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# POLITICAL QUESTIONS IN INTERNATIONAL TRADE: JUDICIAL REVIEW OF SECTION 301?

*Erwin P. Eichmann and Gary N. Horlick*

Section 301 of the Trade Act of 1974 ("Section 301")<sup>1</sup> has become an increasingly potent and widely-used tool in the U.S. arsenal of trade policy measures. The past few years have seen a proliferation of Section 301 cases, affecting the trade of goods and services in Europe, Asia, and Latin America. Even so, in the debate over the Omnibus Trade and Competitiveness Act of 1988 ("Omnibus Trade Act"), Congress expressed impatience with the President's discretion in not undertaking more Section 301 retaliations.<sup>2</sup> But while much attention has focused on the politics and policy aspects of Section 301, little has been discussed of the legal issues underpinning it.

Section 301 provides the President with broad authority to take trade action against unfair foreign conduct. This fact, and experience under Section 301, have promoted the perception that Congress effectively abdicated its constitutional power over foreign commerce to the President. But Congress certainly did not grant the President unchecked powers over foreign trade. Quite the contrary, a closer examination of Section 301's statutory provisions reveals that Congress expressly limited the exercise of the President's authority to specific circumstances, particularly those which meet certain statutory definitions. Under Section 301, the President may grant relief only from "unfair" foreign trade practices. Since Congress has authorized action only to rectify these specific foreign trade practices, the President may be without authority if the foreign conduct falls outside of the statutory definitions. Because the President cannot undertake peacetime (i.e., nonemergency) trade action without Congressional authorization, the President would have to rely on other statutory grants of authority to impose any other action he may wish to take. This article will argue that U.S. courts may be able to review Executive Branch determinations of the "fairness" of foreign trade conduct as these de-

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1. Trade Act of 1974, tit. III, § 301, Pub. L. No. 93-618 (current version at 19 U.S.C. § 2411 (1982)).

2. Bello & Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, 25 STAN. J. INT'L L. 1, 10 (1988).

terminations form the basis for Presidential authority under Section 301.

A major obstacle to judicial review of Section 301, though, is the political question doctrine. Under this label, courts will not adjudicate "political" issues: those which are nonjusticiable or would embarrass the President in the conduct of foreign relations. This article will analyze the justiciability of the unfairness definitions and conclude that while some of the criteria are easily justiciable, others may not be. However, even if some of the statutory criteria are nonjusticiable, a court may sever those questions that are nonjusticiable and continue its review. Secondly, the analysis will reveal that the need for finality of United States actions in foreign affairs causes the greatest political question difficulties, but does not undercut the entire basis of judicial reviewability.

Another obstacle to judicial review is the state secrets doctrine. Under this doctrine, courts will not intrude into certain areas of national defense. This article will argue that courts can follow Supreme Court precedent and use their discretion to separate state secrets from trade matters and adjudicate questions of unfair trade conduct.

Section 301 carefully limits the President's discretion in setting trade policy. Thus, the statutory criteria of Section 301 fall within that category of questions that courts will review. The first section of this article describes the limits of the President's authority under Section 301. The second and third sections demonstrate that while political question, jurisdictional, and state secrets issues provide some serious questions, incantation of "foreign affairs" alone is not enough to prevent judicial review.

## I. THE NECESSITY FOR CONGRESSIONAL AUTHORIZATION OF EXECUTIVE TRADE ACTION

The President does not have an unlimited, unbridled foreign affairs power.<sup>3</sup> While the President may have a certain "very delicate, plenary and exclusive power" in the field of international relations,<sup>4</sup> Congress has explicit constitutional powers to "regulate Commerce with

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3. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 64-65 (1972). As Justice Jackson wrote in his concurring opinion to *Youngstown Sheet & Tube Co. v. Sawyer*:

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.

343 U.S. 579, 641 (1952) (*cited with approval in Dames & Moore v. Regan*, 453 U.S. 654, 662, (1981)).

4. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936).

foreign Nations” and to “lay and collect Taxes, Duties, Imports and Excises.”<sup>5</sup> Most commentators have interpreted this constitutional balance so as to limit the Presidential power over peacetime international trade to that available under an explicit or implicit grant from Congress.

The Supreme Court has examined the limits of Congressional and Executive powers in *Youngstown Sheet and Tube v. Sawyer*.<sup>6</sup> In that case, the Court invalidated President Truman’s seizure of domestic steel mills, even though Truman claimed that the continued operation of the mills was necessary for the Korean War effort. Writing for the court, Justice Black found that “[t]he President’s power, if any, to issue the order must stem from either an act of Congress or the Constitution itself.”<sup>7</sup> Thus, under the reasoning of Black’s majority opinion, the President can only undertake such trade retaliation as Congress or the Constitution has authorized.

Elaborating on Black’s limitation of the President’s powers, Justice Jackson, in an oft-quoted concurrence to *Youngstown*, identified three types of Presidential action. In the first category, as in the majority opinion, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”<sup>8</sup> Without Congressional authorization, Presidential action

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5. U.S. CONST. art. I, § 8, cl. 1, 3.

6. 343 U.S. 579 (1952).

7. *Id.* at 585. The Court’s rationale for overturning the President’s order appears to overturn Justice Sutherland’s dictum that gave the President an independent foreign relations power. *Curtiss-Wright*, *supra* note 4, at 319-20. Sutherland had based the President’s foreign relations power on a transfer of sovereignty from the King of England to the President of the United States. Justice Black, by finding that the President’s power may only come from Congress or the Constitution, implicitly overruled Sutherland’s view of the President attaining power through the passage of sovereignty. However, Black never explicitly mentions or cites *Curtiss-Wright*, even though it had been decided only sixteen years earlier.

8. *Youngstown*, *supra* note 3, at 635. See *Dames & Moore v. Regan*, 453 U.S. 654, 670-89 (1981), where Justice Rehnquist minutely analyzed the Congressional intent behind the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. § 1702 (Supp. V 1987), and the Hostages Act in upholding the President’s settlement of the Iran hostage crisis. The Court evidently would rather find Congressional authorization for the President’s foreign affairs powers than analyze a clash of authorizations.

See also Rehnquist and Stewart’s comments during the oral argument of *Dames & Moore*. Rehnquist was concerned that an unlimited foreign affairs power would allow the President to negate provisions of the Bill of Rights. He asked, “What if the agreement provided that for one year no one should criticize the Ayatollah?” The attorney for Iran replied, “Then the United States would be obliged to attempt to accomplish that.” Furthermore, as the Solicitor General’s theory of Presidential power appeared to provide no limits, Justice Powell remarked, “[t]he President could have exchanged you [Solicitor General Rex Lee] for one of the hostages — you or me.” *N.Y. Times*, June 25, 1981, at D3, col. 1, *quoted in* Nowak & Rotunda, *A Comment on the Creation and Resolution of a “Nonproblem:” Dames & Moore v. Regan, The Foreign Affairs Power, and The Role of the Court*, 29 UCLA L. REV. 1129, 1133 n.18 (1982).

enters Jackson's latter two categories. In Jackson's second category, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority." In Jackson's third category, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>9</sup>

Jackson's three-category balancing test is based on the same underlying principles as Black's absolutist answer—that the Constitution vests most federal powers in the Congress and that the President must find some constitutional underpinning for his exercise of power, even in foreign relations. Were the President to undertake trade retaliation in the absence of Section 301 or other grant, such trade action would have to rely on the President's inherent powers. Although the President has some inherent foreign affairs power over trade, the Constitution gives Congress explicit power over foreign trade, and a Court would have to stretch constitutional theory to uphold Presidential peacetime trade action without some Congressional authorization.<sup>10</sup> Indeed, if the President could always act without any Congressional authorization, then the President could effectively repeal any Congressional trade enactment!

Several court decisions have reviewed Congressional authorization for Presidential trade action. In *Dames & Moore v. Regan*, the Supreme Court analyzed Congressional authority for the President's settlement of the Iran hostage crisis,<sup>11</sup> and based the President's actions on Congressional acquiescence. Here, however, Congress has spoken loudly and frequently about U.S. trade policy and recently narrowed the President's discretion in using Section 301.<sup>12</sup> In *Yoshida International*,<sup>13</sup> the Customs Court examined Presidential power over

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9. *Youngstown*, *supra* note 3, at 637.

10. See *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953) (voiding an executive agreement between the United States and Canada on potato imports that contradicted a Congressional statute "because it was not authorized by Congress,"), *aff'd on other grounds*, 348 U.S. 296 (1954); *but see*, *Consumer's Union of United States v. Kissinger*, 506 F.2d 136, 143 (D.C. Cir. 1974) (upholding Presidential negotiation of steel import restraints because they "do not purport to be enforceable, either as contracts or as governmental actions with the force of law."), *cert. denied*, 421 U.S. 1004 (1975). While the President's actions in *Consumer's Union* were unenforceable, Presidential retaliation under Section 301 may include tariff increases and is enforceable.

11. See *Dames & Moore*, *supra* note 3.

12. *Bello & Holmer*, *supra* note 2, at 10-18.

13. *Yoshida Int'l, Inc. v. United States*, 378 F.Supp. 1155 (Cust. Ct. 1974), *rev'd* 526 F.2d 560 (C.C.P.A. 1975).

trade in interpreting section 255 of the Trade Expansion Act ("TEA"), the precursor to Section 301.<sup>14</sup> The Customs Court held that President Nixon had exceeded his authority in proclaiming a tariff surcharge because "the authority granted by statute to 'terminate, in whole or in part, any proclamation', does not include the power to determine and fix unilaterally a rate of duty which has not been previously legally established."<sup>15</sup> The Appeals Court agreed, noting that "no undelegated power to regulate *commerce*, or to set tariffs, inheres in the Presidency."<sup>16</sup> In another case, the Customs Court overturned a tariff rate quota which the President established after escape clause proceedings.<sup>17</sup> The President had rejected the Tariff Commission's recommendation on the matter, and the court held that, under the statute, the President could not devise his own remedy even if it accomplished the broad Congressional purpose. Thus, the President could only accept or reject the Commission's recommendation.

*Yoshida*, *National Silver* and *Dames & Moore* all contain the implicit notion that the President must meet the statutory criteria before he can invoke the powers delegated to him by Congress. In *Yoshida*, the court found that the TEA did not enable the President to implement a tariff surcharge; instead it relied on the President's authority during "any" period of national emergency as defined by the Trading With the Enemy Act.<sup>18</sup> In *Dames & Moore*, the Court found that an emergency existed under IEEPA, but that Congress' explicit delegation of authority was not broad enough for the President's actions; instead, the Court found an implicit delegation through Congressional acquiescence. Finally, in *National Silver*, the court overturned a Presidential trade action as outside the Congressional delegation.

Not all scholars agree with the interpretation that limits Presidential action to explicit constitutional or Congressional grants. Some would argue, based on *United States v. Curtiss-Wright Export Corp.*,<sup>19</sup> that the President has an independent foreign affairs power that allows him to take trade action outside his enumerated powers. However, *Curtiss-Wright* itself does not actually support that position. The sentence containing Justice Sutherland's famous dictum, that the Presi-

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14. Trade Expansion Act of 1962, 19 U.S.C. § 1885(b) (1980).

15. *Yoshida*, *supra* note 13, at 1162.

16. *United States v. Yoshida Int'l Inc.*, 526 F.2d 560, 572 (C.C.P.A. 1975) (reversing the Customs Court on other grounds) (emphasis in original).

17. *National Silver Co. v. United States*, 388 F.Supp. 1391 (Cust. Ct. 1975).

18. 50 U.S.C.A. app. § 5 (1982).

19. *Supra* note 4.

dent has a "very delicate, plenary and exclusive power" in foreign relations, also holds a significant qualifier—that this power "of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."<sup>20</sup> In context, Sutherland's enunciation of the President's foreign relations power may be no more than recognition of the President's particularized exclusive powers,<sup>21</sup> instead of an expansion of generalizable Executive powers. Indeed, one commentator has noted that the second half of Sutherland's sentence effectively cancels the broad reach of the first part because the reference to Constitutional provisions implies a limitation on Presidential powers through the Necessary and Proper Clause.<sup>22</sup>

In addition, Sutherland's view of the alleged Presidential foreign affairs power may no longer be good law as it has been rejected by the Court and commentators alike. Sutherland based his view on a dubious interpretation of the transmission of sovereignty from England to the United States:

As a result of the separation from Great Britain by the colonies acting as a unit, the powers of the external sovereignty passed from the Crown not to the colonies severally but to the colonies in their collective and corporate capacity as the United States of America . . . . It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.<sup>23</sup>

First, this view is historically inaccurate. The Declaration of Independence, the Articles of Confederation, and contemporary writings all indicate that sovereignty was to reside in the people, acting legislatively through the individual states.<sup>24</sup> In contrast, the Constitution intended a federal government of limited powers,<sup>25</sup> such that the vestiges of sovereignty could not have passed undetected to the Presi-

20. *Id.* at 320.

21. For example, the Constitution grants the President exclusive power to act as the Commander-in-Chief of the armed forces. U.S. CONST. art. II.

22. *Transmittal of Executive Agreements to Congress, Hearings Before the Subcommittee on Foreign Relations, United States Senate*, 92 Cong., 1st Sess., 18 (1971) (statement of Ruhl Bartlett, then Professor at the Fletcher School of Law and Diplomacy, Tufts University) [hereinafter 1971 Hearings] The Necessary and Proper Clause grants to Congress the power "(t)o make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." U.S. CONST. art I.

23. *Curtiss-Wright*, *supra* note 4, at 316.

24. U.S. CONST. amend. X; ARTICLES OF CONFEDERATION art. II. ("Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and Right, which is not in this Confederation expressly delegated to the United States in Congress assembled.").

25. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("the powers of government are limited, and that its limits are not to be transcended.").

dent.<sup>26</sup> Second, the Court has rejected this view repeatedly by declaring that the Constitution limits the powers of the federal government. Indeed, both *Youngstown* and *Dames and Moore* rely on constitutional grants of Presidential power; neither cite *Curtiss-Wright* for its view of extra-constitutional powers.<sup>27</sup> Thus, if the President is to have such an extra-constitutional foreign relations power, its basis must be found outside a literal recitation of *Curtiss-Wright's* dictum.

In reviewing a Section 301 determination, a court must find the statutory criteria and decide on the scope of Presidential authority under it. A court could then examine the Presidential action to ascertain whether it meets the criteria both procedurally and substantively, and if the action does not, then it is beyond the President's Section 301 authority.

#### A. Section 301 Must Have An "Intelligible Principle."

Not every Congressional delegation to the President will withstand judicial review.<sup>28</sup>

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. . . . This means that Congress must tell the President what he can do by prescribing a standard which confines his discretion and which will guarantee that any authorized action he takes will tend to promote rather than flout the legislative purpose.<sup>29</sup>

The "intelligible principle" test of proper constitutional delegation has often arisen in the context of trade and tariff legislation. In the foreign affairs context, courts have often upheld broad delegations as proper.<sup>30</sup> On the other hand, in the international trade context, a

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26. See 1971 Hearings, *supra* note 22, at 17-18.

27. But see Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L. J. 1255, 1311 (1988) (arguing that "(c)oupled with *Chadha* [I.N.S. v. Chadha, 462 U.S. 919 (1983)], Justice Rehnquist's statutory interpretation in *Dames and Moore* radically undercuts *Youngstown's* vision of a balanced national security process . . . . The decisions simultaneously strengthen the President vis-a-vis the judiciary by encouraging the courts to apply a special measure of deference to executive acts in foreign affairs, a requirement that Justice Jackson had soundly rejected in *Youngstown* itself.").

28. *Field v. Clark*, 143 U.S. 649, 692 (1891) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."), quoted in *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974).

29. *Star-Kist Foods, Inc. v. United States*, 275 F.2d 472, 480 (C.C.P.A. 1959).

30. See *Dames & Moore*, *supra* note 3, at 670 (upholding Presidential authority to regulate "any property in which any foreign country or a national thereof has any interest"); *Amalga-*



court may construe Congressional delegations more strictly since Congress has explicit authority to regulate commerce with foreign nations.<sup>31</sup> Nevertheless, in a possible judicial review of Section 301, a court would use the section's "intelligible principle" as a guidepost in determining whether Presidential action is properly authorized.

*B. Congress Has Delegated Broad, But Limited, Powers To Rectify Unfair Foreign Trade Practices Under Section 301.*

Although Congress drafted Section 301 with broad language, Congress did not authorize the President to undertake any trade retaliation at any time he pleases. Instead, the Presidential determination of an unfair trade practice and injury to United States commerce delimits the President's powers. While granting the President authority to suspend, withdraw or prevent the application of any trade concession or impose duties or other import restrictions on any product or service,<sup>32</sup> Congress limited when such remedies could be invoked. In particular, the United States Trade Representative ("USTR") must take mandatory action, "subject to the specific direction of the President," (a) to enforce rights under any trade agreement or (b) against any foreign act, policy or practice that (i) is inconsistent with or denies the benefits of any trade agreement or (ii) is unjustifiable and burdens or restricts United States commerce.<sup>33</sup> In addition, the USTR may take discretionary action, subject to Presidential discretion, if any foreign act, policy, or practice is unreasonable or discriminatory and burdens or restricts U.S. commerce.<sup>34</sup> If the foreign conduct does not meet this threshold test, then the USTR cannot make a positive determination,

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mated Meat Cutters & Butcher Workmen of North America v. Connally, 337 F.Supp. 737 (D.D.C. 1971) (upholding the President's 1971 wage-price freeze as sufficiently following the statutory will of Congress).

31. Even under Justice Sutherland's expansive view of Presidential power in *Curtiss-Wright*, the President cannot act in trade matters without Congressional authorization. Sutherland's list of implicit Presidential powers only includes "the powers to declare and wage war, to conclude peace, to make treaties, [and] to maintain diplomatic relations with other sovereignties." *Curtiss-Wright*, *supra* note 4, at 318. *But see* Mast Ind., Inc. v. Regan, 596 F.Supp. 1567, 1575 (Ct. Int'l Trade 1984) (upholding a Congressional delegation of power over trade and finding that "[w]here Congress has given the President discretion in delegating authority in international trade, the courts have uniformly sustained action by the Executive Branch against a claim that it has exceeded the delegated authority."), *aff'd* 822 F.2d 1069 (Fed. Cir. 1987).

32. 19 U.S.C. § 2411(c) (Supp. V 1987).

33. S. 2613, 100th Cong., 2d Sess. § 301(a)(1) (1988). The USTR is not required to take action (1) if dispute resolution proceedings under the General Agreements on Tariff and Trade find no violation of U.S. trade rights, (2) if the foreign government is taking, has agreed to take, or it is impossible for it to take appropriate measures, (3) if the retaliation would have an excessive adverse impact on the U.S. economy, or (4) if the retaliation would cause serious harm to U.S. national security. *Id.* at § 301(a)(2).

34. *Id.* at § 301(b).

and the President has no authority to act.<sup>35</sup> Following a positive determination, the USTR must take action within 30 days, unless the President directs otherwise.<sup>36</sup> Furthermore, the legislative history shows that Congress intends the President to act upon positive USTR determinations.<sup>37</sup>

The statutory threshold test is crucial. If the petitioner does not meet it, no relief can be granted because the statutory precondition to Presidential authority has not been satisfied. Therefore, if the petitioner does not meet the test and the President does take action without another form of statutory authority, then the President enters the third Jacksonian category where "the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.'"<sup>38</sup> Furthermore, if the petitioner meets the test, then Congress did intend that an investigation be initiated,<sup>39</sup> if the President does not investigate, then he would also be contravening the legislative intent.

Assuming that the political question doctrine does not bar judicial review of Section 301,<sup>40</sup> a court can review the merits of each petitioner's case to determine whether the foreign trade practice passes the threshold test. Even though Congress did not specify that Section 301 was intended to be subject to judicial review, the courts may legitimately infer such a requirement.<sup>41</sup> After all, Congress has enacted a statutory definition for an unfair trade practice under Section 301 and "under the Constitution, one of the judiciary's characteristic roles is to

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35. *Id.* at § 304(a)(1).

36. *Id.* at § 305(a)(1). The USTR may delay action up to 180 days after a positive determination upon specific circumstances. *Id.* at § 305(a)(2).

37. "The [Senate Finance] Committee intends that the President, under the amended law, vigorously pursue appropriate action whenever necessary to enforce the rights of the United States under a trade agreement or to respond to other unfair foreign acts, policies, or practices determined by the USTR to be actionable under section 301." S. REP. NO. 71, 100th Cong., 1st Sess. 80 (1987). Nevertheless, the statutory language does permit the President to direct the USTR to take no action.

38. *Dames & Moore, supra* note 3, at 669 (quoting *Youngstown, supra* note 3, at 637-38).

39. S. REP. NO. 249, 96th Cong., 1st Sess. at 238 (1979) (the President's discretion "must be exercised in light of the need to vigorously insure fair and equitable conditions for U.S. commerce, and in cases including the enforcement of U.S. rights under the agreements negotiated in the MTN or where a petition has been filed requesting a response to an action inconsistent with such agreements, this discretion normally should be exercised by proceeding to investigate and to pursue valid claims in appropriate international fora when the petition properly presents issues covered by Section 301. . . .").

40. *See infra* section II.

41. *California v. Yamaski*, 442 U.S. 682, 693 (1979) (finding a right to a prerecoumpment oral hearing under § 204(a) of the Social Securities Act, 42 U.S.C. § 404(a)(1), even though the statute does not so require).

interpret statutes, and [the judiciary] cannot shirk this responsibility merely because [its] decision may have political overtones."<sup>42</sup>

For example, the Supreme Court did not allow the political overtones of the Nicaraguan revolution to impinge on its adjudication of asylum statutes for Nicaraguan refugees.<sup>43</sup> There, the Court interpreted the "well-founded fear of persecution" standard under section 101(a)(42) of the Immigration and Nationality Act of 1952 to mean a subjective fear. Under the Court's view, refugees need not prove that it is more likely than not that they would be persecuted upon return to Nicaragua in order to be eligible for asylum. Indeed, the Court found no constitutional constraint against interpreting the statute, even though, as in Section 301, the Immigration and Nationality Act only creates categories of refugees from which the Attorney General may, at his discretion, grant asylum.<sup>44</sup> Thus, if the foreign trade practice does not pass the Section 301 test, then the President will have acted without Congressional authorization, and such action may not pass constitutional muster.<sup>45</sup>

## II. CONSTITUTIONAL BARS TO JUDICIAL REVIEW: POLITICAL QUESTION AND PRUDENTIAL CONSIDERATIONS

Courts have traditionally abstained from reviewing cases involving foreign affairs on the grounds that they are "political questions."<sup>46</sup>

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42. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986); see also *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 943 (1983) ("Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by the courts because the issues have political implications. . ."). The legal and factual issues of foreign trade conduct and Presidential retaliation should satisfy the court's jurisdictional requirement of "cases and controversies." U.S. CONST. art. III; see *Buckley v. Valeo*, 424 U.S. 1 (1976). The court can make such a review once the determination becomes final. See *infra* text accompanying notes 102-144.

43. *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

44. 8 U.S.C. § 1158(a) (1982).

45. Action without statutory authorization falls within Jackson's second category of concurrent authority where "congressional inertia, indifference or acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Youngstown*, *supra* note 3, at 637 (Jackson, J., concurring). For example, in *Dames & Moore*, the court found that the President had acted outside of his explicit authorization but upheld the action as constitutional in the face of Congressional acquiescence. *Supra* note 3, at 654. See W. ESKRIDGE, JR. & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 317-21 (1988).

Here, unlike the negotiation for hostage release at issue in *Dames & Moore*, Congress has not backed into acquiescence of Administration trade policy, judging from Congressional changes in Section 301 in 1988 which were subsequently vetoed. Since Congress has explicitly defined unfair trade conduct under Section 301 and recently reworked the definition to limit Presidential discretion, Presidential action outside the statutory guidelines would contravene the will of Congress and fall within Jackson's third category of presumably impermissible action. See *Bello & Holmer*, *supra* note 2, at 10-18.

46. See e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Marbury v. Madison*, 5 U.S. (1

Nevertheless, "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'"<sup>47</sup> Although commentators generally agree that there is a constitutional basis to the political question doctrine,<sup>48</sup> they disagree as to its nature and scope.<sup>49</sup> Justice Brennan, writing for the U.S. Supreme Court, has described the doctrine as having "attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness."<sup>50</sup> Nonetheless, Brennan's six factor test has become the standard for political question analysis:<sup>51</sup>

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments

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Cranch) 137, 170 (1803) (Marshall, C.J.) ("Questions, in their nature political . . . can never be made in this court").

47. *Japan Whaling Ass'n, supra* note 42, at 2866 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)); Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1407 (1988) ("The 'political question doctrine' is a little like the Holy Roman Empire. It doesn't have much to do with whether the question is 'political' in any ordinary sense . . .").

Professor Ely notes that adjudication of "political cases" is entirely in line with the rather plain intent of the Constitution, which lists among the heads of federal judicial jurisdiction cases arising under treaties, cases affecting ambassadors and other public ministers and consuls, cases in admiralty or maritime jurisdiction, and cases to which the United States and/or foreign nations are parties—and indicates further that treaties shall be the supreme law of the land "and the Judges in every state shall be bound thereby." *Id.* at 1409 n.88.

48. *But see* Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L. J. 597 (1976). Professor Louis Henkin has argued that the leading cases on the political question doctrine should instead be understood as determinations that the President's decisions were within his authority, and that the holdings were justified on their merits. *Id.* at 612; Henkin, *Viet-Nam in the Courts of the United States: "Political Questions"*, 63 AM J. INT'L L. 284, 286 (1969) ("In regard to foreign affairs, I believe, the Supreme Court has never found a true 'political question,' "); *but see* *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, & 1514 n.50, 1515 (D.C. Cir. 1984) (en banc) (explicitly rejecting Henkin's assertions).

49. *See, e.g.,* Note, *The General 'Political Question' Doctrine and the Foreign Relations Power: The Parameters of the 'Political Question' Doctrine*, in T. FRANK & M. GLENNAN, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 723 (1987).

50. *Baker v. Carr*, 369 U.S. 186, 210 (1962).

51. Champlin & Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 220 (1985); *Goldwater v. Carter*, 444 U.S. 996, 998-99 (1979) (Powell, J., concurring).

on one question.<sup>52</sup>

The Constitution textually allocates international trade to the Congress in article 1, section 8.<sup>53</sup> Assuming *arguendo* that the Constitution does not allocate international trade entirely to either the legislature or executive, the five remaining factors of the test for Section 301 collapse to but two: justiciability (factors 2 and 3), and embarrassment (factors 4, 5 and 6).<sup>54</sup>

In *Ramirez de Arellano v. Weinberger*, the D.C. Circuit also used a three-step approach to identify nonjusticiable political questions and asked:

- (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government?
- (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise?
- (iii) Do prudential considerations counsel against judicial intervention?<sup>55</sup>

Writing for the court, Judge Wilkey found a justiciable controversy where a United States citizen alleged that United States government officials had unconstitutionally occupied and established a military training camp on his property in Honduras. The Court found that such a dispute over property would necessitate interpretation of the Constitution and of federal statutes, a quintessential task of the judiciary, and would not involve Executive embarrassment because the plaintiffs did not challenge U.S. foreign policy in Central America, only the Executive's taking of private property.<sup>56</sup> In a potential review of Section 301, judicial adjudication would likewise necessitate statutory interpretation involving a narrow injury to private property, not an assault on U.S. foreign policy.<sup>57</sup>

To determine whether Section 301 decisions are barred from review by the political question doctrine, this article will examine

52. *Baker v. Carr*, *supra* note 50, at 217.

53. U.S. CONST. art. I, § 8 (Congress shall 'regulate commerce with foreign nations'); *but see Powell v. McCormack*, 395 U.S. 486 (1969) (reducing the scope of the textual commitment prong).

54. In essence, factors two and three both go to the ability of the judiciary to resolve the question, and factors four, five and six consider the need for speed and finality in international relations and the possibility of embarrassment for both the courts and the executive if the courts were to overturn the President. *See Champlin & Schwarz*, *supra* note 51, at 221 (the *Baker* test collapses to two factors); *Goldwater*, *supra* note 51, at 999-1001 (reducing the test to three factors) (Powell, J., concurring).

55. *Ramirez*, *supra* note 48, at 1511 (quoting *Goldwater*, *supra* note 51, at 998), *vacated and rev'd on other grounds*, 471 U.S. 1113 (1985). *Ramirez* was vacated because changed circumstances effectively mooted the factual issues.

56. *Ramirez*, *supra* note 48, at 1511-14.

57. Moreover, courts have routinely adjudicated the existence or non-existence of hostilities—a quintessential "political question"—for the purpose of war risk clauses in insurance contracts. *Ely*, *supra* note 47, at 1408 n.87, 1409 (listing cases).

whether each factual determination underlying a Section 301 unfair trade practice is incapable of judicial resolution or would cause governmental embarrassment.

### A. *Justiciability*

The justiciability factor analyzes whether a court can find “discoverable and manageable standards” with which to analyze the question;<sup>58</sup> if the court cannot, then the question is political. Section 301 grants the President authority to retaliate for violations of any trade agreement or foreign conduct which is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce.<sup>59</sup> Each of these tests is arguably justiciable.

#### 1. *Violation of a Trade Agreement*

The President can act to “enforce the rights of the United States under any trade agreement” or to respond to foreign trade practices that are “inconsistent with the provisions of, or otherwise den[y] benefits to the United States under, any trade agreement.”<sup>60</sup> The United States Trade Representative has interpreted “trade agreement” to include only the General Agreement on Tariffs and Trade (“GATT”) and any of the GATT codes negotiated during the Tokyo Round.<sup>61</sup> The definition generally does not extend to treaties of friendship, commerce and navigation (“FCN”) and agreements peripherally related to trade.<sup>62</sup>

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58. *Baker*, *supra* note 50, at 217. For example, purely legal questions of statutory interpretation are justiciable, even if accompanied by significant political dimensions. *Japan Whaling Ass'n. v. American Cetacean Soc'y.*, *supra* note 42, at 2866 (finding justiciable a challenge to the Secretary of Commerce's decision not to certify Japan for harvesting sperm whales in excess of International Whaling Commission quotas); *Romer v. Carlucci*, No. 86-1458, slip op. (8th Cir. May 18, 1988) (en banc) (finding justiciable the environmental impact statements filed by the Air Force in conjunction with the proposed deployment of MX missiles in Colorado and Nebraska).

In addition, once the Court accepts the issue for adjudication, it may have a duty to fashion manageable standards. “Thus manageability is certainly a consideration, but principally at the stage of devising principles and remedies as opposed to the stage of deciding whether to decide the issue at all.” *Ely*, *supra* note 47, at 1408; *cf.* J. ELY, *DEMOCRACY AND DISTRUST* 124-25 (1980).

59. 19 U.S.C. § 2411(a)(1) (Supp. V 1987).

60. *Id.*

61. *Bello and Holmer, Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments*, 7 *NW. J. INT'L L. & BUS.* 633, 635 (1986) (for a list of GATT codes which fall under “trade agreement,” see *id.*, at 634 n.4).

62. *Id.* The USTR chose the limited construction of “trade agreement” because § 303(a) of the 1974 Trade Act requires the Trade Representative to request “formal dispute settlement procedures” for violations of a “trade agreement.” 19 U.S.C. § 2413(a) (Supp. V 1987). Since non-GATT agreements typically call for dispute resolution through the International Court of Justice, the USTR has consistently construed “trade agreements” narrowly in the belief that Congress did not intend § 303(a) to compel resolution in the World Court. *Bello and Holmer, supra* note 61, at 634 n.4.

Courts should have no problems of justiciability in analyzing violations of GATT.<sup>63</sup> In fact, U.S. courts have already interpreted provisions of GATT in various settings. In *Zenith Radio Corp. v. United States*,<sup>64</sup> the U.S. Supreme Court found the Treasury Department's interpretation of countervailing duty laws consistent with article VI(3) of the GATT. In *United States v. Star Industries, Inc.*<sup>65</sup>, the Court of Customs and Patent Appeals found that the context and negotiating history of article XXVIII(3) required withdrawal of concessions to conform to the most-favored-nation principle. In *Sneaker Circus, Inc. v. Carter*<sup>66</sup>, the U.S. District Court for the Southern District of New York found that, although GATT violations were nonactionable without statutory implementation, article XIX(1)(a) permitted the Orderly Marketing Arrangement negotiated by the President. Moreover, the Court of International Trade has formally introduced GATT into American trade jurisprudence. The Court held that Congressional statutes "should not be interpreted by means of a tenuous argument to yield a construction which would be in contravention of GATT."<sup>67</sup> Thus, the Court of International Trade now looks to the GATT to interpret trade provisions where Congress has not explicitly legislated. As the GATT is a legalistic treaty with an extensive negotiating history, and is amenable to standard rules of statutory construction, U.S. courts could easily find legal standards with which to discover violations of the GATT.

## 2. *Unjustifiable or Discriminatory Conduct*

Congress has defined foreign unjustifiability in Section 301 as "any act, policy or practice which is in violation of, or inconsistent with, the international legal rights of the United States."<sup>68</sup> Unjustifiability includes the denial of national or most-favored-nation ("MFN") treatment, the right to establish an enterprise abroad, protection of intellectual property rights,<sup>69</sup> or the breach of an agreement other than a trade agreement (such as an FCN treaty).<sup>70</sup> The definition of discriminatory action parallels that of unjustifiability and includes "any

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63. See *Japan Whaling Ass'n, supra* note 42, at 2866 ("the courts have authority to construe treaties and executive agreements").

64. 437 U.S. 443, 458 (1978).

65. 462 F.2d 557, *cert. denied*, 409 U.S. 1076 (1972).

66. 457 F.Supp. 771, 795 (S.D.N.Y. 1978), *aff'd* 614 F.2d 1290 (1979).

67. *U.S. Steel Corp. v. United States*, 618 F. Supp. 496, 501-02 (Ct. Int'l Trade 1985), *appeal dismissed*, 792 F.2d 1101 (1986).

68. 19 U.S.C. § 2411(e)(4)(A) (Supp. V 1987).

69. *Id.*, at § 2411(e)(4)(B).

70. *Bello & Holmer, supra* note 61, at 640.

act, policy, or practice which denies national or most-favored-nation treatment to United States goods, services, or investment."<sup>71</sup>

MFN treatment in FCN treaties is not substantially different from MFN treatment in the GATT and should be justiciable by courts; their terms are as capable of judicial review as the GATT terms analyzed above.<sup>72</sup> For example, the Court of Customs and Patent Appeals analyzed the U.S.-Germany FCN treaty and voided a 50 percent tariff as inconsistent with the treaty.<sup>73</sup> Recent examples of unjustifiability findings involve the United States-Korea and United States-Japan FCN Treaties. In a Section 301 proceeding involving the Republic of Korea's domestic restrictions of foreign insurance companies, the President found unjustifiability in a violation of article VII of the FCN treaty.<sup>74</sup> Similarly, the President found the state-sponsored Japanese tobacco monopoly to be unjustifiable because of a violation of the United States-Japan FCN treaty.<sup>75</sup> To the extent that unjustifiability provisions concern the protection of intellectual property rights, courts already examine foreign treatment of intellectual property rights under section 337 of the 1930 Tariff Act,<sup>76</sup> and they should have little difficulty adjudicating slightly broader questions of those rights under Section 301.

Unjustifiable foreign trade practices may also theoretically include foreign conduct other than the denial of MFN treatment, and as the definition appears open-ended, the USTR could possibly fit any foreign conduct within the definition. Courts could consider overturning such a stretching of the definition in either of two ways. First, if the

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71. 19 U.S.C. § 2411(e)(5) (Supp. V 1987).

72. General Agreement on Tariffs and Trade, opened for signature, Oct. 30, 1947, 61 Stat. 5, T.I.A.S. No. 1700, 27 U.N.T.S. 19, art. I (MFN treatment "with respect to customs duties and charges of any kind"), art. III (MFN treatment for internal taxes and regulations); *see also* *Mentula v. State Land Bd.*, 244 Or. 229, 233, 417 P.2d 581 (1966) (adjudicating the MFN clause in the United States-Finland FCN treaty).

73. *John T. Bill Co. v. United States*, 104 F.2d 67 (C.C.P.A. 1939).

74. Memorandum of Aug. 14, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 29,443 (1986). Article VII of the treaty provides that:

Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity.

Nov. 28, 1956, 8 U.S.T. 2217, T.I.A.S. No. 3947; for a detailed treatment of the incident, see *Bello & Holmer*, *supra* note 61, at 640-41.

75. *See* Japan's Practice With Respect to the Manufacture, Importation and Sale of Tobacco Products, 50 Fed. Reg. 37,609 (USTR 1985) (initiation), based on United States-Japan Treaty of Friendship, Apr. 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863.

76. 19 U.S.C. § 1337 (Supp. V 1987). For a general analysis, see Walders, *Other Import Relief Laws in THE TRADE AGREEMENTS ACT OF 1979—FOUR YEARS LATER* 255 (H. Appelbaum & A. Victor eds. 1983).



foreign conduct falls just slightly outside an existing category, a court could find that Congress intended such conduct not to be a violation of Section 301. Second, a court could decide what are "the international legal rights of the United States"<sup>77</sup> and then decide whether the foreign conduct violated them.<sup>78</sup>

### 3. *Unreasonable Conduct*

Section 301 defines unreasonableness to mean "any act, policy, or practice which, while not necessarily in violation of or inconsistent with the international legal rights of the United States, is otherwise deemed to be unfair and inequitable;"<sup>79</sup> the statute explicitly makes reference to foreign action regarding market opportunities, opportunities for establishing an enterprise and intellectual property protection.<sup>80</sup> Since neither Congressional statute nor international agreement explicitly defines the boundaries of unreasonableness in foreign trade, courts may have difficulty in its adjudication because courts generally defer review on precisely these issues where delicate, non-legal choices of foreign relations must be made.<sup>81</sup>

The 1988 Omnibus Trade Act provides courts with an aid in defining unreasonableness. The Act defies unreasonable foreign actions to include the denial of various trade opportunities, foreign government export targeting and substandard labor safeguards.<sup>82</sup> Courts may find

77. 19 U.S.C. § 2411(e)(4)(A) (Supp. V 1987).

78. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); *Ramirez de Arellano*, *supra* note 48, at 1540 ("When, however, the political branches have specified the controlling legal principles in a treaty with the foreign sovereign or when there are generally accepted tenets of international law concerning the foreign act, the danger of improper judicial interference with the Executive's responsibilities for foreign affairs is greatly reduced."); *but see Garcia-Mir v. Meese*, 788 F.2d. 1446, 1455 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986) (Sustaining the President's authority "to disregard international law in service of domestic needs. . ."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 805 (D.C. Cir. 1984) (Bork, J., concurring).

79. 19 U.S.C. 2411(e)(3) (Supp. V 1987).

80. *Id.*

81. U.S. courts do not inquire into the termination of treaties, the recognition of foreign governments, the recognition of belligerency abroad, a person's status as a foreign government representative or the dates of duration of hostilities. *Baker*, *supra* note 50, at 212-13.

82. H.R. CONF. REP. NO. 596, 100th Cong., 2d Sess. 65 (1988). Section 301(d)(3)(b) of the Omnibus Trade and Competitiveness Act of 1988 defines unreasonable acts, policies or practices to include any combination which

- (i) denies fair and equitable—
  - (I) opportunities for the establishment of an enterprise, (II) provision of adequate and effective protection of intellectual property rights, or (III) market opportunities . . .
- (ii) constitutes export targeting, or
- (iii) constitutes a persistent pattern of conduct that—
  - (I) denies workers the right of association, (II) denies workers the right to organize and bargain collectively, (III) permits any form of forced or compulsory labor, (IV) fails to

adequate guidance to adjudicate the Act's definitions by analogy from similar provisions in current antitrust, labor and intellectual property law. The Act, however, also exempts foreign countries which take "actions that demonstrate a significant and tangible overall advancement" in providing trade and for conduct which is "not inconsistent with the level of economic development of the foreign country."<sup>83</sup> These exemptions may be unjusticiable, particularly those for overall advancement in trade policy and consistency with economic development levels because they call for non-legal "political" choices.

In addition, several commentators have advanced guidelines for reasonableness under Section 301. One method would use the normative definition of reasonableness and decide whether foreign conduct is undertaken in bad faith, regardless of any justifications which may be posited.<sup>84</sup> Another method would weigh the economic distortion of comparative advantage against the legal exercise of jurisdiction to prescribe and find those practices reasonable which favor comparative advantage.<sup>85</sup> A court could fashion guidelines based on the definitions of reasonableness from commentators or from other areas of the law.

On the other hand, the courts could find the question justiciable and then defer to the President's findings in most circumstances:

Both Supreme Court and Court of Customs and Patent Appeals precedent have established that the Executive's decisions in the sphere of international trade are reviewable only to determine [1] whether the President's action falls within his delegated authority, [2] whether the statutory language has been properly construed, and [3] whether the President's action conforms with the relevant procedural requirements. The President's findings of fact and the motivations for his action are not subject to review.<sup>86</sup>

Deference to the President's findings would not be applicable to all trade determinations. For certain unfair trade practices, Section 301 on its face requires mandatory action,<sup>87</sup> and the courts could review the President's actions against the statute. For discretionary actions, the courts can still review the President's actions for statutory compli-

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provide a minimum age for the employment of children, or (V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers.

83. *Id.* § 301(d)(3)(C).

84. Fisher & Steinhardt, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services and Capital*, 14 L. & POL. INT'L BUS. 569, 598 (1982).

85. Hansen, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 YALE L.J. 1122, 1136-42 (1987) (offering the most perceptive insight into the statutory standards).

86. *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (citations omitted) (construing the reviewability of section 504 withdrawal of duty-free treatment under the Generalized System of Preferences).

87. See *supra* text accompanying notes 32-37.

ance and due process claims under the Fifth Amendment.<sup>88</sup> After all, "[t]he Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry."<sup>89</sup>

Courts have reviewed some aspects of Presidential discretion in escape clause proceedings. In section 201 trade relief, the International Trade Commission ("ITC") determines whether increases in imports have seriously injured a domestic industry or threaten the industry with serious injury;<sup>90</sup> after receiving an affirmative finding from the ITC, the President may provide import relief.<sup>91</sup> Although the section grants no explicit judicial review, courts have reviewed section 201 relief to confirm that there was not "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority."<sup>92</sup>

Courts have also reviewed Presidential authority for trade relief against unfair practices under section 337. Section 337 of the 1930 Tariff Act prohibits "[u]nfair methods of competition and unfair acts in the importation of articles into the United States" where the imports may destroy, substantially injure or prevent the establishment of

88. See *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (overturning the Civil Service Commission's citizenry requirement as an unconstitutional violation of the due process clause of the Fifth Amendment); *Morgan v. United States*, 304 U.S. 1, 14-15 (1938) (finding that the quasi-judicial character of administrative proceedings give rise to the "requirements of fair play").

USTR rule-making, though, is arguably not subject to the strictures of the Administrative Procedures Act (the "APA") and would not come under *Hampton* and *Morgan*. Section 553(a)(1) of the APA exempts from notice and comment certain rulemaking "to the extent that there is involved a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1) (1982). International trade policy, including Section 301 proceedings, may fall under the exception. See *Mast Ind., Inc. v. Regan*, 596 F.Supp. 1567, 1580 (Ct. Int'l Trade 1984) (interim textile import regulations fall within the "foreign affairs" exception of the APA). However, the legislative history of the APA would not support a broad view of the "foreign affairs" exemption to include all aspects of Section 301. The House and Senate Reports to the APA specifically cautioned that:

The phrase "foreign affairs functions" used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States, but only those "affairs" which so affect relations with other governments that, for example, public rulemaking provisions would clearly provoke definitely undesirable international consequences.

Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 191, 199 (Senate Report), 257 (House Report) (1947). Moreover, the courts have continually construed section 553 exemptions from rulemaking procedures, including the "foreign affairs" exception, narrowly and granted them reluctantly. See, e.g., *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983).

89. *Ramirez*, *supra* note 48, at 1515.

90. 19 U.S.C. § 2251(b)(1) (1980).

91. 19 U.S.C. § 2252(a) (1980).

92. *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (upholding the President's actions).

an industry.<sup>93</sup> The ITC is given explicit authority to determine violations of this section<sup>94</sup> and has adjudicated claims of unfair imports involving patent claims, trademark infringements, false designations of goods, passing off goods, and misappropriation of trade secrets.<sup>95</sup> After an affirmative ITC determination, the President then has sixty days to reject the relief for "policy reasons" before it takes effect.<sup>96</sup> Courts have reviewed whether the ITC's definitions and standards of unfair imports are "reasonable in light of the language, policy, and legislative history of the statute" and whether the factual finding is supported by substantial evidence;<sup>97</sup> however, the courts have not reviewed the subsequent Presidential decision.<sup>98</sup>

Section 301 relief is bifurcated similarly to that of sections 201 and 337 and may also be reviewed. A court could examine whether the USTR's determination comports with the language, policy, and legislative history of the statute, whether the determination is supported by any (or substantial) evidence, and whether the determination exceeds the USTR's delegated authority. If the USTR determination meets these three tests, it would stand. The subsequent Presidential action, however, might be unreviewable.

Finally, even if a court finds the standard of "unreasonable" to be nonjusticiable and thus a political question, Section 301 as a whole would not necessarily be unreviewable. If "unreasonable" is severable from the other elements of Section 301, then a court cannot dismiss the entire challenge because of the presence of a political question. The doctrine "is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."<sup>99</sup> Thus, each element of a Section 301 challenge must be nonjusticiable in order for the entire challenge to be labeled as a political question.

In sum, the courts could follow either of two alternatives for the justiciability of unreasonableness. First, they could declare unreasonableness to be unjusticiable, hence a political question, and retain re-

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93. 19 U.S.C. § 1337(a) (1982).

94. *Id.* § 1337(c).

95. Kennedy, *Presidential Authority Under Section 337, Section 301, and the Escape Clause: The Case For Less Discretion*, 20 CORNELL INT'L L.J. 127, 131 (1987).

96. 19 U.S.C. § 1337(g)(2) (1982).

97. *Corning Glass Works v. United States Int'l Trade Comm'n*, 799 F.2d 1559, 1565 (Fed. Cir. 1986).

98. *Duracell, Inc. v. United States Int'l Trade Comm'n*, 778 F.2d 1578, 1581 (Fed. Cir. 1985).

99. *Baker*, *supra* note 50, at 217.

view for the other procedural and substantive aspects of Section 301 determinations. For example, a court could find unreasonableness to be a political question but retain review to determine whether the conduct burdens or restricts U.S. commerce. Second, the court could find unreasonableness to be justiciable and subject to review.

#### 4. *Burden or Restriction on U.S. Commerce*

For unjustifiable, unreasonable, or discriminatory foreign conduct, the USTR must make a further injury determination that the conduct "burdens or restricts" United States commerce. This injury requirement can be demonstrated through increased imports into the United States, reduced availability of raw material imports into the United States, the displacement of United States export sales, in either the country engaged in an unfair trade practice or in a third-country market, or an inadequate protection of intellectual property rights.<sup>100</sup>

The "burdens or restricts" requirement is similar to the injury determination under antidumping and countervailing duty laws.<sup>101</sup> To impose antidumping duties and countervailing duties for GATT Subsidies Code signatories, the ITC must determine that the domestic industry is "materially injured" or "threatened with material injury" or its establishment is "materially retarded."<sup>102</sup> The ITC's findings are explicitly subject to judicial review and have encountered no political question problems.<sup>103</sup> If courts can find legal standards with which to review ITC decisions of material injury and threat to material injury, then they should be able to find legal standards with which to determine if a practice "burdens or restricts" U.S. commerce.

#### B. *Prudential and Jurisdictional Considerations*

Courts have refused to adjudicate political question issues because of article III constitutional problems or prudential issues. First, a court may only hear such challenges to Section 301 actions that involve an article III "case or controversy." Then, even after finding the challenge ripe for adjudication, a court may decline to hear it because of a need for the finality of political decisions in foreign affairs or because of potential embarrassment from "multifarious pronouncements by various departments on one question."<sup>104</sup> Indeed, once the Presi-

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100. Bello & Holmer, *supra* note 61, at 644-45.

101. See Note, *ITC Injury Determinations in Countervailing Duty Investigations*, 15 L. & POL. INT'L BUS. 987 (1983).

102. 19 U.S.C. §§ 1671(a)(2), 1673(2) (Supp. V 1987).

103. 19 U.S.C. § 1516a (Supp. V 1987).

104. Baker, *supra* note 50, at 217.

dent undertakes trade negotiations or retaliation against foreign conduct, he could be severely embarrassed by a judicial recall.

On the other hand, mere Presidential embarrassment has not been enough to keep the court out of political conflicts. President Truman did remove the National Guard from the steel mills during the Korean war, President Eisenhower complied with school desegregation orders with which he personally disagreed, and President Nixon made public the tape recordings which doomed his presidency.<sup>105</sup> Even in adjudicating the Iran Hostages Agreement, where the United States' credibility in the Middle East was on the line, the court did not dismiss the suit through an embarrassment rationale.<sup>106</sup> In fact, in one case, the court even cited to itself for the proposition that disobedience to the court's orders is unthinkable.<sup>107</sup>

This analysis of prudential considerations, though, is more complex. It is uncertain when a petitioner would challenge the Section 301 proceedings, if the challenge would be ripe at that point and whether finality problems would affect the decision of ripeness. Three distinct possibilities exist for the timing of actions challenging section 301: after a negative USTR determination, after a positive USTR determination, and after USTR action. Each of these scenarios may have embarrassment difficulties. Furthermore, there may be standing problems if a court were to find no "case or controversy" under any of the scenarios.

A court can review a final administrative action that "determines a 'right or obligation' so that 'legal consequences' will flow from it."<sup>108</sup> In addition, courts should not adjudicate premature, non-ripe cases so as to avoid "entangling themselves in abstract disagreements over administrative policies."<sup>109</sup> Assuming *arguendo* that a court would conduct judicial review of USTR determinations of foreign trade practices, the complaint could be brought immediately after USTR makes a determination.<sup>110</sup> If the USTR finds no unfairness in the foreign conduct, then the President will have taken no action and a court cannot embarrass the President through overturning a Presidential action. The concerns of finality and embarrassment would be moot for

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105. Ely, *supra* note 47, at 1410 ("That the President will disobey an order of the Supreme Court seems less likely in 1988 than it might have 100 years ago.").

106. *Dames & Moore*, *supra* note 3, at 654.

107. *Powell v. McCormack*, *supra* note 53, at 549 n.86 (1969) ("The Court has noted that it is an 'inadmissible suggestion' that action might be taken in disregard of a judicial determination.") (citing *McPherson v. Blacker*, 146 U.S. 1, 24 (1982)).

108. *Pennsylvania R.R. v. United States*, 363 U.S. 202, 205 (1960).

109. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

110. Time limits for USTR determinations are found at 19 U.S.C. § 2414(a) (1980).

negative determinations. Furthermore, the petitioner who initiated the USTR investigation would have standing as she has been injured by the lack of relief.

Under the second scenario, a court could decide to accept the case before the USTR granted actual relief. Following a positive USTR determination, the USTR must implement the action it recommended within 30 days, unless the President directs otherwise.<sup>111</sup> Since the USTR need not grant any actual relief after the 30-day period, if the President so directs,<sup>112</sup> the reviewing court will not necessarily embarrass the Executive. Moreover, the USTR decision to take action provides enough injury to create a "case or controversy." First, since the USTR's formal decision to take action will lead to some form of retaliation, importers, and foreign businesses will be injured.<sup>113</sup> Second, even if the President decides not to take any current action, the decision itself affects the parties by pressuring the foreign government to reach a settlement.<sup>114</sup>

If the court accepts the suit immediately after the 30-day period, then the President may not yet have taken any trade action and embarrassment will not be an issue. The case, though, may remain in court for some length of time, potentially tying Presidential discretion during the review period. Although the President may not like having his hands tied by the courts, the length of law suits usually does not cause a court to deny legal or equitable relief.<sup>115</sup> If Congress truly intended the President to take action only under specified circumstances, without any check on the speediness of Presidential action, then delay in court should not trouble the judicial review. Moreover, Section 301 is not necessary to provide relief for true emergency situations; other trade acts, including IEEPA<sup>116</sup>, provide explicit Presiden-

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111. S. 2613, 100th Cong., 2d Sess. § 305(a) (1988). The USTR may delay the implementation of action for up to 180 days under specified circumstances. *Id.*

112. Bello and Holmer, *supra* note 61, at 652.

113. Railroad Reorganization Act Cases, 419 U.S. 102, 143 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there be a time delay before the disputed provisions will come into effect. . . . 'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.' " (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) (citations omitted))).

114. Bello and Holmer, *supra* note 61, at 652.

115. *See, e.g., SSIH Equipment, S.A. v. International Trade Comm'n*, 673 F.2d 1387, 1391 (C.C.P.A. 1982). The SSIH court held that under statutory construction of section 337 proceedings, "there is no fixed time limits on appeals from final determinations of the [International Trade] Commission." Congress, though, wanted speedier resolution of section 337 actions and instituted a 60-day cap. Trade Act of 1984 § 413, 19 U.S.C. § 1337(c) (West Supp. 1988). Moreover, if the need arose, the court could conduct an expedited review.

116. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1982). For a description of practice under IEEPA, see Koh, *supra* note 27, at 1264-65 (arguing that recent

tial authority for fast trade relief.

The Omnibus Trade Act is persuasive authority toward finding ripeness after a positive USTR determination. First, the Act requires the President to take mandatory action for certain unfair trade practices.<sup>117</sup> Under the amendments to Section 301, the USTR “shall take action, . . . subject to the specific discretion, of the President regarding any such action, and shall take all other appropriate and feasible action within the powers of the President that the President may direct the Trade Representative to take” after a positive determination of any unfair trade practice which (i) violates, is inconsistent with, or denies benefit under any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce.<sup>118</sup> If a positive USTR determination would lead to mandatory action, then such a determination would cause an actual injury and satisfy the jurisdictional requirement of ripeness.<sup>119</sup>

Furthermore, the Act’s provision of mandatory retaliation, subject to Presidential disapproval, duplicates the procedure for section 337 relief, and courts have found section 337 determinations ripe for review. Under section 337, the President has sixty days to reject an affirmative ITC determination before it takes effect.<sup>120</sup> Courts have found section 337 determinations ripe after the President formally disapproves or the sixty-day period lapses.<sup>121</sup> If section 337 mandatory trade relief ripens once the President disapproves or fails to act, then Section 301 mandatory retaliation would also become ripe once the President disapproves or fails to act.

Second, the Act clarifies the distinctions between the standard for USTR determinations and the standard for Presidential determinations. If the USTR determination of unfairness is made on a different standard than the Presidential determination, then the courts could resolve disputes over the USTR determinations, even if the President

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court decisions have transformed IEEPA into a sweeping delegation of authority); see also National Emergencies Act, 50 U.S.C. §§ 1601-1651 (1982).

117. “Subject to specified exceptions, action is mandatory.” S. REP. NO. 71, 100th Cong., 1st Sess. 80 (1987).

118. S. 2613, 100th Cong., 2d Sess. § 1391 (1988) (emphasis added). The USTR, though, is not required to take mandatory action if (i) a GATT dispute resolution proceeding finds no violation of an international trade agreement with respect to the United States, (ii) USTR finds that the foreign country is, will, or cannot take satisfactory measures to provide the rights of the trade agreement or compensatory trade benefits, (iii) USTR action would have an adverse domestic economic impact in proportion to its benefits, or (iv) national security concerns militate against retaliation. *Id.*

119. *But see* Bello & Holmer, *supra* note 2, at 18 (arguing that the mandatory provisions of the 1988 Act still allow “ample discretion”).

120. 19 U.S.C. § 1337(g)(2) (1982); see also *supra* text accompanying notes 94-98.

121. *Duracell*, *supra* note 98, at 1578.



might later have discretion to reject them.<sup>122</sup> As Congress explicitly allocated certain decisions to the USTR instead of the President, Congress intended the USTR to make independent decisions.<sup>123</sup> Moreover, by acting in a quasi-judicial role, not an Executive one, USTR proceedings must comply with due process standards.<sup>124</sup> In adopting a standard of review, the courts could conduct a *de novo* review of USTR determinations, or else could treat USTR as a quasi-administrative agency and apply administrative law doctrine to USTR determinations. Under either standard, USTR determinations would be reviewable.

The Federal Circuit has analyzed similar issues of standing in upholding an importer's challenge of a Customs Service classification under the Generalized System of Preferences ("GSP").<sup>125</sup> Florsheim, a shoe importer, had filed a petition with the USTR to create a separate category for water buffalo leather and asked for duty-free treatment of the leather pursuant to the GSP. The USTR denied the petition. Florsheim filed several protests with the Customs Service, and the Customs Service denied its petitions. Florsheim then brought suit pursuant to section 514 of the 1930 Tariff Act. Both the Court of International Trade and the Federal Circuit held that Florsheim had standing.

The Federal Circuit found two rationales for standing. First, the court held that an importer had standing under a Congressional statute.<sup>126</sup> The court, though, also examined the government's contention that "the existence of 28 U.S.C. § 2531 [the statute granting standing] does not obviate the fact that Section 504's zone of interests does not encompass importers such as Florsheim."<sup>127</sup> The court used a "zone of interests" standing analysis<sup>128</sup> and found that Congress had in-

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122. See *United States v. Nixon*, 418 U.S. 683, 697 (1974) (finding justiciable a controversy between two officials of the Executive Branch, namely the President and the Special Prosecutor).

123. See S. REP. NO. 71, 100th Cong., 1st Sess. 80 (1987) (The determination whether foreign conduct is an unfair practice actionable under Section 301 "should be the province of the USTR, rather than the President, because it is a *technical* decision calling for the application of USTR's experience to the provisions of Section 301 and the particular practices at issue." (emphasis added)); see also *Bello & Holmer*, *supra* note 2, at 2-10.

124. See *Hampton*, *supra* note 88, at 88; *Morgan*, *supra* note 88, at 14-15. Sub-executive agencies must follow the rule of law, including due process, even where the President has full discretion.

125. *Florsheim*, *supra* note 86, at 787.

126. "A civil action contesting the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed the protest pursuant to section 514 of such Act." 28 U.S.C. § 2631(a) (Supp. V 1987).

127. *Florsheim*, *supra* note 86, at 790.

128. "'Zone of interests' is a shorthand description of a test for standing, requiring that a complainant show that the interest it seeks to protect is 'arguably within the zone of interests to

tended importers to challenge Customs Service determinations so that the challenge fell within the requisite zone of interests.

The Court, though, did not question whether Congress may expand a court's jurisdiction if no "case or controversy" exists. Since Congress cannot create standing if no "case or controversy" exists,<sup>129</sup> a statutory definition of ripeness cannot expand a court's jurisdiction. The Federal Circuit's basis of standing on a Congressional statute is therefore irrelevant, and the holding must stand on the "zone of interests" analysis.<sup>130</sup> Since a potential review of Section 301 determinations is similar to a review of GSP classifications in that, in both cases, the President retains discretion to overturn the agency finding,<sup>131</sup> the Federal Circuit's *Florsheim* analysis would equally apply to questions of ripeness for Section 301 determinations.

In the third scenario, a court could reject the complaint as not ripe until USTR and the President actually grant trade relief.<sup>132</sup> In an analogous situation, several senators brought suit against President Carter's termination of a treaty with Taiwan. In that case, Justice Powell found that the controversy was not ripe because "a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority."<sup>133</sup> In a Section 301 action, the court could await Presidential action before undertaking judicial review. But, once the President has acted, the need for finality and lack of embarrassment would strongly suggest against judicial review.

Nevertheless, courts have overturned Presidential actions involving foreign affairs. For example, in *Guy Capps*, the Supreme Court voided an executive agreement between the United States and Canada on potato imports.<sup>134</sup> Moreover, if the courts could never overturn a Presidential action involving foreign affairs, then the President could

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be protected or regulated by the statute of constitutional guarantee in question." *Id.* at 790 (citations to U.S. Supreme Court cases omitted).

129. *Buckley*, *supra* note 42, at 11 ("Congress may not, of course, require this court to render opinions in matters which are not 'cases or controversies.'").

130. *See Canadian Meat Council v. United States*, 644 F.Supp. 1125 (Ct. Int'l Trade 1986) (upholding the statutory definition of standing for Department of Commerce final affirmative subsidy determinations under 19 U.S.C. § 1516a(a)(3) (Supp. V 1987)).

131. "The President may withdraw, suspend, or limit the application of the duty-free treatment accorded under section 501 [GSP treatment] with respect to any article or with respect to any country." 19 U.S.C. § 2464(a) (Supp. 1988).

132. *See Buckley*, *supra* note 42, at 13-14; *see also Chicago & Southern Airlines, Inc. v. Waterman S.S. Co.*, 333 U.S. 103, 112-113 (1948) ("administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.")

133. *Goldwater*, *supra* note 51, at 997 (Powell, J., concurring).

134. *Guy Capps*, *supra* note 10, at 655; *but see Koh*, *supra* note 27, at 1306-17.

always unilaterally form trade policy without either Congressional or judicial intervention.

To determine whether a question is ripe, a court could use standard principles of administrative law, particularly those applicable to other forms of trade relief. The ripeness doctrine in administrative law prevents courts from "entangling themselves in abstract disagreements over administrative policies" and "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."<sup>135</sup>

In antidumping and countervailing duty proceedings, ripeness of judicial review is explicitly governed by statute. Petitioners can contest final affirmative and negative determinations, determinations of a duty suspension or an injurious effect, and determinations of classes of merchandise.<sup>136</sup> The Court of International Trade has upheld the legislature's choice of ripeness under article III of the U.S. Constitution<sup>137</sup> and has reviewed the determinations under the statutory scheme.<sup>138</sup> In section 337 unfair practice proceedings, Congress declared that ITC determinations become final after either a 60-day period or Presidential action;<sup>139</sup> courts have reviewed the ITC's determinations.<sup>140</sup> In escape clause proceedings, the President has 60 days after an ITC affirmative finding to determine what import relief he shall provide;<sup>141</sup> courts have reviewed escape clause proceedings.<sup>142</sup>

In Section 301 actions, a determination not to initiate an investigation or a negative USTR determination would be reviewable as final. For affirmative decisions, the USTR recommendation, followed within 30 days by a Presidential decision, could be an apt point to determine ripeness. As in section 201 review, the Presidential decision to take action will have already been made, and a court could determine whether the USTR and the President have exceeded their Congressional delegation.<sup>143</sup> In the third scenario, courts could review deci-

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135. *Abbott Laboratories*, *supra* note 109, at 148-49 (1967); *see also* *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.")

136. 19 U.S.C. § 1516(a)(1) (Supp. V 1987).

137. *Canadian Meat Council*, *supra* note 130, at 1125, 1128 (Ct. Int'l Trade 1986).

138. *See, e.g., Huffey Corp. v. United States*, 604 F.Supp. 1250 (Ct. Int'l Trade 1985).

139. 19 U.S.C. § 1337(j) (Supp. V 1987).

140. *See, e.g., Corning Glass*, *supra* note 97, at 1559; *Duracell*, *supra* note 98, at 1578.

141. 19 U.S.C. § 2252(b) (1980).

142. *See, e.g., Maple Leaf Fish*, *supra* note 92, at 86.

143. Nonetheless, review of Executive decisions before actual relief may run afoul of the court's jurisdiction because the President may deem the court's opinion to be an advisory opinion and disregard it. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *see also Waterman*, *supra* note

sions once the President takes action without necessarily embarrassing the United States. Finally, even if courts could not review Section 301 actions in some situations because of embarrassment problems, they could still review them in non-embarrassing contexts.<sup>144</sup> Embarrassment and ripeness do not seem to bar judicial review of Section 301 on "political question" grounds.

### III. JUDICIAL REVIEW AND THE STATE SECRETS DOCTRINE

Courts have declined to review some Presidential decisions because they involve national defense secrets into which the courts generally do not intrude. The lead Supreme Court decision which examined Presidential discretion in the foreign affairs context, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, found that a major, if not the main, reason for denying review of Presidential discretion is the limited justiciability resulting from the need for secrecy of certain Executive information:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.<sup>145</sup>

In *Waterman*, an airline company had protested the award of an international air route to another company. Under the statute then in effect, the Civil Aeronautics Board would recommend the proper distribution of foreign air routes to the President, and the President could approve, deny, transfer, amend, cancel or suspend the recommendation.<sup>146</sup> Although the statute granted judicial review for Board actions over domestic routes,<sup>147</sup> the court found that the Presidential discretion regarding the foreign routes was not reviewable, neither under the statute nor because of the need for secrecy.<sup>148</sup>

Although never reversed, the *Waterman* holding has been eroded through the evolution of the political question and state secrets doctrine. The political question doctrine, as formulated by Brennan four-

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132, at 113-14 ("It has been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review by administrative action."). The need for binding opinions casts doubt over judicial review in section 201 and 337 cases. See *Maple Leaf Fish*, *supra* note 92, at 86 (review of section 201); *Duracell*, *supra* note 98, at 1578 (review of section 337).

144. See *supra* text accompanying note 99.

145. *Waterman*, *supra* note 132, at 111.

146. Civil Aeronautics Act, Ch. 9, 49 U.S.C. § 601 (repealed 1958).

147. *Id.* § 646 (repealed 1958).

148. *Waterman*, *supra* note 132.

teen years after *Waterman*, made no mention of the need for Executive secrets, but only referred to the need for Executive respect. Perhaps Brennan felt that Executive Privilege had no place in analyzing political questions because Executive Privilege gives rise to an autonomous body of law as part of the state secrets doctrine. Thus, if the Presidential discretion over foreign air routes is not a political question after *Baker v. Carr*, then the state secrets doctrine could prevent review of Presidential discretion. Moreover, since the state secrets doctrine has evolved considerably since *Waterman*, perhaps *Waterman* itself is no longer good law.<sup>149</sup>

The state secrets privilege protects the Executive from revealing certain information necessary to military, diplomatic, or intelligence activities. When national security and individual rights clash, courts must establish guidelines to distinguish between that information which the President could legally protect and that which must be surrendered.<sup>150</sup> Five years after *Waterman*, the Supreme Court established a three-part approach to determine issues of state secrets.<sup>151</sup> First, the privilege must be properly invoked: “[1] There must be a formal claim of privilege, [2] lodged by the head of the department which has control over the matter, [3] after actual personal consideration by that officer;” the underlying facts must then usually be submitted to the court in a sealed affidavit for *in camera* review.<sup>152</sup> Second, the court “must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”<sup>153</sup> If the court decides to uphold the claim of privilege, the privilege is absolute and “even the most compelling necessity cannot overcome the claim of privilege.”<sup>154</sup>

The state secrets privilege generally involves military affairs, not trade wars. For example, in *Reynolds*, the Court held that the official accident report of the crash of an Air Force B-29 bomber was privi-

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149. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 102 (2d ed. 1988) (“despite emphasis on judicially manageable standards, *Waterman* is something of a deviant case.”).

150. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 706 (1974) (“Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.”).

151. *United States v. Reynolds*, 345 U.S. 1 (1953).

152. *Id.* at 7-8. The D.C. Circuit has found the privilege’s invocation to necessitate “a decision of policy made at the highest level of the executive branch after consideration of the facts of the particular case.” *Halkin v. Helms*, 690 F.2d 977, 996 (D.C. Cir. 1982).

153. *Reynolds*, *supra* note 151, at 8.

154. *Id.* at 11.

leged as a military secret.<sup>155</sup> In more recent cases, the D.C. Circuit ruled that Defense Department documents concerning sales of F-18 fighter aircraft to foreign governments were covered by the privilege,<sup>156</sup> and that CIA surveillance and interception of foreign communications during the Vietnam War were state secrets under the privilege.<sup>157</sup>

Even for military affairs, the state secrets privilege does not preclude all judicial review. The Supreme Court recently allowed judicial review of CIA hiring decisions.<sup>158</sup> Writing for the majority, Chief Justice Rehnquist reiterated that:

[t]he District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.<sup>159</sup>

If the state secrets privilege does not prevent review of CIA hiring decisions, then trade decisions are arguably also reviewable.

Furthermore, the Court of International Trade, in adjudicating trade cases, has also not found the state secrets privilege to be absolute. In *Republic Steel Corp.*, the Court rejected *Waterman* for the context of international trade and declined to protect two cables from the Department of Commerce to the American Embassy in Bucharest, Romania which described conversations between the Ambassador of Romania to the United States and the Deputy Assistant Secretary for Import Administration of the U.S. Department of Commerce.<sup>160</sup> The Court distinguished international trade from military secrets or civil aviation by noting that

[t]he privilege is being asserted here in the context of a comprehensive statutory scheme for the judicial review of these administrative acts. A conclusory assertion of privilege is not sufficient to deny plaintiffs access to material which is part of the record on which the contested decision is made.<sup>161</sup>

The Court of International Trade, though, has not released all

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155. *Id.* at 1.

156. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984).

157. *Halkin*, *supra* note 152, at 977.

158. *Webster v. Doe*, 56 U.S.L.W. 4568 (U.S. June 15, 1988).

159. *Id.* at 4571; *but see id.* at 4571 (O'Connor, J., dissenting) ("[t]he authority of the Director of Central Intelligence to control access to sensitive national security information by discharging employees deemed to be untrustworthy flows primarily from [the] Constitutional power of the President, and Congress may surely provide that the inferior federal courts are not used to infringe on the President's constitutional authority;" *id.* at 4574 (Scalia, J., dissenting) (national security concerns are beyond judicial review).

160. *Republic Steel Corp. v. United States*, 538 F.Supp. 422 (Ct. Int'l Trade 1982).

161. *Id.* at 423.

state documents related to trade. In *Star-Kist Foods*, the United States sought to supplement the administrative record in a countervailing duty determination with cables and internal memoranda from the USTR and the Departments of Commerce and State,<sup>162</sup> and moved for a protective order for the documents. The court agreed to the protective order and refused their release to petitioner's counsel. Although the Court found that it had the power to release the documents, it conducted an *in camera* review and found that the release "would pose a 'reasonable danger' to national security."<sup>163</sup>

The state secrets privilege should not be a complete bar to the adjudication of trade issues. A court should instead examine whether the documents sought in the Section 301 review contained state secrets. If they do, the court could disallow their use, and, as in *Star-Kist Foods*, the party seeking discovery would have to continue its action without that information. If the documents were not privileged as state secrets, then the court would allow their use. In short, the case-by-case analysis dictated by *Reynolds* would reach the result in *Waterman* for true problems of state secrets while permitting full review of non-sensitive Executive determinations.

#### IV. CONCLUSION

The Congressional delegation of Section 301 authority for import relief cannot have granted the President a blank check in international trade. Instead, Section 301 provides statutory relief under specified circumstances. Although courts may not review Presidential discretion, they can review certain aspects of Section 301 relief, and seeing that neither the "political question" nor state secrets doctrines present significant bars to judicial review, challenges to Section 301 proceedings are a distinct possibility.

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162. *Star-Kist Foods v. United States*, 600 F.Supp 212 (Ct. Int'l Trade 1984).

163. *Id.* at 216.