4-1-1985

*Regan v. Wald*: Executive Authority and the Prohibition on Tourist and Business Travel to Cuba through the Use of Currency Controls

Brian G. Hart

Follow this and additional works at: [https://digitalcommons.law.buffalo.edu/buffalolawreview](https://digitalcommons.law.buffalo.edu/buffalolawreview)

Part of the [Constitutional Law Commons](https://digitalcommons.law.buffalo.edu/buffalolawreview), [International Law Commons](https://digitalcommons.law.buffalo.edu/buffalolawreview), and the [International Trade Law Commons](https://digitalcommons.law.buffalo.edu/buffalolawreview)

**Recommended Citation**


Available at: [https://digitalcommons.law.buffalo.edu/buffalolawreview/vol34/iss2/4](https://digitalcommons.law.buffalo.edu/buffalolawreview/vol34/iss2/4)

This Comment is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
Regan v. Wald: Executive Authority and the Prohibition on Tourist and Business Travel to Cuba Through the Use of Currency Controls

INTRODUCTION

Since World War II, United States presidents have frequently regulated foreign travel by Americans. These travel bans were usually imposed by the Department of State through the withholding of passports from particular individuals or by stamping passports invalid for travel to certain countries, such as China and Cuba. The Executive's motive in these cases was principally to prevent individuals or groups of individuals from impairing the President's conduct of foreign policy during crises or to protect travelers from physical harm in areas where armed hostilities were in progress.  

1. Pursuant to 22 U.S.C. § 211a (1982) and its predecessors, the executive branch has promulgated regulations authorizing the State Department to deny passports to individuals upon a finding that their travels would not be in the best interests of the United States. See, e.g., 22 C.F.R. § 51.70(b)(4) (1985) (Secretary "may" refuse passport if the holder would be likely to cause serious damage to national security or U.S. foreign policy); 22 C.F.R. § 51.75 (1949) (allowing denial of passports at the discretion of the Secretary) (repealed 1966); 22 C.F.R. § 51.135 (1958) (allowing passport denials in cases of Communist Party affiliation) (repealed 1966); see also Bauer v. Acheson, 106 F. Supp. 445, 448 (D.D.C. 1952) (Executive Order issued pursuant to section 211a).


3. On March 8, 1975, the Secretary of State published his determination that Cuba, North Korea, and North Vietnam were countries to which travel must be restricted because "unrestricted travel . . . would seriously impair the conduct of U.S. foreign affairs." 40 Fed. Reg. 13,011 (1975). See also 34 Fed. Reg. 5446 (1969) (travel ban to North Korea, due to the hostility of the regime, unsettled conditions along the border, and danger of impairing the conduct of U.S. foreign affairs).

4. E.g., 37 Fed. Reg. 6118 (1972) (travel restrictions on travel to North Vietnam be-
In a recent decision, *Regan v. Wald*, the Supreme Court upheld a new travel restriction aimed at Cuba. The new restriction, Regulation 560 of the Cuban Assets Control Regulations, prevents the transfer of United States currency by Americans traveling as part of our comprehensive trade embargo against that country. The Reagan Administration and the Court have both justified Regulation 560 as a permissible exercise of executive authority. However, the Regulation's legislative background and the case law on travel restrictions suggest otherwise.

In 1963, the United States government imposed a comprehensive embargo on trade and financial transactions between Cuba or Cuban nationals and all persons subject to the jurisdiction of the United States. The embargo was then, and continues to be, administered by the Treasury Department through section 515.201(b) (Regulation 201) of the Cuban Assets Control Regulations (CACRs). The CACRs were promulgated by President Kennedy pursuant to his executive powers under the Trading With
the Enemy Act (TWEA). Regulation 201 explicitly prohibits, except as specifically authorized by the Secretary of the Treasury, all transactions involving property in which Cuba or any Cuban national has "any interest of any nature whatsoever, direct or indirect." From the outset of the embargo, transactions relating to Cuban travel were restricted implicitly through the categorical prohibition embodied in Regulation 201. These restrictions were relaxed in 1977 when the Carter Administration promulgated section 515.560 of the CACRs (Regulation 560) to license, for the first time, all transactions incident to travel.

In May of 1982, President Reagan ordered a curtailment of licenses issued under Regulation 560 to prohibit once again, transactions related to tourist and business travel. The Administration claimed the modification of Regulation 560 was authorized under section 5(b) of the TWEA and the general prohibition em-


8. 31 C.F.R. § 515.309 (1985) defines "transactions involving property" as: "(a) any payment or transfer to [Cuba] or [a Cuban national], (b) any export or withdrawal from the United States to [Cuba], and (c) any transfer of credit, or payment of an obligation, expressed in [Cuban] currency."

9. 31 C.F.R. § 515.201(b) (1985). Regulation 201(b) states in relevant part:

(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 [Cuba] or any national thereof, has at any time on or since [July 8, 1963] had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of any person 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.

Id.


bodied in Regulation 201. As amended, the regulation now prohibits all economic transactions for tourist or business purposes ordinarily incident to travel to and from Cuba, as well as transactions ordinarily incident to travel within Cuba, such as transportation, meals, and lodging. The amended regulation, therefore, makes travel to Cuba impossible for many Americans.

Complex issues concerning the President’s statutory authority to reimpose this currency restriction cloud the legality of Regulation 560. The statute under which the CACRs had been originally promulgated, section 5(b) of the Trading with the Enemy Act (TWEA), had been amended by Congress in 1977 (the TWEA reform legislation). Prior to its amendment in 1977, section 5(b) gave the President, “[d]uring the time of war or during any other period of national emergency declared by the President,” broad authority to “regulate . . . or prohibit, any . . . transactions involving, any property in which any foreign country or a national thereof has any interest.” Congress amended the statutory scheme governing the President’s exercise of emergency powers to confine the President’s broad TWEA authority to regulate transactions and property with respect to a foreign state or national to periods of war. The effect was to withdraw the President’s authority to exercise TWEA powers during peacetime or declared states of national emergency. In its place, Congress en-

12. See Joint Appendix at 98, Regan v. Wald, 104 S. Ct. 3026 (1984) (defendant’s opposition to plaintiff’s motion for temporary restraining order); Id. at 158, (sworn declaration of John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations); Id. at 178, (sworn declaration of James H. Michel, Assistant Secretary of State for Inter-American Affairs).


16. 50 U.S.C. app. § 5(b)(1)(B) (1976) (amended 1977). The Trading With the Enemy Act confers upon the executive broad powers to 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.

acted the International Emergency Economic Powers Act (IEEPA). The IEEPA requires the President to declare a state of national emergency and to seek concurrent Congressional approval before implementing any new economic sanctions against a foreign country or national.

However, Congress provided for a continuation of presidential authority under section 5(b) of the TWEA to exercise economic powers in connection with previously declared peacetime national emergencies. Congress expressly determined that the President should not be required to declare a new national emergency in order to continue an existing embargo; it decided that the President should be permitted to continue under the old statutory framework the trade embargoes, such as the CACRs, that were in effect at the time the new legislation was under consideration. Thus, a grandfather clause was included in the IEEPA preserving the section 5(b) authorities “which were being exercised with respect to a country on July 1, 1977.”

Since the reform of the TWEA, two opposing interpretations of the grandfather clause’s meaning have emerged. The executive branch has construed the clause liberally to mean that the President has unilateral authority to promulgate, amend, or modify specific regulations within the embargoes. On the other hand, citizens and businessmen adversely affected by Regulation 560 interpret the clause narrowly—the clause freezes those specific regulations and restrictions which were in place on the effective date of the legislation, but any future amendments or modifications of the CACRs must be promulgated under the stricter procedural

21. See supra note 12.
Constitutional issues also cloud the validity of Regulation 560. Though Regulation 560 is a currency control on its face, it actually forbids exercise of the constitutional right to travel—a right first recognized by the Court in 1958 in *Kent v. Dulles*.

Congress expressly rejected presidentially imposed travel bans when it amended the Passport Act in 1978 to remove from the President the authority to regulate travel through the withholding or invalidation of passports for travel to certain countries. Regulation 560, however, represents a circumvention of the Passport Act amendment and a restriction of travel to Cuba through a more subtle, yet no less effective, regulatory scheme.

In 1984, the Supreme Court in *Regan v. Wald*, upheld the President's unilateral authority to amend Regulation 560. The Court manipulated the licensing scheme of the CACRs and legislative history of the grandfather clause in order to allocate power to the President. The Court held that in a formalistic sense, amendments to the CACRs were permissible because the regulation under which all CACRs are authorized—Regulation 201—remained in force at the time of grandfathering. The Court reasoned that since the CACRs are ordered on a two-tier structure, consisting of a general prohibition followed by specific exceptions, President Carter's failure to repudiate the upper tier—the general prohibition—automatically reserved the lower tier authority for future amendments. The Court's superficial analysis allows the form of the CACRs to rule over the substance.

---


23. 357 U.S. 116 (1958). *Kent* involved the denial of a passport by the State Department because of plaintiff's affiliation with the American Communist Party. Justice Douglas, writing for the Court, was the first to enunciate the constitutional status of travel. The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. Freedom to travel is, indeed, an important aspect of the citizen's "liberty."

*Id.* at 125-26.


behind recent congressional legislation which has sought to limit
the executive's unilateral control over foreign affairs. In addition,
the decision provides not only an example of the minimal protec-
tion the right to travel is afforded by today's Court, but also a
representation of an impermissible judicial intrusion into this na-
tion's foreign policy. Consequently, the Court may have reduced
the right to travel abroad to a mere political instrument to be uti-
lized at the President's whim.

This Comment will examine the legality of the presidential
use of currency controls to prohibit travel to Cuba. Initially, this
Comment will provide a factual background on the CACRs and
Regulation 560. Next, in Part II, it will address the lower courts' inter-
pretation of the grandfather clause and discuss the Supreme
Court's opinion in Regan v. Wald. Part III will expose statutory
and constitutional flaws in that opinion. Finally, Part IV will con-
clude that the Reagan Administration's amendment of Regulation
560 is an invalid exercise of executive authority and that the Su-
preme Court has impermissibly re-allocated power to the Presi-
dent at the expense of Congress and the people.

I. BACKGROUND OF THE CUBAN ASSETS CONTROL REGULATIONS
AND REGULATION 560

The CACRs were promulgated by President Kennedy pursuant
to section 5(b) of the Trading With the Enemy Act of 1917.\textsuperscript{28}
Section 5(b) gave the President a broad range of powers over in-
ternational trade during times of war or during a peacetime emer-
gency.\textsuperscript{27} The regulations were authorized under the state of na-
tional emergency declared by President Truman in response to
the Korean War.\textsuperscript{28} This "emergency" has been renewed yearly
and remains in effect today with respect to Cuba.\textsuperscript{29} A major objec-

\textsuperscript{26} See 28 Fed. Reg. 6974 (1963) (codified as amended at 31 C.F.R. \textsection 515.524 (1985)).
\textsuperscript{27} See supra note 16.
\textsuperscript{29} The emergency was ended with the passage of the National Emergencies Act, Pub. L. No. 94-412, 90 Stat. at 1255 (1976) (codified as amended at 50 U.S.C. \textsections 1601-1651 (1982)), which terminated "all powers and authorities" possessed by the executive branch "as a result of . . . any declaration of national emergency in effect on the date of enactment" two years after enactment, id. \textsection 101(a), 90 Stat. 1255 (codified at 50 U.S.C. \textsection 1601(a) (1982)). However, Congress also authorized the President to extend for one-year periods the embargoes exercised under section 5(b) of the Trading With the Enemy Act,
ative of the embargo "has been to deny Cuba convertible currency which it could then use for purposes inimical to the interests of the United States."\(^{30}\) In addition, Treasury Department officials assert that the controls are the principal means of expressing this country's rejection of Cuba's international conduct by increasing the financial costs to Cuba for its alleged adventurism in this hemisphere and elsewhere.\(^{31}\)

The CACRs operate through a flexible regulatory scheme consisting of a general prohibition which is relaxed and subsequently tightened by the issuance of specific licenses. The licenses permit or prohibit certain types of transactions and are issued either to influence or to punish Cuba's international behavior. The general prohibition, section 515.201 [Regulation 201], empowers the Secretary of the Treasury to forbid all transactions with Cuba "except as specifically authorized by the Secretary . . . by means of regulations, rulings, instructions, licenses or otherwise."\(^{32}\) In addition, the regulations grant to the Secretary the right to exclude particular persons or types of transactions from the operation of any license.\(^{33}\) Finally, any ruling, license or authorization may be amended, modified, or revoked at any time.\(^{34}\)

The licensing scheme is ideally designed to allow the President maximum flexibility in the management of foreign affairs. The combination of an overall prohibition with selective licensing enables the President to fine-tune the Cuban trade embargo to meet the current foreign policy situation. Licensing decisions then function as the expressions of continuing foreign policy determinations.

---


32. 31 C.F.R. § 515.201(b) (1985).
33. Id. § 515.503 (1985).
34. Id. § 515.805 (1985).
In the past, the regulations have been periodically amended or adjusted to reflect the state of relations with Cuba. The general prohibition against economic transactions embodied in Regulation 201 was relaxed somewhat by the Carter Administration in 1977. In the interest of promoting better relations with Cuba and greater freedom to travel abroad, travel-related expenditures by Americans traveling to and within Cuba were exempted from the general prohibition of Regulation 201 through general licenses. The general licensing provision, Regulation 560, permitted persons to pay for travel-related expenditures while they were engaged in official government travel, visits to close relatives, travel completely hosted by Cuba, travel related to news-gathering, professional research, or travel related to tourism or business. But in early 1982, the Reagan Administration became alarmed over two developments: Cuba's increased support of insurgents in Central America and a recently initiated program by that country to increase its foreign exchange earnings by expansion of its tourist industry with the United States. In response to these two developments, the Reagan Administration amended Regulation 560 to prohibit tourist and business-related transactions. The "adjustment" of the regulation was intended to frustrate Cuba's plans to expand its tourist trade with the United States and to prevent Cuba from earning "hard currency from

37. Id.
38. 31 C.F.R. § 515.560 (1977) (current version at 31 C.F.R. § 515.560 (1985)).
41. Following the relaxation of travel restrictions in 1977, Cuba began to develop plans to build 22 new hotels with 2,800 rooms and to recover or improve an additional 6,900 rooms. Joint Appendix at 173, Regan v. Wald, 104 S. Ct. 3026 (1984) (1981-85 five-year plan) (sworn declaration of Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs). Legislation Decree 50 authorized joint ventures with capitalist investors,
American tourists at a time when Cuba is actively sponsoring armed violence against our friends and allies.  

The amended regulation does not directly forbid tourist or business travel to Cuba. Rather, the regulation simply prohibits the means necessary for travel. The amended regulation forbids, under criminal penalty, the conversion or transfer of United States currency for the ultimate purpose of purchasing or consuming any item or service related to travel such as transportation, meals, or lodging by Americans who go to Cuba for tourist or business reasons. Ostensibly, the amended regulation is intended only as a measure to exacerbate Cuba's shortage of convertible currency. Indeed, tourist and business travel is permitted, provided no economic benefit is derived by the Cuban government (a fully hosted trip, for example). But the result, intended or not, is

announced a campaign to attract hard-currency investments in tourist-related infrastructure, and sought to promote more tourism with the United States. Id.

According to the State Department, the tourist industry in Cuba was undergoing major expansion in 1981 and early 1982. Unless Cuba's plans were thwarted, this expansion would "provide Cuba with a growing and important revenue flow which could in a relatively short period of time... become the second most important source of convertible currency for Cuba." Id. at 173.

While only 20% of Cuba's foreign exchange earnings is in hard currencies, the State Department stresses that its importance "is far in excess of [its] nominal value" because Cuba uses hard currency to buy critically needed machinery and transport equipment. Id. at 175.

42. N.Y. Times, Apr. 20, 1982, at A1, col. 4, col. 5. Assistant Treasury Secretary John M. Walker, Jr. defended the amendment of Regulation 560 as an "important part of [the] Government's policy of tightening the current trade and financial embargo against Cuba" which was "designed to reduce Cuba's hard currency earnings from travel." Id. at A1, col. 4. "Cuba, with Soviet economic and military support, is increasing its support for armed violence in this hemisphere... In the face of Cuba's increasing attacks on freedom, self-determination and democracy, our economic embargo is being tightened." Id. at A9, col. 1.

43. 31 C.F.R. § 515.701 (1985), the enforcement provision, draws from section 5(b) of the Trading With the Enemy Act the following criminal sanctions for violations of the Cuban Assets Control Regulations:

Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $50,000 or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.


that the threat of investigation or criminal prosecution for spending money inhibits tourist and business travel.\footnote{45}

II. JUDICIAL REACTION

Since the reform of the TWEA, courts have differed over the degree of executive authority preserved by the grandfather clause. The majority view, as represented by the recent Supreme Court opinion in \textit{Regan v. Wald},\footnote{46} broadly construes the clause. In \textit{Wald}, the Court held that the clause permits not only future adjustments to existing restrictions but also the unilateral revocation of general licenses as well.\footnote{47} The minority view, represented by the major dissent in \textit{Wald},\footnote{48} and unanimous courts in the first\footnote{49} and eleventh\footnote{50} circuits, take the position that the coverage of the clause is entirely retrospective. Under their analyses, existing regulations and specific prohibitions within those regulations are frozen at the time of grandfathering. Accordingly, the IEEPA is the proper statutory authority for any future amendments to the CACRs.

Section A will first examine the initial judicial reaction to the two post-grandfather amendments to the CACRs\footnote{51} at the circuit
court level. Then the current law will be reviewed in the area of executive emergency power as established by the recent Supreme Court decision in *Regan v. Wald*.

A. Initial Interpretations of the Grandfather Clause

The opportunity for judicial interpretation of the grandfather clause first presented itself in *Wald v. Regan*. In *Wald*, the plaintiffs wanted to travel to Cuba as tourists. Because the recently amended Regulation 560 now blocked this type of travel, they sought an injunction in United States District Court against enforcement of Regulation 560. The district court denied the plaintiffs' motion for a preliminary injunction and they appealed to the first circuit. On appeal, the plaintiffs argued that the restriction was in excess of the authority granted under the grandfather clause of the IEEPA. They alleged that because travel restrictions were not being exercised on the date of grandfathering, the authority to restrict them at a later time was not preserved by the clause. Therefore, the Reagan Administration's amendment of Regulation 560 was invalidly promulgated under the TWEA as amended and instead, should have been promulgated under the IEEPA.

The government disagreed. It contended "that the words 'authorities . . . being exercised' in the savings clause were meant to have a very broad meaning. In the government's view, as long as some TWEA authority was being exercised with respect to a country, say Cuba, on July 1, 1977, the clause saves the power to exercise every TWEA authority or at least every authority of the same broad type (e.g., exchange control authority)."

The Court of Appeals for the First Circuit unanimously reversed the district court's decision, holding that the amendment to Regulation 560 was invalid because it lacked congressional au-

---

and text accompanying notes 61-67.

52. 708 F.2d 794 (1st Cir. 1983), rev'd, 104 S. Ct. 3026 (1984). It should be noted that the circuit courts in *Wald* and United States v. Frade, 709 F.2d 1387 (11th Cir. 1983), invalidated Regulation 560 on statutory grounds alone. Neither court addressed the issue of a constitutional right to travel abroad.


55. *Wald*, 708 F.2d at 796.
thorization. According to the court, the grandfather clause of the TWEA did not apply to preserve powers which were not being exercised at the time the clause became effective.

In reaching its conclusion, the court of appeals cited the plain language of the clause, its legislative history, and the underlying purpose of the clause as the chief reasons for rejecting the government's argument.

First, as a matter of "common sense and common English," the court stated, "restricting, say, commodity purchases and restricting travel purchases would seem to be very different 'exercises' of authority—different enough at least not to count as the exercise of the same authority." Thus, since the Executive was restricting trade but not travel to Cuba on July 1, 1977, its authority to later regulate travel was not grandfathered. Second, the legislative history indicated that Congress intended the savings clause to be narrowly interpreted, allowing the President to continue in effect only those specific restrictions actually in place on July 1, 1977, the date of grandfathering. In particular, the court noted the striking of language from the grandfather clause that would have allowed promulgation of new regulations or programs as persuasive evidence that Congress "did not want the existence of one sort of TWEA restriction in 1977 to serve as a justification for imposing a new one" in the future.

Finally, the court of appeals believed that the savings clause was intended to preserve existing restrictions as bargaining chips in ongoing negotiations with the affected countries and to avoid the adverse diplomatic consequences that might result if the President was required to declare a new national emergency to continue the embargoes. Thus the court concluded, permitting the President to augment his bargaining powers by adding new restrictions to the CACRs would go beyond the purposes of grandfathering.

The First Circuit's reasoning in Wald was followed two months later by an Eleventh Circuit decision which invalidated another CACR promulgated after the TWEA reform act. In United

56. Id.
57. Id. at 798.
58. Id.
59. Id. at 799.
60. Id. at 800.
States v. Frade, the appellants had been convicted under section 515.415 (Regulation 415) of the CACRs for financial transactions made in Cuba during the Mariel Boatlift. The appellants were Cuban-American clergymen who had arranged for a boat to bring their parishioners' relatives from Cuba. They flew ahead to Havana in order to negotiate the release of the relatives with Cuban authorities. When they later returned by boat to Key West with the refugees, they were immediately arrested and eventually indicted for violating section 5(b) of the TWEA and Regulation 415 of the CACRs. At trial, appellants were convicted for their financial expenditures: port fees and the hotel, motel and restaurant bills incurred during their intense two-week negotiations with Cuban authorities.

The court unanimously reversed the district court, finding as had the Wald court, that the President lacked the statutory authority to promulgate a new regulation under the grandfather clause. The government reiterated the argument it had advanced earlier in Wald: the new regulation fell within the category of authorities being exercised on July 1, 1977. On that date, executive authority under the TWEA regarding Cuba was being exercised through the CACRs. It contended that either Regulation 415 was a mere explanatory modification of the general prohibition of Regulation 201, or alternatively, that the existence of some regulations regarding Cuba under the TWEA as of July 1, 1977 was sufficient ground to invoke the grandfather clause as statutory authority for the promulgation of future regulations regarding

---

61. 709 F.2d 1387 (11th Cir. 1983).
62. 31 C.F.R. § 515.415 (1985) prohibits transactions in connection with the transportation of Cuban nationals unless a license to do so is granted. Section 515.415 prohibits
   (6) The transfer of funds or other property to any person where such transfer involves the provision of services to a Cuban national or the transportation or importation of, or any transaction involving, property in which Cuba or any Cuban national has any interest, including baggage or other such property;
   (7) Any other transaction such as payment of port fees and charges in Cuba and payment for fuel, meals, lodging; and
   (8) The receipt or acceptance of any gratuity, grant, or support in the form of meals, lodging, fuel, payments of travel or maintenance expenses, or otherwise, in connection with travel to or from Cuba or maintenance within Cuba.
Id. § 515.415 (a)(6)-(8).
63. See Frade, 709 F.2d at 1391-92.
64. Id. at 1397.
The court conceded that the terms "authorities" and "exercise" could appear to be "elastic enough to encompass the government's interpretation." But it echoed the First Circuit's Wald opinion stating that a "narrow restrictive interpretation is compelled by the legislative history and purpose of the grandfather clause and by its function within the broader statutory scheme."

B. Regan v. Wald

The Supreme Court ultimately found the statutory analysis of the circuit courts unconvincing. On the government's appeal in Wald, the Supreme Court held, by a 5-4 vote, that the language of the grandfather clause, read in conjunction with the broad authority conferred by section 5(b) of the TWEA, supported the government's interpretation that the authority to regulate all property transactions, including travel-related purchases, was being "exercised" on July 1, 1977 and was, therefore, preserved. The Court reasoned, in addition, that neither the legislative history nor the apparent purpose of the 1977 TWEA reform act, supported the opposite view that Congress actually intended to freeze existing restrictions so that any adjustment of pending embargoes would require the declaration of a new national emergency under the IEEPA. Finally, the Court rested its refusal to invalidate Regulation 560 under the guise of "classical deference to the political branches in matters of foreign policy."

The Court opined that "Section 5(b) draws no distinction between the President's authority over travel-related transactions and his authority over other property transactions . . . the authority to regulate travel related transactions is merely a part of the President's general authority [under the TWEA] to regulate

65. Id.
66. Id.
67. Id. at 1997-98. The court found additional support by asserting that the financial impact of Regulation 415 was so trivial that it was insufficient to constitute an exercise of authority like the regulations saved by the grandfather clause. Id. at 1402. The court also noted that even if the regulation qualified as an international economic measure, it was also an immigration control device—an act which necessarily invokes congressional approval. Id. See also U.S. CONST. art. I, § 8, cl. 4 (congressional power over naturalization).
69. Id.
70. Id. at 3038-39.
property transactions." In addition, the Court noted that the umbrella prohibition under which the CACRs are administered, Regulation 201(b), automatically reserved executive authority to modify specific regulations after grandfathering. Regulation 201(b) remained in force on the date of grandfathering. At the same time, travel-related transactions were exempted by general license from the categorical prohibition of Regulation 201(b) by President Carter. The Court concluded that this exemption was an exercise of authority. The Court reached this labored result by reasoning that since President Carter had "regulated" travel under Regulation 560 by permitting Americans to go to Cuba, and because all transactions were still potentially subject to prohibition by Regulation 201, the authority subsequently to modify the license was grandfathered.

The Court also rejected the notion that the term "authorities" in the savings clause meant "restrictions" or "prohibitions" as construed by the lower courts. The Court cited three determining factors in reaching its conclusion. First, if Congress had wished to freeze existing restrictions, it could have done so explicitly. The fact that it did not compelled the conclusion "that Congress intended the President to retain some flexibility to adjust existing embargoes." Second, the legislative history could not overcome the "clear statutory language" of the grandfather clause. Finally, the Court found that the clause was designed to avoid not only the adverse political consequences that would follow a termination of the section 5(b) embargoes, but also the controversy that would have resulted if the President's authority to modify existing licenses was left unprotected.

Addressing plaintiff-respondent's constitutional claims, the Court admitted that Kent v. Dulles recognized the right to travel under the fifth amendment and required that "all delegated powers that curtail or dilute" that right must be narrowly construed. But the Court distinguished Kent arguing that it applied only in

71. Id. at 3034 (emphasis added & footnote omitted).
72. Id. at 3034-35.
73. Id. at 3035.
74. Id. at 3036.
75. Id. at 3037.
77. Id. at 129.
cases where passports were selectively denied because of the applicant's political beliefs. The majority instead relied on Zemel v. Rusk, in which the Court had upheld a comprehensive travel ban to Cuba in the aftermath of the Cuban Missile Crisis. The Court saw "no reason to differentiate between" the currency restriction in Regulation 560 and the passport restrictions upheld in Zemel. The Court maintained that the currency restriction, like the restriction in Zemel, was justified by the weighty considerations of foreign policy which are "largely immune from judicial inquiry or interference." The Court characterized its position as just another example of the "traditional deference to executive judgment in [the] vast external realm" of foreign affairs.

A vigorous dissent written by Justice Blackmun hewed to the approach taken by the lower courts in Wald and Frade. The dissent stressed the significance of three factors which compelled a narrow reading of the clause: (1) the general legislative purpose of the TWEA reform act was to provide for greater congressional control over executive emergency powers; (2) the grandfathering was intended only to avoid exacerbation of the international climate between the United States and affected countries and to win executive support for the bill; (3) this limited interpretation of the goals and purposes of the clause is supported by congressional committee discussions and the clause's redrafting during its markup.

III. Analysis

The deficiencies in the majority opinion are manifold. Valid arguments can be made that the amendment of Regulation 560 is contrary to the purposes of the TWEA and also that the term "authorities" in the grandfather clause is actually undefined and

78. Wald, 104 S. Ct. at 3038.
79. 381 U.S. 1 (1965).
80. 104 S. Ct. at 3039 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)).
81. Id. at 3039 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936)).
82. Id. at 3040-49 (Blackmun, J., dissenting). Justice Blackmun was joined by Justices Brennan, Marshall, and Powell. Justice Powell wrote a brief dissent as well. Id. at 3049 (Powell, J., dissenting).
83. 104 S. Ct. at 3040-43.
84. Id. at 3043-47.
85. Id. at 3043-44.
ambiguous. Further, the majority opinion ignores the remedial purposes of the TWEA reform act, misreads the congressional intent and purpose behind grandfathering and violates the spirit of the other statutes passed in the 1970's. The Court's analysis is also constitutionally defective. The majority incorrectly analogized previous travel restriction cases to *Wald* and failed to follow established principles of statutory construction concerning laws which have an impact upon constitutionally protected rights. Furthermore, the Court failed to discern the difference between judicial deference to the President in the sphere of international relations and judicial deference to executive promulgations that inhibit the exercise of the right to travel. This section will consider each of these assertions.

A. The Court's Statutory Analysis

1. Regulation 560 and the TWEA. The first flaw in the Court's reasoning is its failure to accept the regulation's inconsistency with the purposes of the TWEA and its misunderstanding of the term "interest" as it is used within the CACRs. The Court sustained Regulation 560, in part by claiming that its prohibitions conformed with the broad purposes and the sweeping statutory language of the TWEA. The majority observed that the President is authorized to regulate any transactions involving "property" in which a foreign country or national thereof has any "interest." It concluded that travel expenses fell "naturally within the statutory language" because "payments for meals, lodging and transportation in Cuba are all transactions with respect to property in which Cuba or Cubans [would] have an interest." The Court twists the statutory language, however, in order to extend the reach of the TWEA to transactions that may take place in other countries. The TWEA is concerned with *intranational* transactions of property owned by foreign countries or nationals. The intention of the TWEA was to make it impossible for money or property belonging to an enemy and held in this country to reach the hands of that enemy. Hence, it seems that the TWEA was intended solely to keep foreign-owned assets within the country.

86. *Id.* at 3044 n.16.
87. *Id.*
Similarly, the term “interest” is also misused by the Court. “Interest” connotes not an ownership of property located in Cuba and owned by Cuba or Cubans, but Cuban ownership or partial ownership of assets located within the United States. Finally, the TWEA was never intended to control the flow of assets owned solely by Americans. Both the 1917 and the 1941 Congresses clearly expressed their intentions to restrict application of the TWEA to foreign nationals and to avoid any adverse impacts on Americans’ interests. Regulation 560, therefore, exceeds the TWEA’s restrictive powers in at least two ways: tourists and businessmen travelling to Cuba presumably spend personally owned funds in which no Cuban has any right to title or ownership and Americans are neither foreign nationals nor enemies.

Moreover, the Reagan Administration has characterized the amendment of Regulation 560 as an essential element of our trade embargo of Cuba. Yet this justification is called into question by the regulation’s de minimis impact on Cuba’s hard currency earnings. In order to conform with the purposes of the TWEA, the restriction should logically relate to an emergency situation. The facts suggest that this criterion is not fulfilled in the case of Regulation 560. The stated policy objective of Regulation 560, as amended, is contradicted by the substantial amount of trade and transfers that the Treasury Department still permits. When the amendment became effective in May of 1982, the Treasury Department indicated that the change would cut travel by forty percent from its level of 38,000 persons per year. The Department’s figures show that the total yearly amount to be affected by the amendment would be only eight million dollars. Meanwhile, the majority of travelers to Cuba (government officials, journalists, sports and artistic travelers and researchers) are still authorized under the regulation to spend money. The Department’s own

89. See 104 S. Ct. at 3034 & n.16.
90. See 31 C.F.R. § 515.201(b) (1985); see also Tagle v. Regan, 643 F.2d 1058 (5th Cir. 1981).
91. See Clark v. Uebersee Finanz-Korporation, 332 U.S. 480, 487 (1947); Tagle, 643 F.2d at 1066.
94. See supra note 11; see also supra text accompanying notes 41 & 45.
statistics actually show a net increase in travel to Cuba, and therefore Cuba's hard currency earnings from American travelers, since the date the new regulation came into effect.\(^9\) The Reagan Administration's only accomplishment has been to reduce Cuba's tourist and business travel earnings as a component of the increase.

In contrast with its travel restrictions, the Treasury Department authorizes overseas subsidiaries of American companies to buy and sell Cuban goods and commodities. In 1982, American subsidiary trade with Cuba totaled $250 million.\(^6\) It would appear, therefore, that the policy under which the amendment to Regulation 560 was promulgated, that of denying hard currency to Cuba, is being seriously undermined by the Department's own authorizations of other transactions. According to the Treasury Department, however, the subsidiary trade is justifiable because: "[i]n 1980 and 1981, Cuba incurred substantial trade deficits with U.S. subsidiaries in foreign countries . . . . This two-way trade . . . imposes net costs on Cuba in terms of expenditures of its foreign exchange reserves, and unlike tourism, it does not generate excess hard currency earnings that can be diverted for purposes inimical to U.S. interests."\(^7\) This statement assumes that a thriving tourist industry would give Cuba enough hard currency to meet its foreign trade losses and still retain a surplus that it could use to promote terrorism and military adventurism. The Administration presents no facts in support of its conclusion. There is no data available to suggest that Cuba, having once obtained a viable tourist industry with respect to America, would experience a net gain, or even a balance of trade, with its Western trade partners.

Finally, any shortfall in Cuba's hard currency earnings that is caused by the amended regulation can be replaced easily through expanded tourism with other countries that possess convertible currencies. Despite the Reagan Administration's efforts, Cuba's tourist industry has shown sustained growth in the years since the new regulation went into effect. Between 1983 and 1984, for ex-


ample, visits to Cuba by tourists from market-economy countries grew by twenty-seven percent—from 130,325 visits in 1983, to 166,420 in 1984. Correspondingly, the hard currency earnings from these visits increased by thirty percent. The latest figures from 1984 show that Cuba earned a total of sixty-six million pesos (approximately equal to $80 million) in hard currency from tourism. Foreign aid for the purpose of developing Cuba’s tourist industry is pouring in as well. In addition to the earnings from increased visits, the governments of Spain and West Germany have committed to invest $200 million between them in a Cuban resort complex at Varadero.

The efficacy of any embargo is conditioned upon a coherent and consistent set of controls against a particular country. In the case of the Cuban embargo, Regulation 560’s impact on Cuba’s hard currency earnings has been negligible because of the substantial amount of trade that is still authorized under current State Department policies and because of Cuba’s trade with Europe. Nevertheless, the Administration has characterized the amendment as crucial to American foreign policy interests. Despite this characterization, the rationale behind the amendment is trivialized by contradictions in our own trade policies with Cuba. Regulation 560 may be clothed as an important national emergency measure, but realities suggest that such a claim is frivolous.

2. The Need for Reform. The Court’s expansive reading of the grandfather clause ignores the remedial purposes of the TWEA reform legislation. The legislative history of the act clearly indicates a Congressional intent to curtail the discretionary authority that the President had accumulated over foreign affairs because of past emergencies which no longer existed. Prior to its 1977

98. The Cuban government has launched an aggressive promotional campaign to develop its tourist industry. The campaign includes publicity campaigns in various countries, and the opening of tourist offices in Canada, Mexico, France, the Federal Republic of Germany and Italy. Plans call for the opening of offices in the United Kingdom, Spain and the Scandinavian countries as well. The Economist Intelligence Unit, Quarterly Economic Review of Cuba, Dominican Republic, Haiti, Puerto Rico 22 (1985).


amendment, the TWEA gave the President the authority to prohibit or license trade with certain countries and their nationals and the authority to seize and control foreign assets in this country in times of war or declared emergency.\textsuperscript{102} Congress provided the power to restrict trade as a means of curtailing direct and indirect aid to enemy countries. The ability to freeze and control foreign owned assets also provided the president with the means to protect and safeguard foreign assets of enemies and their allies from being "looted" by American creditors.\textsuperscript{103} However, "through a continuing interplay of executive assertiveness and congressional acquiescence, section 5(b) of the TWEA had become a source of unlimited statutory authority allowing the President to exercise, at his discretion, broad powers in both the domestic and international arena without Congressional review."\textsuperscript{104} Moreover,
the World War II and Korean War emergencies were never officially terminated, making section 5(b) authority continually available for use. Consequently, these powers were available for exercise in situations which bore little, if any, relationship to a national emergency.

Congress decided that there was a need for remedial legislation to correct past abuses of section 5(b) authority and to regain some control over American foreign economic policy. During the 1977 hearings before the Subcommittee on International Economic Policy and Trade, distinguished legal scholars elaborated on the need for reform of the TWEA:

[T]here seems to be no way under existing law to terminate a state of emergency proclaimed by the President except by another Presidential proclamation . . . . The Trading With the Enemy Act itself, and particularly section 5(b), is legislation without limit of time. It has been in effect in its present form since 1941 and has no expiration date or requirement for congressional scrutiny or review. Second, the delegated authority is not only broad, there are no criteria at all. Subject only to the existence of a national emergency, the power of the President, acting "through any agency he may designate" to affect property or transactions is virtually unlimited.105

Another scholar noted that successive presidents had seized upon the open-endedness of section 5(b) to turn that section, through


usage, into something quite different from that which was envisioned in 1917.

Section 5(b)'s effect is no longer to "emergency situations" in the sense of existing imminent danger. The continuing retroactive approval, either explicit or implicit, by Congress of broad executive interpretations of the scope of powers which it confers has converted the section into a general grant of legislative authority to the President permitting the executive branch by order, rule, and regulation to make laws concerning almost any subject matter which can conceivably be brought within the terms of section 5(b).\textsuperscript{106}

Congress responded by enacting Public Law No. 95-223. Title I, section 101(a) of the law amended section 5(b) of the TWEA to remove the provision which had granted the President the authority to control economic transactions in time of national emergency, but left intact the broad authorities available in time of war.\textsuperscript{107} Title II of the law, the IEEPA, conferred upon the President the power to exercise controls on international economic transactions only if he declares a national emergency\textsuperscript{108} and reports to Congress every six months.\textsuperscript{109} The IEEPA also reserves the right of Congress to terminate any declared emergency by concurrent resolution.\textsuperscript{110}

The Court's holding in \textit{Regan v. Wald} allows the President to frustrate Congress's intent to contain executive authority within delegated limits. The IEEPA was enacted because the TWEA had been inappropriately used as a flexible instrument of foreign policy in nonemergency situations. The dubious factual justifications for the Administration's amendment to Regulation 560 fits the type of abuse that Congress was trying to remedy. It is incongruous with the legislative purpose of the IEEPA and the TWEA reform act to allow the executive to amend Regulation 560 without first obtaining congressional approval under the IEEPA.

3. \textit{The Grandfather Clause}. The Court in \textit{Wald} achieved its substantive result by claiming to discern the "clear statutory language" of the grandfather clause.\textsuperscript{111} Contrary to the Court's opin-

\begin{itemize}
  \item \textsuperscript{106} Id. at 9.
  \item \textsuperscript{108} 50 U.S.C. § 1701 (1982).
  \item \textsuperscript{109} 50 U.S.C. § 1703(c) (1982).
  \item \textsuperscript{110} 50 U.S.C. § 1706(b) (1982).
  \item \textsuperscript{111} Regan v. Wald, 104 S. Ct. 3026, 3036 (1984).
\end{itemize}
ion, the "clear statutory language" of the clause is ambiguous and open to interpretation.\footnote{112}

Arguably, the clause can be interpreted broadly to allow modifications to the CACRs and other trade embargoes in effect against communist nations.\footnote{113} Throughout the subcommittee hearings and reports, participants referred to the savings clause and to the "exercise of those authorities" in terms of existing "uses."\footnote{114} These "uses" of authorities were defined in broad terms during the redrafting process to mean regulatory programs limiting trade with Cuba, Vietnam, China and other communist nations.\footnote{115} The legislation's principal sponsor, Representative Bingham of New York, seemed to indicate that the authority to modify regulations within these trade embargoes was unlimited:

As I understand it, ... all we are doing in the way of restricting those [5(b)] powers is to say that starting in October of next year, the President would have to redeclare the emergency and rejustify, in fact, the continuation of the controls. Beyond that, there would be no limitation on the authorities.\footnote{116}

A committee member then queried: "The President would have to redeclare the emergencies. Each use would require its own redeclaration of national emergency."\footnote{117} The bill's sponsor responded in the affirmative. Subsequent administrative practice,

\footnote{112. The grandfather clause states: [t]he authorities conferred upon the President by section 5(b) of the [Trading With the Enemy Act] which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [i.e., Sept. 14, 1976]. The President may extend the exercise of such authority for one-year periods upon a determination that the exercise of such authorities with respect to such country for another year is in the national interest of the United States. 50 U.S.C. app. § 5 note (1982).}

\footnote{113. See infra notes 123-25.}

\footnote{114. See Hearings, supra note 101, at 147 ("There is a clear need to grandfather or deal in some special way with existing uses of Section 5(b) authorities . . . .") (statement of R. Roger Majak, Staff Director of the House Subcommittee on International Economic Policy and Trade); id. at 189 ("it was the purpose of [the saving clause] to grandfather in existing uses of 5(b)") (statement of Rep. Bingham).}

\footnote{115. See Hearings, supra note 101, at 212 (remarks of Rep. Findley and Staff Director Majak).}

\footnote{116. Hearings, supra note 101, at 168.}

\footnote{117. Id.}
without congressional objection, would suggest that "uses" and "exercise of those authorities" means the broad regulatory programs and not specific restrictions within those programs. However, this broad interpretation appears to be contradicted by specific inquiries of committee members into the extent of power that would be reserved under the original draft of the clause. The original draft not only preserved "authorities which were being exercised with respect to a country on the date of enactment of this Act," but also included a provision that "any other authority conferred upon the President by [section 5(b)] may be exercised to deal with the same set of circumstances." It was explained in committee, that under this second provision, "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 was using asset controls towards a particular country, but was not using . . . currency controls, he nonetheless could use, at some later date, if he so desired, currency controls." The bill's sponsor objected to this latter provision stating:

It seems to me that if the President has not up to now used some authority that he has under Section 5(b) in connection with those cases where Section 5(b) has been applied, I don't know why it should be necessary to give him authority to expand what has already been done. It really goes beyond grandfathering.

This "expansion provision" was later struck from the clause. Therefore, it can be argued that Congress and witnesses equated the terms "authorities" and "uses" with the specific prohibitions and restrictions within the trade embargoes and not with the general trade embargoes themselves. The Wald Court failed to note that Congress never defined unequivocally whether they were grandfathering the prohibitions or simply the broad control pro-

118. See 31 C.F.R. § 515.201 (1985). Since 1977, the President has had to justify only the need to extend the national emergency with respect to the general embargo of Cuba. Separate and individual justification for each regulation or restriction within the Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (1985), has not been required. See also supra note 29.


120. Hearings, supra note 101, at 167.

121. Id.
grams and the exercise of any section 5(b) power within those "emergency" situations. It is unpersuasive for the Court to find the statutory language clear when in fact conflicting statements from the legislative history suggest otherwise.

The Court also misunderstood the intents and purposes behind the grandfathering. In an attempt to imbue the clause with unlimited prospective qualities, it concluded that the clause provided the President with authority to modify existing licenses so that he would be able to "respon[d] to heightened tensions" with affected countries. Yet, the legislative history suggests a more limited interpretation of the clause.

At the time Congress was considering the TWEA reform act, it was confronted with the problem of four embargo programs which did not fit the statutory criteria of the IEEPA: the CACRs, Foreign Assets Control Regulations, Transaction Control Regulations and the Foreign Funds Control Regulations all had been implemented by virtue of President Truman's Korean War national emergency declaration, now invalid under the reform legislation. The four programs could have been subjected to the 1977 reform legislation, which would, in effect, have automatically terminated them. This was considered "inappropriate to legislation attempting to legislate for the future not judge the past," and inadvisable because the regulations were "deemed important for the day-to-day functioning of the Government."

Second, the legislators debated over whether the many trade embargoes and regulations within those programs should be considered individually on their merits and incorporated selectively into the new legislation. Because certain current uses of the section 5(b) authorities were considered "controversial—particularly the total trade embargoes of Cuba and Vietnam . . . . The committee decided that to revise current uses and to improve policies and

125. 31 C.F.R. pt. 520 (1985) (blocking the assets of certain Eastern European countries that confiscated property of U.S. citizens after the communists seized power).
127. Id. at 6.
procedures that would govern future uses, in a single bill would be difficult and divisive.\footnote{128} Third, by allowing the four trade embargoes to terminate upon the effective date of the new legislation, Congress would have placed the President in the position of having to declare a new economic emergency pursuant to the IEEPA with respect to each country affected by an embargo. Administration officials and expert witnesses warned that serious diplomatic problems might arise from such action.\footnote{129} There was also a concern among members of the subcommittee that if current embargoes were implicated, the bill would bog down in partisan disputes, delaying or threatening the viability of the legislation.\footnote{130} For this reason, subcommittee members decided to focus their efforts on improving procedures for future uses of emergency international economic powers, not on changing existing uses.\footnote{131} Accordingly, Congress decided that some grandfathering was needed.

The Court seized upon the need for grandfathering as an indication that Congress intended to avoid the controversy that would result if the President’s authority to modify existing regula-

\footnote{128. \textit{Id.} at 10.}
\footnote{129. Witnesses during the hearings suggested that a complete repeal of the Trading With the Enemy Act, one that would terminate the embargoes, would be unwise, both politically and diplomatically. One suggested that forcing the President to publicly announce a new declaration of emergency, as required by the National Emergencies Act, see 50 U.S.C. § 1621(a) (1982), might be an “inappropriate interference in negotiations being carried out by the Executive Branch” and “would be . . . very awkward . . . if the [Cuban] embargo were suddenly to end without any deal [with Cuba].” \textit{Hearings, supra note 101, at 19} (remarks of Professor Lowenfeld). Assistant Treasury Secretary Bergsten repeated this theme, claiming that “a unilateral termination of the embargoes,” coupled with a requirement that the President publicly reassert national emergencies, “would severely undermine the U.S. negotiating position with [certain] countries, and our worldwide posture.” \textit{Id.} at 103.

Representative Bingham remarked that he “personally would not argue that we should ask or expect the President to declare for the first time, an emergency with respect to Cuba.” \textit{Id.} at 190.

130. The subcommittee sought only to reform the procedures and authorities for future cases—not to make changes in the Cuban embargo. Representative Bingham, the bill’s principal sponsor, admitted that “if we were to attempt to do otherwise, this bill would become enormously controversial and would reach into substance rather than being essentially a revision of procedures . . . . We will get this all fouled up . . . if we attempt [to repeal the embargoes].” \textit{Hearings, supra note 101, at 168. See also id. at 199} (Rep. Bingham commenting on the likely success of the bill if the Cuban embargo would not be affected).

\footnote{131. \textit{See House Report, supra note 101, at 11; see also Hearings, supra note 101, at 199.}}
tions was made subject to the TWEA reform. But as the dissent noted, the Court misapprehended the aspects of the statute that Congress feared would be divisive. The need to preserve the power to modify the regulations was never a concern. Rather, Congress' grandfathered "those Section 5(b) authorities" because it would have been controversial if it had instead attempted a substantive examination of existing controls to determine if they were justified by the exigencies of a particular situation. The clause, therefore, actually represented a compromise between those who advocated total termination of the programs and those who appreciated the ramifications of such unilateral action. In an abstract sense, any congressional concern, express or otherwise, to preserve the power of amendment or modification, would have to lie somewhere in between these two negotiating postures. The reserved presidential authority for future modifications appears to reach beyond both the limits established by these postures and the congressional intent of this compromise.

The Court's interpretation might have been correct if a congressional concern had existed to protect the presidential authority to modify licenses. In fact, the debate did not revolve around the question of future modification. Rather, the issue in the subcommittee, beyond grandfathering, was whether the CACRs and the other embargoes would be subject to the provisions of the National Emergencies Act (NEA), with annual review and annual statements by the President for the continuation of that emergency, or whether they should be allowed to continue indefinitely without review. Proponents of unconditional grandfathering were concerned mainly with garnering enough votes from conservative legislators who favored the embargoes of communist nations. Opponents questioned the substance of the "national emergency" with respect to many communist countries. Their viewpoint ultimately prevailed and a partial grandfathering making the embargoes subject to the provisions of the NEA was incor-


133. See Hearings, supra note 101, at 198.

134. Id.
porated into the grandfather clause.135

In sum, far from being concerned with "future tensions," the subcommittee was not persuaded that the situation with Cuba constituted an emergency. It is, therefore, disingenuous for the Wald Court to suggest "that Congress intended to give the President greater flexibility to respond to 'heightened tensions' developments with Cuba than to events in other trouble spots in the world such as the Middle East, Poland, or Afghanistan."136 The IEEPA was enacted to deal precisely with such developments. "With respect to future developments in such places, the IEEPA makes clear that the President cannot use his emergency powers to respond to 'heightened tensions' unless the President has decided that a state of emergency exists, and has so declared."137 To reason that the grandfather clause reserves the executive authority to indefinitely promulgate regulations regarding Cuba, as the Court would permit under its holding vitiates the revision of emergency powers accomplished by the 1977 legislation.

4. Statutory Conflicts. The Court's ruling also conflicts with the spirit of other legislation enacted in the 1970's restricting the executive's authority over foreign affairs. In particular, the Court's holding is contrary to an express congressional limitation on the executive's power to inhibit travel. In 1978 Congress amended the Passport Act to remove the authority of the Secretary of State to impose peacetime travel restrictions barring exceptional circumstances.138 The passport amendment represents a congressional determination that travel can be restricted only under conditions specified by Congress.139 In the face of such a clear

135. Id. at 198-99.
137. Id.
138. Act of Oct. 7, 1978, Pub. L. No. 95-426, § 124, 92 Stat. 963, 971 (1978) (codified at 22 U.S.C. § 211a (1982)). The 1978 amendment added the following provision. Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a 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.
139. 22 U.S.C. § 211a was amended to comply with the various freedom of travel provisions agreed to at the 1975 Helsinki Conference, see, e.g., Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292, 1310-11, 1314-15, 1320, 1322 (1975) (provisions relating to tourism, travel for personal or professional rea-
congressional statement, the power the President claims under the TWEA to restrict travel through currency controls is irreconcilable with the 1978 Passport Act and is presumptively *ultra vires*. The Court contended that the amendment was irrelevant to the question of the President's authority under the TWEA. Yet in ignoring the Passport Act amendment, the Court violates Congress' express intention of making "the freedom-to-travel principle . . . a matter of law and not dependent upon a particular Administration's policy."

The Supreme Court has previously stated that contemporaneously enacted statutes may shed light on the proper interpretation of a statute in question. If the Court had followed its own suggestion it would have found additional reasons beyond the 1978 Passport Act for reading the clause restrictively.

The reform of the TWEA was only a part of a series of laws aimed at imposing congressional limits upon the President's international emergency powers. In 1973 Congress passed the War Powers Resolution restricting presidential power to employ United States forces abroad. Later in 1976, Congress terminated all presidentially declared national emergencies and provided procedures for presidential declarations and continuations of national emergencies until the reform of the TWEA. The Court's action ignores its doctrine followed recently in *Dames & Moore v. Regan* which recognized the relevance of "legislation

sons, travel for cultural and artistic purposes, and educational exchanges), and to encourage other countries to follow suit. The legislative history of the 1978 amendment shows that Congress intended to prohibit the executive from regulating travel in the absence of war or armed hostilities. See S. Rep. No. 842, 95th Cong., 2d Sess. 43-44 (1978); H.R. Rep. No. 1535, 95th Cong., 2d Sess. 11, 45 (1978). Recognizing that the amendment made resumption of Cuban travel restrictions through passport controls impossible, the President turned to the Trading With the Enemy Act, 50 U.S.C. §§ 1-39, 41-44 (1982), and the currency controls available in the Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (1985).

140. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586 (1952); *id.* at 589-609 (Frankfurter, J., concurring); *id.* at 637-46 (Jackson, J., concurring).
145. *See supra* notes 29 & 132.
closely related to the question of the President's authority in a particular case."147 The result of the Regan v. Wald decision is a restoration of executive authority expressly limited by Congress and a nullification of the 1978 Passport Act in terms of Cuba.

B. The Court's Constitutional Analysis

In Wald the Court ultimately rested its constitutional analysis of Regulation 560 on the long judicial tradition of sustaining executive foreign policy decisions.148 In reaching its result, the Court engaged in only the most perfunctory treatment of the constitutional right to travel as first enunciated in Zemel v. Rusk.149 The hurried constitutional analysis in Wald betrays the Court's eagerness to subordinate civil liberties to the President's unilateral foreign policy determinations. In its haste to defer to the executive branch, the Court made several errors.

The Supreme Court first held in Kent v. Dulles150 that travel is a part of liberty of which a citizen cannot be deprived without due process of law. The doctrine was developed further in Zemel, a decision upholding comprehensive travel restrictions that were not directed solely at a person's political beliefs or did not impair a person's first amendment rights. The Court in Zemel recognized

147. See id. at 678.
148. 104 S. Ct. at 3039 ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' ") (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)); see also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

The Court's reluctance to pass on the constitutionality of an executive foreign policy decision is founded on "political question" abstention doctrine. Although this doctrine has been articulated in several different contexts, it rests on a belief by the Court that maintenance of the separation of powers in the federal government precludes judicial decision on issues that are deemed particularly unsuitable for judicial review.

The modern and more narrow guidelines for the political question doctrine were laid out in Baker v. Carr, 369 U.S. 186 (1962). In Baker, the Court stated that there was a "political question" when

[w]e have [a] question decided, or to be decided, by a political branch coequal with this Court. [Or] when we risk embarrassment of our government abroad . . . if we take issue with [the] action . . . challenged. [Or when] the appellants, in order to succeed in [their] action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking.

Id. at 226.
149. 381 U.S. 1 (1965).
travel as a liberty that could be inhibited provided it was accorded due process protections. Under the Zemel standard, the criteria of due process is in part a function of the necessity for the restriction. The justification of the regulation in Zemel was two-fold: the restriction against travel to Cuba applied equally to all citizens and was necessary because of the weightiest concerns of national security.

The Court in Wald, however, mistakenly applied Zemel. It likened the "blanket" currency restriction in Wald to the passport restriction in Zemel. First, the restrictions are factually dissimilar; Zemel dealt with health and safety concerns of American travelers in the wake of the Cuban Missile Crisis, while Wald seeks to deny Cuba hard currency. Second, the Zemel travel restriction withstood due process analysis because tensions with Cuba were of sufficient weight to demand universal travel restrictions applicable to all Americans. The restriction in Wald, however, is not universal; it arbitrarily regulates tourist and business travel while permitting other types of travel.

Third, the restriction in Zemel was permissible because the Court was able to find a congressional grant of authority through a long-standing administrative practice and congressional acquiescence to passport travel restrictions. Congress subsequently rejected passport restrictions in 1978 when it amended the Passport Act to limit the executive’s travel restriction powers only to cases of personal health or safety. Since the urgency which served to legitimate the executive’s action in Zemel is totally absent in Wald, it is difficult to understand the Court’s extension of Zemel to Wald. If the Court had not disregarded the dissimilarities between the two cases, it would have found Zemel inapplicable, and quite possibly, Regulation 560, invalid.

The Court also failed to follow the basic rules of statutory construction when constitutional issues are implicated. It is well established that statutes are construed, whenever possible, to avoid constitutional issues. This is particularly the case when re-

151. See Zemel, 381 U.S. at 13.
152. See 31 C.F.R. § 515.560 (1985) and supra text accompanying notes 92-95.
153. See supra note 138 and text accompanying notes 138-40.
154. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 411 (1978) (Stevens, J., concurring in part and dissenting in part) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”) (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)).
strictions on travel are involved.\textsuperscript{155} Under this approach, the Court could have avoided the right to travel issue by interpreting the grandfather clause narrowly. Instead, the Court rushed to find the amendment of Regulation 560 valid under the guise of the judicial deference doctrine.

Further, the Court ignored the issue of whether the goal of denying Cuba hard currency could have been achieved through less drastic means. In determining the constitutionality of travel restrictions, the Court should have considered the possibility of finding alternative means of safeguarding our national security.\textsuperscript{168} The trade restrictions with Cuba leave open sources from which Cuba can obtain hard currency that are more important than the source blocked by Regulation 560.\textsuperscript{157} Instead, the Court in \textit{Wald} immediately deferred to the President’s judgment that Cuba was pursuing “objectives inimical to United States foreign policy interests” and found this “an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President’s decision to . . . restrict travel.”\textsuperscript{158}

The Court’s failure even to consider the above requirements of basic constitutional analysis represents an extreme willingness to surrender its role in ensuring that the exercise of executive power stays within the limits set by Congress. The majority claimed its decision was based on the Court’s “classical deference to the political branches in matters of foreign policy.”\textsuperscript{160} But in reality, the Court actively intervened to reallocate power to the President. In previous cases, the Court deferred to the executive’s unilateral authority over foreign affairs by reaching first the question of whether the power had been granted either expressly\textsuperscript{160} or through congressional acquiescence to a long-standing executive practice.\textsuperscript{161} In \textit{Wald} however, a grant of authority from Congress

\textsuperscript{155} In \textit{Kent v. Dulles}, the Court stated that “we will construe narrowly all delegated powers that curtail [the right to travel].” 357 U.S. at 129.

\textsuperscript{156} Cf. \textit{Aptheker v. Secretary of State}, 378 U.S. 500, 512-13 (1964) (in determining the constitutionality of travel restrictions, the Court should consider whether there are “‘less drastic’ means of . . . safeguarding our national security”).

\textsuperscript{157} \textit{See supra} text accompanying notes 93-99.

\textsuperscript{158} 104 S. Ct. at 3039.

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{See, e.g.}, United States \textit{v. Curtiss-Wright Export Corp.}, 299 U.S. 304, 319-20 (1936) (executive discretion on enforcement of statute prohibiting sale of war munitions to foreign nations).

\textsuperscript{161} \textit{See, e.g.}, \textit{Dames & Moore v. Regan}, 453 U.S. 654, 678-79 (1981) (practice of for-


is unnecessary; it conceives the executive power to act in foreign affairs to be a matter largely immune from judicial inquiry. Rather than follow the commandment of judicial deference to both political branches, the Court intervened to weigh the factual justification for the restriction in order to balance it against the limitation upon liberty. In this way, the Court forced itself to render an opinion based partly upon its independent foreign policy analysis—a function forbidden by the law upon which the Court relies. Under the Court's skewed reasoning, the restriction of travel is not dependent on any express or implied grant of power, but rather, on a matter which is best left to the sole determination of the President and the Court.

CONCLUSION

The Court's choice of a formalistic approach over a more in-depth analysis of Regulation 560 betrayed its desire to neglect convincing statutory and constitutional arguments that, if considered, would have invalidated the Reagan Administration's prohibition of tourist and business travel to Cuba. Contrary to the Court's opinion, the grandfather clause is vague on the question of whether it permits modifications or amendments in the CACRs.

Evidence presented to the [lower courts shows] that relations between Cuba and the United States have not been "normal" for the past quarter of a century, and that those relations have deteriorated further in recent years due to increased Cuban efforts to destabilize governments throughout the Western Hemisphere. . . . Cuba, [with the support] of the Soviet Union, has provided widespread support for armed violence and terrorism . . . . Cuba also maintains close to 40,000 troops in various countries in Africa and the Middle East in support of objectives inimical to United States foreign policy interests . . . . Given the traditional deference to executive judgment "[i]n this vast external realm," we think that there is an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President's decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by restricting travel.

104 S. Ct. at 3039 (citations omitted & emphasis added).
An examination of Congress' intent behind the grandfathering and the TWEA reform act, as well as Regulation 560's conflict with the 1978 Passport Act, compels a narrow reading of the grandfather clause. The Court also displayed its willingness to subordinate the exercise of the constitutional right to travel abroad—a right that should not be abridged by a particular administration's policy—to a foreign policy determination which conformed to the President's and their own political predilections. In effect, the Court's holding renders meaningless a decade of congressional action which had sought to gain a greater voice in our foreign affairs in terms of Cuba. As a consequence, the power to regulate travel to Cuba has been re-allocated to the President by the Court at the expense of Congress and the people.

Brian G. Hart