencies' that no longer fit Congress' conception of that term. To accomplish this goal, Congress amended the TWEA and enacted the IEEPA."[167]

Justice Blackmun next examined the purpose behind the grandfather clause.[168] He demonstrated that while the Court was correct in stating that Congress sought to avoid controversy,[169] such controversy was avoided by "grandfathering" existing uses only,[170] not by invoking presidential power to revise existing uses.[171] He cited several portions

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162. 104 S. Ct. at 3040-41 (Blackmun, J., dissenting). For a list of some of the declared emergencies, see *supra* notes 18-19 and accompanying text.

163. For the relevant text and a discussion of the National Emergencies Act, see *supra* notes 30-33 and accompanying text.

164. *See supra* note 34 and accompanying text.

165. 104 S. Ct. at 3042 (Blackmun, J., dissenting).

166. *Id.* at 3041. Justice Blackmun quoted the following exchange between Assistant Secretary of State Katz and Subcommittee Chairman Bingham:

> MR. BINGHAM. Mr. Katz, what is the national emergency currently facing us that warrants the use of powers under the [TWEA]?. . .
>
> MR. KATZ. It continues to be the emergency involving the threat of Communist aggression which was declared in 1950 at the time of the aggression in Korea.
>
> MR. BINGHAM. Are you serious?
>
> MR. KATZ. That is the national emergency, Mr. Chairman, and it continues.
>
> MR. BINGHAM. The emergency is the emergency that existed in 1950?
>
> MR. KATZ. It has not been terminated.

Id. (quoting *Emergency Control Hearings*, *supra* note 17, at 110).

167. 104 S. Ct. at 3042 (Blackmun, J., dissenting).

168. *Id.* at 3042-44, 3046-47. For a discussion of the majority's analysis of the grandfather clause, see *supra* notes 92-116 and accompanying text.

169. 104 S. Ct. at 3046-47. For a discussion of the majority's analysis of this aspect of congressional intent in grandfathering the § 5(b) authorities, see *supra* note 107 and accompanying text.

170. 104 S. Ct. at 3046-47.

171. *Id.* at 3047. The majority also asserted that the grandfather clause was designed

of the legislative history that indicated that Congress had decided to drop a working draft clause that would have saved the President's power to exercise residual authority.[172] This type of legislative history, he pointed out, is unusually informative as to legislative intent.[173] Justice Blackmun found it "remarkable" that the majority chose to quote language from the House Report that, by his reading, directly supported the above position.[174] While the report does state that the Committee decided not to revise current uses of the TWEA because it would be "difficult and divisive," Justice Blackmun pointed out that Congress sought to avoid passing judgment on past uses of the Act.[175] Any revision of "such existing uses of international economic transaction controls, and *therefore the policies they reflect* . . . would be difficult and divisive."[176] Justice Blackmun noted that Representative Bingham stated during the Subcommittee hearings that the "existing uses" Congress had decided not to revise included only "what has been done to date,"[177] and found that this, along with the passage quoted from the House Report, clearly indicated that Congress did intend to restrict emergency powers that the President possessed but had not exercised.[178] "[A]s the quotation on which the Court mistakenly relies makes absolutely clear," Justice Blackmun asserted, "the primary purpose of the Act was to curtail 'future uses' of precisely that residual

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to protect the executive's ability to "respon[d] to heightened tensions with Cuba." *Id.* at 3047 (Blackmun, J., dissenting). Justice Blackmun felt that the analysis of the majority leads to an anomaly: If the President were to respond to "heightened tensions" in current trouble spots, his actions would be restricted by the provisions of the IEEPA, yet his actions regarding Cuba would not be. *Id.* at 3047 (Blackmun, J., dissenting). In Justice Blackmun's opinion, nothing in the language of the statute would permit the President to increase restrictions applicable to any country without conforming to the procedures stipulated in the IEEPA. *Id.* at 3046.

172. *Id.* at 3043-44 & n.4. Justice Blackmun quoted the following explanation of the purposes of the dropped provision § 101(b)(2):

> [W]ith respect to any uses of 5(b) authorities for any presently existing situation, not only could the President use those particular authorities that he is now using, but any others which are conferred by section 5(b).
>
> So if the President is presently using asset controls toward a particular country, but is not using, let us say, currency controls, he nonetheless could use, at some later date if he so desired, currency controls with respect to the situation.

Id. at 3043 (quoting *Emergency Controls Hearings, supra* note 17, at 167).

173. 104 S. Ct. at 3044 & n.5 (Blackmun, J., dissenting).

174. *Id.* at 3047. Justice Blackmun quoted the same passage used by the majority in support of his argument. For a discussion of the majority's analysis of the passage, see *supra* note 110 and accompanying text.

175. 104 S. Ct. at 3047 (Blackmun, J., dissenting).

176. *Id.* at 3047 (emphasis added).

177. *Id.* at 3047 (quoting *Emergency Controls Hearings, supra* note 17, at 167 (remarks of Rep. Bingham)).

178. 104 S. Ct. at 3047 (Blackmun, J., dissenting).

authority."[179]

The dissent was particularly outraged by the Court's reliance on the plain language of the grandfather clause.[180] Justice Blackmun agreed with the majority that hazards exist in relying on the words of congressmen.[181] These hazards, however, arise only if the words of the congressmen are not "precisely directed to the intended meaning of the particular words in a statute."[182] According to Justice Blackmun, because the congressional discussion surrounding the enactment of the grandfather clause was clearly concerned with the precise language of the clause, no such hazard was presented.[183] The dissent was quick to stress the fact that the majority, despite its concern over the perils of relying on legislative history, quoted a good deal of it to support its conclusion as to the purpose of the grandfather clause.[184] Hence, he concluded, the majority's concern over the hazards of legislative history could have no bearing on this case.[185] Furthermore, Justice Blackmun stated: "[T]here is nothing to indicate that [Congress] used the term 'authorities' to express any intent other than that which is made plain in the legislative history."[186] In addition, Justice Blackmun noted that the word "authorities" is far from unambiguous[187] and stated that the majority itself had conceded that Congress used interchangeably the words "restrictions," "controls," "specific uses," "prohibitions," "existing uses," and "authorities" when referring to what it wanted to "grandfather."[188] Even if such reliance on the plain language of the statute were warranted, Justice Blackmun argued, the phrase "authorities . . . being exercised," present in the grandfather clause,[189] did not suggest that the President was authorized to increase restrictions without following the IEEPA procedures.[190] Thus, by emphasizing the words "being exercised" rather than the word "authorities," as used in the grandfather clause, and by noting the concomitant enactment of the IEEPA, Justice Blackmun concluded that "there is no coherent

179. *Id.*

180. *Id.* at 3045-46 ("But the Court's confident claim that the statutory language is without ambiguity is pure *ipse dixit.*").

181. *Id.* at 3046.

182. *Id.* (quoting majority opinion, *id.* at 3036).

183. *Id.* at 3046.

184. *Id.*

185. *Id.*

186. *Id.* at 3045. Justice Blackmun noted that § 5(b) powers involve more than just the imposition of prohibitions. Therefore, Congress used the term "authorities" rather than "prohibitions" in order to grant a wider range of power to the President. *Id.* at 3045-46.

187. *Id.* at 3045.

188. *Id.*

189. For the text of the grandfather clause, see *supra* note 8.

190. 104 S. Ct. at 3046.

reason to believe that Congress intended to preserve the President's authority to institute such restrictions without complying with the IEEPA."[191]

Justice Blackmun rounded out his dissent with an interesting analogy. He pointed out that on July 1, 1977, there existed a broad general license[192] under the China embargo[193] that, in effect, nullified the embargo.[194] In discussing the exercise of authority under section 5(b) in effect at the time of the enactment of the IEEPA,[195] Congress referred to this license and stated that its effect was the lifting of the trade embargo of China.[196] This demonstrated, in Justice Blackmun's view, that Congress clearly saw the license as a removal of section 5(b) authorities, even though a general prohibition was technically still in effect.[197] In light of this, it would follow by analogy that Congress saw the general license permitting travel-related transactions under the Cuban embargo as a negation of section 5(b) authority over travel-related transactions.[198] Section 5(b) authority over travel-related transactions was not, therefore, preserved by the grandfather clause because the

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191. *Id.* at 3049.

192. 36 Fed. Reg. 8584 (1971). *See* 31 C.F.R. § 500.201(b)-(d) (1985). The regulations provide:

> (b) 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 designated foreign country, 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 evidence of indebtedness or evidences of ownership of property by persons subject to the jurisdiction of the United States; and
>
> (2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.
>
> (c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) or (b) of this section is hereby prohibited.
>
> (d) The term "designated foreign country" means a foreign country in the following schedule, and the terms "effective date" and "effective date of this section" means with respect to any designated foreign country, or any national thereof, 12:01 a.m. eastern standard time of the date specified in the following schedule, except as specifically noted after the country or area.

Id.

193. 15 Fed. Reg. 9041 (1950).

194. 104 S. Ct. at 3048 (Blackmun, J., dissenting).

195. H.R. REP. No. 459, 95th Cong., 1st Sess. 6 (1977).

196. *Id.* ("This had the effect of lifting the U.S. trade embargo of China.").

197. 104 S. Ct. at 3048.

198. *Id.* at 3048-49.

President was not, by virtue of the general license,[199] exercising authority over travel-related transactions in Cuba on July 1, 1977.

Justice Powell, in his dissent,[200] essentially agreed with Justice Blackmun in stating that the legislative history indicated, without question, congressional intent to curb executive use of emergency powers under section 5(b).[201] He went a step further, however, in noting that while the Court's decision may have been in the best interests of the United States, the judiciary's role is limited to "ascertaining and sustaining the intent of Congress."[202] In failing to do so, he implied, the Court is effectively writing its own law on foreign policy. This, he stated, was a direct intrusion into an arena that properly belongs to Congress and the executive.[203]

The points raised by Justices Blackmun and Powell are well taken. As Justice Blackmun illustrated, this decision is not only internally inconsistent,[204] it is irreconcilable with the legislative history of the grandfather clause and the enactment of the IEEPA.[205] It is indeed disturbing that the majority chose to disregard the express legislative history behind the grandfather clause; the fact that the majority admits doing so[206] causes the Court's decision in *Wald* to become suspect. The language, purpose, and legislative history of the grandfather clause all clearly support plaintiffs' contention that Congress intended to "grandfather" only those restrictions that were actually being exercised on July 1, 1977. Yet the majority chose to side with the government, finding that despite the absence of specific section 5(b) restrictions on tourist travel, such authority was "being exercised" with respect to Cuba on July 1, 1977.

The majority's decision that the grandfather clause, through its language, purpose, and legislative history, provided a statutory basis for the 1982 restrictions on travel transactions has provided the President with a back door through which he is now able to restrict Ameri-

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199. For a discussion of the general license, see *supra* notes 45-48 and accompanying text.

200. 104 S. Ct. at 3049 (Powell, J., dissenting).

201. *Id.*

202. *Id.*

203. *Id.*

204. *See supra* notes 177-93 and accompanying text. Justice Blackmun's reservations arose from the non-conformity of restrictions upon travel-related expenditures in Cuba with IEEPA guidelines. Justice Blackmun also found that there was no reason to infer congressional intention to defer to presidential prerogative in instituting such restrictions without complying with the IEEPA. 104 S. Ct. at 3049 (Blackmun, J., dissenting).

205. For a discussion of the grandfather clause, see *supra* notes 35-40 and accompanying text.

206. 104 S. Ct. at 3036 ("Oral testimony of witnesses and individual Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself.").

can travel to Cuba.[207] Without this finding, the President would undoubtedly be barred from issuing such restrictions absent the requirements set forth in the Passport Act as it now reads.[208] Congress clearly spelled out those conditions under which travel restrictions could be imposed when it amended the Passport Act in 1978.[209] While restrictions on travel-related transactions do not translate literally into geographic travel restrictions, their effect is essentially the same. As Justice Rehnquist himself held, they limit the very same freedom of travel that Congress sought to protect via its 1978 passport amendment.[210] Clearly, Congress does not favor executive use of peacetime area restrictions. In addition, the Court's finding that the *Zemel* decision is not confined to extraordinary circumstances means that now even normal tensions, which are common between many countries, may be characterized as "weighty concerns of foreign policy" and may therefore be used as justificiation for infringement on individuals' fifth amendment right to travel.[211]

It should be noted that the Court completely disregarded the language, purpose, and legislative history of section 5(b) of the TWEA.[212] In addition to being generally unsuitable for restrictions on travel-related transactions, referring as it does to "transferred withdrawal[s], transportation, importation or exportation of, or dealing[s] in" property,[213] the language of section 5(b) simply makes no mention of transactions related to travel. Indeed, it seems that Congress intentionally left travel controls out of section 5(b) since such controls as do exist under the TWEA are covered by section 3(b).[214] Section 3(b) makes it unlawful for any person to transport any enemy citizen into or out of the United States.[215] Legislation pertaining to the travel of American citizens was passed seven months after the enactment of the TWEA,

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207. For a discussion of congressional limits on the executive's use of travel restrictions, see *supra* notes 1-4 and accompanying text.

208. For the relevant portion of the Passport Act and its 1978 amendment, see *supra* notes 2-3.

209. *See supra* note 3.

210. 104 S. Ct. at 3039 (citing Brief for Respondents at 55, 104 S. Ct. 3026 (1984)). Both restrictions on travel-related transactions and geographic travel restrictions effectively curtail travel to Cuba by most United States' citizens, and were justified by important foreign policy concerns. *Id.* at 3039.

211. For a discussion of the relevant legislative history, see *supra* note 4.

212. *See* SUBCOMM. ON INTERNATIONAL TRADE AND COMMERCE OF THE COMM. ON INTERNATIONAL RELATIONS, 94TH CONG., 1ST SESS., TRADING WITH THE ENEMY; LEGISLATIVE AND EXECUTIVE DOCUMENTS CONCERNING REGULATION OF INTERNATIONAL TRANSACTIONS IN TIMES OF DECLARED NATIONAL EMERGENCY (Comm. Print 1976) [hereinafter cited as COMMITTEE PRINT].

213. For the relevant text of § 5(b), see *supra* note 7.

214. 50 U.S.C. app. § 3(b) (1982).

215. *Id.*

when the same Congress enacted a statute that required all citizens traveling to or from the United States to carry a valid passport, which would be "subject to such limitations and exceptions as the President may authorize and prescribe."[216] The House Report accompanying this early Passport Act[217] explicitly indicates congressional recognition that the TWEA did not provide authority for restrictions on travel: "This bill is intended to stop an important gap in the war legislation of the United States . . . . [Transportation of alien enemies is] now partially restrained by section 3(b) of the trading with the enemy act. Even this act leaves American citizens and neutrals perfectly free to come and go."[218]

The legislative history also clearly indicates that section 5(b) was intended to apply only to commercial transactions and not to the travel-related transactions of United States citizens. The debate and hearings prior to the passage of the TWEA focused on commercial and administrative issues such as patents, disposition of foreign shareholders' dividends, and questions involving international exchange and gold transactions.[219] Every time the bill[220] was introduced for debate or report, the TWEA was described as an attempt to regulate commercial trade with the enemy.[221] Representative Montague, the bill's sponsor, summarized the purpose of the bill as follows:

> [T]he suspension, the interdiction, and sometimes the revocation of all *commercial intercourse* between the citizens or subjects of belligerent nations, upon the outbreak of war, is the accepted Anglo-American law. All such trading or *commercial intercourse,* unless specifically licensed, become ipso facto illegal upon the outbreak of war.
>
> . . . .
>
> [N]one of this trade, no matter how necessary and beneficial to our citizens, can be resumed or carried on in the absence of appropriate legislation by Congress. This bill, therefore, is submitted as according the most adequate, the most equitable, and the most practicable method for the conduct of all desira-

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216. Act of May 22, 1918, ch. 81, §§ 1-2, 40 Stat. 559 (codified as amended at 22 U.S.C. § 211 (1982)).

217. H.R. REP. No. 485, 65th Cong., 2d Sess. (1917).

218. *Id.* at 2.

219. *See* COMMITTEE PRINT, *supra* note 212, at 52-59, 77-78, 185.

220. H.R. 4960, 65th Cong., 1st Sess., 55 CONG. REC. 4840-53 (1917).

221. *See, e.g.,* 55 CONG. REC. 6949-50, 6957-58, 7015-18 (1917), *reprinted in* COMMITTEE PRINT, *supra* note 212, at 47-48 (remarks of Rep. Montague, the bill's sponsor), 81 (remarks of Rep. Snook); S. REP. No. 133, 65th Cong., 1st Sess. (1917), *reprinted in* COMMITTEE PRINT, *supra* note 212, at 158 (remarks of Rep. Montague); H.R. REP. No. 85, 65th Cong., 1st Sess. (1917), *reprinted in* COMMITTEE PRINT, *supra* note 212, at 179.

ble trade.[222]

The fact that the TWEA was intended to apply only to commercial transactions was substantiated by the Association of the Bar of the City of New York, which concluded in a 1958 report that the TWEA "was never intended to be used as a device for the regulation of travel."[223] Justice Rehnquist, however, felt that this argument "border[ed] on the frivolous" when weighed against the "sweeping statutory language [of section 5(b)]."[224] Congress, of course, intended the language to be "sweeping" in order to cover a wide variety of commercial transactions.[225]

The 1982 restrictions would most certainly be justified if the President had followed IEEPA procedures pursuant to a genuine national emergency with regard to Cuba. Such an emergency situation does not exist, however, and the executive's imposition of the restriction is a blatant use of the type of power Congress sought to eliminate through the National Emergencies Act. The lack of a true emergency situation also leads one to question the Court's reasoning in finding against plaintiffs' constitutional claim. Can it truly be said that in this situation a citizen's constitutional rights are outweighed by "weighty" concerns of foreign policy? When Congress amended the Passport Act it specifically spelled out what constituted "weighty considerations." Area restrictions can be imposed only during times of war, armed hostilities or imminent danger to the public health.[226] It seems that the President has found a way around the congressional mandate set out in the 1978 Passport Act amendment and the provisions of the IEEPA. Because the use of this loophole has been upheld by the Supreme Court, Americans are now legally isolated from exposure to certain ideologies and social programs that may challenge traditional American beliefs and policies. Such isolation undoubtedly conforms with the

222. 55 CONG. REC. 4840-53 (1917), *reprinted in* COMMITTEE PRINT, *supra* note 212, at 47-48 (remarks of Rep. Montague, the bill's sponsor) (emphasis added). Representative Snook, in his presentation of the bill during the House debate, stated that "[the bill] attempts to define what things a law-abiding citizen may do and what he may not do in regard to his *commercial intercourse* with an enemy . . . ." 55 CONG. REC. 4907 (1917), *reprinted in* COMMITTEE PRINT, *supra* note 212, at 81 (emphasis added).

223. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL 72 (1958). The committee that drafted the report was advised by members of Congress and high-level executive department personnel. *Id.* at xii.

224. 104 S. Ct. at 3034 n.16. Section 5(b) authorizes the President to regulate any transaction regarding any property in which a foreign country has any interest, and payments for travel and lodging are, in Justice Rehnquist's view, "naturally within the statutory language." *Id.*

225. For a list of some of the commercial transactions Congress intended the TWEA to cover, see *supra* note 17.

226. For a discussion of the Passport Act and its 1978 amendment, see *supra* note 1-4 and accompanying text.

President's perception of the nation's best interest, but it is clearly contrary to congressional perception of the nation's best interests as embodied in the language, purpose, and legislative history of section 5(b) of the TWEA and the enactment of the IEEPA.

Anne E. Kershaw