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Judicial Approach to Executive Foreign Affairs Powers: The Road Not Taken in Regan v. Wald

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A Judicial Approach to Executive Foreign Affairs Powers: The Road Not Taken in *Regan v. Wald*

I. INTRODUCTION

A tension exists in the United States between the need for the executive to be preeminent in matters of foreign affairs and the lack of any expressly granted foreign affairs powers in the Constitution.[1] This tension has affected the manner in which the government's legislative and judicial branches respond to the president's foreign affairs power. Congress responds to this tension by trying to accommodate two mutually exclusive goals: providing the president with flexibility and discretion in international crises, while simultaneously attempting to ensure presidential accountability to Congress.[2] Similarly, the judiciary strives to provide the executive with sufficient power to respond to international crises and direct foreign policy, but also seeks to preserve the system of checks and balances on the president's actions in foreign affairs.[3]

Courts resolve the tension by using one of two different approaches to the problem. Under the first approach, the delegation-of-powers approach, the courts lower the standard needed to find a congressional delegation of power when foreign affairs are involved.[4] The second approach, the scope-of-inherent-powers approach, has been used only when a court cannot find a congressional delegation of power under the delegation approach.[5] Under the scope-of-inherent powers approach, a court will readily find that Congress interpreted the Constitution as granting the president broad foreign affairs powers.[6] The two approaches are distinguishable in that, under the delegation-of-powers approach, Congress is delegating its power to the president; while under the scope-of-inherent-powers approach, Congress is acquiescing to the president's own inherent constitutional power.

Courts implement the delegation-of-powers approach by allowing the president very broad discretion in interpreting enabling statutes which involve foreign affairs.[7] If Congress fails to object to the president's interpretation, courts may find that Congress has acquiesced to the executive's version of the statute.[8]

1. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37 (1972).
2. Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Power with the Need for Accountability*, 55 S. CAL. REV. 1453 (1978).
3. *See, e.g.*, Haig v. Agee, 453 U.S. 280 (1981).
4. *See infra* notes 91-126 and accompanying text.
5. *See infra* notes 127-45 and accompanying text.
6. *Id.*
7. *See infra* notes 122-26 and accompanying text.
8. *Id.*

Conversely, the courts implement the scope-of-inherent-powers approach by giving the president broad discretion in interpreting the inherent powers granted to the executive in the Constitution.[9] The courts interpret congressional silence in the face of this claimed power as congressional approval.[10]

These two judicial approaches have three effects. First, they put the burden on Congress to prohibit presidential actions and to circumscribe presidential power more explicitly. Second, they put courts in the more comfortable role of interpreting congressional will rather than deciding the constitutional balance of power. Finally, they allow the court to avoid the problem of creating new inherent powers in the executive.

In *Regan v. Wald,*[11] the Supreme Court was confronted with the dilemma of providing the president flexibility in foreign affairs without creating new inherent powers in the executive. The case arose from a challenge to the Treasury Department's restrictions on travel to Cuba.[12] The controversy centered around the issue of whether the Treasury Department had the authority under the International Emergency Economic Powers Act (IEEPA) to impose travel restrictions.[13] The First Circuit below had invalidated the restrictions. It held that since the President acted without following the procedure prescribed by Congress in the IEEPA, it could only sustain the President's authority to impose the restrictions by disabling Congress from acting upon the subject.[14] Since the Court could not disable Congress from acting in this area, it invalidated the President's restrictions on travel to Cuba.[15]

The *Wald* case presented the Supreme Court with a difficult situation. The Court has always maintained a policy of avoiding decisions which would unduly restrict the president's ability to direct our nation's foreign policy. The executive branch, however, conceded that it did not follow the procedures prescribed by the IEEPA.[16] This failure to follow procedures precluded the court from finding a delegation of power.[17]

Justice Rehnquist, writing for a 5-4 majority, avoided this dilemma by finding that the restrictions on travel to Cuba were grandfathered when the IEEPA was passed. Consequently, he found the president's authority to restrict travel to

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9. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring); Dames & Moore v. Regan, 453 U.S. 654, 678 (1981).

10. *See infra* notes 127-45 and accompanying text.

11. 52 U.S.L.W. 4966 (U.S. June 16, 1984).

12. *Id.*

13. *Id.*

14. 708 F.2d 794, 800 (1st Cir. 1983). This reasoning was adopted by the Eleventh Circuit in United States v. Frade, 709 F.2d 1387, 1402 (11th Cir. 1983) (convictions of persons involved in the Cuban Boat Lift of May, 1980, overturned on grounds that the travel restrictions to Cuba were invalid under the IEEPA for failure to follow procedure).

15. *Wald*, 708 F.2d 794, 800.

16. *Id.* at 797.

17. *See infra* notes 146-56 and accompanying text.

Cuba came under the Trading with the Enemies Act (TWEA) and was not restricted by the IEEPA.[18]

In his dissent, Justice Blackmun compiled numerous excerpts from the CONGRESSIONAL RECORD showing that Congress did not intend to grandfather travel restrictions to Cuba.[19] In fact, Blackmun accused the court of ignoring clear legislative intent in order to achieve its desired result.[20]

This Comment is neither a case note on *Regan v. Wald* nor an analysis of whether travel restrictions to Cuba were grandfathered by the IEEPA. Rather, it is an examination of another possible analysis the court could have taken to achieve the same result. By taking the scope-of-inherent-powers approach, the court could still have allowed Congress to have the primary role in defining executive power. The advantage to this approach, however, is that a minor procedural defect would not prohibit the president's action as it would under a delegation approach.

A court using the scope-of-inherent-powers approach would determine whether Congress approved or disapproved of the president's use of his inherent power. The executive's inherent powers would expand or contract relative to congressional approval or disapproval of the action.[21] In determining this, the court would examine all factors which would indicate Congress' intent. The court would then balance those factors indicating congressional support of the president's action with those indicating congressional disfavor with the president's action. The court then would determine whether Congress approved of the president's use of his inherent power and would expand or contract that power relative to Congress' approval or disapproval.[22]

This Comment studies both approaches courts can take in resolving the dilemma presented by the *Wald* case. Section II analyzes presidential powers inherent in the Constitution and the court's policy of providing the president great discretion in foreign affairs. Sections III and IV discuss the delegation-of-powers approach and the scope-of-inherent-powers approach, which the courts use to implement their policy of promoting a strong executive in foreign affairs. Finally, this Comment applies the delegation-of-powers and scope-of-inherent-powers approaches to the facts of the *Wald* case without the grandfather clause. The author concludes that, although Congress cannot be found to have delegated the disputed power to the president, it did acquiesce to the president's claimed inherent power.

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18. *Wald*, 52 U.S.L.W. 4966, 4972 (U.S. June 26, 1984).
19. *Id.* at 4972-77 (Blackmun, J., dissenting).
20. *Id.* at 4975.
21. *Youngstown Sheet & Tube Co.*, 343 U.S. at 334-55 (1952).
22. *See infra* notes 128-45 and accompanying text.

II. INHERENT FOREIGN AFFAIRS POWERS OF THE EXECUTIVE

A. *Sources of Inherent Powers*

The Constitution enumerates few presidential powers for the conduct of foreign policy.[23] The president is empowered to make treaties with the advice and consent of the Senate.[24] The president is also empowered to appoint and receive ambassadors, public ministers, and consuls with the advice and consent of the Senate.[25] The Constitution designates the president as the commander-in-chief of the armed forces.[26] Other presidential powers are implied from the language of Articles I and II of the Constitution.[27]

The president possesses not only enumerated powers but also powers implied from the "executive powers."[28] The president's power to recognize and maintain diplomatic relations with foreign countries has been implied from the constitutionally granted power to receive ambassadors.[29] The commander-in-chief clause has led to the implied executive power to use military force to protect national interests.[30] Finally, the clause empowering the president to "take care that the laws be faithfully executed"[31] has been a basis for presidential actions to ensure that treaty provisions are carried out and to justify intervention in foreign conflicts under international law.

B. *The Supreme Court's Interpretation of Inherent Presidential Powers*

The courts, through interpretation of the Constitution, have further extended the president's foreign affairs power. The broadest interpretation of the execu-

23. HENKIN, *supra* note 1, at 37.

24. U.S. CONST. art. II, § 2, cl. 2.

25. *Id.*

26. *Id.* at cl. 1.

27. The language of articles I and II of the U.S. Constitution has led to further implied presidential powers. Article I grants Congress "[a]ll legislative powers *herein* granted." U.S. CONST. art. I, § 1 (emphasis added). In contrast, article II begins, "The executive powers shall be vested in a president of the United States of America." U.S. CONST. art. II, § 1. The implication of this language is that the president is not limited to the powers that are expressly enumerated, but rather that he has been granted all of the "executive powers." Congress, however, can only exercise those powers which the Constitution specifically grants.

This argument was first advanced by Alexander Hamilton in the debate between "Pacificus" and "Helvidius." *See* HENKIN, *supra* note 1, at 42. The debate between "Pacificus" (Hamilton) and "Helvidius" (James Madison) is set forth in E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 179-81 (4th ed. 1957).

28. *See supra* note 27 and accompanying text.

29. U.S. CONST. art. II, § 3; *see also* HENKIN, *supra* note 1, at 37. Recognition or non-recognition of foreign countries is an executive act that has international and domestic importance. For example, a recognized sovereign power has access to the federal courts. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408-12 (1964); *see also* Note, *Iranian Assets and Claims Settlement Agreements: A Study of Presidential Foreign Relations Power*, 56 TUL. L. REV. 1364, 1367 n. 20 (1982).

30. The War Powers Resolution, 50 U.S.C. §§ 1541-48 (Supp. IV 1980), was a response to the growth of presidential power in this area.

31. U.S. CONST. art. II, § 3.

tive's foreign affairs power is Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corp.*[32]

In *Curtiss-Wright*, the Supreme Court created an extra-constitutional source of inherent presidential power. The *Curtiss-Wright* case arose from the sale of arms to Bolivia despite a presidential boycott of arms sales to that country. After finding a valid congressional delegation of authority for the president to impose the Bolivian boycott, the Court noted in dicta that the president possessed extra-constitutional powers in the area of foreign affairs.[33]

Justice Sutherland, writing for the majority in *Curtiss-Wright*, stated that the federal government in general, and the president in particular, have greater power in foreign affairs than in domestic affairs.[34] The powers of the federal government are not limited by the Constitution because the Constitution involves only those powers that the original thirteen colonies delegated to the federal government.[35] The foreign affairs power, however, was not delegated by the individual colonies. Rather, it originated as a direct grant from the British Crown to the federal government itself.[36] Since the foreign affairs power came from the Crown rather than the states, the president was not restricted by the express language of the Constitution when acting in foreign affairs.[37]

Sutherland argued that the foreign affairs power is vested in the president rather than the legislature.[38] The basis for this argument was that the "[p]resident is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[39] The unique position of the president in foreign affairs allows him more discretion than he possesses in domestic affairs.[40] Thus, the *Curtiss-Wright* Court concluded that the president has inherent foreign affairs powers beyond those enumerated in the Constitution.[41]

The president's position as the representative of the United States in international affairs has made courts reluctant to find that he exceeded his authority when acting in foreign affairs.[42] For example, the Supreme Court in *Chicago and*

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32. 299 U.S. 304 (1936).
33. *Id.* at 316-17.
34. *Id.* at 316.
35. *Id.*
36. *Id.* at 316-17. *See generally* HENKIN, *supra* note 1, at 19-20.
37. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).
38. *Id.* at 319.
39. *Id.*
40. *Id.* at 320-21.
41. *Id.* at 318. *See also* Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (presidential foreign affairs power permits executive regulation of Iranian student visas); Chicago & Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103 (1948) (Supreme Court refused to examine an executive order granting an overseas air route, recognizing that the president may exercise not only the commerce authority delegated to him by Congress, but also an independent foreign affairs power); HENKIN, *supra* note 1, at 210. *See generally* Note, *Settlement of the Iranian Hostage Crisis: An Exercise of Constitutional and Statutory Executive Prerogative in Foreign Affairs*, 13 INT'L L. & POL. 993, 1005 (1981).
42. Note, *supra* note 41, at 1031.

Southern Airlines v. Waterman Steam Ship Corp.,[43] held that the judiciary should not review the president's decisions involving the licensing of international airlines.[44] The Court's rationale for not reviewing the presidential decision was that the president, as the nation's representative in foreign affairs, has intelligence information which should be kept secret.[45] The Court felt it should not examine this information or attempt to decide the issue without such information.[46] The Court does not consider itself the appropriate forum for issues involving foreign policy.[47]

In *Goldwater v. Carter*,[48] the Supreme Court clarified its policy regarding the proper role of the judiciary in foreign affairs issues. In order to normalize relations with the People's Republic of China, President Carter terminated a U.S./Taiwanese defense treaty. Senator Barry Goldwater challenged the President's ability to terminate a treaty without the advice and consent of the Senate.[49] Justice Rehnquist held that the political question doctrine[50] precluded the Court from deciding this issue. Citing *Curtiss-Wright*, Rehnquist based his holding on the fact that the decision to terminate the treaty was a foreign policy matter,[51] and that the Constitution is silent as to the method of terminating treaties.[52] Rehnquist noted that Congress "has a variety of powerful tools for influencing foreign policy decisions that bear on treaty matters."[53] The judiciary should not, in effect, usurp Congress' role.[54]

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43. 333 U.S. 103 (1948).

44. *Id.* at 114.

45. *Id.* at 111.

46. *Id.*

47. *Id.*

48. 444 U.S. 960, 996 (1979).

49. *Id.* at 1005 (Rehnquist, J., concurring).

50. The political question doctrine of judicial restraint states that the court will not hear political questions because their determination would encroach upon the executive or legislative powers.

The Supreme Court in Baker v. Carr, 369 U.S. 186 (1962), fashioned the following test to determine if the political question doctrine should be invoked:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standard for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

51. Goldwater v. Carter, 444 U.S. 996, 1005 (1979).

52. *Id.*

53. *Id.* at 1004 n.1.

54. *Id.* The courts are more comfortable enforcing Congress' objection to presidential power than limiting the power themselves. Comment, *Illumination or Elimination of the "Zone of Twilight?" Congressional Acquiescence and Presidential Authority in Foreign Affairs*, 51 U. CIN. L. REV. 95, 113-16 (1982).

C. *The Influence of* Curtiss-Wright

While courts are unwilling to restrict the president's power without congressional direction, they are equally unwilling to give it judicial approval.[55] Justice Jackson, in *Korematsu v. United States*,[56] articulated this policy by stating that it is better to let unconstitutional executive emergency actions stand rather than have a judicial opinion try to rationalize the illegal act, because the illegal act ends with the emergency but the judicial interpretation "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[57] The Court fears that precedents they establish for emergency circumstances will be misused in later unforeseen situations.

The case of *Haig v. Agee*[58] exemplifies the Supreme Court's reluctance to rely on implied inherent presidential powers as a means of providing the president flexibility in foreign affairs.[59] In *Agee*, the Court suggested that the president's discretionary authority over passport issuance was inherent. In support of this proposition, the Court cited *Curtiss-Wright*'s language on the "delicate, plenary and exclusive power of the president."[60] In its holding, however, the Court did not rely on an inherent presidential power to issue passports,[61] but rather, relied on an implied congressional authorization[62] for the president to withhold passports for national security reasons.[63]

Although courts are reluctant to rely on implied inherent powers to justify a presidential action, they are still influenced by *Curtiss-Wright* in cases involving foreign affairs.[64] This influence does not take the form of court created plenary inherent powers in the executive. Rather, it takes the form of an increased willingness by the courts to either find a congressional delegation of power to the executive, or to find congressional approval of the executive's interpretation of presidential powers in the Constitution.[65] The tests the courts use to implement both of these approaches originated in the 1952 case of *Youngstown Sheet & Tube Co. v. Sawyer*.[66]

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55. Comment, *supra* note 54, at 113-14.
56. 323 U.S. 214 (1944).
57. *Id.* at 246 (Jackson, J., dissenting).
58. 453 U.S. 280 (1981).
59. Comment, *supra* note 54, at 113.
60. *Agee*, 453 U.S. at 240 n.21.
61. Comment, *supra* note 54, at 113.
62. The Court found that Congress had approved the Secretary's withholding of passports for national security reasons because it failed to object to the State Department's policy on passport denial. *Agee*, 453 U.S. at 300-01.
63. *Id.*
64. *See infra* notes 91-126 and accompanying text.
65. The first of these approaches is the delegation-of-powers approach. The second of these approaches is the scope-of-inherent-powers approach. *See supra* notes 7-11 and accompanying text.
66. 343 U.S. 579 (1952).

III. *YOUNGSTOWN SHEET & TUBE CO. V. SAWYER*

The *Youngstown* case arose from President Truman's seizure of the nation's steel mills in order to avert a nationwide strike and thus avoid possible harm to the Korean War effort.[67] The President claimed authority for his actions under his own inherent powers.[68] The steel companies filed suit on the grounds that neither the Constitution nor Congress authorized the president to seize the steel mills.[69] In fact, Congress had expressly rejected delegating to the president the power to seize property in emergency situations.[70] The government argued, however, that because the President was using his inherent powers, he did not need to consult Congress or seek its approval.[71]

The Court found that neither the executive's authority as commander-in-chief nor his authority to faithfully execute the law gives him the "ultimate power . . . to take possession of private property in order to keep labor disputes from stopping production."[72] The majority opinion apparently rejected the *Curtiss-Wright* concept of broad inherent powers in the executive.[73] Four of the six-member majority, however, wrote concurrences which argued that the president does possess certain implied powers.[74]

Justice Jackson's concurrence has been the most influential in subsequent analyses of inherent presidential power.[75] Justice Jackson did not view inherent presidential powers as broadly as did Justice Sutherland in *Curtiss-Wright*,[76] nor did he believe executive power should be rigidly limited to those powers enumerated in the Constitution.[77] Instead, Jackson viewed the scope of presidential powers as flexible "depending upon their disjunction or conjunction with those of Congress."[78]

Justice Jackson's opinion provides an analytical framework for determining the scope of presidential powers. Jackson outlined three categories of presidential action:[79]

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67. *Id.* at 582.

68. *Id.* President Truman claimed inherent emergency authority and authority as commander-in-chief of the armed forces.

69. *Id.* at 583.

70. *Id.* at 586.

71. *Id.* at 584.

72. *Id.* at 587.

73. *Curtiss-Wright* is of doubtful precedential value in *Youngstown* because *Curtiss-Wright* involved purely foreign affairs, whereas *Youngstown* involved predominantly domestic affairs. *Compare Curtiss-Wright*, 299 U.S. at 315, *with Youngstown*, 343 U.S. at 582.

74. Comment, *supra* note 54, at 98.

75. Note, *The National Emergency Dilemmas: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 S. CAL. L. REV. 1494 (1979).

76. *Youngstown Sheet & Tube*, 343 U.S. at 640.

77. *Id.*

78. *Id.* at 635.

79. Jackson admitted that the categories are "over-simplified groupings of practical situations." *Id.* The limited value of these groupings was also noted by the Supreme Court in Dames & Moore v. Regan, 453 U.S. 654, 669 (1981).

> (1) [W]hen the [p]resident acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . ;
>
> (2) When the [p]resident acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . ;
>
> (3) When the [p]resident takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . .[80]

The practical effect of Jackson's framework is that if the president acts pursuant to the will of Congress, the Supreme Court will view his powers broadly.[81] If the president acts against the will of Congress, the Supreme Court will strictly scrutinize his powers.[82] In the latter case, the president's powers are restricted to those specifically enumerated in the Constitution.[83] Thus, after *Youngstown*, the Court would not focus on whether the president has the necessary inherent power to perform a particular act but whether he was acting in accordance with, or against, the will of Congress.[84] To determine this, the court analyzes the extent to which Congress approved of the president's actions.[85] Jackson's concurrence, therefore, provides a framework for analyzing whether Congress has authorized the president's use of his inherent powers.[86]

Justice Frankfurter's concurring opinion in *Youngstown* is the origin of the delegation-of-powers approach for ascertaining the executive's foreign affairs power.[87] Frankfurter reasoned that Congress can be held to have acquiesced in

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80. *Youngstown Sheet & Tube*, 343 U.S. at 635-38.

81. *Id.* at 635.

82. *Id.* at 638.

83. *Id.* Jackson felt that when the president's acts contravene the will of Congress, the executive should be limited only to those powers mentioned in the Constitution. He did not believe, however, that the express powers should be "narrowed by niggardly construction," but rather given the "scope and elasticity afforded by what seem to be reasonable, practical implications." *Id.* at 640.

84. *See, e.g., Dames & Moore*, 453 U.S. at 668. Jackson's second category offers no real guidance as to whether the president is authorized to act or not. *See* Chemerinsky, *Controlling Inherent Presidential Powers: Proving a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 870 (1983). Consequently, the trend in the courts is to find congressional approval through acquiescence when Congress is silent. *See, e.g.*, Haig v. Agee, 453 U.S. 280 (1981), discussed *infra* notes 110-26 and accompanying text. *See also* Comment, *supra* note 54, at 95.

85. *See infra* notes 127-45 and accompanying text. *See also* Comment, *supra* note 54, at 95.

86. This is the scope-of-inherent-powers approach.

87. *See infra* notes 91-126 and accompanying text. Ironically, the concurrence addressed implied congressional acquiescence to inherent presidential powers rather than the congressional delegation of power. For further discussion of the delegation-of-powers approach, see *infra* notes 91-126 and accompanying text.

the president's actions when there is a "systematic unbroken executive practice, long pursued to the knowledge of Congress and never before questioned."[88] In subsequent decisions, courts have used Frankfurter's test to find that Congress has acquiesced in the executive's interpretation of enabling legislation,[89] thereby finding an implied congressional delegation.[90]

IV. THE DEVELOPMENT OF THE TESTS FOR IMPLIED PRESIDENTIAL POWERS

A. *Delegation of Powers Approach*

The Supreme Court elaborated on Justice Frankfurter's standard for determining "implied congressional delegation through acquiescence" in *Kent v. Dulles*[91] and *Zemel v. Rusk*.[92] The *Kent* case arose from a challenge to the Secretary of State's authority to withhold passports from persons with communist affiliation.[93] Kent, a member of the Communist Party, claimed that the right to travel can be regulated only by Congress and not by the executive.[94] The U.S. government responded that Congress, in the 1926 Passport Act,[95] granted the Secretary discretion over the issuance of passports.[96] Because a constitutionally protected individual right[97] was involved, the Court narrowly construed the legislative grant of authority for passport issuance and held that Congress had not delegated such authority to the executive.[98] The Court found that a mere grant of discretion over passport issuance does not delegate this authority to the executive. Rather, Congress must acquiesce to the criteria the Secretary uses in exercising his discretion.[99] The Court held there are only two ways Congress can delegate authority to the president. It can do it explicitly, or by lack of objection to a "substantial and consistent administrative practice."[100] The Court concluded that the State Department's practice with respect to withholding

88. *Youngstown Sheet & Tube*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

89. *See infra* notes 91-126 and accompanying text.

90. Congress implies a delegation of power by acquiescing to the president's interpretation of an enabling statute. *See also Agee*, 453 U.S. at 291. *See also infra* note 121 and accompanying text.

91. 357 U.S. 116 (1958).

92. 381 U.S. 1 (1965).

93. *Kent*, 357 U.S. at 117-18.

94. *Id.* at 129.

95. Ch. 772, 44 Stat. 8871 (1926) (codified as amended at 22 U.S.C. § 2119 (1976)).

96. *Id.*

97. The right to travel is protected under the fifth amendment. U.S. CONST. amend. V.

98. *Kent*, 357 U.S. at 129.

99. *Id.* at 125. Congress must approve of the secretary's policy of withholding passports on the grounds of political affiliation. The Court stated that the key factor is the manner in which the secretary's discretion is exercised, not the mere fact that he has discretion. *Id.*

100. *Id.* at 125. The "substantial practice" test is essentially the same as Frankfurter's "systematic unbroken practice" test. The only difference is that the *Kent* test is for implied delegation through acquiescence whereas Frankfurter's test is for implied approval of presidential power through acquiescence.

passports from communists was too "scattered and inconsistent" to pass this test.[101]

The cases after *Kent* show a gradual lowering of the standard needed to find a congressional delegation, thus giving the executive branch greater freedom over foreign affairs.[102] For example, the Court in *Zemel v. Rusk* held that the Secretary of State had the authority to restrict travel to Cuba.[103] The *Zemel* Court cited *Curtiss-Wright* in support of the proposition that "Congress — in giving the executive authority over matters of foreign affairs — must of necessity paint with a brush broader than it customarily wields in domestic areas."[104] For this reason, a specific grant of authority is not as necessary in foreign affairs as in domestic affairs.[105] The *Zemel* Court held that the executive's interpretation of the Passport Act must be given great weight.[106] Moreover, Congress' failure to repeal or revise the Act in spite of such administrative interpretation could be held to constitute persuasive evidence that Congress acquiesced in the executive's interpretation.[107] Since Congress had not objected to the executive's restrictions on travel in either the 1926 or the 1952 Passport Acts, the Court felt Congress had intended to grant the president this power.[108] Thus, the *Zemel* Court lowered the requirements of the "substantial practice" test of *Kent*.[109]

The Supreme Court further lowered this standard in *Haig v. Agee*.[110] Phillip

101. *Id.* at 128.

102. *See* Comment, *supra* note 54, at 98-104.

103. Zemel v. Rusk, 318 U.S. 1, 3 (1964).

104. *Id.* at 17. The Court also referred to the necessity of greater executive discretion in foreign affairs, "because of the changeable and explosive nature of contemporary international relations, and the fact that the executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature." *Id.*

105. *Id.*

106. *Id.* at 11.

107. *Id.*

108. *Id.* at 12. The Court noted many instances in which the president exercised his power to restrict travel, including the State Department's restrictions on travel to Belgium in 1915, to Germany and Austria prior to 1922, to the USSR prior to 1923, to Ethiopia in 1935, to Spain in 1936, to China in 1937, to Europe in 1939, to Yugoslavia in 1946-1950, to Hungary in 1949-1951 and after 1951, to Czechoslovakia after 1951, to Albania, Bulgaria, Communist China, and the USSR in 1952, to North Korea and Vietnam in 1955, and to Egypt, Israel, Jordan, and Syria in 1956. *Id.* The *Zemel* Court's finding of a substantial and consistent practice of travel restrictions contradicts the *Kent* Court's holding that only two categories for restriction of passports — citizenship and illegal conduct — constitute a substantial administrative practice from which the Court could infer congressional acquiescence. The *Zemel* Court distinguished its holding by noting that the *Kent* Court limited its examination to practices that involved distinctions based on individual characteristics. *Id.* at 13. Justice Goldberg dissented, stating that the administration's practice in *Kent* was more substantial and consistent than the administration's practice in *Zemel*. *Id.* at 36 (Goldberg, J., dissenting).

109. Unlike the *Kent* Court, the *Zemel* Court did not find an abridgment of Zemel's constitutional right to travel and thus did not interpret the 1926 Passport Act as narrowly as the *Kent* Court. *Id.* at 14. The Court distinguished *Zemel* from *Kent*. *Zemel* involved a travel restriction based on foreign policy considerations affecting all citizens. *Kent*, on the other hand, involved a denial of the applicant's passport because of the applicant's political beliefs. *Id.* at 12.

110. 453 U.S. 280 (1981). Justices Brennan and Marshall in dissent noted that the *Agee* Court was lowering the *Kent-Zemel* standard. *Id.* at 314 (Brennan, J., dissenting).

Agee, an ex-CIA agent, had begun a campaign to expose CIA agents and to interfere with covert CIA activity throughout the world.[111] Because of his position with the CIA, Agee possessed enough information about the CIA's covert operations to severely damage the United States' intelligence gathering ability.[112] In December, 1979, the Secretary of State revoked Agee's passport on the ground that his activities were causing or likely to cause serious damage to the national security or foreign policy of the United States.[113] Agee brought suit challenging the Secretary's action as outside the scope of Congress' delegation to the executive in the 1926 Passport Act.[114] The District Court[115] and the Court of Appeals[116] granted Agee's motion for summary judgment. The lower courts interpreted the *Kent* and *Zemel* opinions as requiring a "substantial and consistent administrative practice" before congressional silence can imply authorization of the executive's interpretation of an act.[117] They reasoned that passport refusals for national security reasons were too few to constitute a substantial and consistent administrative practice.[118]

The U.S. Supreme Court overturned the lower courts and found implied congressional authorization for the Secretary of State to revoke passports for national security reasons.[119] The Court stated that the judicial branch should defer to a consistent administrative construction of the statute unless there is a compelling indication that the construction is wrong.[120] Citing *Curtiss-Wright*, the Court noted that the judicial branch should be especially deferential to the executive's construction of a statute when foreign policy and national security issues are involved.[121] The Court then argued that a consistent administrative policy which exercises the challenged authority would satisfy the *Kent-Zemel* standard.[122] As a result, the Court was able to find that Congress had delegated authority to the president by failing to object to the Secretary's policy of revoking

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111. *Id.* at 283.

112. *Id.* at 284. The Court also noted Agee could endanger the lives of undercover agents. *Id.*

113. The Secretary revoked Agee's passport pursuant to 22 C.F.R. 51.70(b)(4), 51.71(a) (1979), which state in relevant parts:

> § 51.70(b) *Denial of Passports.* A passport may be refused in any case in which: . . . (4) The Secretary determines that the national's activities abroad are causing or likely to cause serious damage to the national security or the foreign policy of the United States.
>
> § 51.71(a) *Revocation or Restriction of Passports.* A passport may be revoked, restricted or limited where: (a) The national would not be entitled to issuance of a new passport under § 51.70.

This administrative regulation was derived from the 1926 Passport Act. 22 U.S.C. § 211(a) (1976).

114. *Agee*, 453 U.S. at 287.

115. Agee v. Vance, 483 F. Supp. 729 (D. D.C. 1980).

116. Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980).

117. Agee v. Vance, 483 F. Supp. at 732; Agee v. Muskie, 629 F.2d at 87.

118. Agee v. Vance, 483 F. Supp. at 731-32; Agee v. Muskie, 629 F.2d at 87.

119. *Agee*, 453 U.S. at 305.

120. *Id.* at 291.

121. *Id.*

122. *Id.* at 303.

passports for national security reasons.[123] The Court held that it would be anomalous to fault the government because there were few occasions to exercise the announced policy and practice.[124] Thus, the Court rejected the previous interpretations of the *Kent-Zemel* test which required a substantial and consistent administrative *practice* and adopted a new test which only requires a substantial and consistent administrative *policy*.[125]

The Supreme Court uses this test to implement its "delegation-of-powers approach." Under this approach, the Court will find a congressional delegation of power to the president unless Congress expressly objects to the president's exercise of that power. The Court uses the delegation approach only in cases involving issues of foreign affairs. Accordingly, the Court is more likely to find a congressional delegation of power to the president in foreign affairs than in domestic matters.[126]

B. *Test for Implied Congressional Acquiescence to Inherent Presidential Powers: The Scope-of-Power Approach*

The ease with which courts can find congressional delegation under the *Agee* test allows them to avoid addressing the scope-of-inherent-powers question. Consequently, courts have rarely used the powers approach delineated in Justice Jackson's *Youngstown* concurrence.[127] A recent decision, *Dames & Moore v. Regan*,[128] is the major case utilizing the test enunciated in Jackson's concurrence.

The *Dames & Moore* case arose from challenges by U.S. citizens to the power of the Carter and Reagan Administrations to enter into an agreement with the Iranian government, nullifying the claims of U.S. citizens against Iran in exchange for the return of fifty-two U.S. citizens held hostage by the Iranian government.[129] In implementing the hostage agreement, President Reagan revoked previously granted prejudgment licenses,[130] issued orders nullifying U.S. interests in Iranian assets, suspended U.S. claims against Iran, and transferred

123. *Id.* at 306.

124. *Id.* at 303.

125. *Id. See also* Note, *Separation of Powers: Congressional Acquiescence to Executive Discretion in Foreign Affairs*, 57 NOTRE DAME LAW. 868, 871 (1982). This interpretation of the *Kent* standard has spurred criticism. Brennan argued in dissent that the *Kent-Zemel* standard requires a substantial and consistent administrative *practice*. A policy alone would not satisfy *Kent-Zemel*. *Agee*, 453 U.S. at 314 (Brennan, J., dissenting). *See also* Comment, *supra* note 54, at 104 n.74.

126. Comment, *supra* note 54, at 106.

127. *Id.* at 99.

128. 453 U.S. 654 (1981).

129. *Dames & Moore*, 453 U.S. at 666-67.

130. Prejudgment licenses were issued by the Carter administration. These licenses provided for attachments of Iranian property in the United States. The licenses, however, could be revoked at any time. 31 C.F.R. § 535.805. President Carter also allowed judicial proceedings to begin but did not allow the entry of any judgment or decree against Iran. 31 C.F.R. § 535.504(a) (1980).

the claims to an international arbitral tribunal.[131] Justice Rehnquist found that Congress explicitly authorized the president to nullify U.S. claims against foreign governments and to transfer Iranian assets in the International Emergency Economic Powers Act (IEEPA).[132]

The Court, however, could not find explicit congressional authorization for the president to suspend U.S. claims against Iran.[133] Relying on Congress' enactment of the IEEPA and the Hostage Act,[134] the Court reasoned that although the IEEPA did not grant explicit approval of the President's actions, it did indicate a congressional willingness to allow the President broad discretion in foreign affairs.[135] Also rejected was the proposition that the Foreign Sovereign Immunities Act (FSIA)[136] implied a congressional desire to remove the president's ability to settle private claims by executive agreement.[137] More specific congressional disapproval of the president's action is required before the Court will negate implied congressional approval.[138]

The *Dames & Moore* Court indicated that in matters of foreign affairs and national security only direct congressional disapproval would invalidate a presidential action.[139] Moreover, the Court further explained that "[l]egislation closely related to the question of the [p]resident's authority in a particular case which evidences legislative intent to accord the [p]resident's broad discretion may be considered to 'invite' measures of 'independent [p]residential responsibility.' "[140]

One commentator has argued that the *Agee* and *Dames & Moore* Courts have

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131. Exec. Order Nos. 12276-12285, 46 Fed. Regs. 7913-31. *See also Dames & Moore*, 453 U.S. at 665-66 (discussion of IEEPA).

132. *Dames & Moore*, 453 U.S. at 675. While admitting that the legislative history of the IEEPA showed a congressional attempt to limit the president's power to vest, the Court refused to ignore the "plain language of the statute in favor of legislative history." *Id.* at 672-73. Thus, "although . . . the IEEPA does not give the [p]resident the power to 'vest' or to take title to the assets, it does not follow that the [p]resident is not authorized under . . . [the] IEEPA . . . to otherwise permanently dispose of the assets in the manner done here." *Id.* at 672 n.5. *See also infra* note 191 and accompanying text.

133. *Dames & Moore*, 453 U.S. at 675. The Court rejected both the IEEPA and the 1868 Hostage Act as sources of explicit congressional approval. The IEEPA was rejected because it dealt with rights exercised against a foreign country's assets, not personal claims meant to establish liability and fix damages. *Id.* The 1868 Hostage Act was rejected because it was concerned with providing the president with authority to protect U.S. citizens abroad from forced repatriation. *Id.* at 676.

134. *See supra* note 133.

135. *Dames & Moore*, 453 U.S. at 678. The *Dames & Moore* Court further held that failure of Congress to deny specific authority does not, "especially in the areas of foreign policy and national security, imply [c]ongressional disapproval of [the] action." *Id.* at 678 (quoting *Agee*, 453 U.S. at 291).

136. Foreign Soverign Immunities Act, 28 U.S.C. §§ 1602-11 (1984).

137. *Dames & Moore*, 453 U.S. at 684. Justice Rehnquist stated that the FSIA should be read narrowly. The purpose of the act was to codify the contemporary concepts of immunity and to remove the president's authority to make binding determinations of the sovereign immunity of foreign states. *Id.* at 685.

138. *Id.* at 678. *See also* Note, *supra* note 125, at 877.

139. *See Dames & Moore*, 453 U.S. at 677. *See also* Note, *supra* note 125, at 877.

140. *Dames & Moore*, 453 U.S. at 678 (citing *Youngstown Sheet & Tube*, 343 U.S. at 637).

defined away Justice Jackson's second category.[141] Under this delegation-of-powers approach, a court following *Dames & Moore* or *Agee* could find congressional delegation or approval of presidential power if Congress had knowledge of the asserted authority and the opportunity to act on that knowledge.[142]

The role given Congress in *Kent*, *Zemel*, and *Agee* is very different from the role of Congress in Justice Jackson's *Youngstown* concurrence and in *Dames & Moore*. In the line of cases culminating in *Agee*,[143] the Court found that Congress had not acquiesced to the president's use of inherent powers. Rather, the Court found that Congress had implicitly delegated its own powers to the president.[144] In *Youngstown* and *Dames & Moore*, however, the Court found that Congress had not delegated its own powers but had authorized the president's use of his own inherent power. In *Agee*, Congress acquiesced to the president's interpretation of how much power Congress had delegated. In *Dames & Moore*, Congress acquiesced to the president's interpretation of how much power he held under the Constitution. The former deals with the delegation of power by Congress and the latter deals with the scope of executive power in the Constitution.

This distinction between *Agee* and *Dames & Moore* is particularly important when dealing with an executive's failure to follow congressionally established procedure. If Congress acquiesces to the president's inherent power, then the president's failure to follow procedure is less important. Conversely, if Congress delegates power to the president, the president's failure to follow the procedure Congress established could be grounds for invalidating the presidential act.[145] The following section analyzes the effect of the executive's failure to follow procedure under the delegation-of-power and scope-of-inherent-powers approaches.

V. THE EFFECT OF THE PRESIDENT'S FAILURE TO FOLLOW PROCEDURE

A. *The Effect of Failure to Follow Procedure: The Delegation-of-Powers Approach*

When Congress delegates power to the executive and prescribes a procedure for the exercise of that power, the executive's failure to follow the established procedure may lead a court to invalidate the executive's action.[146] The Supreme

141. Comment, *supra* note 54, at 112. *See also supra* note 80 and accompanying text.

142. Comment, *supra* note 54, at 112.

143. *See, e.g.*, Kent v. Dulles, 357 U.S. 116 (1958); Zemel v. Rusk, 381 U.S. 1 (1965).

144. *See Dames & Moore*, 453 U.S. at 686, which concluded that "the President was authorized to suspend pending claims pursuant to Executive Order No. 12294." *Id.* The advantage of this holding was that if the Court found the delegation of power to the executive, it did not have to consider the problem of inherent presidential power.

145. *See infra* notes 146-56.

146. Moyer & Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues and Policy Lessons of These Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1, 97 (1983) [hereinafter cited as Moyer & Mabry].

Court has held in several cases that agency action taken without following prescribed procedures is null and void.[147] The Administrative Procedure Act (APA)[148] also invalidates executive action for failure to follow congressional procedure.[149] Section 706(2)(d) of the APA provides that the reviewing court shall "hold unlawful and set aside agency actions, findings, and conclusions found to be . . . without observance of procedure required by law."[150] The policy of the APA regarding failure to follow procedure, however, can only be used by analogy because executive actions regarding military or foreign affairs are exempt from the APA.[151]

Despite the inapplicability of the APA, other arguments support the proposition that Congress cannot be held to have authorized the president's action when the president failed to follow the procedure Congress prescribed.[152] Several courts have held that Congress cannot be held to have acquiesced to executive actions when the president failed to follow the procedures established by Congress. In *Wald v. Regan* [153] and *United States v. Frade*,[154] the First and Eleventh Circuit Courts held that the president's failure to follow congressionally established procedure moves the president's action from the first of Jackson's categories, in which the executive acts with the will of Congress, to the third, in which the executive acts contrary to the will of Congress.[155] Actions in the third category can be upheld only by disabling Congress from acting in the field.[156]

B. *The* Consumers Union *Case*

The effect of the executive's failure to follow procedure was discussed in some detail in Judge Leventhal's dissent in the District of Columbia Circuit Court case

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147. *See, e.g.*, Service v. Dulles, 354 U.S. 363 (1957) (discharge of foreign service officer invalid because not effected pursuant to State Department regulations); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1953) (denial of application for suspension of deportation order invalid because Board of Immigration Appeals failed to exercise its own discretion as required by existing regulations). *See also* Gardner v. F.C.C., 530 F.2d 1086, 1089-90 (D.C. Cir. 1976) (FCC denial of petition for reconsideration invalid because Commission failed to provide personal notice of decisions pursuant to the established practice); Nader v. NRC, 513 F.2d 1045, 1051 (D.C. Cir. 1975) ("an administrative agency is bound not only by the precepts of its governing statute but also by those incorporated into its own regulations."); *Cf.* Brady v. U.S., 515 F.2d 1383 (1975) (discharge of servicemen invalid because Air Force failed to follow procedural regulations).

148. Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-59 (1982)).

149. 5 U.S.C. § 706(2)(d) (1982).

150. *Id.* Under the APA, a court may overturn an agency action taken without observance of prescribed procedure only when there is prejudicial error. *Id.* The rule of prejudicial error states that only error which harms or prejudices the plaintiff will be grounds for setting aside the action.

151. 5 U.S.C. § 9(1) (1982).

152. Moyer & Mabry, *supra* note 146, at 120.

153. *Wald*, 708 F.2d at 800, *rev'd on other grounds*, 52 U.S.L.W. 4966 (U.S. June 26, 1984).

154. *Frade*, 709 F.2d at 1402.

155. *Id.*

156. *Id. See also supra* note 80 and accompanying text.

of *Consumers Union of the United States Inc. v. Kissinger*.[157] The *Consumers Union* case arose from actions taken by the executive in response to the dramatic increase in steel imports during the 1960's.[158] The government perceived this increase in steel imports as a threat to the domestic steel industry, the national economy, and national security.[159] Congress took no action to impose mandatory import restrictions on steel due to the fear of possible retaliation by other countries under the General Agreement on Tariffs and Trade (GATT).[160] Instead, the U.S. State Department negotiated a voluntary reduction of steel imports into the United States with the foreign steel producers.[161] The Consumers Union brought suit against the United States claiming the agreement was prejudicial to the interests of consumers and that the executive did not have the power to negotiate such an agreement.[162]

In order to decide whether the president had the power to negotiate the agreement, the Circuit Court was first required to determine whether the arrangement was an internationally binding executive agreement.[163] Judge McGowan, writing for a majority of the court, found the arrangement to be voluntary, and thus not an internationally binding agreement.[164] Since no binding agreement had been concluded, Judge McGowan did not need to consider the executive's competence to make such binding agreements.[165]

In his dissent, Judge Leventhal argued that the agreement was internationally binding and thus he addressed the question of the executive's competence to make this agreement.[166] A crucial factor in determining the executive's competence to conclude the agreement was that President Nixon, in making the agreement, had ignored certain procedures which Congress had prescribed in the Trade Expansion Act of 1962.[167] While recognizing that the president does have some inherent power in the field of foreign affairs,[168] Leventhal argued

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157. 506 F.2d 136 (D.C. Cir. 1974).

158. *Id.* at 138. Steel imports increased tenfold from 1958 to 1968. *Id.*

159. The D.C. Circuit noted that having a steel industry strong enough to supply a war machine is considered crucial to national defense. *Id.*

160. General Agreement on Tariff and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

161. Consumers Union of the United States, Inc. v. Kissinger, 506 F.2d 136, 138 (1974).

162. *Id.* at 139.

163. *Id.* at 143.

164. Judge McGowan found the arrangements non-enforceable and that the executive had no authority to compel observance. *Id.*

165. *Id.* The president is free to suggest a reduction in imports to foreign producers. If producers *voluntarily* choose to accept this agreement, there is no question of executive competence as the action came from the foreign producers and not from the president.

166. *Id.* at 146 (Leventhal, J., dissenting).

167. *Id.* at 148, 158. *See also* 9 U.S.C. § 1801 (1982). The Trade Expansion Act of 1962 made the exercise of executive authority over import restraints dependent on public ventilation of the issues and on the right of comment by affected interests. *Id.* at 1862.

168. *Consumers Union*, 506 F.2d at 148. (Leventhal, J., dissenting).

that the president's power over foreign affairs cannot allow him to ignore congressional regulatory schemes enacted pursuant to the congressional power to regulate foreign commerce.[169]

Judge Leventhal utilized Justice Jackson's *Youngstown* test to resolve the tension between the president's inherent foreign affairs power and Congress' power to regulate foreign commerce.[170] Like Justice Jackson, Leventhal viewed the scope of the president's powers as expanding or contracting depending on their conjunction or disjunction with the will of Congress.[171] Leventhal argued, however, that the president is foreclosed from acting independently in an area in which Congress has occupied the field by enacting legislation.[172] Thus, unless the president acts in conformity with the procedures established by Congress, his actions fall into Jackson's third category[173] and his executive powers are at their "lowest ebb."[174] Reviewing the legislative history of the Trade Expansion Act and the history of congressional reaction to prior presidential action in trade regulation, Leventhal found that Congress had occupied the field of regulation of imports and had not acquiesced to any procedural shortcomings by the executive.[175] Accordingly, the president's actions fell within Jackson's third category. Since Congress has particularly strong authority in the regulation of foreign commerce, the president is foreclosed from regulating foreign commerce in a manner incompatible with the procedural requirements imposed by Congress.[176]

Judge Leventhal, however, did not ignore the judiciary's traditional policy of allowing presidential discretion in foreign affairs.[177] While he would have held against the executive's exercise of power, Leventhal stated that he would not have invalidated the agreement.[178] Rather, he would have directed the president

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169. *Id.* at 148-49. (Leventhal, J., dissenting). The Constitution grants Congress the power to regulate foreign commerce. U.S. CONST. art. I, § 8, cl. 3.

170. 506 F.2d at 148-49 (Leventhal, J., dissenting).

171. *Id.* at 148 (Leventhal, J., dissenting). Judge Leventhal argued:

> [T]he proper inquiry, is whether the executive action in obtaining the agreements for steel import restrictions comports with the [c]ongressional program for foreign trade, or whether Congress, by occupation of the field of foreign import restraints, has precluded the [p]resident's taking action on an independent basis without complying with the standards and procedures provided by Congress as a condition of executive effectuation of import restraints. *Id.*

172. *Id.*

173. *Id. See also Wald*, 708 F.2d at 800; *Frade*, 709 F.2d at 1387; United States v. Guy Capps, 204 F.2d 655 (4th Cir. 1953) (holding that since Congress had occupied the field in import controls of seed potatoes, the president was foreclosed from independent activity).

174. *Consumers Union*, 506 F.2d at 149. (Leventhal, J., dissenting).

175. *Id.* at 153-57. Judge Leventhal noted that Congress had considered but refused to authorize the president the power to impose restraints without observing procedural requirements. *Id.* at 152 n.11. Leventhal also noted that at no time after the 1962 Trade Expansion Act, 19 U.S.C. § 1862 (1982), did Congress knowingly acquiesce to the executive's actions to impose import restraints without following procedural requirements. *Consumers Union*, 506 F.2d at 156-57 (Leventhal, J., dissenting).

176. *Consumers Union*, 506 F.2d at 149 (Leventhal, J., dissenting).

177. *Id.* at 148, 158.

178. *Id.* at 158.

to adhere to the correct procedure.[179] Citing *Curtiss-Wright*, Judge Leventhal explained that it is appropriate, "in a matter so laced with delicate international relationships, for the court to shun a 'procrustean rigidity' in deference to possible clarification or correction by the [p]resident and Congress together."[180]

Judge Leventhal's dissent provides a possible test for determining whether a court should invalidate presidential action for failure to follow a congressionally prescribed procedure. A court may look at the comprehensiveness of the legislation to establish whether Congress has occupied the field. In addition, the court could examine congressional acquiescence to past presidential action in the area. If the court finds Congress has occupied the field, the president must follow the statutory procedure that Congress prescribes. If he fails to do this, his actions fall within Justice Jackson's third category, and the court must disable Congress from acting in this area before it can support the president's actions.

VI. ANALYSIS OF OPTIONS OPEN TO A COURT IN RESOLVING THE SITUATION PRESENTED IN THE *Wald* CASE: THE ROAD NOT TAKEN

The Court in reviewing *Wald* was faced with the tension between providing the president flexibility in foreign affairs and maintaining checks on the executive.[181] The *Wald*-type case is unique because the tension cannot be resolved by the Court's finding that the president was delegated authority because he failed to follow congressional procedure.[182] Consideration of the various options open to the Court in grappling with this problem illustrates the difficult questions the Court was faced with.

If the Court were to follow *Curtiss-Wright* in resolving *Wald*, it would have created new exclusive inherent executive power.[183] The creation of new presidential powers, however, would upset the system of checks and balances. Traditionally, courts have provided the president greater flexibility without addressing the issue of inherent powers by finding a congressional delegation of power to the president.[184] Without the grandfather clause, however, the facts of the *Wald* case foreclose this solution. In the cases in which the Supreme Court found implied congressional authorization, Congress had acquiesced to past presidential actions in the area and had not enacted any contrary legislation.[185] In *Wald*, Congress' passage of the IEEPA indicates that Congress intended to grant the president power under the IEEPA only when he followed the procedures pre-

179. *Id.*
180. *Id.*
181. *Wald*, 708 F.2d at 800.
182. The executive is acting under authority granted by Congress, yet the president has failed to follow the procedure Congress had established. *Id.* at 796.
183. *See supra* notes 55-63 and accompanying text.
184. *See supra* notes 110-26 and accompanying text.
185. *See Dames & Moore*, 453 U.S. at 678-79. *See also supra* notes 110-26.

scribed by the statute.[186] Thus, in the *Wald* case, it would have been very difficult for the Court to find a delegation of power to the executive without resorting to the grandfather clause.

If the Court found that the President's restrictions on travel to Cuba were neither authorized by a congressional delegation nor under the president's exclusive inherent powers, it could still reach its desired conclusion by using its scope-of-inherent-powers approach articulated in Justice Jackson's *Youngstown* concurrence. If the Court used the scope-of-inherent-powers approach rather than the delegation approach, it would not have had to invalidate the President's actions because of his procedural shortcomings.[187]

Under the scope-of-inherent-powers approach, the Court would decide in which of Justice Jackson's three categories President Reagan's actions belonged when he failed to follow the procedure set out in the IEEPA. The President's failure to follow congressionally prescribed procedure would preclude his action from Jackson's first category. To be in that category, the president must act pursuant to the express or implied authorization of Congress.[188] Moreover, Congress has not acquiesced to any past presidential actions which ignored the procedural requirements of the IEEPA.[189]

The challenged action, however, does not clearly fall into Justice Jackson's third category either. The President's actions in *Wald* did not completely contravene congressional intent. *Youngstown* is the classic example of presidential action in the third category. The facts in *Wald* differ from *Youngstown* substantially. In *Youngstown*, Congress specifically refused to grant the President power to seize private property to end labor disputes, even in times of national emergency.[190] In *Wald*, however, Congress granted the President the power but established a procedure for its use. There is a distinction between a situation such as *Youngstown*, in which Congress specifically denies the substantive power, and a situation such as that in *Wald*, where Congress specifically grants the substantive power but prescribes a procedure which the president fails to follow.

Judge Leventhal's dissent in the *Consumers Union* case provides some guidance as to whether the President's actions in *Wald* should be included in Justice Jackson's second or third category. According to Judge Leventhal's test, the court should focus on how thoroughly Congress intended to occupy the field. An analysis of the IEEPA indicates that Congress did not intend to exclusively occupy the field of emergency economic powers. In fact, the IEEPA gives the

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186. *See infra* note 201.

187. A court could invalidate a congressional delegation of power to the president if he fails to follow congressionally prescribed procedure. *See supra* notes 146-56 and accompanying text. If a court were to follow the scope-of-inherent-powers approach, its finding that the president failed to follow procedure is only evidence of congressional disapproval. *See supra* notes 127-44 and accompanying text.

188. *Id.*

189. *See infra* note 201 and accompanying text.

190. *Youngstown Sheet & Tube Co.*, 343 U.S. at 586.

president broad discretion in interpreting the procedures.[191] Accordingly, the Court would not need to find that the President's action in *Wald* falls within Jackson's third category.

This leaves the second category of the *Youngstown* test for the challenged action.[192] Actions taken in the second category are the most difficult to analyze because there is little judicial guidance in this area.[193] Justice Jackson suggested that, in this area, congressional inertia or indifference may sometimes "enable if

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191. The IEEPA grants the president the authority to investigate, regulate, and prohibit all foreign currency transactions, all imports and exports of currency and securities, and all banking transactions that involve a foreign interest. 50 U.S.C. § 1702(a)(1) (Supp. IV 1980). The president is also granted the power to impose foreign property controls. *Id.* at § 1702(a)(1)(b).

In addition, the IEEPA establishes procedures and conditions for the exercise of emergency economic power by the president. Before using the emergency powers established under the IEEPA, the president must first declare a national emergency. *Id.* at § 1701(a) (Supp. IV 1980). The IEEPA also requires that the president consult with Congress "if possible" before invoking the powers under the Act. *Id.* at § 1703(a) (Supp. IV 1980). In addition, the president must transmit a report to Congress detailing the circumstances surrounding the emergency, the nature of the threat involved, the authorities to be exercised, the reasons for the exercise of these authorities, and the countries involved. 50 U.S.C. §§ 1601-51 (1976).

There is conflicting evidence in the IEEPA of Congress' intent to "occupy the field" in the exercise of emergency economic power. Its motivation in passing the IEEPA was to end perceived abuses of executive power under the controlling statute, section 5(b) of the Trading with the Enemy Act (TWEA). 50 U.S.C. app. § 5(b) (1976) (Current version at 50 U.S.C. app. § 5(b) (1976 & Supp. IV 1980)). Congress, however, wanted to preserve the president's flexibility to respond to international crises. Consequently, the IEEPA establishes procedures and conditions for the use of emergency economic power, yet it grants the president broad discretion in the interpretation of those conditions and procedures. For example, the president determines how grave a threat must be to justify the declaration of an emergency. *See* Note, *Presidential Emergency Powers Related to International Economic Transactions: Congressional Recognition of Customary Authority*, 11 VAND. J. TRANSNAT'L L. 515, 525 (1978). Also, since the IEEPA only requires prior consultation with Congress "if possible," the president has the discretion to determine when and with which members of Congress prior consultation is possible. Congress' concern with providing the president flexibility and broad discretion in interpreting the procedures and conditions for the use of emergency powers suggests that Congress did not intend to occupy the field. The fact that the drafters of the IEEPA did not feel the president's power would substantially change from what it had been under the TWEA supports this conclusion. 123 CONG. REC. 22, 455 (1977).

Legislative intent can be more accurately analyzed when the legislative history is supplemented with an examination of congressional response to past presidential actions in this area. Because the IEEPA was passed relatively recently and is infrequently used, there is no history of congressional response to procedural defects in executive actions. Some support for the proposition that Congress has acquiesced to procedural shortcomings of the president is found from the congressional response to executive actions under the Export Administration Act (EAA), 50 U.S.C. app. §§ 2401-20 (Supp. IV 1980). The EAA involves export controls for foreign policy or national security reasons during times short of a declared national emergency. 50 U.S.C. app. § 2402 (Supp. IV 1980). Since the EAA involves action during non-emergencies, its procedural requirements are more substantial than those of the IEEPA. 50 U.S.C. app. § 2405(e) (Supp. IV 1980). The procedural requirements of the EAA, however, have been ignored on several occasions by the president. *See* Moyer & Mabry, *supra* note 146, at 92-96.

192. Jackson's second category is very rarely used by courts. The reason for this is that, under the *Agee* test, congressional silence regarding a past policy is construed as approval of the policy. *See supra* note 126.

193. Note, *Dames & Moore v. Regan, Congressional Power Over Foreign Affairs Held Hostage by Executive Agreement with Iran*, 15 LOY. L. REV. 249, 283 (1982).

not invite measures [of] independent presidential responsibility."[194] Jackson further explained that in this category, any actual test of power is likely to depend on "the imperatives of events and contemporary imponderables rather than on abstract theories of law."[195] Thus, in the second category, the Court would look at the legislative history of the IEEPA and congressional acquiescence to past action in order to glean congressional intent. Using the second category, the Court could weigh heavily the fact that the action involved a matter of foreign affairs in which the executive has dominated.[196]

Under the scope-of-inherent-powers approach the Court could probably have upheld the President's action for the following reasons: the action involved foreign affairs, an area in which the president has traditionally had broad discretion;[197] the legislative history of the IEEPA suggests that Congress intended the president to have broad discretion in this area;[198] Congress has traditionally supported the president's substantive actions in this area;[199] and the IEEPA does not clearly show a congressional intent to occupy the field.[200] In determining whether to uphold a president's action when he failed to follow congressionally prescribed procedure, the Court should have considered the level of congressional intent to occupy the field, the importance of the procedure,[201] and, most importantly, whether the action involved foreign affairs.

VII. CONCLUSION

This Comment has explored the difficulties the judiciary has when presented with the issue of whether to invalidate a president's action in foreign affairs when the president has failed to follow the procedure prescribed by Congress. In deciding this issue, courts try to accommodate the polar goals of providing the president flexibility in foreign affairs while maintaining constitutional checks on executive power. Courts have refrained from creating inherent executive power for fear of upsetting the constitutional balance of power.

The courts' traditional method of resolving this dilemma has been to find a congressional delegation of the disputed power to the president. After *Haig v. Agee*, congressional silence in the face of a consistent administrative policy will be regarded as implied congressional delegation.

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194. *Youngstown Sheet & Tube*, 343 U.S. at 637.

195. *Id.*

196. Jackson would consider the president's dominance in foreign affairs to be one of the "imponderables" discussed in the second category.

197. *See supra* notes 32-63 and accompanying text.

198. *See supra* note 201 and accompanying text.

199. *See* HENKIN, *supra* note 1, at 119.

200. *See supra* note 201 and accompanying text.

201. *Consumers Union*, 506 F.2d at 148. For example, the IEEPA's requirement that the president publish actions taken under the IEEPA in the Federal Register is a procedural requirement and thus less important than the requirement that he declare a national emergency before using § 203 power. 50 U.S.C. § 1702 (1977).

When the president fails to follow congressionally prescribed procedure, however, the court cannot implement the delegation-of-powers approach. A second option for the court in resolving this dilemma is to adopt the flexible approach to inherent power found in Justice Jackson's concurrence in *Youngstown*. Under this analysis, Congress' approval or disapproval of the president's actions effects the scope of the president's inherent power, rather than the delegation of Congress' power.

Judge Leventhal's dissent in the *Consumers Union* case is useful in determining in which of Justice Jackson's three categories the *Wald* situation belongs. Under Leventhal's test, a court would look at how thoroughly Congress intended to occupy the field of international economic power. Since Congress' intent to occupy the field was unclear, the President's action probably belongs in the second category. In the second category, the court could again consider Congress' intent, and whether the case would interfere with the executive's foreign policy. Using this analysis, the Court in *Wald* could have upheld the President's action without resorting to the grandfather clause.

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