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ARE THE U.S. TREASURY'S ASSETS CONTROL REGULATIONS A FAIR AND EFFECTIVE TOOL OF U.S. FOREIGN POLICY? THE CASE OF CUBA

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Are the U.S. Treasury's Assets Control Regulations a Fair and Effective Tool of U.S. Foreign Policy? The Case of Cuba

The panel convened at 8:45 a.m., April 26, 1985, Michael P. Malloy** presiding.

Remarks by the Chairman, Michael P. Malloy

We shall begin with a brief introduction to the background of the U.S. Treasury controls applied to Cuba.

With the emergence of the Cuban Government of Fidel Castro as a Communist regime, and the embarrassing failure of the Bay of Pigs incursion, the U.S. Government imposed import and export controls on Cuban trade in February 1962. These controls were authorized under the Foreign Assistance Act of 1961.

These limited controls were replaced by the Cuban Assets Control Regulations, promulgated by the Treasury Department in July 1963. These regulations imposed a more complete embargo and "blocked" all assets of the Cuban Government, its owned and controlled entities and all nationals thereof. These blocking controls were issued under the authority of section 5(b) of the Trading with the Enemy Act (TWEA) and have remained in effect in essentially the same terms since then.

The statutory authority for this program of economic sanctions is one of the concerns of the panel. To invoke TWEA at that time, it was necessary that there be either a state of war or a Presidentially declared national emergency in effect. The technical triggering event for the Cuban regulations was President Truman's 1950 proclamation in connection with the Korean conflict. The proclamation had declared an emergency with respect to the "threat of world communism." In 1963 there was no formal Presidential determination that a state of national emergency existed specifically with respect to Cuba, and the program continued with little scrutiny of this fact until the mid-1970s.

The Senate finally began to examine the situation in January 1973, when it created a special committee to consider termination of the state of emergency. The first fruit of this period of congressional study was the National Emergencies Act of 1976. The act

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imposed certain procedural restraints on the President's conduct of future emergencies. These restraints have so far proven to be utterly innocuous in practice. In any event, TWEA programs like the Cuban regulations were exempted from the act, and the 1950 emergency continued for them.

The act did require that a study of TWEA be undertaken with a view to revising it. The result was Public Law No. 95-223, which had two major effects. Title I of the law removed national emergency authority from TWEA entirely. The authority of section 5(b) of TWEA is now available to the President only in time of war. However, existing economic sanctions programs like the the Cuban regulations were grandfathered by section 101(b) for one year, with further extensions by the President permissible for successive one-year periods. These extensions have been consistently renewed since 1978.

The second major effect was enactment of the International Emergency Economic Powers Act (IEEPA) in Title II. Any future declaration of a national emergency in response to a foreign threat is subject to the procedural requirements and substantive provisions of Title II. This new emergency authority is, in most respects, identical to TWEA. Indeed, the new authority has made little difference to the way in which emergency economic sanctions programs are conducted by the President, although procedural requirements have apparently generated more paperwork.

It was this new statutory authority which the President invoked in blocking Iranian assets and in imposing trade sanctions during the 1979–81 hostage crisis. The new authority was also invoked in declaring a national emergency with respect to the Soviet invasion and de facto occupation of Afghanistan and, more recently, in extending export administration controls when the Export Administration Act expired.

Of particular concern to the panel, however, is the language of the grandfathering provision of Title I. Notwithstanding removal of "national emergency" authority from section 5(b) of TWEA, the grandfather provision states: "[T[he authorities conferred upon the President by section 5(b) . . . 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. . . ."

The peculiar phrasing of this provision raises analytical problems. What does it mean by "authorities"? What does it mean for an "authority" to be "exercised with respect to a country?" Programs like the Cuban regulations were continued in force by this language, but were they continued in some frozen state as they existed on the grandfathered date? Could they be amended thereafter? Could the scope and impact of the blocking of Cuba be expanded or contracted as circumstances required? These are some of the questions which were behind the Supreme Court's decision in *Regan v. Wald*.

Among other things, the Cuban regulations prohibit financial transactions with respect to travel to, from and within Cuba, unless the transactions are licensed by the Treasury Department. By May 1977 all transactions ordinarily incident to such travel had been authorized by general license. No specific application for a license was required. Even travel service activities were licensed. Then, in December 1977, the grandfathering provision of Public Law No. 95-223 was enacted. Pursuant to that provision, the Cuban regulations were extended by the President in 1978 and each year thereafter.

With the beginning of the "Freedom Flotilla" in 1980, when thousands of Cuban refugees began flooding into Florida, the Treasury Department issued an interpretive provision which sought to define further and limit the availability of the 1977 general license for travel. In 1982, in accordance with the administration's policies toward Cuba, Treasury amended the general license, significantly narrowing the scope of permissible financial transactions in connection with travel to Cuba.

Could such marked changes in the "exercise" of "authorities" be covered by the grandfathering provision? One question is, how far does this decision reach to legitimate other changes and expansions in Treasury's blocking programs? For example, after enactment of Public Law 95–223, Treasury had ordered all blocked assets (including Cuban assets blocked under the Cuban regulations) transferred by holders thereof into interest bearing accounts, original deposit contracts notwithstanding. Is such an unprecedented use of Treasury's blocking powers within the rationale of *Regan*? Indeed, in light of *Regan*, are there any effective limitations on the President's authority under TWEA to expand or contract the scope of blocking programs such as the Cuban regulations?

REMARKS BY ERIC M. LIEBERMAN*

The issue before the Court in *Regan* was the legality of Treasury Department regulations imposed pursuant to the Cuban regulations forbidding, with certain exceptions, expenditure of money by U.S. citizens incident to travel to Cuba. The effect of the regulations was intended to and did prohibit travel to Cuba by most Americans for personal, informational or business reasons. The regulations were issued under the authority of TWEA and were characterized as amendments to the existing Cuban regulations, rather than as the imposition of a new set of restrictions under the IEEPA. By so characterizing them, Treasury attempted to avoid invocation of IEEPA procedures. Use of IEEPA powers would have required a declaration of a new state of emergency with respect to Cuba and would have imposed additional procedural and other limitations upon the Executive's action. The Department justified its action under TWEA by virtue of the grandfather clause.

In *Regan*, a challenge was brought to the Department's imposition of the travel restrictions by individuals who wished to travel to Cuba. The challenge was based on several grounds. First, plaintiffs argued that the President was required to act under IEEPA, not under the grandfather clause of TWEA. Therefore, the regulations were null and void. Second, plaintiffs argued that amendments to the Passport Act of 1978, which forbade the Executive from prohibiting travel to particular countries except in time of war, danger to the public health, serious threat of insurrection or armed conflict, prohibited the Department's actions. Plaintiffs argued that it was contrary to the intent of Congress to permit the President to achieve indirectly, through blocking programs, what he was explicitly prohibited by Congress from achieving directly. Third, plaintiffs argued that the Executive's acts violated their fundamental constitutional right to travel as recognized in *Kent v. Dulles* without a showing that the regulations in issue substantially furthered a compelling governmental interest in the least restrictive means or otherwise.

The government argued that the grandfather clause of IEEPA, which kept in effect all uses of emergency authorities then in effect under TWEA, justified its failure to use IEEPA procedures in promulgating the new regulations. The government's position was that existence of any asset control regulations with respect to a country under TWEA, at the time of the enactment of IEEPA, was sufficient to justify imposition of any new prohibitions, restrictions or other actions under the grandfather clause. These prohibitions or restrictions would then last until all regulations pertaining to

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that country were lifted. Second, the government argued that the Passport Act Amendments of 1978 had nothing to do with assets control regulations and did not restrict the Executive's power under TWEA or IEEPA. Finally, the government argued that imposition of travel restrictions was constitutional because it was undertaken to further the Executive's foreign affairs power. The government relied upon *Zemel v. Rusk*, which upheld direct restrictions against the use of passports to travel to Cuba in 1963 immediately following the missile crisis.

Both the Court of Appeals for the First Circuit and the Supreme Court devoted most of their attention to the grandfather clause issue. The court of appeals found unmistakable evidence in IEEPA's legislative history that Congress intended to grandfather only those specific uses of blocking authority in existence when the statute was enacted. Relying on colloquies in the legislative history as well as specific statements by sponsors of the legislation, the court unanimously enjoined enforcement of the regulations.

In a 5–4 decision, the Supreme Court reversed. In an opinion by Justice Rehnquist, the Court acknowledged the statement in the legislative history by the sponsors of the legislation relied on by the court of appeals but held that those statements were not conclusive, in light of what the Court found to be the clear language of the grandfather clause. (I would add that I would have thought it unlikely that any five lawyers would agree that the language of the clause was unambiguous, let alone that all five would coincidentally be sitting on the Court at the same time). The Court then held that neither the Passport Act of 1978 nor the constitutional right to travel prohibited the Department from imposing the regulations.

Justice Blackmun wrote a powerful dissent, addressed solely to the grandfather clause argument, in which Justices Brennan, Marshall and Powell joined. In my view, the dissent effectively demolishes the argument made by the majority.

On a narrow level, it would appear clear that, as a result of *Regan*, the Executive is now free to impose almost any new prohibitions or controls with respect to a country or its designated nationals subject to the grandfather clause. The test seems to be whether any controls were in existence with respect to that country when IEEPA was enacted. If so, until all controls with respect to that country are lifted, the Executive may continue to act under the old emergency declared under TWEA.

To answer the questions posed by Professor Malloy, then, it seems that there are no restrictions left under the grandfather clause, except to the extent that Treasury might try to impose noneconomic prohibitions as occurred in *American Airways Charters, Inc. v. Regan*. There Treasury not only attempted to prohibit the transfer of funds to a designated national for retention of counsel, but also tried to thwart the attorney-client relationship per se. The Court of Appeals for the District of Columbia Circuit refused to find Treasury's actions within the assets control regulations. Thus, there was no question of the applicability of the grandfather clause, and the case is distinguishable.

The significance of this is somewhat meaningful, but it must be conceded to be of limited importance. Even if *Regan* had been decided the other way, the Executive would have been free to declare a new emergency under IEEPA and to impose similar controls. The difference is that, under IEEPA, there are more political and institutional limitations upon the President's ability to act. As a result, he might not act, or Congress might veto his action (a scenario which I concede would be unlikely). In enacting IEEPA, Congress clearly determined that it was in the national interest to impose these kinds of national and political controls because of the drastic effect upon liberty and property rights that the imposition of controls could create. Thus, *Regan* undermines that congressional intent, at least with respect to countries affected by the TWEA grandfather clause.

The more important and disturbing aspect of *Regan* is its analysis—or rather, lack of analysis—of the constitutional issues. Under *Regan*, if it is to be taken seriously, virtually all action of the executive branch restricting fundamental liberties of U.S. citizens may be justified under TWEA or IEEPA by the ritualistic invocation of the President's authority over foreign affairs. This is particularly disturbing because of the obvious impact which Treasury blocking actions can have on fundamental liberties of U.S. citizens. Thus, on the rationale of preventing flow of currency to particular countries or their designated nationals, the Department has not only sought to deny Americans the right to travel, but also, inter alia, the right to subscribe to newspapers or magazines, the right to retain and pay for an attorney, etc. The Court's treatment of the constitutional issues can almost be described as cavalier.

The Court purported to rely upon *Zemel*. *Zemel* upheld passport restrictions (not travel restrictions per se) upon travel to Cuba only after making extensive findings of the compelling need of the government at that time to restrict travel to that country. The Court referred to reports of arrest and imprisonment of U.S. citizens in Cuba and the need to avoid dangerous international incidents which might result in such acts. It also acknowledged the precarious state of international relations with respect to Cuba at that time because of the missile crisis.

Contrasting *Zemel* with *Regan*, there was no claim made of potential harm to U.S. citizens who might travel to Cuba. No major international crisis with Cuba existed or threatened. The interested asserted by the government, *i.e.* to restrict flow of currency to Cuba through tourist travel, was de minimis as a factual matter as compared to the flow of currency to Cuba through other means which the Executive permitted. The most dramatic example of this was that, at the same time tourist travel to Cuba was prohibited, Treasury continued to permit travel to Cuba by Cuban nationals and by Cuban-Americans with relatives in Cuba. These two groups dwarfed in number and in dollars the small group of U.S. citizens who conceivably were likely to travel to Cuba as tourists or visitors. It is submitted that these facts belie the government's claim, accepted in a pro forma way by the Court, that the purpose of the regulation was to deprive Cuba of critical foreign exchange. Rather, its purpose, consistent with a host of similar actions, was to limit access Americans had to ideas and social intercourse with people of world views, ideologies and concepts different from those of mainstream America.

The Cuban travel prohibitions must be viewed in light of the ongoing attempt to prevent entry into the United States of aliens who would come to speak or participate in panel discussions or forums. Examples are Mrs. Salvatore Allende and the Canadian who wrote a book on environmental damage and was recently prohibited from entering the United States. The prohibition must also be viewed in light of attempts to designate U.S. citizens as foreign agents based upon their political associations. It must be viewed in light of attempts to label award-winning foreign films on subjects such as acid rain as "propaganda."

It might be objected that these are "political questions" which cannot be rightly resolved by the courts. While this may be true with respect to determination of the real motive and effect of the regulations, it is not true with respect to a court's obligation to determine whether the regulations substantially further a compelling governmental interest. This is a task courts perform all the time. No such finding is justifiable with respect to the currency-control issue, given the disproportion between the currency which is restricted and the currency which is continued regarding Cuban-Americans and Cuban nationals residing in the United States.

Two other critical elements to analysis of the government interest at stake are the Passport Act of 1978 and the Helsinki Accords. In the Passport Act, Congress withdrew the Executive's power to withhold passports for travel to particular countries, except in times of war, insurrection or other serious risk to public health. The Senate Committee which reported the bill said its purpose was to further the freedom to travel. Thus, there existed a clear statement of congressional policy that the executive branch retained no interest in restricting travel to particular countries based upon foreign policy considerations other than those set forth in the act. Similar policy considerations were reflected in the Helsinki Accords in which this country participated. Thus, the Court did not have to engage in an independent analysis of where the government's interest lay in this case. That interest was stated in an Act of Congress and through a treaty, and the Executive should not have been left free to redefine that interest in a contrary fashion.

The *Regan* majority utterly abjured any meaningful constitutional analysis: "[T]he holding in *Zemel* was not tied to the court's independent foreign policy analysis." The Court then held that, on matters of foreign relations, it would grant complete deference to the political branches, and it stated that "[o]ur holding in *Zemel* was merely an example of this classical deference to the political branches in matters of foreign policy." End of analysis.

This analysis would result in the upholding of virtually any act of the Department taken under IEEPA or TWEA affecting assets or currency of a foreign country or designated national, no matter what constitutional rights or liberties of U.S. citizens might be at stake. The formula is simple; assets control is a tool of foreign policy. As such, it is left completely to the discretion of the political branches. To the extent that such actions infringe upon individual liberties, those liberties must give way to the foreign policy prerogatives of the President.

The impact of *Regan*, thus, may be an unprecedented creation of unreviewable state power in the hands of the President and the Treasury Department, so long as they can couch their actions in terms of assets control. It is this aspect of *Regan* which is most disturbing in terms of its future impact.

Remarks by Dennis M. O'Connell*

Regan was rightly decided. Although the 5-4 decision to reverse the first circuit was narrow, those in the Treasury Department who worked with the Justice Department on the case were not terribly surprised that the Court ruled in favor of the interpretation of the grandfather clause advanced by the government.

We might examine some aspects of the Court's rationale as a basis for understanding and predicting what its consequences may be in terms of regulatory features of Treasury's present embargo regulations. How far does *Regan* go? How much flexibility is left the President and the Department in regulating transactions with respect to countries as to which the "authorities" of section 5(b) were grandfathered in Public Law No. 95-223?

The scope of the authorities that are grandfathered with respect to the four fully embargoed countries, North Korea, Vietnam, Cambodia and Cuba, by Public Law No. 95–223 and by the import of *Regan* is very broad. This opinion rests in significant

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part on the basic structure of these embargo regulations, a structure central to the Court's approach to the issues.

As to countries such as Cuba which are subject to a full financial and trade embargo by Treasury under section 5(b) of TWEA, the structure of the regulations would support an inference that nearly all the powers of section 5(b) were currently being exercised on July 1, 1977. Indeed, this was the general view of those in government who worked on the legislation at that time.

The Foreign Assets Control Regulations, which apply to the three embargoed Asian Communist countries of North Korea, Cambodia and Vietnam, and the Cuban regulations, which apply only to Cuba, contain section 201, which prohibits an extraordinarily comprehensive range of financial, commercial and trade transactions and transactions involving property of almost any kind that can be imagined, unless licensed by the Department. In each case, section 201 was in effect from the "effective date" with regard to each country. For Cuba, that was July 8, 1963. Other effective dates range from December 16, 1950 for North Korea to 1975 for South Vietnam and Cambodia. But, in every respect, these predate the date of the grandfather clause.

Transactions under the regulations authorized by Treasury in one form or another are transactions permitted by the exercise of the licensing power. Licenses can be issued in two forms: general or specific. General licenses take the form of a provision in the regulations that authorizes a type of transaction specified in the paragraph or section of the regulations, subject to specified conditions or prerequisities. The Office of Foreign Assets Control (OFAC) also issues specific licenses based on case-by-case applications to execute transactions otherwise prohibited by regulations.

Absent a license, almost every conceivable transaction potentially prohibited by TWEA is prohibited by section 201. Section 201 has been an exercise of virtually all the authorities of section 5(b) of TWEA. There may be an exception or two, such as vesting. This becomes clear when one reads section 201, because the language, drafted by very cautious, conservative Treasury lawyers, takes very few chances, leaves few if any loopholes and tends to recapitulate almost verbatim the language of section 5(b) of TWEA. In other words, when one asks whether or not the "authorities" of section 5(b) were grandfathered in regulations that contain a section 201, our starting point is our belief—supported by the text of the regulations—that section 201 is essentially coterminous with section 5(b) in enumerating "authorities" therein. The Court essentially accepted this argument.

The issue *Regan* had to deal with was whether or not issuance of a general license should be interpreted as a repeal of prohibitions in section 201, rather than as a provisional exception to those prohibitions. Plaintiffs and the court of appeals took the position that, by issuing a general license authorizing certain transactions incident to travel, Treasury had in effect revoked the section 201 prohibitions on travel transactions. Treasury, in other words, had departed the field by general license and had left the area unregulated, so that there was nothing to grandfather.

Having left the field so, Treasury should not be deemed to have retained authority to reoccupy it later with what plaintiffs and the first circuit regarded as a new post-grandfathering prohibition, the authority for which was not preserved. The Court adopted the argument advanced by the government, which was strongly supported by the structure of the Treasury embargo regulations, not only those currently enforced, but also predecessor regulations that applied to many countries and most of the globe during World War II. This history consisted of a consistent practice of building regulations around the structure of a broad, sweeping prohibition, virtually recapitulating the entire text of section 5(b) of TWEA, and accompanying that with various licenses, authorizations and interpretations to refine the scope of those prohibitions, or to carve out exceptions where transactions would be authorized. By promulgating such a broad section 201 in the World War II situation and in the Cuban case, Treasury essentially invoked and took onto itself virtually all the powers of section 5(b). Thus, it totally filled the field, and transactions thereafter permitted by the licensing power were a matter of administrative discretion or grace by the agency. By later narrowing or revoking those licenses, Treasury should not be regarded as having instituted a new prohibition not already covered by section 201.

There is much discussion in the opinions of the legislative history and much debate over whether specific uses of the authority—uses in the narrow sense of subject areas to be regulated, like importation of Cuban cigars, exportation of high-tech products to Cuba, or licensing travel transactions—were what was grandfathered, as opposed to the broader concept of grandfathered authorities, *i.e.* broad, regulatory powers which might be used to apply to many different types of transactions. The position taken by the administration and the Court is that what Congress grandfathered essentially was something very broad and was tantamount to grandfathering the embargoes, broadly defined, against Cuba, North Korea, Vietnam and Cambodia. Clearly that was the congressional intent. For a number of reasons, Congress cannot be deemed to have intended to grandfather very specific regulations like travel regulations. For one thing, during the many congressional hearings and markups, in which I participated along with my colleague, Leonard Santos (quoted quite liberally in the legislative history and the court opinions), there was virtually no examination into the minute details of what specific things Treasury was regulating or prohibiting in the case of the embargoes. It was well known that the embargoes were very broad control programs applying to a wide range of transactions with the relevant countries. In fact, at a point favorable to the government in the legislative history, there was some mention by Mr. Santos that virtually all the authorities of the statute were being exercised. He also specifically mentioned that regulating travel transactions was one such authority.

One of the most powerful arguments upon which the Court relied to support the government's position was that Congress could never have obtained administration support for a bill to curtail the administration's powers to regulate transactions with any of the four embargoed countries. This bill was developed and passed through very close cooperation between the Congress and the Executive. It was also based on a year-long study by Congress and the Executive of what should be done about presidential emergency powers. The Treasury, as well as the State and Justice Departments, participated actively in drafting different versions. A member of my staff and I played a very active role in the discussion of the shape this legislation took.

Congressman Bingham, a sponsor of the legislation, knew very well that he would not get the President to sign the bill or get the administration to support it strongly and participate actively in the process of developing suitable legislation if he injected controversial considerations such as putting a limit on the President's authority to regulate transactions involving the Cuban or Vietnamese embargoes. It is inconceivable that the administration would have supported the bill if it had known that it meant what the *Regan* plaintiffs said it meant.

Congressman Bingham, among others, would have been truly horrified at the prospect that the President might have declared a new emergency with regard to Cuba to tinker with the contours of the already comprehensive, longstanding Cuban embargo. Some Congressmen, like Mr. Bingham, although opposed to the embargo, clearly did not want to confront the President with a situation where, to take some regulatory steps such as was done with the narrowing the travel license, he would be required to take a dramatic political step (like declaring a new emergency) that might inflame the political or international atmosphere, and thus make matters worse.

Yet Mr. Bingham knew, or would have known, as did the Hill staffers and others involved in the process, that the new authority provided through IEEPA would have provided the President with authority to declare a new national emergency and promulgate new regulations on Cuban travel or other economic matters. That would have created a rather absurb situation where perhaps 99 percent of an embargo might exist under TWEA and 1 percent under IEEPA. IEEPA's purpose, however, is quite different; it is intended to apply to crises such as Iran, not to such longstanding problems as the Cuban embargo. Yet, Mr. Bingham would have known that the new law could have been invoked by the President if he felt it necessary and that it would be very difficult for Congress or a court to second-guess him.

The plain impact of *Regan* is that many measures in the Cuban regulations which constitute relaxations or liberalizations of the embargo, like the license for permitting family members to make remittances to relatives in Cuba, permitting licensing policy for cultural and athletic exchanges and regulations applying to travel to the United States by Cuban nationals, can be amended, curtailed or even revoked under the grandfather clause. There is a question about the impact of grandfathering such measures since they postdate July 1, 1977. Even so, it could be argued that authorities to reimpose prohibitions in these areas would not have been preserved by the President's annual national interest determination if the narrow *Regan* view of the grandfathering had prevailed.

Another example is the 1975 licensing policy permitting, by specific license, trade transactions with Cuba by U.S. subsidiaries abroad. Under *Regan* Treasury could alter or revoke that policy without any grandfathering problems, since there is no general license for such transactions. I am not suggesting that Treasury has such a decision in mind: it would raise very serious extraterritorial problems for the United States.

The *Regan* dissent raises an interesting question as to whether, since it has been Treasury practice to use a general license to carry out a total and final dismantling of many features of an embargo program as part of the normalization process with a country, Treasury could mushroom a residual feature of an embargo back into a full embargo under the grandfather clause. An example is China. The dissent stated that, as of the grandfathering date, regulations applying only to China restricted the frozen Chinese assets in the United States and that current trade and financial transactions, banking transactions and export and imports were all authorized by general licenses issued when the United States opened trading relations with China in 1971.

The dissent reasoned that the Executive's position in *Regan* would apply equally to China and that, if all section 5(b) powers with regard to China were preserved, these general licenses could be revoked at any time. Before removing China from the scope of the regulations, Treasury could have reimposed a total embargo against it. While I can see the technical logic in that argument, I do not think it very persuasive. Among other things, the matter of congressional intent cuts strongly against such an attempt by the Executive. The administration testified clearly before Congress that what remained with regard to China and the East European countries was freezing of assets as a residual matter. Outstanding claims against those countries had to be resolved. For the Executive to try to spring from that kind of residual blocking power, particularly after the normalization had occurred with China in 1979, clearly would constitute an abuse of authority. This would be contrary to the basis of administration testimony on the Hill and the assumption of Congress when it passed the legislation.

The case is even less persuasive with regard to East European countries subject to a little-known set of regulations called the Transaction Control Regulations. Their purpose is to prevent circumvention of the Commerce Department's Export Administration Regulations by conducting transactions in strategic goods offshore.

The Chairman has raised the question whether or not Treasury's regulations requiring payment of interest on blocked accounts, published in 1979, exceeded the scope of the authorities grandfathered in 1977 by using powers not previously exercised. Scanning the language of the statute, one could rest the interest requirement on the power to "direct and compel" transfers of foreign property. That seems to be the simplest, plainest statement of the authority. Then the question would arise of whether Treasury was using the power of the statute to direct and compel transfers of assets before 1979.

This is not, however, the only language which can be relied on to support the interest regulations. Treasury perceives the interest regulations as a conservatory measure, clearly part of the kind of management responsibility that OFAC has to maintain and enhance the value of blocked property for the benefit of U.S. claimants. As such, Treasury viewed the interest regulations as clearly ancillary to the blocking of the assets themselves and to exercise of the blocking power. Treasury had one Doubting Thomas who saw this kind of regulation as an assertion of an incident of ownership, a sort of vesting, but that view did not carry the day. Most key Treasury lawyers saw this as a thoroughly reasonable regulation of the holding of any blocked accounts by banks or other holders. I would thus describe the interest regulations as regulating the holding and use of property, rather than a directive to transfer accounts from one holder to another, although that could happen. Treasury clearly has been exercising this authority under the statute from the beginning, and this is one which has clearly been grandfathered.

Comment by Steven M. Schneebaum*

I would observe that this has been a heated discussion on a very minor point. The question before the Court in *Regan* was, "Since on the date the statute was passed it was permissible for Americans to go to Cuba, and on some dates following the act it became no longer permissible, was one of the authorities being exercised the authority which granted people the right to go to Cuba?"

The answer depends on the interpretation of "authority." Although a matter of linguistics, it is a field on which minds can differ about fundamental questions of the Executive's power. We should consider this point in light of Mr. O'Connell's remarks. He characterizes the Executive's power as permissive; one can do things if one has a license from Treasury. The other viewpoint on the panel is that people start off with certain fundamental rights, such as the right to travel, and that, absent express authority from Congress, the Executive should not automatically be assumed to have the power to restrict those rights.

Comments by the Chairman, Professor Malloy

Since late 1984, OFAC has pressed its enforcement efforts under the Cuban regulations, summarily closing down or "freezing" U.S. businesses thought to be operating under the influence of, or on behalf of, Cuba. One such action, related to our previous

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discussion of travel restrictions, is the subject of *American Airways Charters, Inc. v. Regan*.

The target of this enforcement action was a closely held Florida corporation providing charter services for tourist flights between the United States and Cuba. OFAC determined that American Airways was a "specifically designated national" of Cuba and blocked the corporation and its assets. The District of Columbia circuit court repudiated certain aspects of this enforcement action in a strongly worded opinion. But, it should be stressed, the opinion does generally recognize Treasury's authority to pursue enforcement actions.

American Airways raises questions of particular interest. Do these enforcement efforts raise due process or other constitutional problems as yet unaddressed by the Court? How far can OFAC go under its so-called emergency authority in an "emergency" which has already lasted more than 20 years?

REMARKS BY MR. O'CONNELL

Perhaps it is important to point out that actions taken by Treasury under the President's emergency powers authority must pass muster under the Constitution. These powers are about as broad as any statutory authorities that can be conceived, but they do not override constitutional constraints.

In many respects, the regulations take account of constitutional principles through licensing policies. Among these are policies to govern importation of publications and other first amendment materials from countries subject to embargo and blocking controls. Another example is the provision Treasury makes for activities of the media, vis-a-vis various countries, regarding such matters as importation of news materials and travel on journalistic assignments.

The question of due process under the blocking regulations has arisen in different contexts. It is a matter of continuing controversy. One is the basic fact of the blocking itself. In *Sardino v. Federal Reserve Bank*, blocking a U.S. bank account owned by a Cuban national was challenged as an unconstitutional deprivation of property without just compensation. The court concluded that the Cuban national's interest in U.S.-situs property was entitled to constitutional protections. The court stated that the due process clause speaks in terms not of taking but of deprivation. It found it hard to say that there was no deprivation when one is prevented both from obtaining his property and from realizing any benefit from it for a period of indefinite duration which may outrun his life. The court rejected the government's argument that the Constitution did not protect nonresident aliens.

Sardino also referred to the *Russian Volunteer Fleet* case, where the Court squarely held that an alien friend is entitled to protection of the fifth amendment's prohibition of taking without just compensation even when its government was no longer recognized by this country. The court declared unequivocally that nonresident aliens owning property within the United States as well as U.S. citizens are entitled to be protected by the fifth amendment.

The court then drew certain distinctions pertinent when the United States was in a state of relations as strained as those prevailing between the United States and Cuba. The court declared that "the world today is not the classical international law world of black squares and white squares where everyone is either an enemy or a friend. We are not formally at war with Cuba but only in a technical sense are we at peace." *Sardino* also justified the blocking based on considerations such as the valid national purpose of keeping dollar resources out of the hands of a government seeking to create a base for activities inimical to the U.S. security. Referring to wartime precedents, the court made its very famous statement that: "Hard currency is a weapon in the struggle between the free and communist worlds." The court also cited the Cuban expropriation of property of U.S. nationals as a factor justifying the continuing freeze on Cuban property in the United States as a potential pool for compensating U.S. citizens. The *Sardino* rationale for the blocking of nonresident alien Cuban nationals' property in the United States, or the property of nationals of other designated countries, is well established as consistent with due process.

A more controversial area, and a more difficult one in which to balance the various interests and equities involved, is where U.S.-situs assets are claimed by former nationals of a blocked country who have succeeded in expatriating themselves from the blocked area, in some cases establishing U.S. residence or citizenship. It is one of the sad facts of U.S. history and international relations that some countries with which we once enjoyed very close relations have become extremely antagonistic due to a schism in our relationship that has led to many from those countries taking refuge in the United States. Examples are China, Vietnam, Cuba and Iran. In such cases, the fleeing citizens of the now blocked country are often antagonistic toward the new government which is the target of the blocking. They seek to recover property they have in the United States which is blocked by an embargo which is really directed at their former government, one which they may not find at all congenial. In certain situations, efforts of nationals to recover in the United States can be successful under current and past OFAC policy. In other situations, they are not. It has long been policy that where an individual national of a country such as Cuba or Vietnam successfully leaves that country and takes up indefinite residence in the United States or in an area of the free world described as the "authorized trade territory," that person's individually owned U.S. assets are unfrozen by that person's having become an "unblocked national."

One of the simplest cases is *Sardino*, where someone owning a U.S. bank account, leaves Cuba and takes up residence here, becoming a resident or citizen. That account would be unblocked. We apply the same principle to business assets owned individually or through a partnership. In other words, the assets of a sole proprietorship can be unblocked if the owner succeeds in expatriating himself to the United States or the authorized trade territory. We apply the same rule to partnerships, provided that any money owed by the business to, for example, limited partners or creditors in the blocked country remains frozen. We take a different approach to corporate assets. There have been many situations where expatriates from countries such as Cuba or Vietnam have sought to obtain the unfreezing of corporate assets in the United States. They try to obtain, on behalf of themselves and others similarly situated, at least a pro rata unfreezing of their aliquot shares in blocked country corporations. In these situations, it has traditionally been Treasury policy not to unfreeze the assets. The ground of distinction between the corporate and the individual and partnership situations is the nature of a corporation. The corporation itself has a separate legal or juridicial personality, and it is regarded as a national of the relevant country itself. In other words, the Department looks to the corporation as the relevant national for blocking purposes rather than those who claim ownership through shareholdings. Treasury's policy in this regard has been upheld in the cases.

A classic example is *Neilsen v. Secretary of the Treasury*, involving an attempt by owners with 75 percent of the shares of a Cuban corporation, who had succeeded in taking up residence outside of Cuba, to unblock their portion of the assets of that corporation. *Neilsen* upheld the government's policy on the ground that the Cuban Government might claim an interest in the corporate assets as a successor of some kind and that the U.S. Government was thus on valid ground in keeping assets blocked against that contingency. Another major case was *Tran Qui Than v. Blumenthal*, where expatriate shareholders of Dong Phuong Bank, the largest private bank in South Vietnam, sought a proportional unblocking of their shareholders' interests in U.S.-situs assets of the bank. The ninth circuit ruled against the shareholders on the ground that the potential Vietnamese Government interest in the assets of the nationalized corporation was sufficient to justify continuation of the blocking.

Menendez, Garcia v. Faber, Coe & Greg, did not challenge blocking of assets directly, but it implicitly raised the same questions. The case concerned the continued blocking of the assets of Cuban tobacco companies nationalized by the Cuban Government. The assets were claimed by expatriate owners of the corporations who had fled Cuba in the face of the Castro Government's policies. The Cuban private owners in *Menendez* succeeded in establishing the right of their private companies to the assets as against the claim of the Cuban Government. The court divided the rights to proceeds of Cuban cigars sold before and after expropriation of the companies. The second circuit held the expatriate owners were entitled to the sale proceeds before nationalization of the companies. Unfortunately, due to the blocking policies of the Department, these funds were not unblocked in favor of individual owners, because they had sued in the name of the corporations, and the claims for the cigar payments were the claims of the corporations. Although the Cuban Government as an expropriator could not directly claim the payments per se, payments due the corporation were blocked because of an inchoate "interest" of the Cuban Government that might be asserted. All property and assets of those nationalized corporations, including the payments, were required to remain blocked by the Department. Again, the validity of this blocking has not been litigated. It has, however, been the subject of extensive discussion between Treasury and counsel for the companies. In the past year, the Department has substantially reviewed its policy in this area. We believe, based on the *Neilsen* and *Tran Qui Than* rationales, that we could defend a continued blocking of the assets in court. But, on policy grounds, we wanted to reexamine whether or not equities might dictate unblocking of some assets in favor of expatriate shareholders who have a claim.

Continued blocking of such property often rests on the principle, dating back to the 1930s, that the United States is in a position to prefer claims of its nationals to claims of third-country nationals in any distribution of properties or claims settlements it may achieve. That principle is currently viable where the United States receives a lump-sum payment to settle international claims, as with China or, as in the case of the Iranian settlement, where sums are set aside to pay claims. It may be questionable as to whether that principle should apply, however, where third-country nationals seeking protection of U.S. law are not claiming frozen assets as general creditors among other general creditors, but are instead advancing a claim of title to the particular assets. Is it their individually owned property to which claim should be recognized as a matter of right? In *Tran Qui Than*, claimants argued that the territorial limitation on the act of state doctrine would not permit a country such as Vietnam or Cuba to rely on the uncompensated expropriation of the foreign corporation as a basis for seeking to recover the assets in the United States. Therefore, to continue the blocking is to recognize the expropriation. The court rejected the argument in *Tran Qui Than*, essentially making a sword/shield distinction in saying that while Vietnam could not affirmatively rely on the expropriation to sue in the United States and recover the assets, Tran Qui Than could not use the expropriation as a weapon to dissolve the blocking. Again, it is a fairly fine distinction, but one which returns to the *Sardino* philosophy on a very important point—blocking is not a vesting.

A blocking of assets is without prejudice to those who may ultimately claim title and to the question of whether or not they will ever be taken over by the United States or play a role in claims settlement. The concern, expressed by claimants in the tobacco case, in the *Tran Qui Than* type of situation and others before us administratively, is that to defer indefinitely or for a considerable period of time (30 years in the China case) a decision as to the shape of the claims settlement may, given the brevity of human life, work an ultimate deprivation of property in individual cases. There is some point to the argument. The cases are in our favor as far as upholding the blocking judicially. We have publicly expressed a favorable attitude toward unblocking assets in some cases, however. We have not yet published an applicable statement of licensing policy. It is still being discussed and is under clearance within the U.S. Government.

The final area for discussion of the applicability of due process principles to blocking is in *American Airways*, where the government and the court had to deal with difficult issues involving liquidation of a Cuban national firm in the United States. U.S. embargo regulations essentially prohibit transactions of any kind between U.S. persons and Cuba without a license. The effect of these restrictions is to prevent Cuba or any Cuban national from setting up or acquiring a business enterprise in the United States. *American Airways* involves what happens when the Cuban Government gets control of a U.S. enterprise or establishes an enterprise on our shores contrary to U.S. Government policy. The *American Airways* situation grew out of a Treasury decision to license certain transactions incident to travel to Cuba beginning in 1977. For five years travel transactions were generally authorized. Almost anyone could go to Cuba and spend the money necessary to do so. These regulations were tightened in 1982 and gave rise to *Regan*. Whenever any kind of activity such as travel is permitted, there are risks involved for Treasury; one is that an industry might spring up around the licensed activity. That was the case in the travel area, where U.S. entities began handling transactions for travelers to Cuba.

One of the operations that handled travel matters was Havanatur, a Cuban firm that set up shop in Miami during the early years of the travel license. The U.S. Government informed Havanatur that as a Cuban national it was not welcome; essentially, we kicked them out of the United States. They continued to operate, quite legally, offshore; U.S. persons could deal with Havanatur on travel matters. As Havanatur was departing, a new small company, American Airways Charters, began to take over, build a clientele and handle traffic to Cuba. By 1982 Treasury had accumulated substantial information, which I am not at liberty to disclose, that American Airways was controlled by the Cuban Government. We issued a blocking order for its assets, essentially making American Airways a "designated national" of Cuba. That designation treats it for all intents and purposes as any other Cuban company, and U.S. persons cannot deal with it on any commercial or financial matters.

When all of American Airways' assets were frozen, Treasury began a rather long and sometimes arduous process of winding up its affairs by attempting to marshal its assets and satisfy U.S. claims. There were many claims of travelers who had booked reservations but were unable to travel because of the liquidation and who had to get their money back; there were also creditors who had to be paid, etc. We worked with the company from the spring of 1982 to the end of the summer in an effort to get its books in order and to accomplish some of these tasks. Many employees were dismissed from the company to reduce the drain on assets to pay salaries. A staff was kept on hand to consult and cooperate with Treasury to carry out liquidation. Among the employees who remained on board were the president, Fernando Fuentes, and the executive vice president, Frank Masdeu. The Department, my office specifically, was not particularly content with the pace of the liquidation effort in 1982. We became increasingly frustrated with lack of progress in liquidation and became much more assertive about what we expected to be done. Our concerns about the waste of corporate assets, and the effort to liquidate the corporation, among other considerations, led to the decision in September to eliminate Fuentes from the corporation by withdrawing permission for him to engage in any transaction on its behalf.

In Fuentes' absence, we then proceeded to take steps in cooperation with the remaining employees, chiefly Masdeu. Essentially, the right to counsel controversy cannot be understood apart from a perception of this parting of the ways between the Department and Fuentes as to what should be done with American Airways. It was clear that we had certain ideas and priorities that needed to be pursued. We were prepared to pursue them, but those were not necessarily Fuentes' priorities. We became concerned that a great deal of money had been paid, including Fuentes' salary, for a considerable period without resolving such things as paying off creditors. We reduced Fuentes' salary by putting him on half time, licensing only partial payment of his salary. We informed him that he could not dismiss other employees, such as Masdeu, without a Treasury license because these were contractual relationships express or implied, which could not be terminated without one. We then began to develop our own program for liquidation of tangible and other property of the company and developed a plan to pay off creditors. By removing Fuentes' authority to act, we obviously were attempting to remove his ability or his legal power to take steps to interfere with the orderly winding up of the corporation as a blocked Cuban or enemy controlled corporation that never should have been established or allowed to exist in the United States. This is an unusual type of operation, really unprecedented in peacetime. Operations of this kind were extensively conducted in World War II, where Treasury stepped into enemy-controlled corporations and took a wide range of actions including dismissal of corporate officers, termination of employment and other contracts, etc. The steps we took with Fuentes were consistent with World War II precedents. By not authorizing Fuentes to speak for American Airways in choosing an attorney, or with regard to any other matter, we did not intend, and I think our action did not have, the effect of closing the courthouse door to him in any claims he might have as an individual with regard to the matter.

REMARKS BY MR. SCHNEEBAUM

In reviewing *American Airways*, it is important to remember what was at stake. A Florida corporation asked a lawyer to represent it. But the Department told it that it had no right to do this because the person whom the Treasury deemed head of the corporation did not ratify the corporation's choice. Irrespective of the merits, I question whether the government should be doing this sort of thing. I do not ask this in a legislative context; all I suggest is that when reviewing this question, one should keep in mind that the government took over internal management of a corporation solely because it deemed it to be Cuban. This decision was made under a statute which lacks any provision establishing the right to review. Further, it results in the loss of a right to touch one's property; one may not transfer it or use it, and, according to the Department, one cannot even hire a lawyer of one's choosing to contest one's status as a "designated national" under the act. This result is draconian, to say the least. Indeed, in his concurring opinion, Judge Greene said that this is rather inconsistent with our country's fundamental policy. After all, murderers, rapists, those who commit espionage and other antisocial acts are entitled to counsel, often at public expense. Yet here was an entity whose sole offense was that it was Cuban.

Aside from the political question of whether being a Cuban national in the United States is indeed an offense, the inquiry again is, "Why do we want to have the government involved in such things?" Authority for the answer to this is in section 5(b) of TWEA, passed in 1917:

> During time of war, [or during any other period of national emergency declared by the President,] the President may through any agency that he may designate or otherwise, and under such rules and regulations as he may prescribe by means of instructions, licenses or otherwise . . . investigate, regulate, direct and compel, notify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportion of or dealing, or exercising any right, power or privilege with respect to, or transactions involving any property in which any foreign country or national therefore has any interest by any person or with respect to any property subject to the jurisdiction of the United States.

There is much emphasis on "any" in the statute. It may be the case, as Mr. O'Connell stated, that the national emergency power has been used sparingly in the past, but that is not an illustration of its nonexistence. On the contrary, if anything, it speaks well of those who have occupied the Oval Office.

Under this authority in 1950, the designation of a national emergency by President Truman, in the wake of the Korean invasion, was sufficient administrative basis for imposition of subsequent regulations regarding Cuba, Vietnam and Cambodia. Consider this context and whether it makes sense. Under section 5(b) the President had only to recite ritualistic language declaring a national emergency, referring to section 5(b), to trigger all the consequences delineated above, including freezing assets, special designation of nationals and, in Treasury's view, the right to select counsel of one's choice.

Payment of counsel, *i.e.* transfer of assets, was not at issue in *American Airways*. Achieving this would have required a license which I suspect would not have been granted.

Under the authority of section 5(b), however, words like "transfer" and "transaction" are being interpreted so broadly that they even include selection of a legal representative. Although courts have upheld the constitutionality of the power, one ought to be very skeptical of expanded uses of government authority to regulate internal affairs of corporations and to make unreviewable things like designation of nationality. One ought to require, in each case, the government to justify that rather extraordinary incursion into what would otherwise be our established system of laws and property.

Comments by Mr. Lieberman

Two points are apparent in the constitutional problems. The first is that there is utterly no due process in the designation procedure by which Treasury labels someone a national of a foreign country. As Mr. O'Connell said, that can be done with any U.S. corporation or national. The result is that all that person's assets will be frozen without a hearing and, under decisions like *Regan*, that may be perfectly constitutional.

Secondly, Mr. Schneebaum pointed out that there was no question of payment of counsel in *American Airways*, just designation of counsel. In my opinion, there is no meaningful difference between the two, since most lawyers are not willing to work for free. I also take issue with the power to deny payment to counsel by refusal of license and especially at the suggestion that a license would be denied. Such a possibility is very disturbing.

COMMENTS BY THE CHAIRMAN, PROFESSOR MALLOY

Outside the specific context of the Cuban regulations, questions we have considered suggest broader policy concerns. Recent studies have raised questions concerning effectiveness of financial and trade sanctions. As a tool of U.S. foreign policy, economic sanctions are vulnerable to such concerns, particularly where, as in the case of the Cuban regulations, these "emergency" sanctions have been prolonged for decades. Can they be judged effective when the situation which prompted their imposition has become the status quo? Are such programs worth the cost to the United States, *e.g.*, in terms of resistence of third states to broad extraterritorial application of U.S. sanctions? In terms of hardship and dislocation of individuals and business entities within the United States and third states?

REMARKS BY MR. SCHNEEBAUM

My own interest in this area stems from the fact that, over the past eight years, I have been representing a group of expatriates from Cuba who have been trying to unblock assets which should not be under OFAC jurisdiction. My perspective, then, is of one who has litigated against Mr. O'Connell's viewpoint.

I view the effectiveness of these sanctions from these perspectives: their effectiveness in U.S. law and in international law and their effectiveness in making the distinctions that inspired the regulations in the first place. I will not address whether they are economically viable or effective, since I do not know whether the funds which have been preserved in the United States under the regulations are significant in terms of ultimate resolution of our problems with Cuba.

Although the due process aspects of this topic have been discussed, I have additional comments. First, these regulations are a vestige of the imperial presidency of a truly unique proportion. The degree to which they are unregulated, uncontrolled and discretionary is remarkable.

Section 515.201, the basic regulation interpreting section 5(b) of TWEA, gives discretion to do just about everything. TWEA emergency powers continued in effect until Congress blew the whistle in 1976. I submit that the National Emergencies Act shows real concern about limiting Executive discretion. There was particular concern that President Nixon had been too expansive in his designation of Presidential authorities. Of course, it was not Nixon who issued the 1950 proclamation, but President Truman. However, in *Regan*, the Court surveyed national emergencies over the years. Besides 1950, there was one in 1970 when President Nixon declared an emergency to solve the postal strike. The Court discussed even that declaration as if it, also, would have been sufficient to sustain the Cuban regulation. That was indeed not the intent of TWEA was evidenced by the change of that law shortly thereafter.

Because of this extraordinary range of Executive discretion, there have been a number of bizarre, incongruous and harsh results. One example, involving the strange proposition that the government can determine who can or cannot be employed as counsel, manifested itself in *American Airways*. In *Real v. Simon*, the fifth circuit interpreted a regulation concerning the blocked estate of a person who died in Cuba and had heirs in the United States. Because the decedent was a Cuban national, his property was blocked in the United States. The question was whether the property became unblocked at his death since it would be passed to people who were not Cuban nationals. According to the regulations:

> [T]he term "blocked estate of a decedent" shall mean any decedent's estate in which a designated national has an interest . . . a person shall be deemed to have an interest in a decedent's estate if he . . . is a personal representative . . . is a creditor, heir, legatee, devisee, distributee, or beneficiary (who has, essentially, any interest in distribution of the estate) . . . and *is the person who was the decedent*. . . . (emphasis added)

This is strange, because it implied that if a person dies a designated national, that person has a continued interest in the property beyond death. Normally, property interests end at death. The fifth circuit found this to be the result as well and, thus, said caustic things about the government's position in *Real*. The court rejected this interpretation as untenable. However, in *Richardson v. Simon*, the second circuit came out the opposite way on an identical set of facts, without attempting to distinguish *Real*. Instead, the court found the basic policies of the government served by the regulation, however illogical it might have been. This is unusual and is the sort of thing in which the government ought not to take a role.

Another aspect is the separation of powers. Licenses granted under the regulations empower people to litigate before U.S. courts questions involving property in which there is a Cuban interest. Thus, the executive allows suit, but there is no power to execute or collect. The authorization of suit is allowed to preserve rights under statutes of limitation, or for other reasons. But, it is somewhat anomalous that the Executive is being allowed to decide who can litigate in court. This is a situation in which a license, power or authority granted by Treasury can be withdrawn with virtually no procedural requirements. It means that one has the power to sue or not because Treasury gives that power, not by virtue of the Constitution or any common law authority. Regardless of its constitutionality, and I suspect that it is inconsistent with the Constitution, the result is an anomalous one which ought to put us on strong notice as to what is going on here.

The effectiveness of these sanctions in international law is mainly focused on the issue of extraterritoriality. That question is centered on section 515.239 of the regulations. This section defines the term "persons subject to the jurisdiction of the United States," *i.e.* those whose transfers of blocked assets are prohibited. Consistently with the traditional approach, the definition contemplates persons in and corporations organized within this country. However, the definition also includes ". . . any partnership, association, corporation or other organization whatsoever organized or doing business . . . which is owned or controlled by persons specified in paragraphs 1, 2 and 3 of this section. . . ." Does this mean that an English subsidiary of a U.S. company is covered by the Cuban regulations if it is owned by Americans subject to the regulations? Whatever the present state of the law on the extraterritorial reach of corporations, it is clear that there is no consensus on these matters. The United States has asserted very far-reaching jurisdiction in the pipeline cases to affect licenses of corporations (even those with no U.S. ownership) as well as those which are U.S.-owned. This has led to considerable controversy, such as the retaliatory measures taken by the United Kingdom and France to protect against U.S. encroachment upon their respective jurisdictions. Indeed, France has imposed criminal sanctions on those cooperating with U.S. extraterritorial efforts to affect French subsidiaries of U.S. corporations.

To reiterate, regardless of the legality of these things, is raising those vexed questions of extraterritoriality worth the cost when the foreign policy objective itself is of questionable economic and political value? These may not be decisions for judges to make, but they are decisions that concerned observers of the international scene ought to examine. If we continue to assert the right to govern behavior of companies abroad which are citizens of foreign nations, regardless of where ownership lies, we will increasingly confront the wrath of our trading partners, including members of the European Economic Community (EEC). I do not think that this is what we ought to be doing and thus should consider our actions much more carefully under this very broad and nebulous authority.

The final question of effectiveness is whether or not these regulations actually reach those at whom they are aimed. After all, one measure of the effectiveness of statutes is the "mischief rule," *i.e.* does the statute actually prevent the mischief Congress had in mind? There are three policy foundations for the Cuban regulations: (1) maintenance of a pool of assets in the United States out of which U.S. claimants of expropriations by Cuba can someday be satisfied; (2) denial to Cuba of economic benefit; and (3) in a broader sense, a bargaining chip in economic warfare against Cuba. These are the most frequently stated policy goals of the regulations.

But, is the blocking of assets of companies like American Airways, or those expropriated 30 years ago, truly the sort of objective we want to achieve? A case illustrating this principle was *Tran Qui Than*. The government authority there was found under the Foreign Assets Control Regulations, identical to the Cuban regulations. In *Tran Qui Than*, a Vietnamese national, a director of a bank, was able to leave Vietnam before Saigon fell. When he left, the bank directors, anticipating what was going to happen, passed a resolution which stated that any director who could leave the country could act on its authority overseas. When Tran Qui Than left and came to the United States, he claimed to be an assignee of a contracting party in Vietnam war construction who was owed money by two U.S. Government agencies. He sued to get the assets unblocked, claiming the board resolution by assigning the bank's property to him, effectively removed any Vietnamese interest. Tran Qui Than argued that he fled as a refugee and enemy of the takeover government. But the United States argued that because both he and his bank were Vietnamese, they were denied access to funds here even though the bank and its former government no longer existed. However, the point is that by denying access to the funds, the court found itself in the unenviable position of having to implement a foreign act of confiscation because of these regulations. This means that the Vietnamese Government took over the bank and nationalized its assets. Traditionally in U.S. law, such a confiscatory taking is effective only in the country in which it occurs. But we draw a line at the water's edge; if one comes to the United States with assets, a dictator back home cannot reach them when he takes the property away. In this case, though, blocking Tran Qui Than's assets amounted to the court's ratifying the extraterritorial reach of a Vietnamese nationalization act. The court concluded that since this was a Vietnamese bank now run by the Vietnamese Government, its assets were now frozen as assets of the government. Such a conclusion amounts to recognizing the compulsory turnover to the government as legitimate.

Regardless of the legal correctness of that decision, is this what we want U.S. courts to be doing? So long as these regulations are thus interpreted, that kind of unacceptable result will continue. It seems clear that the courts will not construe these regulations narrowly, especially the current Supreme Court, and it may well be that the only answer lies with legislation.

REMARKS BY THE CHAIRMAN, PROFESSOR MALLOY

One of the difficulties in determining whether economic sanctions are "successful" or "effective" is a definitional problem. What do we mean by "successful?" What do we expect from a program of economic sanctions to consider it "effective?"

In a narrow, causal sense, such a program might be considered successful if, as a direct result, the behavior of the target state, and hence our relations with it, are modified in a manner consistent with U.S. foreign policy objectives. Yet this sort of direct, linear causal relationship between sanctions and state behavior would be very difficult to identify on publicly available facts, even if this objective were achieved. The simple fact is that the target state is unlikely to acknowledge any role played by sanctions in modifying its behavior. For its part, the U.S. Government would appear to be engaged in a self-serving and gratuitous exercise if it asserted that there was such a direct causal relationship between sanctions applied and the resultant behavior modification.

Further, it is extremely unlikely that such a simple, direct relationship of cause and effect actually exists in practice. Relations between states, even between friendly states, are likely to represent a much more complex set of counterpoised national interests and accommodations. Economic sanctions do play a role in the total mix, yet it would be foolhardy to expect too much from an instrumentality.

The Iranian hostage crisis may be a case in point. Sanctions, gradually increasing in intensity, were applied against Iran over a relatively short period. Did applying sanctions result in resolving the crisis and an agreement for settling commercial claims of U.S. nationals against Iran? No simple answer is possible. Commentators would accord a significant role to the sanctions as part of the counterpoised circumstances brought to bear on Iran. Still, the timing and terms of the resolution remained very much in the hands of Iran.

Another difficulty in attempting to evaluate effectiveness of economic sanctions is that many commentators (and some courts) have overlooked the fact that, at least in U.S. practice, there is no single policy purpose behind sanctions programs. At least four have traditionally been recognized in programs administered by Treasury.

First, insofar as they involve blocking assets, such programs are intended to prevent a hostile regime from converting U.S. assets of its citizens. This was historically the first purpose behind Treasury controls before the United States entered World War II.

As polarity between the U.S. Government and the target state increases, however, this purpose is usually overshadowed by a second, "economic warfare," purpose. Here the objective is to deny the target state access to foreign exchange, to its own U.S.-situs assets, and generally to capital markets. Such a program is often accompanied by a broader effort to isolate the target state politically and diplomatically. The effect of such a program on the target state is obviously more difficult to measure.

As a crisis continues over time, focus of policy shifts to a third purpose, that of counterpoising economic sanctions as a "bargaining chip," something to be traded away in return for accommodations from the target state. If sanctions are eventually used in this way, they can be said to be "successful." Such was the case with China, but it took more than 20 years before an accommodation could be established.

A fourth and related purpose seeks to preserve the target state's blocked assets as a possible pool for payment of U.S. nationals' claims. While this purpose has frequently been invoked to justify continuing sanctions, one must wonder whether claimants ought to wait decades before satisfaction of claims can begin.

In trying to evaluate the effectiveness of these programs, I suggest two cautionary principles. First, simplistic analysis based upon an assumed direct, causal relationship between application of sanctions and realization of policy objectives should be treated with extreme skepticism. States do not act and react in simple patterns. In any event, these sanctions do not stand on their own but are the instrumentalities of broader political and diplomatic objectives. It is not the sanctions program that must be evaluated but the political objective which it serves.

Second, as a general rule, the longer the duration of sanctions, the less likely it is that their effectiveness, even as a mere instrumentality, can be evaluated with even an approximation of accuracy. Sanctions have greatest impact in their early stages. The policy purposes behind sanctions are likely to change with time and the change of political circumstances. As they become part of the status quo in relations between states, two problems arise. The target state will learn to live with or around the sanctions, if the political issues at stake are important. The sanctioning state may continue to apply sanctions with little thoughtful and pragmatic attention to their current usefulness. Sanctions thus become less of a practical instrument and more of a symbol.

One salutary effect of the recent revision of TWEA may therefore be that it requires the President to make a conscious, formal determination each year that each sanctions program should continue. Unfortunately, there is a very real danger that this requirement may simply become an empty formality rather than an occasion for rigorous review of current policy.

Discussion

A question was posed to Mr. O'Connell by a speaker from the floor. What if any due process limitations did the regulations have in regard to the Cubans, in particular? He did not think there were any. Mr. O'Connell felt that the question was difficult to answer because it was so broad. Due process considerations flowed from the Constitution and in regard to assets control, even a Cuban nonresident alien was entitled to constitutional protection. This was confirmed by case law, *Sardino* in particular, which said that the government's position that the Constitution did not protect nonresident aliens was wrong. A blocking was not considered an unconstitutional taking, however. Indeed, the government had had a very strong success record in defending the blocking of assets. As a policy matter, the government had reviewed whether it should adopt a different view in this area, particularly when refugees were concerned, but as of that time, it stood with its policy.

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