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CASENOTE

The Cuban Travel Case: An Executive Carte Blanche

Regan v. Wald
104 S. Ct. 3026 (1984)

In 1982, a group of American citizens seeking to travel to Cuba brought an action in the United States District Court for the District of Massachusetts challenging an amendment to the Treasury Department's Cuban Assets Control Regulations.¹ Regulation 560, as amended, restricted the scope of a general license which permitted travel-related transactions otherwise forbidden by the Cuban embargo.² The new regulation 560, therefore, effectively prohibited travel to Cuba. The citizens attacked the amendment on statutory and constitutional grounds. They claimed the amendment had not been promulgated in accordance with proper statutory procedures and alleged, on constitutional grounds, a violation of the freedom to travel protected by the due process clause of the fifth amendment.³ Therefore, they sought a preliminary injunction against its

1. Cuban Assets Control Regulations, 31 C.F.R. § 515.560 (1983). The amendment significantly narrowed the scope of permissible economic transactions in connection with travel to Cuba. Certain types of travel are permitted such as official visits, news gatherings and visits with close relatives. General tourist and business travel are specifically excluded and thereby prohibited.

2. Cuban Assets Control Regulations, 31 C.F.R. § 515.560 (1983). Pursuant to the Cuban embargo of 1963, the Cuban Assets Control Regulations prohibit any transaction involving property in which Cuba or any national thereof has "any interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 515.201(b) (1983). The general license excluded from the broad prohibitions of Regulation 201(b) "transactions ordinarily incident to" travel to Cuba. Some restrictions did remain. *See, e.g.*, 31 C.F.R. §§ 515.560(a)(3)-(7) (1977)(codified as amended at 31 C.F.R. § 515.560 (1983)).

3. The claimants also alleged that the 1982 restrictions violated the Passport Act, which was amended to prohibit the executive branch from imposing peacetime passport travel restrictions without congressional authorization except when health and safety considerations were involved. Passport Act of 1978, Pub. L. No. 95-426, § 124, 92 Stat. 971, 801 (1978)(codified at 22 U.S.C. § 211(a) (1978)). They also alleged that the restrictions exceeded authority conferred by the Trading With the Enemy Act and the International Emergency Economic Powers Act. These issues were not passed on by the circuit court and were not addressed by the Supreme Court.

enforcement.⁴ The district court refused to issue the injunction, because it found the claim lacked a substantial likelihood of success.⁵ The United States Court of Appeals for the First Circuit disagreed. The First Circuit vacated and remanded the cause to the district court, ordering that a preliminary injunction be issued.⁶ The appellate court rejected the government's argument that travel-related restrictions were within the purview of executive authorities retained by a grandfather clause to the Trading With the Enemy Act (TWEA).⁷ For this reason, the appellate court held that the amendment was invalid.⁸ After staying the court of appeals' mandate, a divided United States Supreme Court, on certiorari review, *held*, reversed: (1) There was sufficient statutory authority for the 1982 amendment of regulation 560. The enacted language of the grandfather clause, read in conjunction with §5(b) of the TWEA,⁹ indicates that the authority to regulate travel-related transactions with Cuba was being exercised pursuant to the Cuban embargo and was therefore retained. In addition, the legislative history and purpose of the grandfather clause indicates that Congress intended that the President retain flexibility with regard to existing embargoes. (2) In light of the traditional deference to the executive branch in the realm of foreign affairs, the President's decision to curtail the flow of funds into Cuba through travel restrictions does not violate the freedom to travel protected by the due process clause of the fifth amendment. *Regan v. Wald*, 708 F.2d 794 (1st Cir. 1983), *modified and reh'g denied*, 708 F.2d 802 (1st Cir. 1983), *rev'd*, 104 S. Ct. 3026 (1984).

This note will focus on the majority's approach in *Wald* to determine how the Court was able to find statutory authority and sufficient due process, to achieve executive flexibility and preserve executive prerogative. Based upon this inquiry, the precedential value of *Wald* can be assessed. The note will then analyze *Wald's*

4. *Regan v. Wald*, 104 S. Ct. 3026, 3029-30.

5. *Id.* at 3030.

6. *Id.*

7. Trading With the Enemy Act, 50 U.S.C. app. § 5 note (1977) [hereinafter cited as TWEA]. The grandfather clause of the TWEA provides that "the authorities conferred upon the President by §5(b) of the TWEA 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. . . ."

8. *Regan v. Wald*, 708 F.2d 794 (1st Cir. 1983).

9. 50 U.S.C. App. § 5(b)(1) (1958). Section 5(b) confers authority upon the President "during the time of war or during any other period of national emergency declared by the President." *Id.*

effect on the future scope of judicial and congressional review of executive powers and the prospective validity of the right to international travel. Emphasis will be placed on the Court's treatment of executive determinations in matters of foreign policy and its analysis of congressional intent through legislative history.

In 1963, the Office of Foreign Assets Control implemented the Cuban Assets Control Regulations.¹⁰ These regulations, which are referred to as the Cuban embargo, were implemented under the authority that Congress conferred upon the President in §5(b) of the TWEA to cope with national emergencies.¹¹ Regulation 201(b) constitutes the main provision of the Cuban embargo and prohibits transactions with Cuba.¹² In 1977, Congress amended §5(b) of the TWEA to limit the President's authority to wartime emergencies only.¹³ In the same bill, Congress enacted the International Emergency Economic Powers Act (IEEPA). The IEEPA confers executive authorities which are essentially identical to the peacetime authorities now deleted from §5(b) of the TWEA.¹⁴

Pursuant to the IEEPA, the President is first required to declare a national emergency and thereafter follow consultive proce-

10. See *supra* note 2.

11. Section 5(b)(1)(B) provided the President with broad authority, through any agency he may designate to impose comprehensive embargoes on foreign countries ". . . with respect to or transactions involving any property in which any foreign country or a national thereof has any interest of any nature whatsoever, direct or indirect." This authority was to be used during ". . . time of war or during any other period of national emergency declared by the President . . ." 50 U.S.C. app. § 5(b)(1) (1958). The President delegated his authority under the TWEA to the Secretary of Treasury. Exec. Order No. 9193, 3 C.F.R. 1174, 1175 (1942). The Secretary of the Treasury then delegated the authority to the Office of Foreign Assets Controls. T.D. Order No. 128 (Rev. 1, Oct. 15, 1962).

12. 31 C.F.R. §515.201(b) (1983).

13. Congress noted that the TWEA had "become essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review." H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977). Therefore, Congress repealed all peacetime powers from §5(b). The TWEA Amendments deleted the phrase "or during any other period of national emergency declared by the President." Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified at 50 U.S.C. app. § 5(b) (1977)). The TWEA amendment was intended "to revise . . . the President's authority to regulate international economic transactions during wars or national emergencies." S. Rep. No. 466, 95th Cong., 1st Sess. 2 (1977).

14. The International Economic Emergency Powers Act, 50 U.S.C. §§ 1701-1706 (1982) [hereinafter referred to as IEEPA]. The IEEPA did not alter the powers given the President under the TWEA but defined those powers more clearly and limited the duration of a declared national emergency. Prior to its enactment, the only method for termination of the emergency was through executive declaration. See 50 U.S.C. §§ 1701(b), 1706(b) (Supp. III 1979).

dures with Congress.¹⁵ When Congress enacted the IEEPA, it also enacted a grandfather clause to the TWEA which preserved "the authorities conferred upon the President by §5(b) of the TWEA, which were being exercised . . . on July 1, 1977."¹⁶ By enacting a grandfather clause to the TWEA, Congress sought to prevent the President from having to declare a new national emergency in order to continue embargoes previously authorized by the TWEA. Congress also sought to avoid partisan disputes which might have delayed the IEEPA's enactment.¹⁷

Pursuant to the broad prohibitions of regulation 201(b), all transactions with Cuba are prohibited. Prior to the 1977 amendment to the TWEA which eliminated the President's peacetime emergency authorities, travel related transactions with Cuba were exempted from the prohibition of regulation 201(b). These transactions were exempted under the general license embodied in regulation 560 as originally enacted in 1977.¹⁸ Based upon this general license, the restrictions found in regulation 201(b) regarding travel related transactions were not in effect at the time the grandfather clause was enacted.

In 1982, in order to reduce Cuba's hard currency earnings from travel by U.S. persons to and within Cuba, the Treasury Department's Office of Foreign Assets Control amended regulation 560 and restricted the scope of permitted transactions with Cuba.¹⁹ The amendment specifically precluded general tourist and business travel transactions.²⁰ Regulation 560, as amended, prohibited

15. IEEPA, Title II, Pub. L. No. 95-223, 91 Stat. 1625 (codified at 50 U.S.C. §§ 1701-1706) (1982). The IEEPA requires the President "in every possible instance" to consult with Congress prior to exercising his IEEPA authorities and to report to Congress every six months on the actions taken and any changes in the underlying circumstances. *Id.* at § 1703. Congress retained the authority to terminate any declared national emergency by concurrent resolution. 50 U.S.C. § 1622 (1982).

16. 50 U.S.C. app. § 5 note (1983). Presidents Carter and Reagan have retained the TWEA authority by determining that continued exercise of §5(b) authorities with respect to Cuba is in the national interest. *See* 48 Fed. Reg. 40,695 (1983), 47 Fed. Reg. 39,797 (1982), 46 Fed. Reg. 53,153 (1979), 43 Fed. Reg. 40,449 (1978).

17. The Supreme Court determined that the primary purpose of the grandfather clause was to keep the amendments to TWEA and enactment of IEEPA "from becoming too controversial," and resulting in "partisan disputes, which might delay the implementation of the new procedures in IEEPA." 104 S. Ct. at 3037.

18. 31 C.F.R. § 515.560 (1977). Persons who visit Cuba may pay their transportation and maintenance expenditures while in Cuba. 42 Fed. Reg. 16,621 (1977).

19. 104 S. Ct. at 3032; 31 C.F.R. § 515.560 (1983) (excluding official visits, news gatherings, visits to close relatives and, in appropriate cases, travel for humanitarian reasons, as well as public performances and public exhibits).

20. 31 C.F.R. § 515.560(a)(3).

American businessmen and tourists from travelling to Cuba.

The 1982 amendment was challenged on the ground that it was not promulgated in accordance with the procedures mandated by the IEEPA; the President had declared no new national emergency and had not consulted with Congress regarding the present condition of U.S. relations with Cuba.²¹ The government admitted that it had not complied with IEEPA procedures.²² Instead, the government relied on the grandfathered authorities of the TWEA. In essence, the government claimed that although the specific restrictions on travel were not in effect on July 1, 1977, the President was exercising authority over travel-related transactions pursuant to the general regulation of property transactions contained in regulation 201(b), and that such authority could continue without resort to IEEPA procedures.²³

Previously, the TWEA provided for virtually unlimited executive authority upon the declaration of a national emergency. This emergency authority would continue to exist until the President officially declared its termination. The IEEPA limited the President's broad national emergency powers under the TWEA by requiring congressional review, consultation, and termination. The grandfather clause was enacted to prevent partisan disputes which might have delayed enactment of the IEEPA and to keep the President from being forced to declare a new national emergency in order to continue existing restrictions which would otherwise have been unilaterally terminated.²⁴ The government relied entirely on authorities retained pursuant to the grandfather clause of the TWEA. Ironically, these authorities were retained in order to expedite enactment of the IEEPA. Congress enacted the IEEPA in order to restrict previously unrestricted authority by requiring congressional review of executive action. The grandfather clause of the TWEA was not intended to expand the executive authority Congress had sought to restrict in enactment of the IEEPA.

Speaking for the majority, Justice Rehnquist found that the language, legislative history, and purpose of the grandfather clause, read in conjunction with §5(b) of the TWEA, supported the government's contention that the authority to regulate all property

21. See *supra* note 3. Other grounds were raised, however, this Note will only deal with the issues addressed by the Supreme Court.

22. 104 S. Ct. at 3032.

23. *Id.*

24. *Id.* at 3043 (Blackmun, J., dissenting).

transactions "including travel-related transactions was being exercised on July 1, 1977 and was therefore preserved."²⁵ The Court based its decision on the premise that the authority to regulate travel is merely part of the President's general authority to regulate property transactions, and that the existence of a general license which permitted travel at the time §5(b) of TWEA was amended did not alter the fact that §5(b) authority was being exercised at that time.²⁶ The Court relied on its recent decision in *Dames & Moore v. Regan*²⁷ in support of a potentially limitless power in the executive branch to control transactions in response to national emergencies. This determination was based on the statutory construction of the IEEPA and the TWEA found in *Dames & Moore* and the regulatory structure of the Cuban Assets Control Regulations.

In *Dames & Moore*, Rehnquist spoke for a unanimous Court upholding the President's authority pursuant to executive agreement with Iran to nullify prejudgment attachments of Iranian assets in exchange for the release of American hostages. The Court upheld the President's authority on the ground that the language of the IEEPA permitted such executive action.²⁸ The Court rejected the argument that the legislative history of the IEEPA and its predecessor, the TWEA, had not been intended to give the President the power he exerted over the assets of a foreign state.²⁹ Recognizing its "expeditious treatment" of issues touching "fundamentally upon the manner in which our republic is to be governed," the Court repeatedly emphasized the narrowness of its decision.³⁰

Rehnquist had strongly emphasized the narrowness of the *Dames & Moore* decision which determined that the President's authority to settle claims was a "necessary incident to the resolution of a major foreign policy dispute."³¹ The *Wald* Court's reliance on *Dames & Moore* expands upon a case in which the Court had intended "to lay down no general 'guidelines.'"³² Contrary to the Court's request that its opinion be limited "to the very ques-

25. *Id.* at 3033.

26. *Id.* at 3034.

27. 453 U.S. 654 (1981).

28. *Id.* at 669-74.

29. *Id.* at 672-73.

30. *Id.* at 659-61, 688.

31. *Id.* at 688.

32. *Id.* at 661.

tions necessary to decision of the case,"³³ *Wald* has extended the *Dames & Moore* decision. Through an expansive reading of the *Dames & Moore* analysis, the Court in *Wald* has ignored its prior attempt to limit a decision approving executive authority.

The Court's reliance on the reasoning of *Dames & Moore* is misplaced in light of the Court's previous attempt to restrict its holding to the specific facts and urgency of the Iranian Hostage Crisis. In addition, the legal academic community has sharply commented on the Court's analysis in *Dames & Moore*, noting the political nature of the decision.³⁴ In fact, *Dames & Moore* has been characterized as an "unprecedented reading of the President's statutory and constitutional power to conduct foreign affairs."³⁵ In light of *Dames & Moore*'s restricted holding and the criticism of legal commentators, the *Wald* case is a startling extension of executive branch authority in the absence of a foreign policy dispute of a magnitude which might have justified the Court's approval of executive action.

The Court in *Wald* also based its finding of statutory authority on the regulatory structure of the Cuban trade embargo. The Court found that because of regulation 201(b), "absent an explicit license, all transactions involving Cuban property are and, at all relevant times, have been prohibited."³⁶ The Court's contention that §5(b) authorities were being exercised under the general prohibition of regulation 201(b) ignores the circuit court's decision in which that argument was raised in the government's petition for rehearing. The Court of Appeals denied this petition, and the argument was deemed invalid.³⁷ The Court has assumed that the regulatory form of the Cuban embargo, rather than its substance, controls. Substantively, there were no travel-related restrictions in effect nor was the President exercising his authority with regard to those transactions when the grandfather clause was enacted. The

33. *Id.*

34. See Miller, *Dames & Moore: A Political Decision by a Political Court*, 29 U.C.L.A. L. REV. 1104, 1109 (1982) ("A tortured construction of the IEEPA and the TWEA . . ."), and Marks and Grabow, *The President's Foreign Economic Power After Dames & Moore: Legislation by Acquiescence*, 68 CORNELL L. REV. 68, 69 (1982) ("The Court also failed to provide a conceptually solid foundation in upholding the President's authority . . .") See also *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 191 (1981) ("The Court created a theory of implied congressional delegation that is without firm doctrinal or historical support.").

35. Marks and Grabow, *supra* note 34 at 69.

36. 104 S. Ct. at 3034.

37. 708 F.2d at 802.

Court ignored the fact that such transactions were exempted from the overall embargo of regulation 201(b) and that the President was not exercising his authority on that date. Instead, the Court based its decision entirely on the regulatory structure, or form, of the embargo provisions. The Court found that the broad prohibitions of regulation 201(b) represented the presidential authority, being exercised on July 1, 1977, which was retained by the grandfather clause. The Court made this determination despite the fact that there was no authority being exercised over travel-related transactions at that time. In this way, the Court has placed regulatory form above substance. The Court's analysis allows for unrestricted authority in the executive branch with regard to similarly structured embargoes promulgated under the TWEA. Using *Wald* as precedent, virtually any executive exercise of authority could be approved if characterized as an adjustment to embargo provisions originally enacted under the TWEA and in effect as of July 1, 1977. The IEEPA was specifically designed to place congressional controls over previously unrestricted executive authority. Therefore, the analysis found in *Wald* has abrogated the purpose for the enactment of the IEEPA.

Perceiving the potential ramifications of the majority's approach, Justice Blackmun's dissent analogizes the Cuban Assets Control Regulations to the structure of trade regulations with regard to China.³⁸ Blackmun noted that if the majority's analysis was correct, the President would be able to reinstate a complete trade embargo with foreign countries at any time simply by eliminating the general license in effect when the IEEPA was passed. As the dissent explained, "there is no question that the Congress that enacted the IEEPA did not imagine that the grandfather clause preserved the President's authority to transform trade relations with another country from a situation of virtually free trade to a situation of complete embargo without following the IEEPA procedures."³⁹

The majority emphasized the language of the grandfather clause which provided:

38. 104 S. Ct. at 3048, n.7 (Blackmun, J., dissenting). The issue of whether the President could have reinstated the Chinese embargo under the grandfather clause is moot, since the President ended the use of §5(b) authorities against China in 1980. Under the Court's analysis, the President would have been free to place a full embargo on China, prior to 1980, without complying with the IEEPA.

39. *Id.* at 3048.

Notwithstanding the amendment made by subsection (a), the authorities conferred upon the President by §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.⁴⁰

The Court relied heavily on the fact that Congress chose the generic term *authorities* as opposed to *prohibitions* actually in place in order to support its expansive reading of the grandfather clause.⁴¹ The Court's persistent reliance on the fact that Congress chose the term *authorities* in the wording of the grandfather clause is incongruous. Having admitted that a narrow construction of the grandfather clause is supported by a reading of the legislative history, the Court refused to look beyond what it deemed to be the clear generic meaning of the word *authorities*. The Court's reliance on the enacted word contradicts prior case law involving application of the TWEA, in which literal statutory interpretation had been rejected in favor of a "wise latitude of construction in enforcing its purposes."⁴² The Court refused to acknowledge the legislative history which supported a narrow reading of grandfathered authorities in order to avoid undermining the language actually voted on by Congress.⁴³ The Court attempted to construe the TWEA by looking solely to the enacted language. Despite contrary indications of legislative intent, the majority opinion's statutory analysis has effectively broadened the executive powers which Congress and the courts had previously sought to restrict.

40. 50 U.S.C. app. §5 (note) (1977).

41. 104 S. Ct. 3026, 3035.

42. *Guessefeldt v. McGrath*, 342 U.S. 308, 319 (1952). For discussion of statutory interpretation of the IEEPA and TWEA. See *supra*, note 34, Marks and Grabow at 79-80 and cases cited therein.

43. The majority opinion includes an excerpt from the legislative history:

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

MR. BERGSTEN. Yes sir.

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

MR. BERGSTEN. That is right."

Revision of TWEA: Markup before the House Committee on International Relations, 95th Cong., 1st Sess. 21 (1977); 104 S. Ct. at 3038. (colloquy between Rep. Cavanaugh and Assistant Secretary of the Treasury, Bergsten, spokesman for the bill).

The citizens claimed that even if the Court found sufficient statutory authority for the amended regulation, the enforcement of its provisions constituted a violation of their right to travel protected by the due process clause of the fifth amendment. In support of their position, the citizens cited several cases dealing with the right to travel in which first amendment issues had also been raised. The majority found that the contested travel restrictions posed no threat to first amendment rights, and that the fifth amendment right, by itself, was insufficient to overcome foreign policy justification. In reality, the Court dismissed the first amendment issue in order to avoid the higher standard of scrutiny which would have forced the government to establish a compelling interest supporting its actions. Under the rubric of a fifth amendment analysis, the Court could approve of executive action as long as it was rationally based. Instead, the Court founded its foreign policy justifications on a deference to the executive branch, and thereby avoided even the lowest standard of review — the rational basis inquiry.

At the start of its due process inquiry, the Court acknowledged its prior recognition of the right to travel in *Kent v. Dulles*.⁴⁴ In *Kent*, the Court determined that the Secretary of State had not been authorized by Congress to question passport applicants regarding communist affiliations. The Court found that a citizen could not be denied a passport based upon political beliefs or associations. The Court determined that the right to travel was “a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law.”⁴⁵ The *Wald* court decided that the restriction in question did not infringe upon first amendment rights to freedom of speech and association, including the right to gather information, because the ban involved was not based upon any characteristics peculiar to the individual seeking travel.

The Court relied on *Zemel v. Rusk*,⁴⁶ in which it had sustained the Secretary of State’s refusal to validate passports of United States citizens for travel to Cuba. In *Zemel*, the State Department’s ban on travel to Cuba was upheld against a citizen’s request to have his passport validated for tourist travel. The *Zemel* Court specifically found no interference with the citizen’s first amendment right to travel abroad noting that the right to speak and pub-

44. 357 U.S. 116 (1958).

45. *Id.* at 125.

46. 381 U.S. 1 (1965).

lish does not constitute an unrestrained right to gather information.⁴⁷ The majority in *Wald* stated that the "Secretary of State in *Zemel*, as here, made no effort selectively to deny passports on the basis of political belief or affiliation, but simply imposed a general ban on travel to Cuba following the break in diplomatic and consular relations with that country in 1961."⁴⁸

The Court's contention that the general ban in *Zemel* is identical to the contested restrictions in the present case ignores the substance of the Cuban Assets Control Regulations. The amended regulation 560 did not forbid all travel-related transactions. Instead, the prohibitions are based on the individual's purpose for travel. For that reason, the contested restrictions do not constitute a general ban which could be deemed identical to the restrictions imposed in *Zemel*. Nevertheless, the Court's recharacterization of the contested regulations as a general ban on travel allowed it to find that "no first amendment rights of the sort that controlled in *Kent* . . ." were implicated.⁴⁹ It should, however, be noted that the Court's recharacterization is consistent with its current views on international travel. The Court is generally reluctant to implicate first amendment rights.⁵⁰

In cases involving infringements of the first amendment's freedom of association, the Court has tested the constitutionality of imposed restrictions by determining whether a compelling governmental interest would support the alleged infringement. In *Aptheker v. United States*,⁵¹ a statute which forbade the issuance of a passport to members of the Communist Party was held unconstitutional because it swept "too widely and too indiscriminately."⁵² Although the right to travel was cited as an aspect of the citizen's liberty guaranteed by the due process clause of the fifth amendment, the Court emphasized that this right is closely related to the rights of free speech and association and based its decision upon cases involving first amendment rights.

The Court in *Wald*, however, chose to disregard the contested regulation's effect on first amendment rights. When first amendment rights are allegedly curtailed, the government is required to

47. *Id.*

48. 104 S. Ct. at 3038.

49. *Id.*

50. Annot., 58 L.Ed. 2d 903, 910 § 3[b] (1980).

51. 378 U.S. 500 (1964).

52. *Id.* at 514.

demonstrate a substantial or compelling interest.⁵³ On the other hand, liberties protected by the due process clause of the fifth amendment are susceptible to reasonable or rational governmental restraints.⁵⁴ By summarily determining that no first amendment rights were involved in *Wald*, the Court was able to circumvent application of the higher "compelling interest" standard of scrutiny involved in a deprivation of first amendment rights.⁵⁵

Having dismissed the first amendment issue, the Court turned to the fifth amendment question; whether there exists a reasonable or rational basis for imposing the travel restrictions. Instead of pursuing this inquiry, the Court chose to rely on its "classical deference to the political branches in matters of foreign policy."⁵⁶ In *Zemel*, the fifth amendment right to travel was held insufficient to overcome foreign policy justifications supporting the contested restriction. However, in *Zemel*, the "weightiest considerations of national security" were involved since the Cuban Missile Crisis of October, 1962, occurred two months before the contested restrictions were imposed.⁵⁷ The situation in *Wald* is readily distinguishable. The travel restrictions imposed by the amendment to regulation 560 were not promulgated as a direct result of recent crises; the purpose of the amendment was merely to "reduce Cuba's hard currency earnings from travel by U.S. persons to and within Cuba."⁵⁸

Ultimately, the Court cites *Zemel* as authority for its deference to the executive branch "in matters of foreign policy."⁵⁹ The Court's reliance on *Zemel* was misplaced. In *Zemel*, the Court's decision was substantially based upon the existence of a recent emergency of national proportion which was directly related to the contested passport restriction. Under such circumstances, judicial approval of executive action in response to emergency conditions should be justifiable. The executive branch should be able to take independent actions in order to respond effectively to exigent circumstances. In *Wald*, however, there was no real emergency.

53. See Annot. 33 L.Ed. 2d 865 § 6(a) (1973).

54. Annot. 47 L.Ed. 2d 975 (1977).

55. It has been noted that "the outcome of the constitutional question has been determined by the court's decision whether to apply the rationality requirement or a more stringent standard instead. Application of the latter signals doom for the legislation." Bennett, *Mere Rationality and Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1051 (1979).

56. 104 S. Ct. at 3039.

57. 381 U.S. at 16.

58. 104 S. Ct. at 3032.

59. *Id.* at 3038.

Under the Court's own foreign policy analysis, the only justification for the travel restrictions noted in *Wald* was the deterioration of U.S./Cuban relations "in recent years due to increased Cuban efforts to destabilize governments throughout the western hemisphere."⁶⁰ The citizens in *Wald* had rightfully claimed that at the time the travel restrictions were imposed no emergency existed which might have justified a deference to foreign policy. After a brief review of United States' relations with Cuba, the Court concluded that, given the traditional deference to executive judgment in foreign policy matters, there is an adequate basis under due process to sustain the travel restrictions. The *Wald* Court invoked its traditional deference to executive decision-making prior to determining whether there was a rational basis for upholding the government regulations. In effect, the Court has found that its traditional deference to executive authority constitutes such rational basis.

The majority opinion notes that the constitutional right to travel within the United States and the right to travel abroad are distinguishable.⁶¹ The Supreme Court has previously determined that "legislation which is said to infringe upon the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel."⁶² The standard to be applied to regulations restricting international travel is whether the contested statute is reasonable or rationally based.⁶³ In fact, the Supreme Court has noted that "restrictions on the right of in-

60. *Id.* at 3039.

61. *Id.* at 3038, n. 25.

62. *Califano v. Aznavorian*, 439 U.S. 170, 176-77 (1978). In *Aznavorian*, the Court found a crucial distinction between the freedom to travel among the states and the freedom to travel abroad. The Court noted that the constitutional right to interstate travel has been recognized for over one hundred years (*see, e.g.*, *Crandall v. Nevada*, 18 L.Ed. 745, 747, 6 Wall. 35, 43-44 (1867)). The Court stated that the constitutional right of interstate travel is virtually unqualified. *See United States v. Guest*, 383 U.S. 745, 757 (1966) (the right to travel among the states "occupies a position fundamental to the concept of our Federal Union"). On the other hand, the right to travel abroad has been considered to be merely an aspect of the liberty protected by the due process clause of the fifth amendment and can be regulated within the bounds of due process. *See Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978). However, the right to interstate travel has been considered to be more than a conditional aspect of the liberty which would be subject to regulation under conventional due process or equal protection standards. *See Shapiro v. Thompson*, 394 U.S. 618 (1969), *Stewart, J. concurring*. Based upon this distinction, the Court in *Aznavorian* found that legislation which is claimed to infringe upon the right to travel abroad is not to be judged by the same standards applied to laws which penalize the right of interstate travel. *Aznavorian*, 439 U.S. at 176.

63. 58 L.Ed. 2d at 916.

ternational travel are generally judged by the due process test of reasonableness."⁶⁴ Assuming, *arguendo*, that the reasonableness standard is the appropriate standard of scrutiny in the *Wald* case, it is highly questionable whether the Court's deference to the executive branch comports with this standard or reduces it to the point of obscurity. It remains to be seen whether future regulations which impinge upon the right to international travel would be upheld in a similar bootstrap fashion, which approves executive authority by deferring to foreign policy determinations made by the executive branch.

Thus far, the majority opinion has been analyzed with regard to its statutory interpretation of the TWEA and the IEEPA and its due process inquiry regarding the right to travel abroad. The amendment to regulation 560 was upheld based upon a technical construction of statutory language in the grandfather clause which disregarded legislative history and intent.⁶⁵ The Court found no due process violation even though fifth amendment rights had been infringed because the mere existence of foreign policy justifications invoked the Court's traditional deference to executive prerogative in foreign affairs. In this way, the Court was able to sustain an amendment which infringed upon fifth amendment rights without evaluating the basis for the contested restriction.⁶⁶ Having relied on aberrational case law, in which positive judicial response was necessitated by emergency conditions, the *Wald* court has failed to consider the implications of its decision.

In fact, the implications of the Court's holding could be severe. Blackmun's dissenting opinion revealed the potential for unbridled executive power with regard to existing embargoes through an analogy to trade relations in China.⁶⁷ There would seem to be no limit to the Court's reasoning that by enacting the grandfather clause, Congress intended for the President to retain some flexibility to adjust existing embargoes in response to developments in foreign relations.⁶⁸ This proposition is particularly alarming in light of the fact that the majority opinion includes language that will provide precedent for approval of similar unilateral executive action affecting embargoes in existence prior to enactment of the

64. *Id.*

65. See *supra* notes 37-42 and accompanying text.

66. See *supra* notes 55-63 and accompanying text.

67. See *supra* note 38 and accompanying text.

68. 104 S. Ct. at 3042-43.

IEEPA.⁶⁹ These embargoes, promulgated under the TWEA, would remain in effect and be subject to subsequent adjustments until such time as the President officially declares a termination of the "emergency." The Court's decision effectively abrogates the IEEPA and its procedures regarding embargoes in existence prior to its enactment. In this regard, *Wald* has placed executive authority beyond the scope of judicial and congressional review.

The Court's decision in *Wald* has serious ramifications with regard to the ability of the judicial branch to act as a check or balance on executive powers. The admitted purpose of enacting the grandfather clause was to expedite the enactment of the IEEPA which would then govern the President's peacetime national emergency powers. By enacting the IEEPA, Congress sought to "revise current uses and to improve policies and procedures" currently in effect with regard to executive authority during national emergencies.⁷⁰ The Court, through its literal reading of the grandfather clause, has provided the President with carte blanche authority over embargoes existing at the time the IEEPA was enacted. The Court could easily have based its decision on the government's position in this case while requiring that future executive action comport with IEEPA procedures. Having failed to do so, the Court has approved of executive power and flexibility and has made no attempt to limit or restrict its holding. The *Wald* case will therefore provide strong precedent to block future judicial review of executive action.

Furthermore, the Court's approval of the amendment to regulation 560 has also removed executive authority from the purview of congressional review as intended by the enactment of the various procedures found in the IEEPA. The amendment to regulation 560 was approved in *Wald* despite the government's admitted failure to follow IEEPA procedures. The amendment was also upheld despite the absence of a national emergency of a proportion which might have justified swift executive action. By approving the executive's actions under these circumstances, the Court has removed executive authority from the scope of congressional review in direct contravention of the IEEPA's provision for consultive procedures.

69. *Id.* at 3043 (quoting 123 Cong. Rec. 38166 (1977), "This legislation specifically grandfathers the embargoes against Vietnam, Cambodia, Laos, Cuba and other existing embargoes so that they are not affected in any way by this legislation.").

70. *Id.* at 3043 (quoting H.R. Rep. No. 95-459 at 9-10).

In addition, the *Wald* court's due process inquiry may prove critical in future cases involving a citizen's right to travel outside of the United States. In the final analysis, it was the Court's traditional deference to the political branches in matters of foreign policy which allowed it to sustain the President's decision to curtail the flow of hard currency to Cuba by restricting travel. The right to travel outside of the United States has not received the same level of scrutiny as interstate travel.⁷¹ The *Wald* court's review of the basis for the contested regulations, however, rested entirely on a deference to the foreign policy determinations of the executive branch.

It appears that any future travel restrictions imposed under the guise of a national emergency could be upheld in a similar fashion. In addition, the Court's refusal to make foreign policy determinations contrary to prior executive decision indicates that travel restrictions, based upon such determinations, regardless of cause or purpose, would be upheld. The Court's deference to executive prerogative has preempted the rational basis inquiry where the fifth amendment right to travel has been infringed. The Court deferred to executive judgment without having weighed rational basis. Having circumvented the lowest standard of judicial review in order to approve executive authority, the right to travel, as protected by the due process clause of the fifth amendment, may no longer extend to travel beyond American borders.

The foregoing discussion has sought to highlight the potential significance of *Wald* on the scope of judicial and congressional review of executive authority in foreign affairs and on the right to travel abroad. Of course, there is no way to accurately predict the precedential value of the *Wald* decision. The true effect of the analysis found in *Wald* can only be ascertained through hindsight; placing the Court's decision in the context of subsequent case law. In *Dames & Moore*, the Court had plainly sought to restrict its analysis to the facts presented.⁷² Nevertheless, the case has been cited as "sustaining the exclusive power of the President in the sphere of international relations."⁷³ *Dames & Moore* purported to establish no guidelines regarding the President's power to conduct foreign affairs.⁷⁴ Its analysis has, however, been employed in subse-

71. See *supra* note 62 and accompanying text.

72. See *supra* notes 30-33 and accompanying text.

73. *United States v. Fernandez-Pertierra*, 523 F.Supp. 1135, 1141 (S.D. Fla. 1981).

74. 453 U.S. at 659-61, 668.

quent federal court decisions. As stated by a district court judge who has cited *Dames & Moore*, any attempt to limit the Court's decision "must always be defeated in some measure as soon as reasons are given for the particular decision."⁷⁵ Now *Wald* has taken the analysis found in *Dames & Moore* beyond its narrow context.⁷⁶ In addition, the Court in *Wald* has neglected to make a similar attempt to restrict its decision. Unquestionably, the *Wald* decision will have a limiting effect on the future review of executive actions.

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75. *Persinger v. Iran*, 690 F.2d 1010, 1019 (D.C. Cir. 1982).

76. See *supra* notes 31, 32 and accompanying text.