WHO CONTROLS INTERNATIONAL TRADE? CONGRESSIONAL DELEGATION OF THE FOREIGN COMMERCE POWER

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I. INTRODUCTION

Proponents of the realpolitik[1] school of international relations have traditionally defined the power of a nation-state in terms of its military strength.[2] In today's world, however, one cannot overlook the importance of economic strength in assessing a nation's overall ability to achieve its goals in the international sphere.

The use of international trade as a foreign policy tool is nothing new. The Founding Fathers used foreign commerce as a means of securing open markets for American goods and as a means of maintaining independence from the great powers of Britain and France.[3] In more recent times, the United States has used

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1. Realpolitik, or realism, "contained three key assumptions: (1) states (or city states) are the key units of action; (2) they seek power, either as an end in itself or as a means to other ends; and (3) they behave in ways that are, by and large, rational, and therefore comprehensible to outsiders in rational terms." Robert O. Keohane, *Realism, Neorealism and the Study of World Politics*, *in* NEOREALISM AND ITS CRITICS 1, 7 (Robert O. Keohane ed., 1986).

2. JAMES E. DOUGHERTY & ROBERT L. PFALTZGRAFF, JR., CONTENDING THEORIES OF INTERNATIONAL RELATIONS 7 (3d ed. 1990).

3. Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The*

trade sanctions to promote human rights, contain communist expansion, and retaliate against military aggression.[4]

The creation of regional trading blocs and multilateral trade agreements underscores the developing prominence of international trade. With the creation of the European Community came the parallel creation of the North American Free Trade Agreement.[5] Other such regional trading blocs could be in the making.[6] This trend has some political scientists wondering if trade policies, not tanks, will be the weapons of the New World Order.[7]

International trade may become a major focus of the United States as it heads into the twenty-first century. If so, one question must be addressed: Who will control it?

While it may seem clear that the Constitution has expressly provided for congressional dominance of foreign commerce regulation, constitutional law is never as clear in practice as it seems in theory.[8] Instead of maintaining absolute control over international trade, Congress has delegated much of its foreign commerce authority to the executive branch.[9]

This Note will examine the history of the foreign commerce power in an attempt to determine which branch of government really controls international

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Fabric of Economics and National Security Law, 26 INT'L LAW. 715, 720 (1992). For a discussion of the early Presidents' use of foreign commerce as a diplomatic tool, see *infra* notes 209-21 and accompanying text.

4. STEPHEN D. COHEN ET AL., FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY 18 (1996). "For better or worse, trade sanctions built around export controls became the U.S. program of choice for attaining a wide range of foreign policy goals." *Id.*

5. *Id.* at 77.

6. *Id.* at 282.

> If all goes according to design, the United States (and a few other countries) could, by the second decade of the twenty-first century, find itself a member of two overlapping free trade blocs—one in the Asia-Pacific region and the other in the Western Hemisphere. Presumably, U.S. trade officials are about to expend at least a decade's worth of time and energy in simultaneously seeking to negotiate a free trade arrangement under the aegis of the Asia-Pacific Economic Cooperation forum and to create the Free Trade Area of the Americas.

See id. at 287 n.8 (noting that the 18 countries committed to a 2020 deadline for dismantling all trade and investment barriers among themselves accounted for "slightly over one half of the world's GNP and about 40 percent of global trade in 1994").

7. For a discussion of the interplay between international economics and politics, see Charles Lipson, *International Cooperation in Economic and Security Affairs*, 42 WORLD POL. 1, 1-23 (1984).

8. Compare the Constitution's explicit grant of foreign commerce power to Congress under Article 1, § 8 with Part III of this Note, discussing the evolution of foreign affairs and foreign commerce case law favoring presidential prerogatives.

9. *See infra* Part IV. Ever since the Great Depression, Congress has enacted numerous statutes granting the President control over both tariff and nontariff barriers. *Id.*

trade. Although Congress has delegated much of its responsibility to the executive branch, and although the courts have been more than happy to favor an executive prerogative in recent decades, the President does not have unbridled discretion.

Part II of this Note looks to the Constitution as the framework for determining the foreign affairs powers of the Congress and the President. The Constitution, in fact, assigns most of the nation's foreign affairs power to Congress, including the explicit power to regulate foreign commerce.[10] The President has no such explicit power over foreign commerce, and must rely upon his duty to faithfully execute the laws of the nation or the treaty power if he wishes to assert any constitutional authority over international trade.[11]

Part III examines the case law as it relates to the separation of foreign affairs powers generally and congressional delegation of the foreign commerce power specifically. The political question doctrine has allowed the Supreme Court to escape instances of line drawing on the issue of foreign commerce.[12] Where it has taken a stand, the Court is generally deferential to the executive in its exercise of delegated authority.[13] The case law, however, does provide a substantial argument for Congress's ultimate control in matters of international trade.[14]

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10. U.S. CONST. art. I, § 8.

11. *Id.* art. II, §§ 2-3. Case law suggests that in times of national emergencies, the Commander in Chief Clause may also provide the President with some independent authority. *See, e.g.*, Prize Cases, 67 U.S. (2 Black) 635 (1862).

12. Koh & Yoo, *supra* note 3, at 736. "[C]ourts have increasingly resorted to other judicially created doctrines, such as standing, mootness, ripeness, and the political question doctrine, to find national security cases nonjusticiable and beyond judicial competence." *Id.*; *see also* John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 DICK. J. INT'L L. 203, 222-39 (1995) (examining the President's authority to act independently of, or in conflict with, trade legislation despite extensive congressional controls in trade matters). *See generally* Nancy E. Powell, Comment, *The Supreme Court as Interpreter of Executive Foreign Affairs Powers*, 3 CONN. J. INT'L L. 161 (1987) (surveying the United States Supreme Court's contribution to the present scope of presidential powers in foreign affairs over the past 200 years).

13. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936) (granting the President great latitude in the realm of external affairs, as opposed to internal affairs); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 302-03 (1933) (upholding the President's ability to proclaim tariff rates under the 1922 Tariff Act); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 110-11 (1948) (allowing substantial congressional delegation of foreign commerce power to the President); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 241 (1986) (allowing the executive branch in a whaling quota case to go outside of the means authorized by Congress so long as the ends obtained were the same as those envisioned by the legislature).

14. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. at 319-20 (acknowledging that even in external affairs, the President must act according to the principles established by the Constitution); United States v. Yoshida Int'l Inc., 526 F.2d 560, 576-77 (C.C.P.A. 1975)

Part IV traces the history of international trade regulation in the United States. The legislative and executive balance in international trade policy formulation was destroyed by the Smoot-Hawley Tariff Act.[15] The disastrous outcome of this Act prompted Congress to question the wisdom of placing trade regulation under the branch of government most easily affected by special interest groups.[16] In the decades following Smoot-Hawley, Congress allowed the President to take the lead on matters involving international trade.[17]

Starting in the 1950s, Congress once again asserted its role in foreign commerce regulation.[18] While Congress still delegates regulatory power to the executive branch, it is beginning to paint with a much narrower brush than it originally had.[19] Part IV places significance on fast-track procedures and their impact on congressional input into trade agreements.

Part V concludes by putting the current balance of power between the executive branch and Congress into perspective. While the courts may be expanding the role of the President in foreign affairs—and even in the area of foreign commerce[20]—Congress has not delegated itself into a corner. Instead, Congress has allowed the executive branch to take the lead on trade agreements, while reserving significant power to effect those agreements through fast-track procedures.[21]

II. THE CONSTITUTIONAL FRAMEWORK

Article I, Section 8 of the United States Constitution grants to Congress the power to "regulate Commerce with foreign Nations."[22] It also allots to Congress

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(upholding presidential proclamation of an import duty, but denying any inherent presidential power over foreign commerce).

15. Smoot-Hawley Tariff Act, Pub. L. No. 71-361, 46 Stat. 590 (1930).

16. Smoot-Hawley was a product of intense political lobbying by farmers, labor, and other special interests. *See* COHEN, *supra* note 4, at 31-32.

17. *See* The Reciprocal Trade Agreements Act of 1934, 19 U.S.C. §§ 1351-1354 (1994) (allowing the President to negotiate tariff agreements with foreign nations and implement them by presidential proclamation alone).

18. *See* The Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, 65 Stat. 72 (1951) (obligating the President to deny Most Favored Nation status to communist countries and to give public notice of any intended trade agreement).

19. *See* Trade Act of 1974, 19 U.S.C. §§ 2101-2495 (1994) (instituting fast-track procedures, which forced the executive branch to bring Congress into trade negotiations).

20. See *infra* Part III for a discussion of the evolution of case law in foreign affairs and foreign commerce.

21. For a discussion of fast-track procedures and how Congress has reserved for itself the right to intervene in trade negotiations and trade agreements, see *infra* notes 255-88 and accompanying text.

22. U.S. CONST. art. I, § 8, cl. 3.

the power to "lay and collect Taxes, Duties, Imposts and Excises."[23] Thus, under a literal interpretation of the Constitution, Congress is granted broad authority to regulate international trade.

The President's authority over international trade is not so clear. As one legal scholar noted, Article I "gives Congress almost all of the enumerated powers over foreign affairs, and [A]rticle II gives the President almost none of them."[24] In fact, Article II provides the President with no explicit authority concerning foreign commerce.[25]

This apparent lack of constitutional authority, however, has not been a substantial obstacle to the executive branch's involvement in foreign commerce issues. Past Presidents have relied upon the presidential powers to negotiate treaties,[26] and to see that "the Laws be faithfully executed,"[27] in order to assert a constitutionally permissible role in international trade regulations.[28] Furthermore, national emergencies generally provide the President with some leeway in using international trade as a national security tool under Article II's Commander in Chief Clause.[29]

III. CASE LAW

One of the problems with evaluating case law regarding the separation of powers between Congress and the executive branch is the tendency of the judicial branch to avoid deciding such issues on the merits.[30] When the Supreme Court is faced with two co-equal branches squabbling over foreign affairs powers, it often relies upon the political question doctrine to free it from the quagmire.[31] Or, as Nancy Powell argues, the Court finds implicit power within the supposedly binding text of the Constitution so as to reach "holdings necessary to the perpetuation of the federal enterprise."[32] The effect is generally a bastardization of

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23. *Id.* cl. 1.

24. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L. J. 1255, 1292 (1988).

25. U.S. CONST. art. II.

26. *Id.* § 2, cl. 2.

27. *Id.* § 3.

28. Linarelli, *supra* note 12, at 224.

29. U.S. CONST. art. II, § 2, cl. 1. For example, the Supreme Court legitimized President Lincoln's use of a blockade, even though that power arguably falls under the foreign commerce clause, because a state of war existed. *See* Prize Cases, 67 U.S. (2 Black) 635, 671 (1862).

30. Powell, *supra* note 12, at 172.

31. *Id.* at 173.

32. *Id.*

the Constitution to allow more practical power over foreign affairs within the executive branch.[33]

As stated in the previous section, Congress has explicit power regarding foreign commerce under Article I, Section 8 of the Constitution. The President's authority in this area, constitutionally speaking, is limited to treaty making and the execution of laws relating to foreign commerce.[34] Yet Presidents throughout the nation's history have exercised some powers within the area of foreign commerce, thanks to the delegation of foreign commerce power by Congress and the sympathetic ears of the Supreme Court.

A. *The Early Cases*

One of the earliest cases to deal with foreign commerce issues was *Little v. Barreme*.[35] In *Little*, Congress enacted a statute allowing the President to order the seizure of American ships sailing to French ports.[36] Unfortunately for a United States ship captain by the name of Little, the resultant presidential order mandated the seizure of ships sailing *to or from* a French port.[37] Little seized a neutral vessel coming from a French port in accordance with the presidential order, but in violation of the congressional statute.[38]

The Court held Little liable even though he was acting pursuant to a presidential order.[39] In the majority opinion, Justice Marshall noted that Congress had prescribed the manner in which the law was to be executed by specifically men-

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33. *Id.* at 172.

> By interpreting the set of facts before it in such a way as to arrive at the conclusion that separation of powers considerations mandate the issue's resolution by one or both of the co-equal branches, the Court arguably makes threshold determinations about the claim, and also determines the respective roles of Congress and the executive. The effect of the application of the doctrine in foreign affairs cases has been generally to enhance the executive's authority.

Id.

34. U.S. CONST. art. II, §§ 2-3.
35. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).
36. *Id.* at 171.
37. *Id.*
38. *Id.* at 172-73.
39. *Id.* at 179. Justice Marshall showed obvious sympathy for Little's predicament, stating: "I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation." *Id.*

tioning ships sailing to French ports.[40] In other words, the language of the statute "was to exclude a seizure of any vessel not bound to a French port."[41]

It was clear to Marshall that the President had reconstructed the congressional statute to give it better effect; seizing only those vessels bound to a French port solves only half of the problem.[42] Yet, giving such a facelift to congressional statutes is outside the sphere of presidential authority.[43]

The Civil War pushed the Constitution to its limits and beyond. President Lincoln suspended the writ of habeas corpus, instituted a draft, and issued the Emancipation Proclamation under his powers as Commander in Chief of the military.[44] Lincoln also assumed control of foreign commerce by ordering the seizure of Confederate ships via a naval blockade.[45]

The immediate result of Lincoln's actions was the *Prize Cases*.[46] The suits were brought by several men who had their ships seized during the blockade.[47] They argued specifically that the President had no right to institute a blockade because Congress had not declared war.[48]

The Court found for Lincoln, noting that while Congress had not formally declared war, previous acts of Congress allowed the President to take action against insurgents.[49] It also helped that Congress subsequently approved Lincoln's actions.[50]

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40. *Id.* at 178.

41. *Id.*

42. *Id.* "It was so obvious, that if only vessels sailing to a French port could be seized on the high seas, that the law would be very often evaded, that this act of [C]ongress appears to have received a different construction from the executive of the United States." *Id.*

43. *Id.* at 177-78. While never directly stated by Marshall in his opinion, this view of presidential authority is implicit in the text.

44. GORDON SILVERSTEIN, IMBALANCE OF POWERS 50-53 (1997).

45. LOUIS FISHER, PRESIDENTIAL WAR POWER 38 (1995). Fisher notes that Lincoln fully admitted to "exceeding the constitutional boundaries established for the President and thus needed the sanction of Congress," although Lincoln asserted that the powers he exercised rightfully belonged to the national government as a whole. *Id.* at 38-39.

46. Prize Cases, 67 U.S. (2 Black) 635 (1863). The formal names of the cases involved are *Rafael Preciat v. United States*; *John Currie et al. v. United States*; *Peter Miller et al. v. United States*; and *William Currie et al. v. United States*. *Id.* at 636-37.

47. *Id.* at 637. Two of the boats were registered in Virginia; the others were registered in Mexico and Britain. *Id.* at 637-38.

48. *Id.* at 641-43.

49. *Id.* at 670.

> If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency.

Id.

50. *Id.*

The Justices emphasized the President's duty as Commander in Chief of the military to protect American citizens from hostilities.[51] Congress had enacted several statutes requiring Lincoln to respond to crises militarily, and the Court seized upon this legislation to find a duty for the President to "accept the challenge without waiting for any special legislative authority."[52]

One portion of Justice Grier's majority opinion should be of particular interest to students of foreign commerce. The opinion rested on a determination by the Court of whether a state of war existed.[53] In a truly circular argument, Justice Grier argued that the creation of a blockade was conclusive evidence of a state of war, which would thus allow the President to legally institute a blockade via his emergency powers.[54] In other words, the President could usurp Congress's foreign commerce powers in a way that would also usurp the legislative branch's power to declare war.

Norwegian Nitrogen Products Co. v. United States[55] was one of the most notable of the early twentieth century cases to speak on the issue of foreign commerce powers. In *Norwegian Nitrogen*, the United States sued to collect on duties owed by a Norwegian importer.[56] Under authority granted by the 1922 Tariff Act,[57] the President proclaimed an increase in duties assessed on sodium nitrate in order to balance the costs of production between the United States and Norway.[58]

The defendants challenged the 1922 Tariff Act as an unconstitutional delegation of the foreign commerce power.[59] The Court disagreed, pointing to the history of tariff-making in the United States.[60]

First, the Court found the delegations of tariff-making power by Congress permissible under the intelligible principle test established in *J.W. Hampton, Jr. & Co. v. United States*.[61] The Court then looked to the trend of congressional

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51. *Id.* Congress had previously passed legislation allowing the President to call forth the militia to suppress insurrections. *Id.* at 647, 660.

52. *Id.* at 668.

53. *Id.* at 670-71. "Congress alone can determine whether war exists or should be declared; and until they have acted, no citizen of the State can be punished in his person or property . . . ." *Id.* at 693.

54. *Id.* at 670. "The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." *Id.*

55. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933).

56. *Id.* at 296.

57. Tariff Act of 1922, Pub. L. No. 67-318, 42 Stat. 858 (1922).

58. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. at 297.

59. *Id.*

60. *Id.* at 297-303. For a delineation of the tariff acts, see *infra* Part IV.

61. *Id.* at 300 (citing J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1927)). According to the intelligible principle test, "If Congress shall lay down by legislative act an

delegation of power to the President, citing several pieces of legislation in which Congress created and extended the United States Tariff Commission to provide information to the President and Congress on the industrial effects of customs laws.[62]

The Court also looked at congressional acquiescence.[63] In 1928, for example, members of Congress argued that the Tariff Commission should have been brought completely within the sphere of Congress, thereby allowing Congress to recapture its dominance in foreign commerce.[64] The full Congress, however, failed to support this move.[65] According to the Court, this act and the history of congressional delegation of the foreign commerce power provided a basis for the President's legitimate use of such power.[66]

B. Curtiss-Wright *and Its Legacy*

Until 1936, case law generally supported the notion that Congress ultimately controlled foreign affairs, and more specifically foreign commerce, unless it chose to delegate some of its power or if the President was forced to respond to a national emergency.[67] Such was the general trend until the questionably reasoned yet oft-cited case of *United States v. Curtiss-Wright Export Corp.*[68]

In *Curtiss-Wright*, Congress passed a joint resolution allowing President Franklin Roosevelt to issue a proclamation outlawing the sale of arms and munitions to countries engaged in armed conflict in South America.[69] Roosevelt issued such a proclamation against sales to Paraguay and Bolivia, then later rescinded the proclamation.[70] Curtiss-Wright Export Corporation was convicted under Roosevelt's proclamation and, among other things, argued the joint resolution was an unconstitutional delegation of legislative power.[71]

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intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." J.W. Hampton, Jr. & Co. v. United States, 276 U.S. at 409.

62. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. at 313-15.

63. *Id.* at 315. Gordon Silverstein, a staunch critic of unbridled executive power in foreign affairs, has suggested that the courts have generally favored executive prerogative by assuming "congressional acquiescence in the absence of explicit and narrowly drawn statutes that would *deny* discretion to the executive." SILVERSTEIN, *supra* note 44, at 15.

64. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. at 315.

65. *Id.*

66. *Id.*

67. *See supra* Part III.A.

68. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

69. *Id.* at 311.

70. *Id.* at 312-13.

71. *Id.* at 314. More specifically, the defendants objected to Roosevelt's unfettered discretion in the making and unmaking of the proclamation because it substituted his will for that of

In perhaps the most infamous opinion in the history of foreign affairs cases, Justice Sutherland greatly expanded the powers of the President in the realm of foreign affairs.[72] In doing so, he distinguished between internal and external affairs and the sources of power for each.[73]

The powers of the federal government in the regulation of internal affairs, according to Sutherland, are enumerated by the Constitution.[74] The purpose was to invest in the federal government such legislative power possessed by the states as necessary, leaving all unmentioned powers in the hands of the states.[75]

The federal government's powers in the realm of foreign affairs were not so governed, Sutherland argued.[76] Foreign affairs powers were not given to the federal government by the states, but were divested in the federal government when it became sovereign.[77] More specifically, the powers over foreign affairs were passed from the British crown to the United States as a Union and, Sutherland argued, to the President as the "sole organ of the nation" in foreign affairs.[78]

Sutherland's opinion in *Curtiss-Wright* has been strongly criticized for its historical inaccuracies.[79] The first criticism targets Sutherland's account of the transfer of sovereign power from Britain to the United States federal government and the President.[80] While Sutherland mentions how foreign affairs powers transferred from Britain to the United States, he failed to recognize that such powers originally would have been vested in the Continental Congress under the

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Congress. *Id.* at 314-15.

72. *Id.* at 316-32. "This case, offering a model of a strong, centralized foreign affairs power in the executive, altered the balance of power between the executive and Congress." Powell, *supra* note 12, at 188-89.

73. United States v. Curtiss-Wright Export Corp., 299 U.S. at 315-16. Sutherland's *Curtiss-Wright* opinion was not the first time he distinguished between external and internal affairs. *See* David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 473 (1946).

74. United States v. Curtiss-Wright Export Corp., 299 U.S. at 316.

75. *Id.* "[T]he primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government . . . ." *Id.*

76. *Id.*

77. *Id.* "[S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source." *Id.*

78. *Id.* Sutherland borrowed the "sole organ" language from Chief Justice Marshall, but gave it a new meaning. *See infra* note 84.

79. *See* Koh & Yoo, *supra* note 3, at 727-28; Linarelli, *supra* note 12, at 226-27; Charles A. Lofgren, United States v. Curtiss-Wright Export Corp.: *An Historical Reassessment*, 83 YALE L.J. 1, 24-25 (1973).

80. Lofgren, *supra* note 79, at 25.

Articles of Confederation, and thus, supposedly, to Congress under the Constitution.[81]

Sutherland's assessment of the Constitution's virtually nonexistent power to regulate the foreign affairs actions of the federal government seem to contradict the intention of at least one of the Founding Fathers.[82] James Madison was recorded as saying: "The powers delegated by the proposed Constitution to the federal government . . . will be exercised principally on external objects, as war, peace, negotiation, and *foreign commerce* . . . ."[83]

Another criticism can be made against Sutherland's reliance upon the "sole organ" quote from Justice Marshall's argument before the House of Representatives on March 7, 1800.[84] Charles A. Lofgren has argued that the quote was taken out of context, as Marshall was referring to presidential authority under congressional delegation, not inherent presidential authority.[85]

Finally, Sutherland's discourse on the sources of foreign affairs power and the inherent authority of the President are pure dicta.[86] The Court could have relied upon the historical precedents of the delegation doctrine to validate Roosevelt's acts.[87]

If there is a saving grace to Sutherland's opinion in *Curtiss-Wright*, it comes in his recognition that foreign affairs powers reserved to Congress may limit the President's powers in that area.[88] While Sutherland asserts that the President's authority to act as the sole organ of the nation "does not require as a basis for its exercise an act of Congress," he also accepts the notion that such power must also "be exercised in subordination to the applicable provisions of the Constitution."[89]

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81. *Id.*; *see* Koh & Yoo, *supra* note 3, at 728.

82. *See* Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26-33 (1972).

83. THE FEDERALIST NO. 45, at 137 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966) (emphasis added).

84. Lofgren, *supra* note 79, at 24.

85. *Id.* at 25. To put Marshall's quote in context, the issue was the President's ability to execute treaties. The full speech included the lines "Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses." *Id.* (quoting 10 ANNALS OF CONG. 613-14 (1800)).

86. *See* Koh & Yoo, *supra* note 3, at 728; Linarelli, *supra* note 12, at 227.

87. This point was raised by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring) (stating *Curtiss-Wright* "involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress").

88. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

89. *Id.* Koh and Yoo argue that Sutherland's opinion recognizes that presidential actions

Curtiss-Wright provided the launch pad for *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,[90] which solidified the ability of Congress to delegate its foreign commerce power to the executive branch.[91] In *Chicago*, an air carrier questioned Congress's decision to delegate to the Civil Aeronautics Board (CAB) the power to approve foreign air routes by domestic carriers, subject to the approval of the President.[92]

In his majority opinion, Justice Frankfurter stated that Congress could "delegate very large grants of its power over foreign commerce to the President,"[93] reiterating the earlier holding of *Norwegian Nitrogen*.[94] Frankfurter suggested that "[t]he President also possesses in his own right certain powers conferred by the Constitution on him as Commander in Chief and as the Nation's organ in foreign affairs . . .," and then tossed the entire issue aside as a political question.[95]

The Supreme Court attempted to constrict the ever-expanding executive prerogative in foreign affairs in *Youngstown Sheet & Tube Co. v. Sawyer*.[96] When steel workers threatened a nationwide strike, President Truman issued an executive order requiring seizure of the nation's steel mills.[97] Truman sent a message to Congress the following morning, arguing that he acted under his authority as Commander in Chief and as Chief Executive to keep the mills operating.[98] He asserted a national security interest in the continued production of steel, which was needed for the nation's military actions in Korea.[99]

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must be subordinate to "substantive and procedural limitations set by the Constitution." Koh & Yoo, *supra* note 3, at 728. "By *substantive* constitutional limits, we mean that *Curtiss-Wright* did not give the President, as 'sole organ,' the power to declare war or regulate foreign commerce, substantive powers that the Constitution expressly granted to Congress." *Id.* n.57.

90. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948).

91. *Id.* at 109. The Court had already held that congressional delegation of tariff-making power was permissible under the Constitution. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 305-08 (1933).

92. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. at 104.

93. *Id.* at 109.

94. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 305-08 (1933).

95. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. at 109, 111 (refusing to allow the Court to involve itself in political, executive actions).

96. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

97. *Id.* at 583.

98. *Id.* at 583-84.

99. *Id.*

> The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel.

Id.

The Court sided with the steel companies and invalidated Truman's actions as an unconstitutional usurpation of power by the executive branch.[100] Justice Black's majority opinion criticized Truman for making law, as opposed to merely enforcing it, and emphasized that all lawmaking authority rested with Congress alone.[101] Moreover, Congress had already considered and rejected the idea of seizing the steel mills, which Black took to be an expression of Congress's will.[102]

While only a concurrence, Justice Jackson's opinion in *Youngstown* has overshadowed its majority counterpart.[103] Jackson's tripartite analysis of foreign policy powers provides a much more substantial limitation on the President's foreign affairs and foreign commerce powers than does *Curtiss-Wright*.[104]

Jackson's opinion delineated three zones of executive and congressional authority in foreign affairs.[105] In the first category, the President acts "pursuant to the express or implied authorization of Congress," and thus may rely on his own constitutional authority over foreign affairs as well as that of Congress.[106] In the second category—the "zone of twilight"—the President acts while Congress remains silent.[107] In this situation, the President can rely upon only his own authority, whether express or implied.[108] Finally, when the President acts contrary to the established "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."[109]

Jackson refused to stretch the Commander in Chief and Chief Executive clauses to allow the seizures in *Youngstown*, noting the inherent danger of al-

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100. *Id.* at 588.

101. *Id.* "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Id.*

102. *Id.* at 586. Due to the fact Congress had refused to accept the seizure of the mills as an option, and because Congress had the constitutional authority to make such a decision, Truman had no legal authority to contradict Congress's wishes. *Id.*

103. Powell, *supra* note 12, at 194. "The real significance of the case lies in Justice Jackson's concurring opinion, establishing the three-part analysis around which modern separation of powers cases are so often oriented." *Id.*

104. While *Curtiss-Wright* granted the President a virtual blank check in the realm of foreign affairs, Jackson's opinion in *Youngstown* makes it perfectly clear that the President's powers as Commander in Chief and as Chief Executive are not without end. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1936); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 641-47 (Jackson, J., concurring).

105. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 635 (Jackson, J., concurring).

106. *Id.* at 635-37.

107. *Id.* at 637.

108. *Id.*

109. *Id.* Essentially, Truman's actions fell into this category because Congress had already considered and rejected the idea of seizing the steel mills, thereby expressing its will. *Id.* at 586.

lowing a President to regulate domestic affairs via national security concerns.[110] As to any emergency powers Truman might have used to legitimize his actions, Jackson argued that such powers should remain in the hands of the Legislature.[111]

Jackson's *Youngstown* opinion was influential in *United States v. Guy W. Capps, Inc.*,[112] a case dealing with foreign commerce specifically. In *Capps*, the Fourth Circuit found an executive agreement invalid because it contradicted a congressional statute.[113] The court held that the "power to regulate foreign commerce is vested in Congress, not in the executive or the court,"[114] and refused to allow the President to contravene constitutional provisions with executive agreements.[115]

Capps may provide a basis for asserting congressional supremacy in the area of foreign commerce because of the court's reliance on a strict interpretation of the Constitution.[116] To use *Capps* in such a way, however, would be to overlook one essential factor: The trade agreement in question had no relation to any other foreign policy issues in which the President might have asserted inherent constitutional authority as the Commander in Chief or as the Chief Executive.[117] The rationale used in *Capps* may not apply when the President can assert other constitutional bases for his actions.[118]

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110. *Id.* at 641-47 (Jackson, J., concurring). Jackson's argument may also be applicable to foreign commerce issues, because foreign commerce often has a significant impact on the domestic economy. *See* COHEN, *supra* note 4, at 31-32 (discussing the impact of extremely protectionist tariffs on the domestic economy of the 1930s).

111. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 651-56 (Jackson, J., concurring). Jackson cited Nazi Germany as an example of emergency powers run amok when vested in the executive. *Id.* at 651.

112. United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

113. *Id.* at 658. The executive agreement between the United States and Canada would have allowed the export of seed potatoes to an American importer only if the importer agreed not to divert the potatoes for "table stock purposes." *Id.* at 657.

114. *Id.* at 658.

115. *Id.*

116. Essentially, the Fourth Circuit's decision wrested from the executive branch any "inherent" constitutional authority to regulate foreign commerce simply because the Constitution vested such power in Congress. It is also interesting to note how this case is buttressed by *Reid v. Covert*. Reid v. Covert, 354 U.S. 1 (1957). In *Reid*, the Supreme Court held that the President could not diminish constitutional rights of United States citizens through executive agreements. *Id.* at 40-41. *Reid* involved a military wife—a civilian—who was court-martialed for murder under the provisions of an executive agreement between the United States and Britain, contrary to her Fifth and Sixth Amendment rights. *Id.* at 3-4.

117. *See* Linarelli, *supra* note 12, at 236. In other words, if the President could have articulated a national security interest in implementing the agreement, the result in *Capps* may not have been the same. *Id.*

118. *Id.* Lincoln's blockade of the Confederate states during the Civil War provides one such example. *See* Prize Cases, 67 U.S. (2 Black) 635 (1862).

Six years later, the United States Court of Customs and Patent Appeals considered *Star-Kist Foods, Inc. v. United States*,[119] a case involving the Reciprocal Trade Agreements Act of 1934.[120] Through the Act, Congress delegated to the President the power to modify import restrictions under foreign trade agreements if the President found that the existing restrictions were "unduly burdening and restricting the foreign trade of the United States," or were harming the national economy.[121]

Star-Kist, an American manufacturer, protested the Treasury Secretary's refusal to overturn the Collector of Customs's decision to reduce the duty on imported tuna from 25% to 12.5%.[122] Star-Kist attacked the Reciprocal Trade Agreements Act of 1934 as an unconstitutional delegation of Congress's authority over legislation, foreign commerce, and taxes and excises.[123] Star-Kist also attacked the trade agreement with Iceland, providing for the importation of the tuna in question, claiming that as an executive agreement made without the advice and consent of the Senate, it was null and void.[124]

Referring to cases such as *J.W. Hampton, Jr. & Co. v. United States*, the court legitimized the delegation of power in *Star-Kist*.[125] The connection to *Curtiss-Wright* was made clear when the court held that "Congress can give the President much broader discretionary powers in legislation inherently bearing upon his conduct in foreign affairs . . . than when purely domestic matters are involved."[126]

While the *Star-Kist* court said that Congress would be allowed to delegate its legislative authority in foreign affairs, it also specified that Congress would be required to adhere to the intelligible principle test outlined in *J.W. Hampton*.[127] The legislation must constrain the President's discretion.[128]

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119. Star-Kist Foods, Inc. v. United States, 275 F.2d 472 (C.C.P.A. 1959).

120. Reciprocal Trade Agreements Act of 1934, 19 U.S.C. §§ 1351-1354 (1994). For a discussion of the Act, see *infra* notes 237-42 and accompanying text.

121. *Id.* § 1351(a)(1).

122. Star-Kist Foods, Inc. v. United States, 275 F.2d at 473-74.

123. *Id.* at 475.

124. *Id.* The executive agreement was validated in 1937 by *United States v. Belmont*. United States v. Belmont, 301 U.S. 324, 330 (1937).

125. Star-Kist Foods, Inc. v. United States, 275 F.2d at 477.

126. *Id.* at 480 (citation omitted).

127. *Id.*

> A constitutional delegation of powers requires that Congress enunciate a policy or objective or give reasons for seeking the aid of the President. In addition, the act must specify when the powers conferred may be utilized by establishing a standard or "intelligible principle" which is sufficient to make it clear when action is proper.

Id.

128. *Id.* Compare this case with *Japan Whaling Ass'n v. American Cetacean Society*,

According to the court, Congress fulfilled the necessary requirements by stating the policy objectives of expanding foreign markets for American goods and reducing the burden upon American trade.[129] Moreover, the Act constrained the President from arbitrarily reducing the duties on imported goods.[130]

Finally, the court rejected Star-Kist's argument that the trade agreement with Iceland constituted a treaty requiring the advice and consent of the Senate.[131] The court noted that Congress allowed the President to make such agreements under the Trade Agreements Act of 1934 because Congress realized the need for the President to negotiate tariff reductions with other nations.[132] The court reflected upon prior case law in holding that certain commercial agreements are not treaties and therefore do not require the involvement of the Senate.[133]

The Supreme Court appeared to give congressional power in the realm of foreign affairs a boost in *Kent v. Dulles*.[134] Prior to *Kent*, the Supreme Court had generally allowed administrative practices and policies when Congress had been silent.[135] The *Kent* Court seemed to overturn this precedent, however, when it disallowed an administrative policy regarding issuance of passports even though Congress had failed to act.[136]

The Court attacked the executive branch's argument that the Secretary of State's actions were legitimized by the history of similar executive actions—and the history of congressional acquiescence—since Congress passed the Passport

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where the Supreme Court held that the executive branch does not need to use the means authorized by a congressional grant of commerce power, so long as the ends obtained are practically the same. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 240-41 (1986).

129. Star-Kist Foods, Inc. v. United States, 275 F.2d at 480.

130. *Id.* at 481-82. "Not only must [the President's actions] advance the congressional policy, . . . they must be 'required or appropriate' to carrying out the trade agreement as well." *Id.* at 482.

131. *Id.* at 483-84.

132. *Id.* at 483.

133. *Id.* at 483-84; *see* B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912) (holding that an international compact between sovereign nations dealing with important commercial relations is not a treaty in the constitutional sense); United States v. Belmont, 301 U.S. 324, 330-31 (1937) (upholding the constitutionality of an executive agreement between the President and the Soviet Union concerning claims by American nationals against the Russian government).

134. Kent v. Dulles, 357 U.S. 116 (1958).

135. *See, e.g.*, Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 307-08 (1933) (allowing litigants appearing before the Tariff Commission a limited opportunity to cross-examine opposing party).

136. Kent v. Dulles, 357 U.S. at 130. The Secretary of State had promulgated regulations that 1) denied passports to communists and those suspected of going abroad to further communism and 2) required passport applicants to furnish a noncommunist affidavit. *Id.* at 117-18 n.1.

Act of 1926.[137] The Court stated that "the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion."[138]

While *Kent* held that there was a line to be drawn in the realm of executive actions taken pursuant to congressional delegation of foreign policy power, *Zemel v. Rusk*[139] made that line quite blurry. In *Zemel*, the Secretary of State, acting under a congressional statute, refused to validate passports for people wishing to travel to Cuba after diplomatic relations with that country had been severed and an area restriction imposed.[140]

Following the precedent laid down by *Curtiss-Wright*, the Court allowed the executive branch great discretion to act in the realm of foreign affairs.[141] Once again, the Court noted the tumultuous nature of international relations, the President's access to confidential information, and the President's ability to act upon such information quickly and decisively.[142] These considerations, the Court noted, meant that congressional delegations of power to the President were to be interpreted broadly.[143]

The Court of Customs and Patent Appeals authored another foreign commerce case in 1975, this time dealing with authority delegated to the President in times of national emergency.[144] In *United States v. Yoshida International, Inc.*,[145] an importer of zippers from Japan challenged a presidential proclamation imposing a ten percent import duty surcharge on all dutiable items.[146] While neither the Tariff Act of 1930[147] nor the Trade Expansion Act of 1962[148] allowed such a surcharge, the court upheld it under the Trading with the Enemy Act (TWEA).[149]

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137. *Id.* at 128-29 (discussing the Passport Act of 1926, 22 U.S.C. § 211a (1994)).
138. *Id.* at 125.
139. Zemel v. Rusk, 381 U.S. 1 (1965).
140. *Id.* at 3-4.
141. *Id.*
142. *Id.* at 17.
143. *Id.*

> [B]ecause 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, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.

Id.

144. United States v. Yoshida Int'l, Inc., 526 F.2d 560, 566 (C.C.P.A. 1975).
145. United States v. Yoshida Int'l, Inc., 526 F.2d 560 (C.C.P.A. 1975).
146. *Id.* at 566.
147. Tariff Act of 1930, 19 U.S.C. §§ 1202-1677 (1994).
148. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872.
149. United States v. Yoshida Int'l, Inc., 526 F.2d at 576 (citing the Trading with the Enemy Act, 50 U.S.C. app. § 5(b) (1994)); *see infra* notes 220-21 and accompanying text.

The court began with a strong statement about the President's inherent authority to regulate foreign commerce: There is none.[150] While the majority recognized the "'pooled' legislative and executive powers in foreign affairs, including delegations of power over foreign commerce," the majority found it "nonetheless clear that no undelegated power to regulate *commerce*, or to set tariffs, inheres in the Presidency."[151] Thus, whatever power the President has in foreign commerce must come from Congress.

The court found such power in the TWEA, a 1917 statute allowing the President, during times of national emergency, to regulate, prevent, or prohibit the importation of any property in which any foreign country or its nationals have an interest.[152] The court applied the statute in this case because, while not at war, the United States was faced with a national economic emergency—a serious balance of payments deficit.[153]

The court's decision weakened the intelligible principle test for delegations of power during times of national emergencies. The court noted that the delegation of power under the TWEA was "broad and extensive," but that "it could not have been otherwise if the President were to have, within constitutional boundaries, the flexibility required to meet problems surrounding a national emergency with the success desired by Congress."[154] After all, Congress is not expected to, nor could it reasonably, delegate specific power for all possible contingencies during a national emergency.[155]

The court did not provide the President with carte blanche under the TWEA.[156] Instead, the court made clear that "the delegation could not constitutionally have been of 'the full and all-inclusive power to regulate foreign commerce.'"[157] The President's acts under the TWEA had to be substantially related to his delegated authority and his "choice of the means of execution must also bear a reasonable relation to the particular emergency confronted."[158]

On its face, *Yoshida* appears to strengthen the position of Congress. The court expresses several times its underlying respect for Congress's ultimate

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150. United States v. Yoshida Int'l, Inc., 526 F.2d at 572.

151. *Id.*

152. Trading with the Enemy Act, 50 U.S.C. §§ 1-39, 41-44 (1994); *see* COHEN, *supra* note 4, at 157.

153. United States v. Yoshida Int'l, Inc., 526 F.2d at 575.

154. *Id.* at 573.

155. *Id.* at 581. "Clearly, Congress can be 'constitutionally required to appraise beforehand the myriad situations' even less stringently when legislating with respect to the inherently unknown and unknowable problems which may accompany a future national emergency." *Id.*

156. *Id.* at 583.

157. *Id.* at 574 (quoting from the Customs Court opinion, which the Court of Customs and Patent Appeals reversed).

158. *Id.* at 579.

authority over foreign commerce.[159] It acknowledges that congressional delegation of foreign commerce power does not mean that Congress has abdicated its role in that area.[160] Furthermore, the court proclaims its willingness to "impede an unreasonable or ultra vires exercise of power" by the President under the TWEA.[161]

While the predominant rhetoric in *Yoshida* may allow Congress some comfort, other passages in the opinion in fact favor a considerable degree of discretionary power in the executive branch. The court states the judiciary will not "review the bona fides of a declaration of emergency by the President,"[162] in essence allowing the President to assert his own authority without providing a judicial check. Finally, the inherent danger of the unwise delegation of power to a President who may abuse it is a matter for the Congress alone to resolve, and the courts will not intervene unless such abuse implicates constitutional provisions.[163]

In *Haig v. Agee*,[164] the Supreme Court continued its attack on congressional foreign policy powers by limiting its holding in *Kent v. Dulles*.[165] In *Haig*, the Secretary of State, under the authorization of the 1926 Passport Act, revoked the passport of an American citizen who was suspected of actions threatening CIA activities in other nations.[166]

In an opinion reminiscent of *Curtiss-Wright*, the Court found that the "broad rulemaking authority" granted in the Act, coupled with the foreign policy implications, meant executive actions consistent with the Act must be allowed unless "'there are compelling indications that it is wrong.'"[167] The President's prerogative was further substantiated by the fact that Congress had accepted the President's authority to withhold passports for national security reasons.[168]

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159. *Id.* at 582-83. Not only does the court recognize Congress as the "ultimate decision maker" on issues of foreign commerce, it also states that national emergencies will not give the President a blank check to "sound the death-knell of the Constitution" or "rewrite the tariff schedules." *Id.*

160. *Id.* at 582. "[Congress] remains the ultimate decision maker and the fundamental reservoir of power to regulate commerce. It may, of course, recall or limit the delegated emergency power at any time." *Id.*

161. *Id.* at 583.

162. *Id.* at 581 n.32.

163. *Id.* at 583-84.

164. Haig v. Agee, 453 U.S. 280 (1981).

165. *See id.* at 301-06.

166. *Id.* at 283-87. Agee, a former CIA employee, had worked in the agency division responsible for covert intelligence gathering. *Id.* He had threatened to expose CIA officers and agents operating in foreign countries—a threat on which he had previously made good. *Id.*

167. *Id.* at 291 (quoting E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 55 (1977)).

168. *Id.* at 294. "From the outset, Congress endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific

The Court noted that there was no long-standing enforcement practice by the executive branch, which Agee argued was necessary to find a history of implied congressional approval.[169] This fact was not determinative, however, because the Court noted the few times similar factual circumstances had occurred.[170] When similar circumstances did occur, the Congress did not object to the administrative action taken, thus implying congressional approval.[171]

Perhaps one of the most significant Supreme Court cases in the area of foreign affairs powers to be decided in the last twenty years, *Dames & Moore v. Regan*,[172] made it perfectly clear that the Court was willing to find executive authority to act in even the most obscure legislation.[173] The case involved an intricate factual scenario, but essentially involved a plaintiff who had judgments against Iran suspended under executive agreements and orders issued by Presidents Carter and Reagan as a means of obtaining the release of American hostages held by Iran.[174]

The Supreme Court found no explicit authority for the President to suspend claims and order mandatory dispute resolution in any legislation approved by Congress.[175] Under Justice Jackson's *Youngstown* analysis, Congress's failure to speak on this issue could have thrown the executive branch's actions into Jackson's second or third categories, raising serious doubts as to the constitutionality of the executive agreement and orders.[176]

The Court, however, went above and beyond the call of duty to find implied congressional approval for the executive branch's actions. It looked to the provisions of the International Emergency Economic Powers Act and the Hostage Act of 1868 to find that Congress had provided the President with authority

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application to the subject of passports." *Id.*

169. *Id.* at 301-02. Agee attempted to argue that implicit congressional approval rested upon a showing of "longstanding and consistent *enforcement* of the claimed power: that is, by showing that many passports were revoked on national security and foreign policy grounds." *Id.*

170. *Id.* at 302 (stating that the "continued validity of the power is not diluted simply because there is no need to use it").

171. *Id.* (noting that in one instance the President had even withheld the passport of a member of Congress and Congress did little to object).

172. Dames & Moore v. Regan, 453 U.S. 654 (1981).

173. *Id.* at 678-79. For example, the Court relied upon the Hostage Act of 1868, which allowed the President to use all means short of war to obtain the release of American citizens held unjustly by foreign governments. *Id.*

174. *Id.* at 662-68.

175. *Id.* at 675-78 (stating that neither the International Emergency Powers Act of 1977, nor the Hostage Act of 1868, explicitly granted the President such sweeping powers).

176. If the Court viewed the legislation as giving the President no explicit authority to act as he did, then the agreement would place no higher than category two, in which Congress is silent and the President can rely upon only his own constitutional authority. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

to act similarly in similar circumstances.[177] Furthermore, Congress had been silent when similar executive actions were taken pursuant to these Acts, and the Court interpreted this as congressional approval.[178] Finally, the Court made clear that it did not wish to remove a substantial bargaining chip from the President's hand when he was involved in negotiations with foreign governments.[179]

In 1986, it became obvious that Congress would be required to act with caution if it wanted to preserve its authority over foreign affairs and foreign commerce. *Japan Whaling Ass'n v. American Cetacean Society*[180] expanded the powers of the executive branch beyond what had become the traditional delegation approach.[181]

Japan Whaling arose when wildlife conservation groups objected to the manner in which the Secretary of Commerce was handling Japan's violation of international whaling quotas.[182] Under the Pelly Amendment to the Fishermen's Protective Act of 1967,[183] Congress authorized the President, in his discretion, to prohibit importation of fish products from a certified violator nation.[184] When Congress became unhappy with the President's lack of action, it passed the Packwood Amendment to the Magnuson Fishery Conservation and Management Act,[185] which dropped the "discretionary" language from the Pelly Amendment.[186]

As the 1984-1985 whaling season grew closer, concern over Japan's noncompliance mounted and pressure to act was applied to the President.[187] Instead of imposing the mandatory economic sanctions outlined under the Packwood Amendment, the President concluded an executive agreement with Japan in

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177. Dames & Moore v. Regan, 453 U.S. at 678-79.

178. *Id.*

179. *Id.* at 673 (noting that blocking orders "permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency").

180. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986).

181. *See id.* at 232-41. Notice that in the cases previously cited, the executive branch was required to follow the intelligible principle within congressional delegations, but with some executive discretion allowed. *See, e.g.*, Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933); Star-Kist Foods, Inc. v. United States, 275 F.2d 472 (C.C.P.A. 1959). In *Japan Whaling*, all thoughts of following minimal congressional guidelines were tossed out the window. *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. at 246-50 (Marshall, J., dissenting).

182. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. at 227-28. The quotas were established by the International Whaling Convention (IWC), and were to be overseen by parties to the agreement. *Id.*

183. Fishermen's Protective Act of 1967, 22 U.S.C. § 1978(a)(1) (1994).

184. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. at 225.

185. Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1978(a)(3) (1994).

186. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. at 226.

187. *Id.* at 227.

which Japan agreed to certain harvest limits and pledged to end commercial whaling by 1988.[188] The wildlife groups filed suit to force the Secretary of Commerce to certify Japan as a violator and thereby expose Japan to mandatory economic sanctions.[189]

After disposing of the political question doctrine,[190] the Supreme Court turned to the issue of whether the amendments were a congressional mandate requiring the Secretary to certify all violators.[191] The Court explicitly stated that the Secretary "may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter."[192]

The problem was that while Congress mandated presidential action with the Packwood Amendment, it failed to mandate the actions of the Secretary of Commerce.[193] Not only was the Secretary's action reasonable considering the ambiguous nature of the statutory language, the very ambiguity of the language meant that the executive branch would be given broad discretion in its interpretation of the statutory language.[194]

The Court then took a substantial step in its tradition of analyzing foreign policy issues by holding that the Secretary's actions would be upheld because they furthered the object and purpose of the legislation, even though the means used may have been questionable.[195] Rather than relying upon "the possibility that certification and imposition of economic sanctions" might affect Japan's whaling activities, the Secretary was justified in reaching a separate agreement with Japan if he reasonably believed that the agreement would be more effective at obtaining "the same or better result."[196] As long as the Secretary's actions

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188. *Id.* at 228.

189. *Id.*

190. *Id.* at 230. The political question doctrine did not apply here because the courts have the duty to interpret treaties and executive agreements, as well as congressional legislation. *Id.*

191. *Id.* at 229-31.

192. *Id.* at 233.

193. *Id.* The difference is between forcing the Secretary of Commerce to certify any nation violating the whaling quota and forcing the executive branch to impose economic sanctions once such certification is made. "[T]he statutory language itself contains no direction to the Secretary automatically and regardless of the circumstances to certify a nation that fails to conform to the IWC whaling Schedule." *Id.*

194. *Id.*

195. *Id.* The Court at this point essentially abandons the intelligible principle test and adopts a reasonable means test. *See id.* (holding that the Secretary's actions could be justified if he "reasonably believed" they would satisfy the intent of Congress).

196. *Id.* "[T]he Secretary's decision to secure the certainty of Japan's future compliance with the IWC's program through the 1984 executive agreement, rather than rely on the possibility that certification and imposition of economic sanctions would produce the same or better result, is a

contradicted neither the express language of the Amendments nor congressional intent, his actions would be permitted.[197]

So what does this intermingling of foreign affairs and foreign commerce case law mean? Simply put, in the arena of foreign affairs generally, the President is king.[198] Since Justice Sutherland's decision in *Curtiss-Wright*, the judiciary has been prone to expand the powers of the President in the realm of foreign affairs, while limiting Congress's role to that of delegator.[199]

In the area of foreign commerce, however, Congress is given more respect by the courts. While Congress will be allowed to delegate its foreign commerce power to the President if it so chooses,[200] the courts have held that power over foreign commerce ultimately rests with the legislative branch and with that branch alone.[201] The problem, however, may lie more in Congress's desire to assert its supremacy than in the courts' willingness to recognize it.[202]

IV. THE HISTORY OF FOREIGN COMMERCE REGULATION

A. *The Early Years*

During the early years of the republic, trade relations were initiated by the President through "bilateral treaties of friendship, commerce, and navigation."[203]

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reasonable construction of the Pelly and Packwood Amendments." *Id.*

197. *Id.* at 240.

198. While Justice Sutherland was careful to ultimately subordinate presidential power to constitutional provisions, one could argue that his opinion in *Curtiss-Wright*, in which the President alone holds the nation's sovereign power, essentially envisions the President as a monarch ruling over foreign affairs as the "sole organ" of the nation. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). *But see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (holding that the President's foreign affairs powers are not unlimited).

199. *See supra* notes 67-197 and accompanying text.

200. *See* Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 305 (1933) (holding that Congress can delegate its tariff-making power to the President); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948) (holding that Congress can delegate large portions of its foreign commerce power).

201. *See* United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (4th Cir. 1953) (nullifying an executive agreement that conflicted with a congressional statute and asserting that the President has no inherent authority over foreign commerce), *aff'd on other grounds*, 348 U.S. 296 (1955); United States v. Yoshida Int'l, Inc., 526 F.2d 560, 571-72 (C.C.P.A. 1975) (holding that the President has no inherent authority to regulate foreign commerce or to set tariffs).

202. For an excellent discussion of Congress's unwillingness to assert its rights in foreign commerce and foreign affairs and the incentives working for and against congressional resurgence, see SILVERSTEIN, *supra* note 44, at 191-210.

203. Linarelli, *supra* note 12, at 208.

The President negotiated the details of these treaties, but they required approval by the Senate.[204] Unlike the executive branch of today, the Presidents of the eighteenth and nineteenth centuries had no separate legal authority regarding trade barriers, especially tariffs.[205] In fact, the executive branch had a "virtually nonexistent role . . . in the formulation of U.S. import policy during the eighteenth century."[206]

In the 1800s, the President, with the permission of Congress, took on the responsibility of negotiating trade treaties and determining whether a country was entitled to Most Favored Nation (MFN) status.[207] The President's initiative in this area went unquestioned until 1934, when Congress attempted to reassert its role in creating trade agreements.[208]

While the President was allowed to negotiate trade agreements, the legislative branch took a dominant role in setting tariffs and implementing embargoes and blockades.[209] The trade statutes of the late 1700s and early 1800s were designed to maintain the newborn nation's independence from the great powers of Europe.[210] Because the nation was militarily weak, it relied upon regulations "restricting imports or exports with offending great powers."[211]

While the early Presidents may have used international trade as a means to foreign policy ends, they also respected congressional authority in the foreign

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204. U.S. CONST. art. II, § 2, cl. 2.

205. COHEN, *supra* note 4, at 28-29.

206. *Id.* at 28. "The executive branch in trade matters was little more than a tax (tariff) collector. . . . The [P]resident had absolutely no legal authority—and sought none—to reduce U.S. trade barriers on his own; all trade agreements signed with other governments had to be ratified by Congress." *Id.* at 28-29.

While author Gordon Silverstein has criticized President Jefferson's post facto request for congressional authorization to use military force against the Barbary pirates, he notes that Jefferson had congressional approval in advance for the embargoes he imposed and that Jefferson never claimed to have exclusive authority over foreign commerce. *See* SILVERSTEIN, *supra* note 44, at 47-48.

207. Linarelli, *supra* note 12, at 209. While the name may suggest preferential treatment, the granting of MFN status means nothing more than a promise by the United States to give imports from the favored country the same low tariff schedule as it gives to imports from any other country. *See* I.M. DESTLER, AMERICAN TRADE POLITICS 314 (3d ed. 1995). A withdrawal of MFN status would result in increased tariff rates being imposed upon the disfavored country. *See* COHEN, *supra* note 4, at 19-23 (discussing the debate over granting MFN status to China); *see also* DESTLER, *supra*, at 233-36.

208. Linarelli, *supra* note 12, at 209.

209. *Id.* at 210.

210. Koh & Yoo, *supra* note 3, at 720.

211. *Id.* "In the long run, the Jeffersonians believed the nation needed to pursue free trade overseas, so as to provide markets for an agrarian, republican society. In the short term, American leaders sought to use commerce as a means of removing the United States from great-power conflicts." *Id.*

commerce arena.[212] Prior to initiating any economic or military action against France for its seizure of United States merchantmen, President John Adams sought congressional approval for statutes enacting an embargo, which called for the creation of a navy and the raising of a provisional army.[213] When Thomas Jefferson was confronted with the British impressment of American sailors, he formally asked Congress for the Embargo Act[214] and the Nonimportation Act.[215] Congress thus delegated to Jefferson authority to wage economic warfare through foreign commerce.[216]

During the nineteenth century, Congress continued to provide the President some discretion over trade issues.[217] Prior to the outbreak of the Civil War, Congress granted Abraham Lincoln emergency power to prohibit shipping, block trade, regulate imports, and control foreign ships in United States waters.[218] While Lincoln acted unilaterally in instituting a blockade, he later received congressional support for his actions.[219]

Congress provided the President with an extra measure of authority in times of national emergencies when it passed the Trading with the Enemy Act of 1917.[220] If the President declared a national emergency, he would be allowed to seize assets and block or regulate commerce, both foreign and domestic.[221]

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212. *Id.*

213. *Id.*

214. 18 ANNALS OF CONG. 2065 (1808) (prohibiting exports from the United States).

215. Act of Mar. 3, 1805, ch. 91, 2 Stat. 339 (prohibiting imports from England).

216. Koh & Yoo, *supra* note 3, at 721. "Jefferson exercised extraordinary and often oppressive power, but always with congressional support, and was, in fact, enforcing laws passed by Congress." SILVERSTEIN, *supra* note 44, at 47.

217. Koh & Yoo, *supra* note 3, at 723. "Recognizing the need for presidential emergency powers, Congress . . . passed statutes during the wars of 1812 and 1848 granting special powers, to be exercised at the President's discretion, over economic welfare measures." *Id.*

218. *Id.* (citing Harold Relyea, *Reconsidering the National Emergencies Act: Its Evolution, Implementation, and Deficiencies*, *in* THE PRESIDENCY AND NATIONAL SECURITY POLICY 274, 282 (R. Gordon Hoxie ed., 1984)).

219. FISHER, *supra* note 45, at 39. "Congress eventually passed legislation 'approving, legalizing, and making valid all the acts, proclamations, and orders of the President, etc., as if they had been issued and done under the previous express authority and direction of the Congress of the United States.'" *Id.*; *cf.* SILVERSTEIN, *supra* note 44, at 51-52 (noting that Lincoln never admitted that his actions were exclusive to the executive, but that they were delegated to the national government as a whole and thereby available to him in times of national crisis).

220. Trading with the Enemy Act, 50 U.S.C. §§ 1-39, 41-44 (1994).

221. *Id.* This broad grant of power sometimes led to abuse, such as when President Nixon invoked it to deal with a balance of payments problem in 1971. COHEN, *supra* note 4, at 157. The TWEA was superseded in 1977 by the International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701-1706 (1994). COHEN, *supra* note 4, at 156. It allows the President to prohibit transactions involving foreign property if he declares a national emergency involving a serious threat to American foreign policy, economy, or national security. 50 U.S.C. §§ 1701-1706.

Thus, each branch established its own sphere of influence in creating foreign commerce policy. The early years of the republic were marked by a balance of power between the two branches, where the President asked for congressional permission for trade actions, whether it was for trade agreements or emergency powers, and Congress provided it.[222]

B. *The Tariff Acts of the Twentieth Century*

1. *Smoot-Hawley and Its Aftermath: Congress Abdicates*

Everything changed with the passage of the Smoot-Hawley Tariff Act.[223] Under protectionist pressure from their constituents, members of Congress voted to raise the average tariff rate to fifty-three percent and increase the number of dutiable items.[224]

The Act was the most infamous in a series of acts attempting to appease insecure domestic interest groups.[225] Congress began by raising agricultural prices in response to the demands of American farmers.[226] The Tariff Act of 1922[227] increased import duties on agricultural goods in hopes of easing farmer distress "over falling prices for agricultural goods."[228] The 1922 Act also increased tariffs for industries such as the chemical industry, which had flourished during World War I but were now feeling the pinch.[229]

The imposition of protectionist tariffs for agricultural goods had little economic justification, because foreign competition was not the primary problem.[230] By granting protectionist measures to farmers without any serious rationale behind the action, Congress opened itself to intense lobbying from other organized

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222. COHEN, *supra* note 4, at 156; *see also* Linarelli, *supra* note 12, at 208-09; Koh & Yoo, *supra* note 3, at 720-25.

223. The Smoot-Hawley Tariff Act, Pub. L. No. 71-361, 46 Stat. 590 (1930).

224. COHEN, *supra* note 4, at 32. The major pressure came from farmers who mistakenly believed higher tariffs would protect them from falling prices, which were actually caused by excessive domestic production. *Id.* at 31.

225. *Id.*

226. *Id.*

227. Tariff Act of 1922, Pub. L. No. 67-318, 42 Stat. 858 (1922).

228. COHEN, *supra* note 4, at 31.

229. *Id.*

230. *Id.*

interest groups.[231] Organized labor soon joined farmers and industry in pressuring Congress for more protectionist measures.[232]

The hike in American tariffs caused by Smoot-Hawley resulted in reactionary tariff increases by other nations.[233] The tariff war among the world's greatest powers contributed to the decline of international trade and the subsequent world-wide depression.[234] The Smoot-Hawley Tariff Act demonstrated "the difficulties in having a legislative body, whose members owe allegiance to regions and factions, micro-manage international trade for a country."[235]

The impact of the Act was not lost on Congress. While Congress wanted to increase the volume of international trade, it also realized the danger in trying to manage foreign commerce when Congress was susceptible to popular pressure.[236] Congress attempted to solve the dilemma with the Reciprocal Trade Agreements Act of 1934.[237]

The 1934 Act allowed the President to enact tariff-cutting agreements with other nations.[238] According to the terms of the Act, if the President determined that another country was "unduly burdening" the foreign trade of the United States through import duties or restrictions, he could enter into foreign trade agreements with those countries and modify, continue, or add to "import restrictions" and "excise treatment."[239]

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231. *Id.* "The result was the unleashing of an unprecedented exercise in logrolling: Votes in the House and Senate were freely exchanged to provide higher tariffs in response to nearly every constituent demand for relief from import competition." *Id.*

232. *Id.*

233. *Id.* at 32; *cf.* DESTLER, *supra* note 207, at 6 (asserting that not only did Smoot-Hawley contribute to a worldwide depression, it also contributed to the rise of Nazi Germany and aggressive militarism in Japan).

234. COHEN, *supra* note 4, at 32. "Estimates peg the value of world trade in 1933 at just one-third of what it had been in 1929." *Id.* (citing JOHN M. DOBSON, TWO CENTURIES OF TARIFFS 51 (1976)); *see also* Linarelli, *supra* note 12, at 211 ("In fact, many view the Smoot Hawley Act as one of the primary causes of the Great Depression.").

235. Linarelli, *supra* note 12, at 211; *see* COHEN, *supra* note 4, at 32 ("To this day, it remains a textbook case of what *not* to do in trade policy."). *But see* Colleen M. Callhan et al., *Who Voted for Smoot Hawley?*, 54 J. ECON. HIST. 683, 690 (1994) (arguing that Smoot-Hawley was more a product of political partisanship than of interest group lobbying).

236. Linarelli, *supra* note 12, at 211. The return to low tariffs was also assisted by the victory of the Democrats in 1932. COHEN, *supra* note 4, at 32. "The Democratic platform presented what was then a unique critique by politicians of higher tariffs: It vigorously condemned the Smoot-Hawley Act as detrimental to U.S. industry and agriculture by causing a loss of foreign markets as well as increases in domestic production costs." *Id.*

237. The Reciprocal Trade Agreements Act of 1934, 19 U.S.C. §§ 1351-1354 (1994).

238. *Id.*

239. *Id.* § 1351(a)(1).

Under the Reciprocal Trade Agreements Act, the President became a major player in international trade regulation.[240] "The President negotiated and entered into twenty-one agreements before 1940 and thirty-two agreements before 1945."[241] Through interpretation, the Act allowed the President broad discretion in international trade, unquestioned by Congress.[242]

The President's independence in the realm of international trade at this time in history can be evidenced by the negotiation of the General Agreement of Tariffs and Trade (GATT) in 1947.[243] Despite its influence on trade relations, the GATT was never approved or reviewed by either house of Congress, nor was it explicitly rejected.[244]

Congress continued to grant the President authority to enter into foreign trade agreements via extensions to the Reciprocal Trade Agreements Act of 1934.[245] The extensions marked the beginning of Congress's attempt to regain control of foreign commerce regulation.[246] The 1951 extension directed the President to deny MFN status to communist nations.[247] The extension also required the President to provide public notice when he intended to negotiate an agreement.[248]

Congress took a substantial step in curtailing the President's delegated authority with the Trade Expansion Act of 1962.[249] This Act required the President to obtain congressional approval for multilateral trade agreements, based upon the fear that the President might attempt to reduce nontariff trade barrier (NTB) restrictions such as anti-dumping laws.[250] The Act also required the

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240. COHEN, *supra* note 4, at 33. "For the first time, the executive branch was given authority to *enact* reductions of up to 50 percent in U.S. tariffs as long as other countries reciprocated in kind." *Id.*

241. Linarelli, *supra* note 12, at 213.

242. *Id.* at 212-13. As Linarelli explains, "The Act contained very few substantive standards that could be applied to restrict presidential discretion. The President exercised hegemony over trade matters and Congress abdicated." *Id.*

243. General Agreement on Tariffs and Trade, Oct. 30, 1947, 27 U.N.T.S. 19. The GATT was a multilateral agreement on trade rules, which were to be enforced through an International Trade Organization (ITO). DESTLER, *supra* note 207, at 313. When Congress failed to ratify the ITO agreement, the GATT articles were used as the rules for international commerce. *Id.* The GATT was superseded by the World Trade Organization in 1995, after the Uruguay Round agreements were adopted. *Id.*

244. Linarelli, *supra* note 12, at 213.

245. Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, 65 Stat. 72.

246. Linarelli, *supra* note 12, at 214.

247. Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, § 5, 65 Stat. 72, 73.

248. *Id.* § 3, 65 Stat. at 72-73.

249. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872.

250. *Id.*; *see* Linarelli, *supra* note 12, at 215; *see also* Koh & Yoo, *supra* note 3, at 751 ("Increasingly, postwar Presidents sought greater discretion to negotiate trade pacts that went beyond tariffs. In response Congress tightened controls over negotiating authority to forestall

President to include members of Congress as part of his trade negotiations teams.[251]

Another substantial provision in the 1962 Act created the Special Representative for Trade Negotiations in the Executive Office of the President.[252] Congress was tired of the State Department serving as the country's chief spokesperson on trade matters because of the State Department's focus on diplomacy.[253] Congress did not want "striped pants cookie pushers"—it wanted a "more hard-nosed chief negotiator . . . who would be willing to walk away from the negotiating table if unable to get a good overseas market access deal for U.S. producers."[254]

2. *The Trade Act of 1974 and Fast Track: Congress Resurrected*

The most concrete effort in re-establishing Congress's role in foreign affairs is embodied in the Trade Act of 1974.[255] The Trade Act introduced fast-track procedures to the international trade debate and greatly restricted the President's ability to manipulate trade agreements.[256]

Fast-track procedures did for nontariff barriers (NTBs)[257] what the Reciprocal Trade Agreement Act of 1934 did for tariffs.[258] With tariffs, the executive branch was free to negotiate reductions in United States tariffs if it could obtain similar reductions from trading partners.[259] When the deal was agreed upon, a presidential proclamation was all that was required to implement the agreement.[260] Given that tariffs were nothing more than taxes, it was relatively easy for Congress to set strict guidelines in advance to constrain the President's actions.[261]

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unilateral presidential trade decisions via executive agreement.").

251. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 243, 76 Stat. 872, 878.

252. *Id.* § 241, 76 Stat. at 878. The Special Representative was to serve as head of the trade negotiations delegation and interagency trade commissions in the executive branch. *Id.* It later became the Office of the United States Trade Representative. COHEN, *supra* note 4, at 109.

253. COHEN, *supra* note 4, at 37.

254. *Id.*

255. Trade Act of 1974, 19 U.S.C. §§ 2101-2495 (1994).

256. *Id.* § 2192. Another important feature of the 1974 Trade Act worth mentioning is the Jackson-Vanik Amendment, which allows the President to provide MFN status to countries only if they allow free emigration. *Id.* § 2432(c).

257. NTBs are nontariff barriers that distort the flow of commerce, such as import quotas and subsidies. DESTLER, *supra* note 207, at 315.

258. *Id.* at 71.

259. *Id.*

260. *Id.* "It gave [American trade negotiators] maximum credibility abroad, since their power to deliver on their commitments was not in doubt." *Id.*

261. *See id.* at 34-35 (noting how easy it was for Congress to set limits on measurable

There was no similar procedure for NTBs. Because NTBs cannot be "measured" in advance of legislation, the system of advance authorization used in tariff negotiations was inappropriate for NTB negotiations.[262] Only when the President was able to determine the scope of the NTB problem would he be able to negotiate an NTB reduction, which would then require the approval of Congress.[263] The result in 1967 was the executive branch's acceptance of a new anti-dumping code and a plan to eliminate the American Selling Price, neither of which were authorized by Congress.[264] American trade negotiators were publicly embarrassed when Congress formally rejected both commitments.[265] Furthermore, the Johnson Administration secretly negotiated a bilateral tariff agreement on vehicles, auto parts, and accessories with Canada and presented the package to Congress as a done deal.[266] Under the fast-track procedure, Congress is less likely to be kept in the dark because Congress has to pass legislation "at both ends of a negotiation."[267]

In order to enter into trade agreements and use fast-track procedures, the President must publish his intentions in the Federal Register[268] and must notify both houses of Congress ninety days prior to entering into the trade agreement.[269] Along with notification, the President must provide a draft of the proposed implementing legislation and a statement of his reasons as to how the agreement would serve United States interests.[270] Furthermore, the President is required to consult with the Senate Finance Committee, the House Ways and Means Committee, and any joint committee whose jurisdiction would be affected by the proposed trade agreement.[271]

If the President complied with the terms of the 1974 Act as mentioned above, fast-track procedures were triggered. These procedures represented changes in the internal rules of Congress that allowed for the expedited consideration of a trade agreement and its implementing legislation.[272]

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tariffs).

262. *Id.*

263. *Id.*

264. Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 146 n.8 (1992). The American Selling Price was a system of customs appraisals that "inflated the duties of certain categories of US imports." DESTLER, *supra* note 207, at 72.

265. *See* Koh, *supra* note 264, at 146 n.8; DESTLER, *supra* note 207, at 72.

266. Koh, *supra* note 264, at 146 n.8. Johnson got his agreement, but his acts prompted Congress to limit the President's ability to enter into such agreements without consulting Congress. *Id.*

267. DESTLER, *supra* note 207, at 75.

268. Trade Act of 1974, 19 U.S.C. § 2112(e)(1) (1994).

269. *Id.*

270. *Id.* § 2112(e)(2)(A), (B).

271. *Id.* § 2112(c).

272. *Id.* § 2191(a) ("This section and sections 2192 and 2193 of this title are enacted by

In the case of NTBs, agreements and their implementing bills would be automatically discharged from committee within forty-five legislative days, thereby preventing any one committee from "bottling" the bill or preventing discussion by the full chamber.[273] A bill or resolution approving each agreement would be placed on each chamber's calendar for a floor vote without amendment,[274] thereby avoiding "killer amendment" and "Christmas tree" packages. Finally, floor debate in each chamber was limited to twenty hours and the final package had to be voted on within fifteen legislative days,[275] thereby terminating the time-honored practice of filibustering.

As John Linarelli has noted, fast-track procedures allow Congress to negotiate with the executive branch the final content of trade agreements and the implementation of bills via "nonmarkup" sessions and "nonhearings."[276] The President is not only expected to jump through procedural hoops, but is also pressured into considering congressional preferences when negotiating trade agreements, lest Congress reject the implementing bill.[277]

Congress used the Trade and Tariff Act of 1984[278] to revisit fast track. The fast-track procedures were amended to include the House Ways and Means Committee and the Senate Finance Committee as gatekeeper committees.[279] The change required the President to provide notice to these committees and consult with them sixty days prior to entering into any free trade agreement.[280] If neither committee passed a disapproval resolution, the agreement would receive fast-track treatment; if either committee disapproved, however, the executive branch could submit it only under normal legislative procedures.[281]

Constitutional scholar Harold Koh suggests that the 1984 Act significantly increases Congress's control over foreign commerce in three ways.[282] First, either committee could take trade agreements off fast track or, in the alternative, kill the agreement, so the President had "incentives to consult with the committee's members at each step of the process."[283] Second, the President was

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Congress . . . as an exercise of the rulemaking power of the House of Representatives and the Senate . . . .").

273. *Id.* § 2191(e)(1).

274. *Id.* § 2191(d).

275. *Id.* § 2191(e)-(g).

276. Linarelli, *supra* note 12, at 218.

277. DESTLER, *supra* note 207, at 75-76. "U.S. negotiators had to worry about the danger that unhappy industries might join together and mobilize a congressional majority to block the implementing bill." *Id.*

278. Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948.

279. *Id.* § 401(a), 98 Stat. at 3013-15.

280. *Id.*

281. *Id.*

282. Koh, *supra* note 264, at 149.

283. *Id.* (noting that committee members were consulted according to the necessary 60-day

virtually required to keep the committees informed throughout the process, lest they should become unhappy with the final product.[284] Finally, either chamber could vote down the agreement regardless of the committees' positions.[285]

Congress modified fast-track procedures yet again with the Omnibus Trade and Competitiveness Act of 1988.[286] The 1988 Act allowed Congress to manipulate extensions of fast track and to terminate fast-track procedures once they were already underway.[287]

When Congress enacts a statute allowing fast-track procedures, it usually allows the procedures to be used for a specified number of years, with the possibility of an extension.[288] Under the 1988 Act, the President was required to submit a formal request for extension with his reasons for making the request, and the extension could be denied by a disapproval resolution from the House Ways and Means Committee, the Senate Finance Committee, or the House Rules Committee.[289] Thus, the 1988 Act expanded the inner circle of congressional committees the executive branch had to court.

Perhaps even more significant was the Act's creation of "reverse fast-track."[290] If the President failed to properly consult with Congress concerning trade agreement negotiations, the ranking committee chairs of the gatekeeper committees[291] could introduce disapproval resolutions which, if reported by the full committees and adopted by both chambers within sixty days, would remove the questionable trade agreement from fast track.[292]

Fast-track legislation has been actively supported by American businesses. Retailers and manufacturers are concerned that the inability of the United States to create free markets in Latin America and elsewhere would give a head start to

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consultation period of the Canada Free Trade Agreement, which allowed them to win concessions from the President).

284. *Id.*

285. *Id.*

286. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

287. Koh, *supra* note 264, at 151.

288. *See, e.g.*, Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (allowing the fast-track option for implementing legislation for three years, with the possibility of a two-year extension).

289. *Id.* § 1103(b), 102 Stat. at 1129-30.

290. *Id.* § 1103(c), 102 Stat. at 1130-31. For a discussion of reverse fast track, see Sharyn O'Halloran, *Congress and Foreign Trade Policy*, *in* CONGRESS RESURGENT: FOREIGN AND DEFENSE POLICY ON CAPITOL HILL 293-94 (Randall B. Ripley & James M. Lindsay eds., 1993).

291. For the purposes of reverse fast track, this would be either the Senate Finance and House Rules Committees or the Senate Finance and House Ways and Means Committees (one from each chamber). Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1103(c), 102 Stat. 1107, 1130-31.

292. *Id.*

foreign competitors.[293] Other businesses are concerned that the inability of the United States to negotiate tariff and nontariff barrier reductions will force American businesses to shift production overseas as a means of escaping the trade barriers.[294] This is coupled with the corollary concern that, without fast-track authority, other countries will be encouraged to strengthen their barriers against United States goods as a means of challenging United States competitiveness in those countries.[295]

Fast track has its critics. Some have argued that fast-track procedures inhibit legislative input by limiting floor amendments and debate.[296] In essence, these critics argue, fast track creates a "take-it-or-leave-it package" that brushes aside congressional interests and, vicariously, the interests of the public.[297] Yet another criticism targets the intent of Congress, suggesting that fast track is merely a means for Congress to delegate its authority to the President and, by a mere up-or-down vote on the agreement, escape its authority for enacting the executive branch's agreement.[298]

In an excellent piece on fast-track procedures, Harold Koh dissected the criticisms against fast track and found them lacking in substance.[299] Koh argues that the no-amendment objection is unfounded because fast-track procedures, as an internal procedural system created by Congress, could be modified by a rule change if Congress believed the procedures were indeed stifling its voice on trade matters.[300] Furthermore, the fact that Congress has the ability to amend a disfavored agreement (via a rule change) or to kill the agreement in its entirety provides an incentive to the executive branch to include Congress in its negotiation strategy.[301] Koh dismisses the accountability objection by noting the number

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293. Joyce Barrett & Jim Ostroff, *Fast Track Failure Leaves Many Unsure on Trade*, WOMEN'S WEAR DAILY, Nov. 11, 1997, at 2.

294. *Id.* at 16.

295. *Id.*

296. *See* Koh, *supra* note 264, at 163-66 (discussing what he calls the "no amendment" objections to fast track).

297. *Id.* at 163-64. "Moreover, critics claim, the Fast Track puts pressure on members to accept agreements as originally drafted, even if they have substantial concerns with them, because their only other option is to vote against an agreement whose negotiation they have approved and which has taken many long years to negotiate." *Id.* at 164.

298. *Id.* at 166 (referring to this criticism as the "accountability objection").

299. *Id.* at 161-71.

300. *Id.* at 164. "In the original language of the 1974 Act authorizing Fast Track, Congress explicitly declared that it could change its own procedures at will." *Id.* (citing the Trade Act of 1974, 19 U.S.C. § 2191(a) (1994)).

301. *Id.* at 165-66; *see also* DESTLER, *supra* note 207, at 75-76 (discussing President Carter's Multinational Trade Negotiations and the Special Trade Representative's concern regarding the potential response from Congress, given interest group pressure).

of "leverage points" through which Congress can affect the outcome of an agreement.[302]

Despite Koh's avid defense of fast-track authority, fast track's critics have apparently won the battle. In November 1997, President Clinton gave up his fight for an extension of fast-track authority after it became clear that the executive branch could not garner enough votes from Congress.[303] Issues such as workers' rights, labor, and the environment played a significant role in lawmakers' decisions to oppose fast track.[304]

Although it may have appeared as though Congress ceded much of its power to regulate foreign commerce to the executive branch, Congress had, in fact, been wise enough to leave itself some loopholes for reasserting its power.[305] The end result was "a procedural device that impose[d] a statutory structure upon the hazy constitutional battleground between overlapping presidential and congressional trade jurisdictions, . . . [and] create[d] moral commitments, mutual assurances, credible threats, and settled expectations" between the two branches.[306]

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302. Koh, *supra* note 264, at 152. Congress may act in the following ways:

> (1) through *gatekeeper-committee denial of initial access* to the Fast Track[;] (2) through *one-house extension disapproval*[;] (3) through the ongoing possibility of *two-house derailment* of an agreement from the Fast Track under the reverse-Fast Track procedure[;] (4) through *ad hoc modification of Chamber rules to eliminate the Fast Track*[;] . . . (5) through the *final up-or-down vote* on the implementing legislation[;] . . . (6) *direct congressional participation* in trade negotiations[;] . . . (7) several layers of advisory committees that render *private industry advice* regarding the negotiations[;] . . . (8) the *limited amendment option*[;] . . . (9) the *nonapplicability of Fast Track to regional agreements*[;] . . . (10) [rule] modification in the Senate by *unanimous consent* procedures[;] (11) the remote possibility that Congress could simply *ignore its own rules*; and (12) modification of the Fast Track by *passage of new legislation*.

Id. at 152-53, 156-57.

303. *GOP Sees "Fast Track" as Dead Issue*, OMAHA WORLD-HERALD, Nov. 11, 1997, at 1.

304. *See* Barrett & Ostroff, *supra* note 293, at 2, 16 (describing the issues that played a role in the defeat of fast track, and what the defeat means for American trade policy).

305. *Id.* The "leverage points" Koh lists provide an example of exactly how easy it is for Congress to affect trade agreements, despite the single up-or-down vote on implementing legislation, if Congress so chooses. *Id.*; *see also* O'Halloran, *supra* note 290, at 303 ("[L]egislators affect policy through the procedures they design. Congress thereby can influence foreign-trade policy not *despite* delegation but *through* it.").

306. Koh, *supra* note 264, at 161.

V. CONCLUSION

Ask separation of powers scholars about the balance of power between the executive branch and Congress in the realm of foreign affairs generally, and they will probably respond, "What balance?" The common perception is that the executive branch has come to dominate foreign affairs—indeed, becoming the "sole organ" Justice Sutherland championed in *Curtiss-Wright*.[307]

This perception may not necessarily be accurate in the realm of foreign commerce. Congress has explicit authority over foreign commerce under Article I, Section 8 of the Constitution, while the President has no such authority.[308] Furthermore, the courts have generally respected the ultimate authority Congress holds over foreign commerce, while generally deferring to the executive branch in other foreign affairs cases.[309]

Ultimately, the responsibility for reasserting a strong congressional role in foreign commerce regulation will have to come from Congress itself.[310] As has been shown, Congress at one time was the unquestioned ruler of foreign commerce (and foreign affairs) until the Smoot-Hawley Tariff Act made lawmakers question their ability to handle trade matters.[311] After Smoot-Hawley, congressional delegation of foreign commerce power became a virtual lifestyle for the institution.[312]

Congress has not completely abdicated its position, though, and has actually become increasingly protective of its foreign commerce authority, as can be

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307. *See generally* SILVERSTEIN, *supra* note 44, at 224 (arguing that in order to achieve a "successful foreign policy" the imbalance of powers must be reduced); FISHER, *supra* note 45, at 185 (arguing that the system of checks and balances must be restored).

308. *Compare* U.S. CONST. art. I, § 8, *with* U.S. CONST. art. II.

309. *Compare* United States v. Guy W. Capps, Inc., 204 F.2d 655, 659-61 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) (nullifying an executive agreement that conflicted with a congressional statute and asserting that the President has no inherent authority over foreign commerce), *and* United States v. Yoshida Int'l, Inc., 526 F.2d 560, 583-84 (C.C.P.A. 1975) (holding that the President has no inherent authority to regulate foreign commerce or to set tariffs), *with* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1933) (asserting that the President is the nation's "sole organ" in foreign affairs), Haig v. Agee, 453 U.S. 280, 307-10 (1981) (holding that the President could withhold the passport of a citizen suspected of threatening national security), *and* Dames & Moore v. Regan, 453 U.S. 654, 688-90 (1981) (allowing the President to suspend private claims against a foreign state as a "bargaining chip" in hostage negotiations with that state).

310. *Cf.* SILVERSTEIN, *supra* note 44, at 191-210 (discussing the incentives Congress has for and against seeking a more effective role in foreign relations).

311. *See supra* notes 223-37 and accompanying text.

312. *See supra* notes 237-54 and accompanying text.

seen with the creation and subsequent modification of fast-track procedures.[313] Through fast track, lawmakers are able to force the executive branch to come to them with trade issues prior to negotiation of any trade agreement and to jump through procedural hoops if the executive branch wants a favorable vote on the agreement's implementing legislation.[314]

Fast-track procedures prove Congress has the tools at its disposal to assert its role in foreign commerce. Case law suggests the courts will listen to Congress if it does so. As international trade becomes increasingly important in the latter stages of the twentieth century, now may be the most exciting time for members of Congress to reassert their constitutional role as foreign commerce *regulators*, as opposed to their current role as foreign commerce *delegators*.

Theresa Wilson

313. These procedures allow Congress to have a considerable impact on trade agreements, simply by changing the body's internal rules. *See supra* notes 255-306 and accompanying text. *See generally* Koh, *supra* note 264 (discussing the fast track and suggesting possible modifications); O'Halloran, *supra* note 290.

314. See *supra* notes 302-06 and accompanying text for a discussion of the procedural loopholes Congress can use to affect the President's behavior in trade negotiations.