

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-436

TITLE DONALD REGAN, SECRETARY OF THE TREASURY, ET AL.,
Petitioners v. RUTH WALD, ET AL.

PLACE Washington, D. C.

DATE April 24, 1984

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DONALD REGAN, SECRETARY OF :

4 THE TREASURY, ET AL., :

5 Petitioners :

6 v. : No. 83-436

7 RUTH WALD, ET AL. :

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9 Washington, D.C.

10 Tuesday, April 24, 1984

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:06 a.m.

14 APPEARANCES:

15 PAUL M. BATON, ESQ., Deputy Solicitor General,

16 Department of Justice, Washington, D.C.;

17 on behalf of Petitioners.

18 LEONARD B. BOUDIN, ESQ., New York, N.Y.; on behalf
19 of Respondents.

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on behalf of Petitioners	
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on behalf of Petitioners - rebuttal	

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Regan against Wald.

Mr. Bator, you may proceed whenever you're ready.

ORAL ARGUMENT OF PAUL M. BATCER, ESQ.,

ON BEHALF CF PETITIONERS

MR. BATOR: Thank you, Mr. Chief Justice, and may it please the Court:

This case raises questions about the President's authority in connection with national emergency economic embargoes, that is, in connection with programs of comprehensive control on financial and property transactions that apply to a few countries with which our foreign relations are in a state of very special and acute difficulty.

This case involves Cuba. The embargo that is involved here is very much like the Iranian assets control program that was before the Court in Dames & Moore, and the case involves the very statute considered in Dames & Moore, the Trading With the Enemy Act of 1917 and the International Emergency Economic Powers Act, which is known as "IEEPA."

Specifically, this case presents the question of the validity of regulations issued in 1982 by the

1 Treasury which prohibit certain financial transactions
2 incident to travel to Cuba. In effect, these
3 regulations provide that Americans traveling to Cuba may
4 spend money for Cuban goods and services only if the
5 travel involves Government business or involves
6 journalism or involves scholarly research or a visit to
7 close relatives, or if it is authorized by a specific
8 license in connection with humanitarian activities or in
9 connection with sporting or artistic exhibitions.

10 The regulations do not prohibit travel as
11 such. You are free to go to Cuba if, for instance, you
12 have friends or relatives who invite you or will fund
13 you, or if the Cuban Government or a Cuban organization
14 will fund your visit, so that hard currency is not spent
15 in Cuba. But you can't spend American dollars in Cuba
16 unless you fall within one of the licensed categories.

17 The 1982 regulations here modified a general
18 license which had been issued by President Carter in
19 March of 1977 -- that's an important date -- which gave
20 permission to Americans to spend American dollars when
21 they went to Cuba.

22 Now, that general license itself was, however,
23 subject to important qualifications on the flow of
24 American travel dollars to Cuba. For instance, American
25 credit card companies were not allowed to make credit

1 card arrangements in Cuba, and that made it harder for
2 Americans to travel on credit.

3 Perhaps more significant, travelers who wanted
4 to go to Cuba under that general license pretty much had
5 to arrange for charter travel, because financial
6 transactions in connection with any scheduled voyages to
7 Cuba were not permitted by that license.

8 Both the '77 license and the '82 modifications
9 were part of the overall Cuban assets control
10 regulations, regulations that continuously since 1963
11 have subjected all economic transactions between
12 Americans and Cuba or Cubans to a comprehensive system
13 of licensure.

14 Section 201(b) of the Cuban assets control
15 regulations has since '63 provided that no economic
16 transaction in which Cuba has any interest may go
17 forward without a license from the Treasury, so that by
18 the terms of regulation 201(b) it has been unlawful
19 since 1963 to spend American dollars in connection with
20 travel to Cuba unless you had a Treasury license.

21 Now, from '63 to '77 these licenses were
22 issued on an individual basis to particular
23 individuals. Then in '77 came the general license,
24 which was in turn modified in 1982.

25 The legal issue before the Court is whether

1 there is a valid legal authority for the 1982
2 modifications. The Cuban assets control regulations
3 were themselves issued under Section 5(b) of the TWEA,
4 Trading With the Enemy Act, which broadly authorizes the
5 President during war or during peacetime declared
6 national emergencies to use rules or regulations or
7 licenses to regulate or prohibit any transaction
8 involving any property in which Cuba -- in which a
9 foreign country or a foreign national has any interest.

10 Now, as explained in our briefs, the question
11 in the case arises because the TWEA was amended by
12 Congress in December of 1977 to apply generally only
13 during wartime. Peacetime economic embargoes in
14 connection with future national emergencies were
15 switched by Congress onto a different statutory track
16 under a new statute, IEEPA.

17 IEEPA gave the President pretty much the same
18 substantive authority as he had under the TWEA. In
19 fact, IEEPA replicates the Section 5(b) TWEA language
20 relevant to this case. But IEEPA lays down new
21 procedures and new predicates for the exercise of those
22 peacetime powers.

23 QUESTION: Mr. Bator, what other countries
24 were there at the time of the grandfather clause
25 enactment which our Government had a broad prohibition

1 on unlicensed property transfers?

2 MR. BATOR: The major standing embargoes in
3 '77 were Cuba, North Korea, Vietnam and Cambodia.

4 QUESTION: How about China?

5 MR. BATOR: There was -- the China situation
6 is complicated. There was a general assets embargo, but
7 it had been pretty much reduced to an assets freeze by
8 the time of the statute through general licenses, so
9 that the China situation was very different from these
10 four comprehensive ones in terms of --

11 QUESTION: But arguably within the same
12 authority --

13 MR. BATOR: The China situation to us is the
14 most difficult or the most borderline one as to what
15 exactly was grandfathered and what China had in mind.
16 The China issue is pretty much moot by the fact that the
17 whole embargo was taken off when the general settlement
18 was made with China somewhat later.

19 QUESTION: But under your theory perhaps could
20 be restored, is that correct?

21 MR. BATOR: It's -- the Government simply has ✓
22 not taken a position, Your Honor, on the question of
23 whether the legislative intent with respect to China is
24 clear enough to warrant reimposition. Of course, it
25 couldn't be reimposed now because the whole assets

1 situation -- there would be no continuity now, since
2 there was a general takeover. So that as of how that
3 issue really is moot. That is, we do not contend that
4 the grandfather clause authorizes the reimposition of
5 embargoes which have been completely eliminated.

6 As Justice O'Connor question indicates, the
7 problem of this case arises because, although Congress
8 switched new national emergency embargoes onto the IEEPA
9 track, future ones, at the same time it did grandfather
10 the existing embargoes.

11 Congress decided that it did not want to force
12 the President to issue new national emergency
13 declarations under IEEPA in order to continue the four
14 existing embargo systems in operation in 1977, and
15 therefore it specified in the grandfather clause that
16 TWEA authorities which were being exercised on July 1,
17 1977, could continue to be exercised as long as the
18 President makes an annual ^{semi?} determination that that is in
19 the national interest. And Presidents Carter and Reagan
20 have each year made that determination.

21 Now, the Court of Appeals in this case held
22 that the President was without authority in 1982 to
23 modify the 1977 general license which governed the flow
24 of hard currency to Cuba, because it reasoned that the
25 '77 general license permitted many travel-related

1 financial transactions; it was issued a few months
2 before the July 1, '77, cutoff, and therefore it
3 concluded that the authority to regulate those
4 transactions was simply not being exercised at all on
5 that date.

6 The Government believes that the most
7 substantial question before the Court is the question of
8 the proper scope of the grandfather clause, and that
9 President Carter's 1977 general license is perhaps a
10 good starting point for the analysis of that issue. As
11 I said, the Court of Appeals concluded that, since the
12 March '77 general license authorized most travel-related
13 expenditures, it follows that the authority to regulate
14 them was not being exercised.

15 But we think that's a complete non sequitur
16 and that it is based on a misunderstanding of the
17 structure of the Cuban assets control program. We think
18 the authority to regulate financial transactions
19 incident to travel was being exercised on that date at
20 four different levels.

21 First, we have regulation 201(b), which
22 prohibited all property transactions unless licensed.
23 This represented an underlying exercise of authority to
24 demand licensure, and that has been continuously
25 asserted since 1963.

1 Second, the general license gave permission to
2 engage in transactions incident to travel, but against
3 the background of regulation 201(b). We think this was
4 an act of regulation, not of deregulation.

5 That is, the Court of Appeals simply assumed
6 that the exercise of an authority to regulate only goes
7 on at such times when the activity is prohibited. But
8 we think that's a false picture. It distorts the nature
9 of a system of licensure.

10 Regulatory authority does not simply vanish
11 when it is exercised to license an activity, and this
12 point is made very plain by the words of the statute.
13 The grandfather clause doesn't authorize the
14 preservation simply of prohibitions on the books. It
15 authorizes the reservation of authority of authorities
16 being exercised under 5(b), and 5(b) specifies that its
17 authorities include the power to regulate, "regulate" by
18 means of "licenses."

19 So to us the message is quite clear. Congress
20 was referring to the continuation of a licensing system,
21 an ongoing licensing system, which of course --

22 QUESTION: Do you think the message was as
23 clear in the minds of Congress as it is to you from
24 looking at the structure of the legislation? Certainly
25 there are expressions in the legislative history that

1 would indicate that members of Congress may have had a
2 different view and that they were really concerned about
3 thinking that the authorities then being exercised were
4 being grandfathered in, but nothing else.

5 MR. BATOR: Well, Justice O'Connor, I think
6 that there are countervailing intonations and quite
7 often rather loose language in the legislative history.
8 Congress was torn by the fact that it wanted to
9 accomplish two ends: one, to narrow the President's
10 authority to use these peacetime embargoes; on the other
11 hand, very clearly to allow the President to continue to
12 operate these existing embargoes.

13 That really was the compromise.

14 QUESTION: Well, I haven't spotted anything in
15 the legislative history that clearly indicates that the
16 members of Congress were as aware of the structure that
17 you propose.

18 MR. BATOR: Well, Your Honor, in our brief we
19 do indicate that there are passages, although they are
20 not as -- we would be happier if they were clearer, but
21 we think there are in fact specific examples in the
22 legislative history where it was indicated that what
23 would be grandfathered was an embargo system, not simply
24 a kind of frozen list of specific prohibitions, because
25 there was no reference, certainly no reference to

1 anything involving the fact that travel was not to be
2 regulated. There is no specific indication of that in
3 the history of the grandfather clause.

4 Congress must have been aware that assets
5 controls programs generally have been ongoing and rather
6 flexible systems, subject to adjustment from time to
7 time. There is another point here, which is that travel
8 in fact was being regulated at that time because the '77
9 license, general license, did include some specific
10 regulations and prohibitions on financial transactions.

11 Now, that fact, of course, must be a major
12 embarrassment to the Respondents' theory of this case.
13 It's ignored in their brief, ignored by the Court of
14 Appeals. It raises a very important question.

15 On July 1, '77, President Carter was in fact
16 prohibiting certain financial transactions incident to
17 personal travel, including all transactions incident to
18 scheduled travel. Now, how, in light of that, can it be
19 said that the authority to regulate travel-related
20 financial expenditures was not being exercised?

21 I remind the Court, too, that the '77 general
22 license, which is so critical to the Court of Appeals'
23 theory of this case, was explicitly by regulation
24 subject to revocation and modification, and in that
25 respect we think this case is governed and controlled by

1 Dames & Moore, because in Dames & Moore the Court
2 explicitly held that a general license subject to
3 revocation is a contingent instrument, subordinate to
4 the President's continuing underlying regulatory
5 authority, and that reasoning seems to us compelling
6 here.

7 I want to go back to Justice O'Connor's
8 question, which I think is really the heart of the
9 case. What could Congress have had in mind when they
10 grandfathered this?

11 We think that it is simply an incoherent
12 account of what Congress could have meant to suppose
13 that they were simply freezing an existing laundry list
14 of specific prohibitions. We don't think this is a
15 sensible or a credible reading. I don't think Congress
16 could have wished to freeze the North Korean and the
17 Vietnamese and the Cuban embargoes so that the President
18 couldn't fill in loopholes or gaps, that he couldn't
19 clarify coverage, that he couldn't add a restriction,
20 for instance, in connection with a negotiation to create
21 an incentive for settlement.

22 The ironic thing actually is that under the
23 Court of Appeals' reading the executive may even be
24 disabled from amending an embargo to implement a
25 negotiated settlement with another country, because that

1 settlement might call for the addition of new 5(b)
2 measures, as indeed happened in the Iranian settlement. ✓

3 Again perhaps for example to look at the
4 general license, it's an interesting example, because
5 when it was first issued in March of '77 it did not
6 include the restriction on financial transactions
7 incident to scheduled travel. That was added in May of
8 '77.

9 Now, suppose it had been added in August
10 rather than in May. Is it conceivable that the
11 President would have been disabled from making it? That
12 was obviously an afterthought or, if you will, the
13 filling in of something that was just overlooked. But
14 that kind of adjustment could not be made. I don't think
15 that it creates a coherent system.

16 Now, the Court of Appeals' answer to this was,
17 use IEEPA. But to use IEPPA requires the President to
18 issue a new national emergency declaration, and a
19 declaration that Cuba or Vietnam represents an unusual
20 or extraordinary threat to the United States. And
21 Justice O'Connor, if there's anything clear from the
22 legislative history, it is that the Congress was
23 persuaded by the Administration in this compromise that
24 it would be undesirable and awkward to force the
25 President to declare such a new emergency and make such

1 a statement in order to maintain these four
2 extraordinary embargoes.

3 The purpose of Congress to allow the President
4 to maintain these four extraordinary embargoes without
5 declaring a new national emergency would simply be
6 frustrated if what we say is that the only thing that
7 can be preserved is a frozen list of restrictions, that
8 is, that a new declaration has to be made every time
9 there is an adjust^{or} or a gap filled or a new restriction
10 imposed in order to create a bargaining chip.

11 MR. BATOR: Mr. Bator, may I ask one question
12 about the change in May of 1977 of the general license.
13 I'm not quite clear as I look at the material at the
14 very end of your brief where you quote the version of
15 the asset control regulation at 10(a) on. You say
16 that's what was in effect from March '77 through May of
17 '82.

18 Does that include the May '77 amendment or
19 does it not?

20 MR. BATOR: Yes, Your Honor, that in fact is a
21 -- we did not discover the fact that there was a -- that
22 is, we used the --

23 QUESTION: You used something post-May of '77
24 to come here?

25 MR. BATOR: No. There was a change made in

1 May of '77 from March of '77.

2 QUESTION: What part -- where do I find that
3 in 10(a) to 12(a)? What is new in there, because I'm
4 just not --

5 MR. BATOR: I think, Your Honor, I'm going to
6 have to --

7 QUESTION: It's a rather critical part of your
8 argument, because you're relying on that as evidence of
9 the ability to make the regulations tougher.

10 MR. BATOR: I'm relying on the fact that,
11 although that happened before the cutoff --

12 QUESTION: Right.

13 MR. BATOR: -- the July cutoff, that it's
14 simply a routine example of, if you will, second
15 thoughts in connection with ongoing administrative
16 regulations.

17 QUESTION: I just want to be sure I have -- I
18 can follow at the appropriate time.

19 MR. BATOR: I would just want to say that I'm
20 not -- I could go back, but I think that subsections
21 (4), (5), and (6), certainly (4) and (5), were added in
22 May rather than in March, Your Honor.

23 QUESTION: But they seem to be authorizations
24 rather than restrictions.

25 MR. BATOR: Well, they're put in an odd way,

1 but what they add up to when you come down to it in the
2 end is the creation of a rule which says that you cannot
3 expend any moneys in connection with scheduled trips.

4 QUESTION: In other words, it's an
5 authorization of all kinds of travel except scheduled
6 trips?

7 MR. BATOR: Most of the material on 11(a) was
8 added in May rather than in March. I don't take that as
9 a fundamental argument, Your Honor. It just gives a
10 clue to how these programs in fact are managed and that
11 there is a constant system of adjustments and repairs.

12 I want to say a word -- I have only a few
13 minutes left -- about the Passport Act of 1978. That's
14 a statute which the Respondents say forbids the use of
15 TWEA authorities or IEEEA authorities. Even if they did
16 exist and even if TWEA authorities were grandfathered,
17 they say that the Passport Act of '78 revoked,
18 restricted, prohibited the President from regulating
19 expenditures incident to personal travel. They say that
20 expenditures to personal travel are simply now a special
21 category which may not be regulated under these
22 comprehensive embargoes.

23 We think this reading would -- in fact, we
24 think it necessarily follows that what Congress on that
25 reading, what Congress was doing in '78 was invalidating

1 the '77 general license with its restrictions. We think
2 that this reading means that President Carter violated
3 the Passport Act when in 1980 he used IEEPA to control
4 expenditures, to prohibit expenditures in connection
5 with travel to Iran.

6 And the point is significant to us because the
7 Carter Administration was instrumental in the Passport
8 Act of '78. Nevertheless, President Carter clearly
9 assumed that the Passport Act did not override this
10 preexisting separate power to regulate travel
11 expenditures in the context of comprehensive assets
12 embargoes.

13 And we think that's the natural assumption.
14 The Passport Act says nothing about economic or
15 financial transactions. It says nothing about anything
16 except the regulation of passports. Nothing in the
17 legislative history indicates that Congress was
18 overriding an independent, long-standing regulatory
19 power to restrict the flow of financial and economic
20 benefits to countries which -- and I want to remind the
21 Court, the few countries with which by hypothesis our
22 relations are in a state of acute difficulty.

23 The Respondents speak as if it were somehow
24 inconceivable that Congress could say that passports
25 must be issued on the one hand and yet that the

1 President could continue to exercise an authority to
2 restrict the flow of American dollars from American
3 travelers abroad.

4 But there's nothing inconceivable about it.
5 It's an absolute commonplace of modern public policy in
6 many countries -- England and France -- that have
7 created fiscal restrictions on the expenditure of travel
8 moneys, without in any way aiming at travel as such or
9 trying to restrict the liberty of the citizens to
10 travel.

11 And we do not credit the Respondents'
12 suggestion that the TWEA on our reading, the
13 grandfathered authority, can be used to negate the
14 Passport Act. We're talking about four grandfathered
15 embargoes. We're talking about the regulation of travel
16 expenditures as a subsidiary element in the context of
17 comprehensive assets programs. We think that's simply a
18 different subject than the subject of the regulation of
19 passports.

20 Unless the Court has further questions, I
21 would like to reserve the remainder of my time for
22 rebuttal.

23 CHIEF JUSTICE BURGER: Very well.

24 Mr. Boudin.

25 ORAL ARGUMENT OF LEONARD P. BOUDIN, ESQ.,

1 ON BEHALF OF RESPONDENTS

2 MR. BOUDIN: Mr. Chief Justice and may it
3 please the Court:

4 I would like to address myself first to
5 Justice O'Connor's question, what did Congress have in
6 mind. I do this before I come to the other aspect of
7 the case, that we are dealing here with a liberty, a
8 liberty recognized by the Court in the cases ranging
9 from Kent to Agee and even Califano, protected by the
10 Fifth Amendment.

11 But I thought Justice O'Connor's question
12 really was directed to the heart of the case here.
13 Congress did not direct itself to the four countries
14 referred to by my good friend the Deputy Solicitor
15 General. Congress was concerned about two things:

16 First, the broad power that the President had
17 exercised over the many years which led Congress to pass
18 the statute under consideration, which is not merely the
19 grandfather clause, but the broad statute which included
20 IEEPA, the Economic Control Act.

21 Congress in doing that was aware of the fact
22 that the proliferated emergencies declared by the
23 President over the years, A, were either outmoded or not
24 justified and, as the administrative spokesman stated to
25 the Congress, particularly the Assistant Treasury

1 Secretary, there was no emergency at the time that
2 Congress was considering IEEPA. And as the
3 administrative spokesman said, without an emergency, Mr.
4 Bergsten, the Assistant Secretary of Treasury said, "We
5 recognize we do not have the powers to carry out the
6 embargoes."

7 Therefore, Congress passed this very broad
8 statute which was upheld in IEEPA, in which Congress set
9 forth a procedure bringing the President into the --
10 bringing the Congress into the consultative operations
11 of this statute, because it was concerned with what had
12 been done in the past.

13 Now, what the Government is doing here is
14 acting as if all we have to do here is consider what I
15 will consider in a moment, the savings clause, and it
16 forgets the dominant purpose of the legislation, which
17 was to restrict the President, and that the savings
18 clause was, as most savings clauses are, a narrow
19 savings clause for the purpose of preserving something.

20 And that really is the question, Justice
21 O'Connor: What were they trying to save?

22 QUESTION: Well, right, and we have to focus
23 on the legislative history --

24 MR. BOUDIN: Precisely.

25 QUESTION: -- for the coverage of the

1 grandfather clause.

2 MR. BOUDIN: Exactly. Now, if one looks at
3 the statements made, as the Court of Appeals for the
4 First Circuit pointed out and the Court of Appeals for
5 the Eleventh Circuit in the Frade⁷case which came to the
6 same conclusion, one sees that they were concerned about
7 the existing uses. And you see there in the opinion of
8 the Court of Appeals and in our brief and in the
9 Fradeopinion a reference to existing controls, existing
10 embargoes.

11 You never see this inchoate conception which
12 is suggested by the Government in its brief and
13 argument.

14 QUESTION: Mr. Boudin, are you referring to
15 the language of the Court of Appeals?

16 MR. BOUDIN: I'm referring specifically to the
17 language used by the Congressmen --

18 QUESTION: By the Congress.

19 MR. BOUDIN: -- discussing the problem.

20 And Your Honors will see, for example at page
21 39 of our brief, when Congressman Bingham observed: "If
22 the President has not used up to now some authority he
23 has under 5(b), I don't know why it should be necessary
24 to give him authority to expand what has already been
25 done."

1 And Your Honors will see the references made
2 by Congressmen and by administrative spokesmen which
3 appear at the bottom of page 39 of our brief in footnote
4 70, when they talk about powers currently operative, not
5 powers inchoate, not powers possessed, powers currently
6 operative; and then when they refer to current
7 employment of controls.

8 This is everything that was said by the
9 various people here, and you do not find any support for
10 the suggestion made by the Government that there is some
11 ambiguity in the legislative history.

12 Now, as a matter of fact, as Your Honors will
13 see from our brief, a proposal was made to give the
14 power to the Government, to the executive, under the
15 savings clause, precisely the one which is suggested by
16 my friend here -- an old friend, I may say -- the power
17 to add new regulations, new controls. And that
18 legislation would have added another paragraph to the
19 existing statute, which is that the President can
20 exercise not only the authorities being exercised, but
21 any other authority conferred upon the President by that
22 section may be exercised to deal with the same set of
23 circumstances.

24 And then came the very important colloquy
25 which came at the end, not in the early stages of the

1 legislation, as the Government suggests, between the
2 leading representative of the Administration, Mr.
3 Bergsten, Assistant Secretary of the Treasury, when he
4 was asked:

5 "First of all, Mr. Bergsten, would it be your
6 understanding that Section 101, the grandfather clause,
7 would strictly limit and restrict the grandfathering of
8 powers currently being exercised under 5(b) to those
9 specific uses of the authorities granted in 5(b) being
10 employed" -- it is hard to find -- "as of June 1, '77,
11 now July 1?"

12 Mr. Bergsten said: "Yes, sir."

13 And then the question was: "And it would
14 preclude the expansion by the President of the
15 authorities that might be included in 5(b) but are not
16 being employed as of June 1, 1977?" And he says: "That
17 is right."

18 Now, in fact, on July 1, 1977, in reality,
19 forgetting about whether you could travel on this plane
20 or that plane, which is simply a question of mechanics,
21 in reality there was no substantive bar to travel to
22 Cuba. I will take up in a moment this whole conception
23 of general licenses. But in fact the realities of the
24 situation were there was no embargo on travel to Cuba.

25 And the Government's petition at page 5, as I

1 recall it, original petition for certiorari, stated what
2 is our view, that the purpose of the savings clause was
3 "to continue an existing embargo." And the question is,
4 was there an embargo on travel to Cuba? There were
5 difficulties, but were those an embargo on travel to
6 Cuba, and the answer is no.

7 And I would consider this a very telling
8 argument even if it were not dealing with liberty.

9 QUESTION: Well, Mr. Boudin, but they take the
10 position that there was in effect the general
11 prohibition on financial transactions, regulation
12 201(b).

13 MR. BOUDIN: Correct. May I address that?

14 QUESTION: Please.

15 MR. BOUDIN: The Government actually has five
16 different theories of what the exercise of authorities
17 means, but let me address myself, which we've talked
18 about in our brief, to the general license theory. The
19 general license is merely a convenient device for
20 withdrawing controls previously in existence, and Your
21 Honors will see that when you look at the China
22 situation.

23 There is a general license exempting China for
24 the most part from the controls. Under the Government
25 theory, whatever the executive is now doing, that

1 general license is a control.

2 A general license is merely a technique. When
3 you have a broad prohibition, then you decide not to
4 carry out that with respect to particular areas, you
5 have a general license. And the best illustration would
6 be if I were to take an alternative way to handle the
7 situation. If in Section 201, which forbids financial
8 transactions -- and I'm assuming for the purpose of this
9 discussion that a man is engaging in a financial
10 transaction with respect to property, although I have
11 some hesitation in accepting that.

12 The statute, Section 201, could read as
13 follows: All transactions with respect to property in
14 which Cuba has an interest are prohibited, except those
15 relating to travel. Now, no one would suggest if the
16 statute, if the regulation had been thus written, that
17 there was an exercise of control over travel.

18 But because it is in the form of a general
19 license, the Government suggests that somehow or other
20 they are giving permission to exercise this liberty of
21 travel. But what they're really doing in the general
22 license technique is withdrawing it, withdrawing the
23 prohibition of travel from the transactional area.

24 This of course brings to mind Justice
25 Rehnquist's opinion in Dames against Moore. Dames

1 against Moore -- Dames & Moore, excuse me, against Fegan
2 was a case in which there was a general license issued
3 and the Government's contention, upheld by the Court --
4 and I may say by me supporting the Government in that
5 case -- was that where the President had attached
6 assets, or rather frozen assets, and then released them
7 and allowed them to be subject to attachments, the
8 President by virtue of a later provision was able to --
9 was able to recover the assets and use them the way he
10 did.

11 But in Dames against Moore there was no
12 grandfather clause. We are dealing here with the
13 meaning of the grandfather clause, and the grandfather
14 clause was intended, as the two courts that I referred
15 to indicated, was intended to allow only those
16 prohibitions that were in effect.

17 Now, why do I say that it was intended to do
18 that, aside from the language, which is uniform, as Your
19 Honors will see. It is precisely because the
20 Congressmen who were in charge of this and the
21 administrative spokesmen recognized that they were
22 attempting to save something, to save the embargoes in
23 existence, and most important, to save the assets which
24 were under embargo, to save those from being given away,
25 because it was recognized there would be dealings with

1 Cuba and with other countries eventually.

2 But more than that it is not, because the
3 continuation -- and this is the key problem with the
4 Government's position -- the continuation under the
5 savings clause of those controls, those embargoes, was
6 not predicated upon an emergency, it was predicated upon
7 a non-emergency, and it is because of that that we have
8 to give a limited interpretation to those words in the
9 savings clause.

10 Now, when we consider the Government's
11 argument of flexibility, an argument which this Court of
12 course upheld in Dames & Moore, that was flexibility
13 under IEEPA, the Economic Control Act, subject to the
14 control which Congress had and exercised in that real
15 emergency of consultation with the President.

16 Flexibility is of course necessary in foreign
17 relations, and that's why IEEPA was passed. Flexibility
18 is not necessary in connection with the savings clause,
19 because the savings clause is based upon a narrow area
20 which cannot be justified on an emergency basis. And
21 Mr. Bergsten recognized and Mr. Katz, from another
22 Department of the Government, in testifying recognized
23 that there might not be constitutional validity even to
24 those things being grandfathered, because there was no
25 emergency.

1 So that whether we take the conception of the
2 statute as a whole, it comes down to the question of
3 what was prohibited. And again, just to remember what
4 we said about general licenses, lest the conceptual
5 thing overlook the reality here, in the China situation,
6 which the Government says it's troubled about answering,
7 in the China situation where there's a general license
8 permitting everything, we could restore that, if we
9 wanted to, under the grandfather clause.

10 Now, I do want to address --

11 QUESTION: As to China that's not right, is
12 it? Don't you have -- doesn't the President have to
13 make an annual declaration of a continuing, to keep the
14 authority alive?

15 MR. BOUDIN: A continuing national interest,
16 rather than emergency.

17 QUESTION: But he did not do that with respect
18 to China, so that could not be revived.

19 MR. BOUDIN: I don't -- yes, Your Honor is
20 quite right. I don't think he did it. I assume he
21 didn't do it with respect to China.

22 QUESTION: Well, they say in the briefs he
23 didn't do it.

24 MR. BOUDIN: I'll accept that.

25 Now, I want to remind the Court what the

1 Government has done here. The Government has, in
2 contrast to the rather clear-cut position taken by the
3 Court of Appeals for the First Circuit and the Eleventh
4 independently -- Your Honors will read the reasoning of
5 the Court of Appeals' opinion, I trust, in the Eleventh
6 Circuit -- the Government gives four or five different
7 possible interpretations of the grandfather clause,
8 itself making each one suspect, although not
9 conclusively so, of course.

10 QUESTION: Mr. Boudin.

11 MR. BOUDIN: Yes.

12 QUESTION: Your brief struck me as somewhat
13 different in theory than the Court of Appeals' opinion.
14 Was I wrong in thinking that?

15 MR. BOUDIN: I do know that the Government
16 made that point. I think we and the courts below, both
17 courts, Courts of Appeals, Eleventh and the First, are
18 of the opinion that if there is a substantive control
19 being exercised by regulation -- that may be the thing
20 that was confusing -- a substantive control being
21 exercised over travel or over anything, that control
22 could be continued by the grandfather clause. We do not
23 differ with the Court of Appeals.

24 Now, remember what the Government has said, if
25 Your Honors please: We believe that one possible

1 reading of the grandfather clause is -- rather an odd
2 way to find a clear-cut statute involving a basic
3 liberty like the right to travel.

4 The first argument is that if any 5(b)
5 authority is exercised, the Government preserves all
6 5(b) authorities. The second argument is that under any
7 exercise of a 5(b) authority, referring to the statute
8 now, with respect to property, then everything can be
9 exercised.

10 We pointed out in our answering brief that
11 there was a problem raised with the Government's two
12 views, and the main problem was that with respect to
13 many countries, not merely the four that the Government
14 now targets, although there was no indication they were
15 to be targeted, with respect to many countries there
16 were, A, controls under 5(b) generally and controls over
17 transactions.

18 So the Government came back with its general
19 license theory which, as I have indicated, is really a
20 language problem, a semantic problem, rather than
21 dealing with the reality. And with respect to that, I
22 trust Your Honors will look at the House Committee
23 report on this bill, Report No. 95-459, which we cite in
24 our brief, but I regret to say somewhat elliptically,
25 because that House report, in discussing the Cuban

1 situation after it discusses a number of other
2 countries, at page 6 says:

3 "Under the Cuban assets control regulations,
4 all transactions between the United States and Cuba are
5 similarly prohibited" -- now, there's a comma after that
6 -- "with certain exceptions." In other words, they are
7 prohibiting certain things, but the exceptions at that
8 time were travel. Travel, by the way, is separately
9 mentioned by Professor Lowenfeld, who is a leading
10 spokesman, scholarly spokesman at least.

11 Secondly, with respect to the general license,
12 again addressing myself to questions that were put by
13 two of Your Honors, the same page 6 explains my position
14 and the Court of Appeals' position on what it means to
15 have a general license, not that it means that you're
16 permitting, that you're regulating something; it means
17 you're withdrawing it from control.

18 And here are the words used on page 6: "On
19 May 8, '71, the Department licensed most" -- "most" --
20 "subsequent transactions with China, while continuing
21 the blocking of China assets in U.S. hands before that
22 date. This had the effect of lifting" -- I emphasize
23 the word "lifting" -- the United States trade embargo of
24 China."

25 Now, if you have lifted an embargo -- I think

1 we and the Government, at least theoretically, are in
2 agreement. If you have lifted the embargo, then there
3 is no embargo. And there was no embargo on July 1,
4 1977, after they had lifted the embargo.

5 I have not addressed myself, because I wanted
6 to get to the heart of the problem raised by two of Your
7 Honors in asking questions of Mr. Bator, of other
8 considerations in connection with the statute, and that
9 is what you would have in terms of general tenets of
10 construction rather simple.

11 A savings clause is normally a narrow
12 exception, because you have a broad remedial purpose.
13 Here we have a statute which involves liberty of
14 movement, and here you have a statute with very serious
15 criminal sanctions, all of which have been grounds
16 historically for considering savings clauses and all
17 statutes in a narrow way.

18 But I had omitted one thing, Your Honors.
19 After I finished with the general license view, I did --
20 the Government did come in in its answering brief, its
21 reply brief, with a new theory, and that was the one
22 that Mr. Bator quite properly articulated, since it was
23 the newest theory of the Government, namely four
24 countries are being targeted.

25 Four countries. It's no longer the original

1 theory of 5 being exercised and therefore you could
2 exercise new authorities; no longer the property
3 conception; it's no longer even the licensing thing.
4 The important thing is, Congress had in mind -- I can't
5 call it a bill of attainder, having heard yesterday's
6 argument. Congress had in mind four countries.

7 Well, this is an odd situation. So you have a
8 flexibility argument that they would recognize, that
9 they insist upon with respect to four countries, and you
10 have another standard, namely non-flexibility with
11 respect to all other countries of the world.

12 Your Honors will read or have read the
13 legislative history. You'll find no theory under which
14 Congress drew a line between "comprehensive embargoes
15 and embargoes generally."

16 Now, as far as IEEPA is concerned, one of
17 course has to ask, not under my theory that perhaps
18 IEEPA couldn't control, but under the Court of Appeals'
19 implied view that IEEPA applies, why the Government
20 doesn't deal, doesn't go under IEEPA. They didn't want,
21 the Administration spokesmen and the Congressmen didn't
22 want, for the continuation of the old controls in old
23 situations to have to have an application under IEEPA.

24 But IEEPA was passed for a purpose. It was
25 passed after at least seven years of study by the

1 Congress. It was passed because that's what Congress
2 wanted when we had a crisis situation.

3 And of course, the Government claims that the
4 current situation is a quasi-emergency or emergency. It
5 is a new situation which they say has arisen since 1977,
6 to when a new Administration took effect. Well, if this
7 is a new situation, if this is an emergency, then the
8 Government is supposed to go to the Congress, the
9 President is supposed to go to Congress and consult with
10 the Congress on the IEEPA and put into effect these
11 regulations.

12 And on their theory that this is a serious
13 problem, this is exactly the thing that Congress had in
14 mind. Congress didn't intend that when new crises arose
15 that suddenly Congress -- the President could disregard
16 the IEEPA procedures. Seven years of study went into
17 the drafting of the IEEPA. There was a reason for it.
18 And they have not followed that procedure.

19 This will bring me very briefly to three other
20 points that have been made in our brief and that
21 obviously the Court of Appeals did not decide any of
22 those points, although I think it considered some of
23 them in determining the general interpretation, the
24 narrow interpretation of the savings clause.

25 The first relates to the 1978 statute. The

1 1978 statute was passed because the Congress was not
2 satisfied, as a matter of fact the Administration wasn't
3 satisfied, to rest merely upon President Carter's
4 removal of bars to travel to Cuba. And the reports of
5 the committees in charge said, we don't want this to
6 depend upon a particular Administration's policies or
7 discretion. Great prescience, as we see.

8 And they were concerned about liberty of
9 movement, and they said so, and the basic Helsinki
10 general declarations, which are not statutory of course,
11 relating to freedom of movement.

12 Now, the Government says it talks about the
13 Secretary of State and it talks about passports. Why do
14 we think this has anything to do with this case? Well,
15 the reason we do is because the Congress was concerned
16 about protecting liberty of movement. If it directed
17 its attention to the Secretary of State, it was because
18 that was the normal way in which travel restrictions
19 were imposed.

20 And as we argued in Laub, and as we argued in
21 Zemel, as we argued in Kent, the whole history of travel
22 control had been a history in which the Secretary of
23 State was doing his job, controlling it, sometimes we
24 said wrongly, sometimes the Court said rightly; and
25 Treasury, if it did anything, was ancillary.

1 QUESTION: Are you saying that none of the
2 restrictions ever issued under the TWEA from the time of
3 its passage had any effect on the control of travel?

4 MR. BOUDIN: Your Honor will note that the
5 restrictions were never restrictions by regulation
6 directed specifically to travel, and I have suggested,
7 yes, I have thought that TWEA was never passed to
8 control travel as such.

9 I do recognize that every time the Secretary
10 of State gave a license -- sorry, amended a passport --
11 by removing restrictions, the Treasury Department would
12 automatically -- and I say automatically -- give a
13 license to spend money.

14 But I have found nothing in the legislative
15 history of TWEA that suggests that that statute really
16 authorized the practice even of the Treasury in
17 connection with licensing.

18 QUESTION: Well, it authorizes the restriction
19 and control of property in the hands described, and if
20 the regulation affects the property the fact it has an
21 incidental effect on travel doesn't make it illegal
22 under the statute.

23 MR. BOUDIN: Of course. I haven't suggested
24 that. I have suggested that historically travel was
25 never contemplated by the Congress, and that each time

1 legislation was proposed to control travel nobody ever
2 mentioned the Treasury Department, nobody ever mentioned
3 TWEA. And this Court in discussing either in Haig or in
4 Laub, in discussing travel controls, recognized that the
5 first travel control statute was a 1918 statute, not the
6 1970 TWEA.

7 I must say to Your Honor, as I say, we've
8 studied this problem for a long time. It is a murky
9 area. I cannot -- it's probably the reason why the
10 Court of Appeals did not think it advisable to found its
11 decision upon that.

12 Let me address finally the constitutional
13 issue. I don't want to overlook it. We raised it, that
14 the Court consider the fact that we are dealing with a
15 liberty to be significant in interpreting the
16 grandfather clause, and that is this.

17 I would agree -- I must agree, having read
18 Agee, having looked at a few other cases of this Court
19 in the travel area and elsewhere -- that there are
20 emergency circumstances under which travel could be
21 controlled, forbidden, but not this one. The Court had
22 a very serious nuclear confrontation problem which it
23 addressed, with the consequent dangers to American
24 citizens traveling to Cuba, when I argued Zemel against
25 Rusk, and the Court held there, not that the President

1 could prevent the travel, but it said that the President
2 could not be compelled through the Secretary of State to
3 validate a passport for travel to Cuba.

4 Then came Haig against Agee, the second
5 clear-cut bar on travel, but of an individual. And the
6 Court is aware of the stipulations made by Congress and
7 of the findings made in the Chief Justice's opinion with
8 respect to the great danger to foreign relations, to
9 national security, in the possible assassination of CIA
10 agents.

11 Given those facts, I may say, I don't -- quite
12 aside from the question of statutory authorization, I
13 don't see how the constitutional power of the Government
14 could be challenged to meet situations such as Haig and
15 Agee.

16 But what do we have here in reality? We have
17 a hypothetical that if somebody goes to Cuba with his
18 dollars, including these Americans who have never
19 violated any laws at all and who are perfectly good
20 people, if somebody goes to Cuba with his dollars, that
21 money will someday help build a Cuban tourist industry.
22 I'm not an authority on how to build an industry,
23 including a tourist industry, but I suspect it's a long
24 way off between the dollars of American citizens today
25 and building it.

1 And that industry will make money, and with
2 that money they will eventually be able to subvert Latin
3 America against American interests. Now, I suggest this
4 series of hypotheticals is far too tenuous, particularly
5 in the light of the amount of money which, as we
6 describe in our brief, we are allowing to go to Cuba by
7 the travel that is permitted.

8 Thank you, Your Honor.

9 CHIEF JUSTICE BURGER: Do you have anything
10 further, Mr. Bator?

11 REBUTTAL ARGUMENT OF PAUL M. BATOR, ESQ.,

12 ON BEHALF OF PETITIONERS

13 MR. BATOR: I have a few points I'd like to
14 make. Thank you, Mr. Chief Justice.

15 I think that Mr. Boudin and the Government are
16 in happy agreement on what the central issues are. The
17 question is what Congress meant by the grandfather
18 clause. That in turn depends crucially on what the
19 situation was in '77 with respect to the authorities
20 being exercised under the TWEA.

21 Mr. Boudin takes this whole bundle of complex
22 authorities, which include the general regulation
23 201(b), the restricted general license, the fact that
24 that restricted license is subject to revocation and
25 modification, and he just says that all adds up to

1 totgal deregulation, and he says a general license in
2 general is nothing but an administrative technique for
3 deregulation.

4 But the very first exercise of power to
5 regulate travel-related transactions under the TWEA in
6 1940 by President Roosevelt, in connection with
7 remittances abroad, to travelers abroad, was by way of a
8 general license and asserted the authority to restrict
9 expenditures over \$250 a month.

10 If this Court will read its own opinion in
11 Dames & Moore, it will see that there was a general
12 license in that case and it was not simply an
13 administrative technique which receded and said, we are
14 no longer exercising the power to regulate. It is
15 simply a contingent and subordinate instrument.

16 Now, Mr. Boudin read a sentence from the House
17 report which said that in connection with China the
18 structure of the situation did look as though the
19 authority to regulate had been reduced to a very, very
20 narrow point, and that is why we have this. We are
21 troubled by the question as to what the grandfather
22 clause would have implied for China if that question
23 were still a live question today.

24 But the very question -- the very sentence
25 that Mr. Boudin read you is followed by the following

1 sentence. After "this had the effect of lifting the
2 U.S. trade embargo of China," it then goes on and says:
3 "However, the embargoes of North Korea, Vietnam,
4 Cambodia, and Cuba continue. Second," the report
5 continues, "under the Cuban assets control regulations
6 all transactions between the United States and Cuba are
7 similarly prohibited, with certain exceptions."

8 That is, the structure that is suggested here
9 is quite different. It's suggested that the general
10 regulation continues, but subject to exceptions. It's
11 not a statement about deregulation.

12 Mr. Boudin objects to the fact that we think
13 the fair reading of the legislative history targets
14 these four countries. The very last thing Mr. Bingham
15 said on the floor of the House was that "This
16 legislation" -- that is, that he said about the
17 grandfather clause was, he says on the floor of the
18 House:

19 "This legislation specifically grandfathers
20 the embargoes against Vietnam, Cambodia, Laos and Cuba,
21 and other existing embargoes, so that they are not
22 affected in any way by this legislation." The one he
23 dropped from there was North Korea.

24 So it is targeted, and he says they are not
25 affected in any way.

1 Now, one further quick point, Mr. Chief
2 Justice. The Congress I think was persuaded in 1977
3 that these four situations were extraordinary and that
4 special powers needed to be maintained to allow the
5 President to conduct a credible and serious foreign
6 policy with respect to these four extraordinary
7 situations.

8 It's the statute that says that the President
9 does not need to make a new emergency declaration in
10 connection with these four embargoes. That doesn't mean
11 that our relations with these countries have not and
12 cannot from time to time reach very acute and difficult
13 circumstances.

14 The fact that the President has not formally
15 declared a new state of emergency with Cuba has no
16 probative effect on what is the state of our relations
17 with Cuba as long as it is true, as the President was
18 persuaded is true, that he has authority to continue to
19 administer these embargo systems because of the
20 extraordinary situation that persists with these four
21 countries.

22 QUESTION: Mr. Bator, may I ask just one
23 question I'm a little puzzled about. Apart from these
24 four countries, just in other parts of the world, as I
25 understand it there are certain kinds of property

1 transactions that are prohibited by the President. And
2 are those prohibitions also pursuant to the TWEA, and if
3 so to what extent do they survive and is there any
4 flexibility under your theory for changes in those?

5 MR. BATOR: Your Honor, there are very special
6 and specific prohibitions, there were in '77 under TWEA,
7 with respect to the export of what I believe are
8 described as strategic items to certain countries. And
9 we assume that those are continued in place under TWEA
10 and they may be maintained without a new IEEPA.

11 QUESTION: But you would not --

12 MR. BATOR: We do not think, we do not think
13 it would be a fair reading of this legislation to use
14 those as a springboard for a comprehensive assets
15 program. We have never maintained that.

16 Unless there are further questions --

17 CHIEF JUSTICE BURGER: Very well.

18 Thank you, gentlemen. The case is submitted.

19 (Whereupon, at 11:06 a.m., oral argument in
20 the above-entitled case was submitted.)

21 * * *

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#83-436- DONALD REGAN, SECRETARY OF THE TREASURY, ET AL,, Petitioners
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