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# American Cetacean Society v. Baldrige: A Blow Is Dealt to Executive Agreements

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# American Cetacean Society v. Baldrige: A Blow is Dealt to Executive Agreements

## I. INTRODUCTION

Since the end of World War II, the United States has seen an unprecedented growth in the use of executive agreements.<sup>1</sup> This growth has paralleled an equally dramatic increase in the power of the President in foreign affairs.<sup>2</sup> During this same period, Congress has played a very limited role in controlling executive actions in foreign affairs.<sup>3</sup> The extensive use of executive agreements has been criticized as a factor which has disrupted the delicate balance of foreign affairs powers between the President and Congress.<sup>4</sup> Yet, in recent years, Congress has attempted to assert greater influence over United States foreign policy.<sup>5</sup> In *American Cetacean Society v. Baldrige*,<sup>6</sup> the Dis-

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1. See *International Executive Agreements: Hearings on S. 596, H.R. 14365 and H.R. 14647, Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 92d Cong., 2d Sess. 4 (1972) (Statement of Senator Case) "During the year 1930, 25 treaties and only nine executive agreements were entered into by the United States. [In] 1968 . . . the record reflect[ed] more than 200 executive agreements in comparison with only 16 treaties." *Id.*; L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 173 (1972); In 1941, there were well over 1,250 executive agreements, W. MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES* xii (1941); Stevenson, *Constitutional Aspects of the Executive Agreement Procedure*, 66 DEP'T ST. BULL. 840 (1972). Of 5,306 treaties and other international agreements in force for the United States as of January 1, 1972, 947 were treaties and 4,359 were executive agreements. *Id.*

2. See Rovine, *Congressional-Executive Relations and United States Foreign Policy*, 17 WILLAMETTE L.J. 41, 42 (1980); F. WILCOX, *CONGRESS, THE EXECUTIVE AND FOREIGN POLICY* 7-9 (1971); T. FRANCK & E. WEISBAND, *FOREIGN POLICY BY CONGRESS* 3-6 (1979). All of these authors suggest that Executive predominance in foreign affairs became subject to strict scrutiny during the Vietnam War era.

3. See Rovine, *supra* note 2, at 42-43; see T. FRANCK & E. WEISBAND, *supra* note 2, at 3-4.

4. See Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 3-4 (1972); *Congressional Review of International Agreements: Hearings Before the Subcomm. on Int'l Security and Scientific Affairs of the House Comm. on Int'l Relations*, 94th Cong., 2d Sess. (1976); *Congressional Oversight of Executive Agreements-1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975).

5. Rovine, *supra* note 2, at 42-43; T. FRANCK & E. WEISBAND, *supra* note 2, at 3-9.

6. 768 F.2d 426 (D.C. Cir. 1985) [hereinafter cited as *Baldrige III*], *aff'g* Am. Cetacean Soc'y v. Baldrige[sic], 604 F. Supp. 1398 (D.D.C. 1985), *stay pending appeal denied*, Am. Cetacean Soc'y v. Baldrige, 604 F. Supp. 1411 (D.D.C. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 106 S. Ct. 787 (1986).

trict of Columbia Circuit Court of Appeals affirmed a lower court decision which voided an executive agreement between the United States and Japan, because the agreement conflicted with a prior act of Congress.<sup>7</sup> The court exhaustively analyzed the relevant statutes.<sup>8</sup> However, this decision involves several important questions regarding the role of Congress and the executive in foreign affairs, as defined by the Constitution, which were inadequately addressed by the court.

This note assumes that the statutory analysis performed by the court of appeals was correct and focuses on the important constitutional issues which the court inadequately addressed. This note will first discuss, under the heading of justiciability, whether the judiciary is capable of deciding disputes involving the interrelationship of Congress and the executive in foreign affairs.<sup>9</sup> This note will conclude that it was proper for the district court and the court of appeals to have decided *Baldrige III*. Second, this note will analyze the issue of the separation of powers between Congress and the executive in foreign affairs as defined by the Constitution.<sup>10</sup> This note will conclude that in *Baldrige III*, the court of appeals properly held that the executive agreement did not supersede the prior acts of Congress.<sup>11</sup> By its decision, the court dealt a serious blow to the unbridled use of executive agreements when restraints are imposed by Congress.

## II. FACTS OF THE CASE

### A. *Statutory Background*

In 1946, the United States signed the International Convention for the Regulation of Whaling (ICRW) which was formed "to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale

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7. 768 F.2d at 445.

8. 768 F.2d at 432-44.

9. See *infra* notes 73-166 and accompanying text.

10. See *infra* notes 167-326 and accompanying text.

11. The questions presented to the Supreme Court on the writs of certiorari are: whether the court of appeals correctly interpreted the statutes and whether the issuance of a writ of mandamus is appropriate. 54 U.S.L.W. 3468-69 (Jan. 14, 1986). The justiciability and separation of powers issues were not explicitly raised by the petitioners, even though they were alluded to by the court of appeals. If the Supreme Court finds that the statutes did not create a mandatory duty to certify the Japanese, then the executive agreement was not entered into contrary to an act of Congress and the discussion of justiciability and the separation of powers in this article would become moot.

stocks . . . .”<sup>12</sup> Under article I of the ICRW, a “Schedule,” containing specific rules and prohibitions regarding whaling practices, was established.<sup>13</sup> The member nations of the ICRW also agreed to create the International Whaling Commission (IWC)<sup>14</sup> to study whales and whaling practices.<sup>15</sup> The IWC was given authority to amend the ICRW Schedule by “fixing . . . [the] time, methods and intensity of whaling (including the maximum catch of whales to be taken in any one season). . . .”<sup>16</sup> Under the terms of the Convention, any member nation that objects within ninety days to an IWC amendment to the Schedule is not bound by that amendment.<sup>17</sup> However, if an objection is subsequently withdrawn, the objection cannot be reimposed.<sup>18</sup>

In 1971, realizing that adequate enforcement of international fishery conservation programs did not exist, Congress passed the Pelly Amendment to the Fishermen’s Protective Act of 1967.<sup>19</sup> The Pelly Amendment states that after determining that the nationals of a foreign country are “diminish[ing] the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.”<sup>20</sup> After receiving certification from the Secretary of Commerce, the President may then direct the Secretary of the Treasury to prohibit the importation of that country’s fish products to the United States.<sup>21</sup> If the President does not impose these sanctions, he must give reasons to Congress for his failure to do

12. International Convention for the Regulation of Whaling, Preamble, Nov. 10, 1948, 62 Stat. 1716, T.I.A.S. 1849 [hereinafter cited as Convention].

13. *Id.* at art. I, § 1.

14. *Id.* at art. III, § 1.

15. *Id.* at art. IV, § 1.

16. *Id.* at art. V, § 1(e).

17. *Id.* at art. V, § 3. These objection procedures are common to international conservation programs. *See, e.g.*, 117 CONG. REC. 34752 (1971) (Statement of Rep. Pelly). “Unfortunately, under the terms of the [International Convention for the Northwest Atlantic Fisheries], individual nations are permitted to exempt themselves from the decisions of the [International Northwest Atlantic Fisheries Commission].” *Id.*

18. Convention, *supra* note 12, at art. V, § 3.

19. 22 U.S.C. § 1978 (1983). *See also* H.R. REP. NO. 468, 92d Cong., 1st Sess. 4-6 (1971) *reprinted in* 1971 U.S. CODE CONG. AD. NEWS 2409; 117 Cong. Rec. 34752 (1971) (Statement of Rep. Pelly). The Pelly Amendment was an amendment to the Fishermen’s Protective Act of 1967.

20. 22 U.S.C. § 1978(a)(1) (1983).

21. *Id.* at § 1978(a)(4), *as amended*. As originally drafted the present 22 U.S.C. § 1978(a)(4) was 22 U.S.C. § 1978(a)(3). For discussion of subsequent amendment, see *infra* notes 27 to 30 and accompanying text.

so.<sup>22</sup>

In 1974 the Secretary of Commerce certified the Soviet Union and Japan for IWC quota violations, and in 1978 the Secretary of Commerce also certified the Republic of Korea and Peru for IWC quota violations.<sup>23</sup> However, on both occasions the President did not order the Secretary of the Treasury to impose the Pelly Amendment sanctions against any of these nations.<sup>24</sup> Instead, the President used the threat of discretionary sanctions to eventually obtain compromises.<sup>25</sup>

Because Congress perceived that the Secretary of Commerce was delaying certification of nations that had violated IWC quotas<sup>26</sup> and because the President had consistently failed to impose the discretionary Pelly Amendment sanctions, Congress passed the Packwood-Magnuson Amendment on August 15, 1979 (Packwood-Magnuson Amendment).<sup>27</sup> To remedy the extensive delays in certification by the Secretary of Commerce, the Packwood-Magnuson Amendment requires the Secretary of Commerce to "periodically monitor the activities of foreign nationals that may affect [international fishery conservation programs],"<sup>28</sup> "promptly investigate any activity by foreign nationals that, in the opinion of the Secretary, may be cause for certification . . .,"<sup>29</sup> and "promptly conclude . . . [that] investigation . . . ."<sup>30</sup> To remedy the consistent presidential failure to impose the discretionary Pelly Amendment sanctions, the Packwood-Magnuson Amendment requires the Secretary of Commerce to order the Secretary of State to reduce by at least fifty percent a foreign nation's allocation of United States fishing rights, if the Secretary of Commerce certifies that a nation has diminished the effectiveness of the ICRW.<sup>31</sup>

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22. 22 U.S.C. § 1978(b) (1983).

23. H.R. REP. NO. 1029 (Merchant Marine and Fisheries Committee), 95th Cong., 1st Sess. 9 (1978) *reprinted in* 1978 U.S. CODE CONG. AD. NEWS 1768, 1773. 22 U.S.C. § 1978(a)(4), *as amended*, authorizes the President to impose sanctions at his discretion.

24. H.R. REP. NO. 1029, *supra* note 23.

25. *Id.*

26. *See* 125 Cong. Rec. 22084 (1979) (Statement by Rep. Oberstar).

27. Act of Aug. 15, 1979, Pub. L. No. 96-61, 93 Stat. 407. Section 3(a) of this Act amended the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1821(e), by adding 16 U.S.C. § 1821(e)(2)(A)-(D); Section 3(b) of this Act amended Section 8 of the Fishermen's Protective Act of 1967, 22 U.S.C. § 1978, by renumbering the previous § 1978(a)(3) as § 1978(a)(4) and inserting a new § 1978(a)(3).

28. 22 U.S.C. § 1978(a)(3)(A) (1983).

29. *Id.* at § 1978(a)(3)(B).

30. *Id.* at § 1978(a)(3)(C).

31. 16 U.S.C. § 1821(e)(2)(A)-(B) (1983). *See* 16 U.S.C. § 1821(e)(1) for the procedures

### B. *The Procedural History And Underlying Facts*

In 1981, the IWC determined that no sperm whales from the North Pacific, Western Division could be taken in any given years, until catch limits for that year are established by the IWC.<sup>32</sup> Thus, if the IWC could not agree on a catch limit, no whales could be taken from that region for that year.<sup>33</sup> Japan, under the terms of the Convention, lodged an objection to this provision and, therefore, was not bound by it.<sup>34</sup>

In 1982, the IWC imposed a five year commercial whaling moratorium to begin in 1986 and last until 1990.<sup>35</sup> Japan, Norway, Peru and the Soviet Union filed timely objections to the moratorium and, therefore, under the terms of the Convention,<sup>36</sup> were not bound by the decision.<sup>37</sup> In addition, at the 1982 annual meeting, Japan was granted two additional years of sperm whaling.<sup>38</sup>

In 1984, the IWC was unable to establish a specific quota for the harvest of sperm whales from the North Pacific, Western Division for

for determining the allocation levels for foreign countries of allowable fishing levels in United States waters. See 16 U.S.C. § 1821(d) for the definitions of some relevant terms.

32. INT'L WHALING COMM'N, THIRTY-SECOND REPORT OF THE INTERNATIONAL WHALING COMMISSION 17, 19-20, 40, 42 (1981) (Chairman's Report to the Thirty-Third Annual Meeting, app. 10). Footnote 1 to Table 3 to Annex A to Appendix 10 reads: "[n]o whales may be taken from this stock [Sperm whales, North Pacific, Western Division] until catch limits including any limitations on size and sex are established by the Commission." *Id.* at 42.

33. *Id.* at 40.

34. INT'L WHALING COMM'N, INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING, 1946, SCHEDULE 17 (March 1982).

35. INT'L WHALING COMM'N, INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING, 1946, SCHEDULE 3, 13 (Feb. 1983, as amended by the Commission at the 34th Annual Meeting, July 1982). Paragraph 10(e) reads:

catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.

*Id.* at 13 (footnote omitted).

36. Convention, *supra* note 12, at art. V, § 3.

37. INT'L WHALING COMM'N, *supra* note 35, at 13. Footnote \* to paragraph 10(e) states: "[t]he Governments of Japan, Norway, Peru and the Union of Soviet Socialist Republics lodged objection to paragraph 10(e) within the prescribed period. This paragraph came into force on 3 February 1983, but it not binding on those governments." *Id.*

38. *Id.* at 17. Footnote 2 to Table 3 is in boldface, indicating an amendment by the IWC at the 34th Annual Meeting, July 1982. Footnote 2 reads: "catch limits for the 1982 and 1983 coastal seasons are 450 and 400 whales respectively . . . ." *Id.*

the 1984-85 season.<sup>39</sup> Thus, under the terms of the IWC Schedule, no sperm whales from this region could be harvested for the 1984-85 season, except by Japan, because Japan's objection of 1981 was still in force.<sup>40</sup>

On November 13, 1984, an executive agreement was executed between Malcolm Baldrige, United States Secretary of Commerce, and Yasushi Murazumi, Chargé d'Affaires ad interim of Japan.<sup>41</sup> Under the agreement the Secretary agreed not to certify Japan if Japan limited its sperm whale catch to 400 during the 1984-85 and 1985-86 seasons and if Japan withdrew its objection to footnote 1 of Table 3 of the IWC Schedule (which stated that if the IWC did not establish a catch limit then no sperm whales could be taken from the North Pacific, Western Division).<sup>42</sup> Moreover, if Japan agreed by April 1, 1985 to cease all Japanese commercial whaling after the 1986-87 season and if Japan agreed to limit its minke and Bryde's whales catches to levels "acceptable" to both the United States and Japanese governments, then the Secretary would not certify Japan for taking up to 200 sperm whales during the 1986 and 1987 coastal seasons.<sup>43</sup> On December 11, 1984, Japan withdrew its objection to footnote 1 of the IWC Schedule's Table 3.<sup>44</sup>

The plaintiffs in *Baldrige III* are twelve wildlife conservation groups.<sup>45</sup> On November 11, 1984, several members of one of the

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39. INT'L WHALING COMM'N, THIRTY-FIFTH REPORT OF THE INTERNATIONAL WHALING COMMISSION 14, 30 (1985) (Chairmen's Report of the Thirty-Sixth Annual Meeting, app. 4, Table 3 n.1).

40. *Id.*

41. Letter from Yasushi Murazumi, Charge d'Affaires ad interim of Japan, to The Honorable Malcolm Baldrige, Secretary of Commerce (Nov. 13, 1984) and Letter from Malcolm Baldrige to Yasushi Murazumi, Charge d'Affaires ad interim of Japan (Nov. 13, 1984) [hereinafter cited as November Executive Agreement] reprinted in Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, apps. K and L, at 102a-09a. Attached to the Letter from Murazumi to Baldrige is a "Summary of Discussions on Commercial Sperm Whaling in the Western Division Stock of the North Pacific, November 1-12, 1984, Washington, D.C.," signed November 13, 1984 [hereinafter cited as Summary of Discussions]. Dr. John V. Bryne, United States Commissioner to the International Whaling Commission, and Mr. Hiroya Sano, Director-General, Fisheries Agency, Ministry of Agriculture, Forestry and Fisheries, the Government of Japan were the chief negotiators for each side.

42. November Executive Agreement, *supra* note 41, app. K, at 104a-05a.

43. November Executive Agreement, *supra* note 41, app. K, at 105a-06a.

44. Letter from Yoshio Okawara, Ambassador of Japan, to The Honorable Malcolm Baldrige, Secretary of Commerce (Dec. 11, 1984) reprinted in Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia, app. M, at 110a.

45. The twelve plaintiffs in this action are: American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The

plaintiffs' organizations documented the killing of two sperm whales by Japan, in violation of the IWC's zero quota.<sup>46</sup> The plaintiffs demanded that the Secretary certify the Japanese and impose the sanctions.<sup>47</sup> The Secretary of Commerce, however, refused to certify the Japanese, indicating that he would abide by the November executive agreement.<sup>48</sup> As a result, the plaintiffs filed an action for (1) a declaratory judgment that the Secretary's failure to certify the Japanese was in violation of the Pelly and Packwood-Magnuson Amendments, (2) a declaratory judgment that whaling activities by any nation in excess of an IWC quota is an activity which "diminishes the effectiveness" of the ICRW, and (3) a permanent injunction enjoining any executive agreements which would violate the certification and sanction requirements of the Pelly and Packwood-Magnuson Amendments.<sup>49</sup>

### III. REASONING OF THE COURT

#### A. *United States District Court Decision*

The main issue before the district court was whether the Pelly and Packwood-Magnuson Amendments created a discretionary or mandatory duty of the Secretary of Commerce to certify the Japanese for violations of IWC quotas.<sup>50</sup> District court Judge Charles Richey determined that the "case is a simple issue of statutory interpretation."<sup>51</sup> He then extensively analyzed the legislative history of the Pelly and Packwood-Magnuson Amendments and the executive branch's applications of the Pelly and Packwood-Magnuson Amendments.<sup>52</sup> From this analysis, he concluded that the Pelly and Packwood-Magnuson Amendments required the Secretary of Commerce to certify to the President that Japan had violated the IWC quota.<sup>53</sup> In addition, he concluded that a writ of mandamus was ap-

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Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, Connecticut Cetacean Society, Defenders of Wildlife and Friends of the Earth. Brief for Appellees, Appeal from the United States District Court for the District of Columbia ii (1985).

46. *Am. Cetacean Soc'y v. Baldrige* [sic], 604 F. Supp. 1398, 1404 (D.D.C. 1985) (Affidavit of J. Campbell Snowden) [hereinafter cited as *Baldrige I*].

47. *Id.*

48. *Id.*

49. *Id.* at 1401.

50. *Id.* at 1405. The court states "the only true issue in this case is whether there exists a nondiscretionary duty to certify and did the Secretary fail to do so." *Id.* at 1408.

51. *Id.* at 1410.

52. *Id.* at 1404-08.

53. *Id.* at 1410.



propriate in this case and, therefore, permanently enjoined the Secretary of Commerce from entering into any future executive agreement contrary to his mandatory duty under the Pelly and Packwood-Magnuson Amendments.<sup>54</sup> Judge Richey also denied defendants' motion to stay the court's order pending appeal.<sup>55</sup>

Although the court performed primarily a statutory analysis, it did make some statements regarding the justiciability and separation of powers issues. The court, especially critical of the Secretary's action, stated: "[t]he Secretary of Commerce may not unilaterally, or even bilaterally with the Japanese, dismiss the mandate of the IWC so as to proceed with his own particular vision of whale preservation."<sup>56</sup> The court seems to conclude that the Secretary may never disobey this statutory mandate. Also, the court recognized that it was abrogating the November Executive Agreement by ordering the Secretary of Commerce to certify the Japanese.<sup>57</sup> Yet, the court did not comment on or provide any authority for this conception of the separation of powers issue. Presenting an interesting conception of the interrelationship of Congress and the Executive, the court stated that "this nation is a republic, wherein the Executive Branch is not free to ignore the will of Congress or the requirements of the Constitution, and where the legality of Administration action is subject to judicial review."<sup>58</sup> With this statement, the district court, in effect, concluded that the case was justiciable, and that an executive agreement does not supersede a prior inconsistent act of Congress.

## B. *The District of Columbia Circuit Court of Appeals Decision*

### 1. The majority opinion

The court of appeals affirmed the district court decision, although for slightly different reasons.<sup>59</sup> Judge Skelly Wright, writing for the majority, performed an analysis of the Pelly and Packwood-Magnuson Amendments' legislative history similar to, but even more

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54. *Id.*

55. *Am. Cetacean Soc'y v. Baldrige*, 604 F. Supp. 1411 (D.D.C. 1985) [hereinafter cited as *Baldrige II*]. On appeal the stay was granted, *Baldrige III*, 768 F.2d at 432.

56. *Baldrige I*, 604 F. Supp. at 1411.

57. *Baldrige II*, 604 F. Supp. at 1414.

58. *Id.* at 1415.

59. *Baldrige III*, 768 F.2d at 428. On appeal the defendants only argued that the district court made an erroneous interpretation of the law and unlawfully issued the writ of mandamus. *Id.* at 432. They did not claim that the issue was nonjusticiable or that an executive agreement supersedes a prior act of Congress.

extensive than that by Judge Richey of the district court.<sup>60</sup> He concluded that, according to the statutes as amended, the Secretary of Commerce has a mandatory duty to certify any violation of an IWC quota.<sup>61</sup>

Judge Wright's only statement as to the justiciability and separation of powers issues, which were alluded to in the district court opinion,<sup>62</sup> was:

Although it is urged that deference to the Executive is particularly apt and intrusion by the judiciary particularly inapt in the foreign affairs context, it is imperative to remember that the Legislative Branch, by explicit constitutional provision, has the power to regulate foreign commerce. . . . And, since the judiciary's role is to declare what the law is when Congress has acted, . . . we must perform that duty even in this delicate context.<sup>63</sup>

It is unfortunate that so little analysis was performed on these issues considering their importance to the working of United States foreign policy.

## 2. The dissent

In his dissent, Judge Oberdorfer correctly stated that the threshold issue in *Baldrige III* was whether a justiciable question exists, especially since the case involved foreign affairs.<sup>64</sup> He also correctly pointed out that the majority failed to address this threshold issue.<sup>65</sup> Judge Oberdorfer believed that the court should not decide this case, because a decision would "entangle the judiciary in foreign policy"<sup>66</sup> and because a decision would "in effect require the Secretary to dishonor the United States' commitment, upon which Japan relied . . . ."<sup>67</sup> Although Judge Oberdorfer considered the justiciability question important, he proceeded to the merits of the case.<sup>68</sup>

Judge Oberdorfer also reviewed the legislative history of the

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60. *Id.* at 434-43.

61. *Id.* at 443-44.

62. *See supra* notes 56-58 and accompanying text.

63. *Baldrige III*, 768 F.2d at 444.

64. *Id.* at 447.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* "This is not to say that the factors which call justiciability into question are not relevant here. In my view, these factors heighten the need for forbearance by the courts in the absence of a clear command from Congress." *Id.*

Pelly and Packwood-Magnuson Amendments.<sup>69</sup> Unlike the majority, however, he concluded that the Secretary of Commerce has a discretionary duty under the amendments to certify Japan for IWC quota violations.<sup>70</sup> The dissent considered it particularly relevant in foreign affairs cases not to construe a mandatory duty on the Executive absent a clear congressional mandate.<sup>71</sup> Regarding the role of the Executive in foreign affairs, Judge Oberdorfer stated "we should be particularly hesitant to contradict the Executive's interpretation of a statute relied upon to form an international agreement, unless the interpretation is clearly erroneous."<sup>72</sup>

#### IV. ANALYSIS OF THE CASE

##### A. *Justiciability*

Before proceeding to the merits of a case, a federal court must establish that the case is justiciable.<sup>73</sup> Justiciability is a judicially self-imposed set of principles based on article III's limitation of jurisdiction to "cases" and "controversies."<sup>74</sup> The court will only decide those cases which are adversarial in nature and which are historically of the type capable of judicial resolution.<sup>75</sup> Although a case may be nonjusticiable for a number of reasons,<sup>76</sup> only standing, ripeness and the political question doctrine are potentially dispositive in the *Baldrige III* case. When discussing these three aspects of justiciability, it is important to remember that "[j]usticiability is of course not a legal concept with fixed content or susceptible to scientific verification. Its utilization is the result of many subtle pressures, including the appropriateness of the issues for decision . . . and the actual hardship to

69. *Id.* at 448.

70. *Id.* at 448-49.

71. *Id.* at 449.

72. *Id.* at 448.

73. Yet, "[j]usticiability is itself a concept of uncertain meaning and scope." *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

74. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority . . . to Controversies to which the United States shall be a Party; to Controversies between two or more States . . ."); *Baker v. Carr*, 369 U.S. 186, 198 (1962). In *Baker*, Justice Brennan stated: "[i]n the instance of determining justiciability . . . the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id.*

75. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-7, at 53 (1978).

76. A case may be nonjusticiable based on problems of standing, ripeness, mootness, political question or inadequacy of equitable remedies. L. TRIBE, *supra* note 75, §§ 3-8 to 3-17.

the litigants of denying them the relief sought."<sup>77</sup>

### 1. Standing

Standing involves a determination of whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."<sup>78</sup> When standing is at issue "the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."<sup>79</sup> To establish standing in a case such as *Baldrige III*,<sup>80</sup> the plaintiffs must demonstrate that they have suffered or will suffer some concrete injury in fact which is not the same as the injury to all other citizens,<sup>81</sup> the defendants' act caused the plaintiffs' injuries and the relief sought would probably redress the plaintiffs' injury.<sup>82</sup> Neither the district court nor the court of appeals addressed these elements of standing.<sup>83</sup>

In *Baldrige I*, the plaintiffs sought a declaratory judgment and injunction against the Secretary of Commerce regarding IWC whale quota enforcement.<sup>84</sup> *Baldrige I* is similar in many ways to *Sierra Club v. Morton*.<sup>85</sup> In *Sierra Club*, an environmental group sought a declaratory judgment and injunction against federal officials regarding the approval of construction of a ski resort in a national forest.<sup>86</sup> The Supreme Court held that injury to "aesthetic and environmental well-being" was sufficient to establish standing, but that the plaintiff did not allege that any members of its group were personally among the

77. *Poe v. Ullman*, 367 U.S. 497, 509 (1961) (Frankfurter, J., concurring).

78. *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). See generally *L. TRIBE*, *supra* note 75, §§ 3-17 to 3-22.

79. *Flast*, 392 U.S. at 99-100.

80. A different standing test is used for citizenship and taxation cases. See *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Flast*, 392 U.S. at 95; *United States v. Richardson*, 418 U.S. 166 (1974); *Valley Forge College v. American's United for Separation of Church and State*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

81. *Sierra Club*, 405 U.S. at 734-35. See *L. TRIBE*, *supra* note 75, §§ 3-20 to 3-21, at 89-93.

82. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72-74 (1978).

83. See *Baldrige I*, 604 F. Supp. at 1401. Judge Richey suggests a standing discussion by referring to the plaintiffs as "wildlife conservation groups which share a common dedication to preserving and protecting endangered species." *Id.*

84. See *supra* note 49 and accompanying text.

85. 405 U.S. 726 (1972).

86. *Id.* at 728-30.

injured.<sup>87</sup> In its amended complaint, the plaintiff solved the standing problem.<sup>88</sup>

Using the reasoning of *Sierra Club*, the plaintiffs in *Baldrige III* could not establish standing by alleging that they represent a general concern for whale conservation and United States whale conservation policies. Instead, the plaintiffs must establish that some members of the environmental groups have suffered an injury to their individual "aesthetic and environmental well-being" when using the area where the whales were seen.<sup>89</sup> Unlike *Sierra Club*, however, the acts giving rise to the cause of action in *Baldrige III* did not occur in the United States; the IWC quota violations occurred in the Western Division of the North Pacific.<sup>90</sup> There is evidence in the record, however, that members of the plaintiffs' organizations do travel in the Western Division of the North Pacific; these members witnessed the killing of two sperm whales in Japan.<sup>91</sup> Thus, these members could allege that they suffered injury to their aesthetic and environmental well-being and do frequent the area to view whales. However, the issue remains whether, under *Sierra Club*, the concrete injury to a member of the plaintiffs' organization must occur in the United States.<sup>92</sup> Because standing is primarily concerned with whether the party suing actually suffered the injury,<sup>93</sup> the place of the injury would seem irrelevant to a determination of the standing issue. Therefore, standing should not render the *Baldrige III* case nonjusticiable.

## 2. Ripeness

Ripeness is another element of justiciability which a court must address when constitutional issues affecting legislation are involved.<sup>94</sup>

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87. *Id.* at 734-35.

88. *Sierra Club v. Morton*, 348 F. Supp. 219 (N.D. Cal. 1972) (Motion to dismiss amended complaint denied).

89. *Sierra Club*, 405 U.S. at 728-30.

90. *See supra* notes 32, 38-39 and accompanying text.

91. *See supra* note 46 and accompanying text.

92. *See supra* note 78 and accompanying text.

93. *See supra* notes 78-79 and accompanying text.

94. *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947). For the Court, Justice Rutledge held: "[thus] the constitutional issues affecting legislation will not be determined in friendly, non-adversary proceedings; in advance of the necessity of deciding them . . ." *Id.*; *Poe*, 367 U.S. at 503-04 ("[the] various doctrines of 'standing,' 'ripeness,' and 'mootness' . . . are but several manifestations . . . of the primary conception that federal judicial power is to be exercised to strike down legislation . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Id.*; *Buckley v. Valeo*, 424 U.S. 1, 113-14 (1976).

In *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, the Court stated that “[i]t has . . . been a 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 or alteration by administration action.”<sup>95</sup> Thus, the ripeness issue in *Baldrige III* is whether the court’s interpretation of the acts of Congress will be binding on the parties.

The case of *Goldwater v. Carter*<sup>96</sup> is an excellent example of a case not yet ripe for adjudication. In *Goldwater*, a group of United States Congressmen sued the President for terminating a United States-Taiwan Mutual Defense Treaty without prior Senate or congressional approval.<sup>97</sup> While the case was being heard, Congress was still considering a resolution on the matter.<sup>98</sup> Justice Powell concluded that the case was nonjusticiable because when suit was brought there was no clear indication of conflict between the President and Congress.<sup>99</sup> He stated that

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. . . . The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage . . . [individuals] to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.<sup>100</sup>

In *Baldrige III*, however, both Congress and the Executive have asserted their constitutional authority through the normal political process; Congress enacted the Pelly and Packwood-Magnuson Amendments and the Secretary of Commerce signed the November Executive Agreement.<sup>101</sup> Unlike *Goldwater*, there is a clear conflict between the action taken by the Secretary and the action required by the acts of Congress as interpreted by the court.<sup>102</sup>

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95. 333 U.S. 103, 113-14 (1948).

96. 444 U.S. 996 (Powell, J., concurring). *But see, id.* at 1002 (Rehnquist, J., concurring), *id.* at 1006 (Brennan, J., dissenting), *id.* at 1006 (Blackmun, J., dissenting).

97. *Id.* at 997-98.

98. *Id.* at 998.

99. *Id.*

100. *Id.* at 997.

101. *Baldrige III*, 768 F.2d at 428-32.

102. *Id.* at 432.

### 3. The political question doctrine in foreign affairs

While standing involves the question of *who* is an appropriate plaintiff, and mootness and ripeness involve the question of *when* it is appropriate to file suit, the political question doctrine involves the question of *which branch of government* is to decide the issue — the judiciary, or one of the “political branches.”<sup>103</sup> Also, while standing, mootness and ripeness address the “case” or “controversy” requirement of article III, the political question doctrine “is primarily a function of the separation of powers.”<sup>104</sup> The origin of the political question doctrine is probably a statement by Chief Justice Marshall in *Marbury v. Madison*:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. *The subjects are political.* They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.<sup>105</sup>

In recent years, there has been much confusion regarding the nature and extent of the political question doctrine.<sup>106</sup> Three distinct views have prevailed: the classical view, the prudential view and the functionalist view.<sup>107</sup> Under all three views, when the Constitution grants Congress or the Executive sole authority to resolve an issue,

103. *Baker v. Carr*, 369 U.S. 186, 210 (1961). The “political branches” are Congress and the executive, because both of these branches decide “political” as compared to “legal” or “constitutional” matters. As Henkin stated, “there is little agreement as to . . . how the courts decide whether a question is ‘political.’” L. HENKIN, *supra* note 1, at 210. See generally L. TRIBE, *supra* note 75, § 3-16, at 71-79; Roberts, *Hopson v. Kreps: Bowhead Whales, Alaskan Eskimos, and the Political Question Doctrine*, 9 HASTINGS CONST. L.Q. 231, 231-36 (1981).

104. *Baker*, 369 U.S. at 210. Note that separation of powers as discussed in the context of justiciability relates to the relationship between the judiciary vis-a-vis Congress and the executive; the separation of powers discussion, see *infra* notes 167-326 and accompanying text, refers to the relationship between Congress vis-a-vis the executive. Thus, *Baldrige III* involves the interrelationship of all three branches of the federal government.

105. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803) (emphasis added).

106. See, e.g., L. HENKIN, *supra* note 1, at 210-11; L. TRIBE, *supra* note 75, § 3-16, at 71; *Baker*, 369 U.S. at 210. There is much debate whether the political question doctrine even exists as an independent doctrine. See Henkin, *Is there a “Political Question” Doctrine*, 85 YALE L.J. 597 (1976); Tigar, *The Political Question Doctrine and Foreign Relations*, 17 UCLA L. REV. 1135 (1970).

107. L. TRIBE, *supra* note 75, § 3-16, at 71-72 nn.1-2.

the Judiciary cannot interfere.<sup>108</sup> Under the classical view, if the Constitution *does not* grant Congress or the Executive sole authority to resolve an issue, then a court *must* decide the issue.<sup>109</sup> Under the prudential view, even if the Constitution does not grant the political branches sole authority to decide an issue, a court *may* still refuse to decide the case if a decision would “force the court to compromise an important principle or would undermine the court’s authority.”<sup>110</sup> The functionalist view is broader than the prudential view. Under the functionalist view, even if the Constitution does not grant the political branches sole authority to decide an issue, a court *may* still refuse to decide a case if special considerations exist, other than concern for the court’s integrity or principles.<sup>111</sup>

a. the *Baker v. Carr* analysis

In the seminal case of *Baker v. Carr*, the Court created a six-step political question analysis.<sup>112</sup> In *Baker*, Justice Brennan stated that a case is nonjusticiable under the political question doctrine if any one of the following factors are an integral part of the case:

[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 undertaken independent resolution without expressing lack of 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 on one question.<sup>113</sup>

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108. *Id.* at 71 n.1.

109. *See, e.g.,* Wechsler, *Toward Natural Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7 (1959), Weston, *Political Questions*, 38 HARV. L. REV. 298 (1925). *See generally* L. TRIBE, *supra* note 75, § 3-16, at 71-79. The classical view is consistent with a strict reading of *Marbury v. Madison* and urges a broad scope of judicial review. *Id.* at 71 n.1.

110. *See, e.g.,* A. BICKEL, *THE LEAST DANGEROUS BRANCH*, 23-28, 89-91 (1962); Finkelstein, *Judicial Self Limitation*, 37 HARV. L. REV. 221 (1976). *See* L. TRIBE, *supra* note 75, § 3-16, at 71-73 n.1.

111. L. TRIBE, *supra* note 75, § 3-16, at 71 n.1. Such factors might include inadequate judicial knowledge to decide a case, need for uniformity of decision and respect for the other political branches. *Id.* *See, e.g.,* Scharpf, *Judicial Review and the Political Question Doctrine: A Functional Analysis*, 75 YALE L.J. 517, 566-82 (1966).

112. 369 U.S. 186, 208-37. *See also id.* at 241-47 (Douglas, J., concurring); *id.* at 266-67, 277-302, 323-30 (Frankfurter, J., dissenting); *id.* at 330-40 (Harlan, J., dissenting).

113. *Id.* at 217.



Therefore, only the absence of all six of these factors will render a case justiciable. This model combined elements of the classical view (factor 1), the functionalist view (factors 2 and 3) and the prudential view (factors 4, 5 and 6).<sup>114</sup> Thus, by establishing this test, the Court inherently rejected the classical view.

In *Baker*, Justice Brennan specifically discussed the political question doctrine as it relates to foreign affairs.<sup>115</sup> He rejected prior case holdings which had concluded that all cases involving foreign affairs are nonjusticiable under the political question doctrine.<sup>116</sup> Justice Brennan urged in all cases, including foreign affairs, a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."<sup>117</sup>

In *Baldrige III*, neither the majority nor the dissent performed the discriminating analysis required in *Baker*.<sup>118</sup> Although the majority in *Baldrige III* does not expressly address the political question doctrine, it concludes that "since the judiciary's role is to declare what the law is when Congress has acted . . . we *must* perform that duty even in this delicate context."<sup>119</sup> Thus, in essence, the majority relied on the classical view of the political question doctrine.<sup>120</sup> Yet, as stated above, the classical view was rejected in *Baker*.

The dissent in *Baldrige III* did mention the political question doctrine. It addressed the need for a discriminating analysis before proceeding to the merits and some of the factors of the *Baker* test.<sup>121</sup>

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114. L. TRIBE, *supra* note 75, § 3-16, at 72 n.1. Some authors suggest that all three views can be combined into one theory. *See generally*, Roberts, *supra* note 103. Yet, the classical view, by definition is inconsistent with either the prudential or functionalist views. *See supra* notes 109-11 and accompanying text. Therefore, although the *Baker* analysis contains elements of all three views, by using discretionary elements of the prudential and functionalist views, the *Baker* analysis rejects the classical view.

115. *Baker*, 369 U.S. at 211-13.

116. *Id.* at 211-12. Justice Brennan stated "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211.

117. *Id.* at 211-12.

118. *Baldrige III*, 768 F.2d at 444, 447-49. The majority failed to address the political question doctrine because it did not consider the implications of its decision on the conduct of foreign affairs. The majority considered the case to be simply a matter of statutory interpretation. *Id.* at 432.

119. *Id.* at 444 (emphasis added). In this quotation the court referred to *Marbury v. Madison*, the foundational case for the classical view. L. TRIBE, *supra* note 75, § 3-16, at 71 n.1.

120. *See supra* note 109 and accompanying text.

121. *Baldrige III*, 768 F.2d at 447.

Yet, the dissent in *Baldrige III*, stated that it was unnecessary to perform a discriminating analysis because the justiciability issue had serious constitutional implications and because great deference should be shown the Executive's interpretation of a statute in foreign affairs, unless that interpretation is clearly erroneous.<sup>122</sup> The dissent then concluded that the Secretary's interpretation of the Pelly Amendment was not clearly erroneous, especially because it involves foreign affairs.<sup>123</sup> This seems to be circular reasoning.

The dissent also used the holding in *Adams v. Vance*<sup>124</sup> as authority for avoiding the political question doctrine and proceeding to the merits. The court of appeals in *Adams* stated that

when the merits of a case are clearly against the party seeking to invoke the court's jurisdiction, the jurisdictional question is especially difficult and far-reaching, and the inadequacies in the record or briefing make the case a poor vehicle for deciding the jurisdictional question, we may rule on the merits . . . .<sup>125</sup>

The proceedings in *Adams* were extraordinarily rapid: the suit was filed, a district court order was entered, the defendant appealed and the court of appeals reversed the lower court decision in just four days.<sup>126</sup> However, in *Baldrige III*, the record and briefing were not inadequate and the case did not require as rapid adjudication as was necessary in *Adams*.<sup>127</sup> Thus, it seems inappropriate for the dissent to have avoided the political question doctrine.

#### b. application of the *Baker* test

As mentioned in the previous section, both the majority and dissent in *Baldrige III* failed to perform the discriminating analysis required by *Baker*.<sup>128</sup> In this section each of the six elements of the

122. *Baldrige III*, 768 F.2d at 447-49. "For the present purposes, however, it is not necessary to . . . determine whether this case is justiciable. The justiciability issue has serious constitutional implications which make it appropriate to bypass the question and proceed to the merits." *Id.* at 447. "I am not persuaded that the Secretary's interpretation of the Pelly Amendment was clearly erroneous." *Id.* at 448.

123. *Id.* at 448. Judge Oberdorfer, dissenting, stated "if this statute involved domestic affairs, I might be able to endorse a [mandatory duty on the Secretary] based on [the] secondary evidence of congressional intent." *Id.*

124. 570 F.2d 950 (D.C. Cir. 1977).

125. *Id.* at 954 n.7.

126. *Id.* at 953.

127. The plaintiffs in *Baldrige I* filed suit on November 8, 1984. *Baldrige III*, 768 F.2d at 446 n.1. *Baldrige I* was decided on March 5, 1985 and the stay pending appeal was denied on March 13, 1985 (*Baldrige II*); *Baldrige III* was decided on August 6, 1985.

128. Each case involves several sub-issues. Part of the problem in any opinion which in-

*Baker* test will be applied to the facts of *Baldrige III* to determine whether it is justiciable under the political question doctrine.

In applying the *Baker* test, a court should first consider whether there was "a textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>129</sup> In *Baldrige III*, the majority correctly concluded that under the Constitution, the Judiciary has sole authority to interpret statutes.<sup>130</sup>

A corollary to this first prong of the *Baker* test is: "[if] the performance of a 'duty' is left to the discretion and good judgment of an executive officer, the judiciary will not compel the exercise of his discretion one way or the other . . . for to do so would be to take over the office."<sup>131</sup> Thus, in *Baldrige III*, a court should first determine if the Pelly and Packwood-Magnuson Amendments create a duty which is left to the discretion of the Secretary of Commerce. If the amendments do create a discretionary duty, the case is not justiciable. However, if the amendments create a mandatory duty, then a court, according to *Baker*, must determine whether any of the other factors are present which would make the case nonjusticiable.

A court should next consider whether there was "a lack of judicially discoverable and manageable standards for resolving [the case]."<sup>132</sup> In *Baldrige III*, the determination of these factors depends on which sub-issue is addressed. The competence of courts to per-

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volves a political question analysis is that different judges will focus on different sub-issues. In *Baldrige III*, some of the sub-issues include: whether the Pelly and Packwood-Magnuson Amendments create a discretionary or mandatory duty, whether these amendments are constitutional, whether the executive agreement supersedes the amendments, and whether it is proper for a court to issue a writ of mandamus. In *Baldrige III*, the majority focused primarily on the first sub-issue — whether the court has the authority to determine whether the Pelly and Packwood-Magnuson Amendments create a discretionary or mandatory duty. The dissent, however, focused on whether a court should decide whether an executive agreement supersedes the amendments. *Baldrige III*, 768 F.2d at 444, 447-49.

129. *Baker*, 369 U.S. at 217.

130. *Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province of and duty of the judicial department to say what the law is." *Id.*)

131. *Baker*, 369 U.S. at 245 (Douglas, J., concurring). Thus, if Congress gave the Secretary absolute discretion to certify a foreign nation under the Pelly and Packwood-Magnuson Amendments, then the courts should not review the matter. Possible exceptions to this general rule might include the issues of abuse of discretion by the executive (*See, Rainbow Navigation, Inc. v. Department of the Navy*, 620 F. Supp. 534 (D.D.C. 1985)) and improper delegation of authority. The improper delegation of authority issue is beyond the scope of this article; the abuse of discretion issue does not effect this analysis, because the assumption of this paper is that the court of appeals finding of a mandatory duty was correct.

132. *Baker*, 369 U.S. at 217.

form statutory analysis has long been established.<sup>133</sup> Yet, due to the ambiguity in the Constitution regarding the separation of powers of the Executive and Congress in foreign affairs, adequate judicial standards, arguably, do not exist.<sup>134</sup> However, it is the duty of a court to determine the meaning of the Constitution, no matter how difficult that task might be.<sup>135</sup> Even the determination of whether an executive agreement supersedes a prior inconsistent act of Congress is a matter of constitutional interpretation.

There is a tremendous debate regarding the power of the courts to interpret the Constitution in matters involving the separation of powers in foreign affairs.<sup>136</sup> Yet, Henkin suggests that the reason for judicial deference in constitutional interpretation of matters affecting foreign affairs is not that courts should demonstrate extraordinary abstention in this area, but that courts usually find that the Constitution grants generous powers to Congress or the Executive.<sup>137</sup> If one accepts this view, the courts have exercised judicially discoverable standards. Thus, in *Baldrige III*, there are judicially discoverable standards for determining whether the Constitution holds that an executive agreement supersedes a prior act of Congress. If a court finds that the Constitution does create such a right, a court should declare that interpretation; it should not declare that it is a nonjusticiable political question.

Under the third prong of the *Baker* test, a court should consider whether it can decide the case "without [making] an initial policy determination of a kind clearly for nonjudicial discretion . . . ."<sup>138</sup> In *Baldrige III*, the policy decisions have already been made; Congress has stated its policy in the legislative history to the Pelly and

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133. See *supra* notes 130-31 and accompanying text.

134. See *infra* text accompanying note 175.

135. *Powell v. McCormack*, 395 U.S. 486, 548-49 (1968); *Goldwater v. Carter*, 444 U.S. 996, 999 (1979) (Powell, J., concurring).

136. Compare *Goldwater*, 444 U.S. at 1000 (Powell, J., concurring) with *Chicago Southern Air Lines, Inc.*, 333 U.S. at 111.

137. See Henkin, *supra* note 112, at 612-13. Henkin also states:

Despite common impressions and numerous citations, there [is] . . . no foreign affairs case, in which the Supreme Court ordained or approved such judicial abstention from constitutional review . . . . In the foreign affairs cases commonly cited the courts did not refrain from judging political actions by constitutional standards; they judged them but found them constitutionally not wanting. If the Court sometimes spoke of the special quality of foreign relations and the need for the nation to speak with one voice, it did so not to support judicial abstention but to explain the broad constitutional powers granted the President or Congress.

L. HENKIN, *supra* note 1, at 213.

138. *Baker*, 369 U.S. at 217.

Packwood-Magnuson Amendments and the Secretary of Commerce has stated its policy decisions in the November Executive Agreement.<sup>139</sup> It might be argued, however, that, since these two policy statements conflict, a court, by deciding the case, must choose between the two. Thus, it might be claimed that a court is usurping the legislative power of Congress.<sup>140</sup> This argument, however, confuses the role of the courts. The issue in *Baldrige III* is not which policy statement is most appropriate, but whether each political branch had constitutional authority to act as it did. Since the policy decisions have already been made, *Baldrige III* is justiciable under the third prong of the *Baker* test.

Under the fourth prong of the *Baker* test, a court should consider whether deciding the case will demonstrate "lack of the respect due coordinate branches of government . . ." <sup>141</sup> In *Baldrige III*, while it would not demonstrate a lack of respect due either the Executive or Congress to perform a statutory interpretation of the Pelly and Packwood-Magnuson Amendments, it might demonstrate a lack of respect for the Executive if a court abrogated an executive agreement. However, it might be equally disrespectful to Congress for a court to nullify the statute. It might be argued that if there is a possibility of showing disrespect to either branch of the government, then a case is nonjusticiable. This prong of the *Baker* test, however, is more convincing when the acts of only one branch of the government are under judicial scrutiny. Since *Baldrige III* involves independent actions by both Congress and the Executive, the utility of this prong of the *Baker* test is suspect.

Under the fifth prong of the *Baker* test, a court should consider whether there is "an unusual need for unquestioning adherence to a political decision already made."<sup>142</sup> Because *Baldrige III* involves an unresolvable conflict between action by the Executive and by Congress, there is not an unquestioning need for adherence to a political decision already made; there is an unusual need for resolution of an unresolvable conflict between two political decisions already made. Also, in *Baldrige III*, there is no overriding concern or emergency situation which requires an unquestioning adherence to the decision

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139. See *Baldrige III*, 768 F.2d at 429-31, 435-44; November Executive Agreement and Summary of Discussions, *supra* note 41.

140. See U.S. CONST. art. I, § 1. "All legislative Powers herein granted shall be vested in a Congress . . ." *Id.*

141. *Baker*, 369 U.S. at 217.

142. *Id.*

of the Executive.<sup>143</sup>

Under the final prong of the *Baker* test, a court should consider whether there exists the possibility "of embarrassment from multifarious pronouncements by various departments on one question."<sup>144</sup> The dissent refers to this prong of the *Baker* test, yet fails to provide any specific explanation of what that embarrassment involves.<sup>145</sup> Also, as mentioned above, there has already occurred multifarious pronouncements by various departments on one issue. Although, as the dissent states, "the district court's order has added the Judicial Branch's voice to this delicate process [of foreign affairs],"<sup>146</sup> the court has attempted to alleviate the embarrassment by resolving the issue judiciously. Thus, this prong seems to almost require adjudication of the case, rather than preclude it.

Therefore, none of the six factors of the *Baker* test seem to firmly establish the nonjusticiability of *Baldrige III* under the political question doctrine. In addition, since *Baldrige III* involves a direct conflict between legitimate acts of authority by both political branches, *Baldrige III* should be adjudicated to resolve this basic separation of powers issue.

### 3. *Goldwater v. Carter*

*Goldwater v. Carter*<sup>147</sup> contains one of the Supreme Court's most recent analysis of the political question doctrine as it relates to foreign affairs, and is similar in many ways to the *Baldrige* situation. In *Goldwater*, twenty-five Congressmen sued the President for terminating a mutual defense treaty with Taiwan without prior Senate approval.<sup>148</sup> The plaintiffs claimed that the President exceeded his constitutional power when he terminated the treaty.<sup>149</sup> Justice Rehnquist, writing for the plurality,<sup>150</sup> held that the case involved a nonjusticiable polit-

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143. *But see infra* note 199. Typically, in emergency situations involving international affairs, Congress gives the executive very broad powers. *See, e.g.*, International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.* (1983). *Baldrige III* does not involve such a dire situation.

144. *Baker*, 369 U.S. at 217.

145. *Baldrige III*, 768 F.2d at 447 (Oberdorfer, J., dissenting).

146. *Id.*

147. 444 U.S. 996 (1979).

148. *Goldwater v. Carter*, 481 F. Supp. 949, 950-51 (D.D.C. 1979), *rev'd*, 617 F.2d 697 (D.C. Cir. 1979), *vacated* 444 U.S. 996 (1979); 617 F.2d at 700-01.

149. *Goldwater*, 444 U.S. at 997-98.

150. Joined by Chief Justice Burger, Justice Stewart and Justice Stevens.

ical question.<sup>151</sup>

One rationale for Justice Rehnquist's opinion in *Goldwater* was that the Constitution was silent as to the Senate's role in treaty abrogation.<sup>152</sup> *Baldrige III* is distinguishable, however, because the Pelly and Packwood-Magnuson Amendments seek to regulate foreign commerce and the Constitution expressly gives Congress the power to regulate foreign commerce.<sup>153</sup> In *Goldwater*, Justice Rehnquist specifically referred to the Congress' authority to regulate foreign commerce as one of "a variety of powerful tools for influencing foreign policy decisions that bear on treaty matters."<sup>154</sup> Thus, the majority's holding in *Baldrige III* that Congress' power to regulate foreign commerce voids a conflicting executive agreement is consistent with *Goldwater*.

Another rationale for Justice Rehnquist's finding of nonjusticiability in *Goldwater* was that the case involved foreign affairs and the deployment of military forces.<sup>155</sup> Although *Baldrige III* does involve foreign affairs, it does not involve the use or deployment of military forces. Thus, this second rationale does not render *Baldrige III* nonjusticiable.

The third rationale for Justice Rehnquist's decision in *Goldwater* was that the case involved a dispute between co-equal branches of the federal government, rather than private litigants.<sup>156</sup> Unlike *Goldwater*, however, the plaintiffs in *Baldrige III* are individuals who do not have "resources available to protect and assert [their] interests . . . ,"<sup>157</sup> other than by resorting to the judiciary. Thus, this third rationale also does not render *Baldrige III* nonjusticiable.

The Rehnquist opinion has been criticized for its unusual treatment of the political question doctrine and its implied rejection of the *Baker* analysis.<sup>158</sup> Also, no clear rule regarding the political question doctrine emerges from *Goldwater*, because there was no majority opinion. Justice Marshall concurred in the result without joining the

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151. *Id.* at 1003 (Rehnquist, J., concurring).

152. *Id.* at 1005.

153. U.S. CONST. art. I, § 8, cl. 3.

154. *Goldwater*, 444 U.S. at 1004 n.1 (quoting Wright, C.J., concurring in *Goldwater*, 617 F.2d at 715-16, quoting App. to Pet. for Cert. 44A-45A).

155. *Goldwater*, 444 U.S. at 1003-04.

156. *Id.* at 1004.

157. *Id.*

158. See, e.g., Note, *Justiciability and Foreign Affairs — The Treaty Power*, 46 Mo. L. REV. 164, 176-79 (1981). See also *Goldwater*, 444 U.S. at 998-1001 (Powell, J., concurring).

Rehnquist analysis.<sup>159</sup> Justice Powell, who concurred in the judgment because he believed the case was not ripe for adjudication, stated that if the case had been ripe, it would have been justiciable under the *Baker* test.<sup>160</sup>

Justice Powell applied the *Baker* test to *Goldwater*.<sup>161</sup> He recognized that the Constitution did not specifically state the role of the Senate in treaty termination.<sup>162</sup> Yet, judicially discoverable standards do exist to determine the issue, he stated, because resolution "only requires [the Court] to apply normal principles of interpretation of the constitutional provision at issue."<sup>163</sup> This same reasoning should apply to *Baldrige III*, even though the Constitution does not state whether a subsequent executive agreement supersedes a prior inconsistent act of Congress.

Justice Powell further concluded that prudential considerations, such as embarrassment from multiple pronouncements or an unusual need for unquestioning adherence to a political decision already made, are not present.<sup>164</sup> Justice Powell, in a hypothetical which is particularly applicable to the controversy in *Baldrige III*, asserted that:

If the President and the Congress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations. The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and Congress would require this Court to provide a resolution. . . .<sup>165</sup>

In *Baldrige III*, both Congress and the Secretary have reached irreconcilable positions. As a result, the Court should act to resolve the situation.<sup>166</sup>

After *Goldwater*, there is great confusion regarding the applica-

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159. *Goldwater*, 444 U.S. at 996.

160. *Id.* at 997-1002.

161. *Id.* AT 998-1002.

162. *Id.* at 999.

163. *Id.* (citing *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969)).

164. *Id.* at 1000.

165. *Id.* at 1001.

166. Justice Brennan, dissenting, also believed the issue was justiciable and did not involve a political question. *Id.* at 1006. Justice Brennan stated that "the issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts." *Id.* at 1007. He would affirm the decision, since the Constitution commits to the President sole authority to recognize or withdraw recognition of a foreign country. *Id.* Justice Blackmun, joined by Justice White, dissented in part, holding that the justiciability and merits of the case deserved greater consideration. *Id.* at 1006.



tion of the political question doctrine to cases involving foreign affairs. Yet, as indicated above, there are several statements in *Goldwater* which support the conclusion that a court must resolve the *Baldrige III* case, because of the irreconcilable positions of the Executive and Congress. Thus, although the majority in *Baldrige III* failed both to perform the detailed analysis required in *Baker* and to distinguish *Baldrige III* from *Goldwater*, the majority in *Baldrige III* correctly concluded that the case is justiciable.

### B. *Executive Agreements and the Separation of Powers*

In *Baldrige III*, Judge Wright determined that the Pelly and Packwood-Magnuson Amendments required the Secretary of Commerce to certify the Japanese for any IWC quota violation.<sup>167</sup> However, in the November Executive Agreement the Secretary of Commerce expressly agreed not to certify the Japanese for IWC quota violations, if certain conditions were met.<sup>168</sup> Judge Wright concluded that "the executive agreement . . . was entered into in violation of the Secretary's statutory mandate."<sup>169</sup> The court did not explicitly void the November Executive Agreement. Yet, by ordering the Secretary of Commerce to certify the Japanese, the court, in essence, rendered the November Executive Agreement void. Although not mentioned by either the majority or dissent, whether an executive agreement supersedes a prior inconsistent act of Congress is one of the great unsettled questions of constitutional law as it applies to foreign affairs.<sup>170</sup>

As part of the rationale for its order, the majority in *Baldrige III*, stated that "it is imperative to remember that the Legislative Branch, by explicit constitutional provision, has the power to regulate foreign commerce."<sup>171</sup> This statement suggests that subsequent executive agreements do not supersede prior inconsistent statutes based on Congress' explicit constitutional authority in foreign affairs. Such a conclusion involves several very basic assumptions about the separation of foreign affairs powers between Congress and the Executive. In the following sections, Supreme Court and lower court decisions will be

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167. *Baldrige III*, 768 F.2d at 444.

168. *Id.*

169. *Id.*

170. See generally L. TRIBE, *supra* note 75, § 4-4, at 170-71; Comment, *Self-Executing Executive Agreements: A Separation of Powers Problem*, 24 BUFFALO L. REV. 137, 150-51 (1974); 1 RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135 Reporter's Note 5 (Tent. Draft No. 6, 1985).

171. *Baldrige III*, 768 F.2d at 444.

analyzed regarding this issue. Special emphasis will be placed on the rationale for these decisions and their applicability to *Baldrige III*.

### 1. The separation of powers doctrine in foreign affairs

While the Constitution explicitly grants some important foreign affairs powers to Congress<sup>172</sup> and some to the President,<sup>173</sup> it fails to mention many other important foreign affairs powers.<sup>174</sup> As one author states, the Constitution is "hopelessly vague as to the allocation of the foreign affairs power among the various branches of the Federal Government."<sup>175</sup> In general the Constitution explicitly vests all legislative powers in Congress, all executive powers in the President, and all judicial powers in the Judiciary.<sup>176</sup> However, strict application of this separation of powers to matters involving foreign affairs has been questioned.<sup>177</sup> Two Supreme Court cases, *United States v. Curtiss-Wright Export Corp.*<sup>178</sup> and *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>179</sup> present both sides of this debate.

#### a. *United States v. Curtiss-Wright Export Corp.*

In *Curtiss-Wright*, Justice Sutherland rejected a strict application of the separation of powers doctrine to foreign affairs matters.<sup>180</sup> In that case, the defendant, a military weapons exporter, was indicted for conspiring to sell weapons to a foreign country in violation of a Congressional Joint Resolution and a Presidential Proclamation.<sup>181</sup> The Joint Resolution authorized the President, as he deemed necessary, to prohibit all weapons sales made in the United States to nations in the Chaco region of South America.<sup>182</sup> President Roosevelt issued a

172. See *infra* notes 220-24 and accompanying text.

173. See *infra* notes 213-16 and accompanying text.

174. L. HENKIN, *supra* note 1, at 16.

175. Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 371 (1955).

176. See U.S. CONST. arts. I, II & III.

177. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 304, 315-16 (1936); Mathews, *supra* note 175, at 373-74. Mathews argues that the purpose of the separation of powers was to prevent autocracy, which could result in the loss of individual's rights. But, because the foreign affairs power involves the interaction between nations, which rarely affects individual rights, the separation of powers doctrine should not apply. *Id.*

178. 299 U.S. 304 (1936).

179. 343 U.S. 579 (1952).

180. 299 U.S. at 315-16.

181. *Id.* at 311.

182. *Curtiss-Wright*, 299 U.S. at 311-12 (citing Joint Resolution of May 28, 1934, 48 Stat. 811).

proclamation pursuant to this Joint Resolution which the defendant subsequently violated.<sup>183</sup> The defendant claimed that the Joint Resolution was an unlawful delegation of congressional power, because it gave absolute discretion to the President.<sup>184</sup>

Justice Sutherland, speaking for the majority, held that the broad delegation of authority by Congress to the President was appropriate because "[t]he President is the sole organ of the nation in its external relations and its sole representative with foreign nations."<sup>185</sup> He favored the predominance of the Executive in foreign affairs because: (a) important, complicated and delicate decisions may be involved, (b) unity of design may be necessary, (c) extreme secrecy may be required, (d) quick resolution may be necessary, (e) the President may have superior knowledge or competence, and (f) avoidance of embarrassment to a court or the government is required.<sup>186</sup>

Many of these rationale for the rule in *Curtiss-Wright* do not apply to the facts in *Baldrige III*. Assuming that the Pelly and Packwood-Magnuson Amendments create a mandatory duty, the important, complicated and delicate decision had already been made by Congress. Also, unity of design requires that the Executive abide by the previously enacted statute. There is no evidence in *Baldrige III* that secrecy was required or that the Executive had superior knowledge or competence.<sup>187</sup> Quick resolution was not necessary because, if the statute was mandatory, the Secretary of Commerce did not have any discretion to make a quick resolution. To avoid embarrassment to Congress, the Secretary should have exercised his mandatory duty.

Justice Sutherland, in *Curtiss-Wright*, also stated that all of the inherent powers of a sovereign nation, in the exercise of foreign af-

183. *Id.* at 312-13 (citing Proclamation of May 28, 1934, 48 Stat. 1744 repealed by Proclamation of November 14, 1935, 49 Stat. 3480).

184. *Id.* at 314-15.

185. *Id.* at 319 (quoting John Marshall).

186. *Id.* at 319-21. See also THE FEDERALIST No. 75, at 450-53 (A. Hamilton) (C. Rositer ed. 1961).

187. Congress closely follows the activities of the IWC. The House Subcommittee on Human Rights and International Organizations of the House Committee on Foreign Affairs conducts hearings both before and after each IWC annual meeting. See, e.g., *Baldrige I*, 604 F. Supp. at 1402-03 (citing *Preparations for the 34th Int'l Whaling Comm'n Meeting: Hearings before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. (1982) (Congressional Research Service Report), *Review of the 33rd Int'l Whaling Comm'n Meeting: Hearings before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. (1981) and *Review of the 34th Int'l Whaling Comm'n Meeting*, 97th Cong., 2d Sess. (1982)).

fairs, are vested in the federal government.<sup>188</sup> He concluded that the origin of the foreign affairs powers of the federal government "did not depend upon the affirmative grants of the Constitution."<sup>189</sup> However, Justice Sutherland did not indicate how these inherent powers were distributed between Congress and the Executive.

As a result of the *Curtiss-Wright* decision, it has been assumed that the President has extensive inherent powers in foreign affairs that far exceed those powers enumerated under the Constitution.<sup>190</sup> Yet, the majority in *Baldrige III*, as part of the rationale for its order, relies heavily on the fact that the Constitution explicitly granted to Congress sole authority to regulate foreign commerce.<sup>191</sup> *Curtiss-Wright* suggests that the November Executive Agreement in *Baldrige III* should supersede the prior act of Congress, because of the supremacy of the Executive in foreign affairs.<sup>192</sup> The "inherent power" doctrine discussed in *Curtiss-Wright*, however, has been criticized in recent years.<sup>193</sup>

b. *Youngstown Sheet & Tube Co. v. Sawyer*

A very different view of the proper balance between Congress and the Executive was stated in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>194</sup> In *Youngstown*, several domestic steel companies sued the Secretary of Commerce for taking possession of their steel mills upon order of the President.<sup>195</sup> The President ordered the seizure of the mills to avert a steel workers strike which allegedly jeopardized national security.<sup>196</sup> The steel companies claimed that the President had usurped Congress' legislative power; the President relied on his con-

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188. *Curtiss-Wright*, 299 U.S. at 315-19.

189. *Id.* at 318.

190. See L. HENKIN, *supra* note 1, at 45. Henkin explains:

It is not apparent that either [the terms] "foreign affairs power" or "sole organ" aspires to legal precision or that they imply different measures of constitutional authority; both have come to describe a constitutional "power," supplementing if not subsuming those specified, supporting a variety of Presidential actions not expressly authorized by the Constitution.

*Id.*

191. See *supra* note 171.

192. But see *Youngstown*, 343 U.S. at 636 n.2.

193. See Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Re-assessment*, 83 YALE L.J. 1, 32 (1973). "*Curtiss-Wright* does not support the existence of an extra-constitutional base for federal authority, [or] broad independent executive authority . . . ." *Id.*

194. 343 U.S. 579 (1952).

195. *Id.* at 582.

196. *Id.* at 582-83.

stitutional powers as Chief Executive and Commander in Chief as authority for his action.<sup>197</sup> Justice Black found for the steel companies, stating that “[i]n the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”<sup>198</sup> This statement conflicts sharply with the “inherent power theory” of Justice Sutherland in *Curtiss-Wright*. Thus, in *Baldrige III*, Justice Black would probably conclude that by entering into the November Executive Agreement contrary to the acts of Congress, the Secretary’s action was unconstitutional lawmaking.

Justice Jackson, concurring in *Youngstown*, took a position between the two extremes of Justice Sutherland in *Curtiss-Wright* and Justice Black in *Youngstown*. He stated that:

When 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. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be *scrutinized with caution*, for what is at stake is the equilibrium established by our constitutional system.<sup>199</sup>

In this passage, Justice Jackson seems to suggest that an executive agreement may supersede a prior inconsistent statute if “scrutinized with caution.”<sup>200</sup> Yet, he fails to indicate what must be scrutinized when making such a determination. By stating that the President’s power is “at its lowest ebb,”<sup>201</sup> rather than nonexistent, Justice Jackson seems to indicate that some executive agreements do supersede prior inconsistent acts of Congress.

197. *Id.* at 582.

198. *Id.* at 587.

199. *Id.* at 637-38 (Jackson, J., concurring) (emphasis added). Justice Jackson, commenting on the power of the President to exercise his inherent power in emergencies, stated:

[The forefathers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that emergency powers would tend to kindle emergencies. . . . I do not think we rightfully may so amend their work . . . .

*Id.* at 650. *But see* Mathews, *supra* note 175, at 375.

200. 343 U.S. at 637-38.

201. *Id.* at 637.

Although *Youngstown* is sometimes referred to as a domestic affairs case which has little application to foreign affairs,<sup>202</sup> this passage of Justice Jackson's opinion seems directly applicable to the facts in *Baldrige III*. In *Baldrige III*, the executive agreement was found to be incompatible with the court's interpretation of the Pelly and Packwood-Magnuson Amendments.<sup>203</sup> Justice Jackson correctly points out that much of the Court's opinion in *Curtiss-Wright* is dictum.<sup>204</sup> He also states that "[i]t was intimated [in *Curtiss-Wright*] that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress."<sup>205</sup> Thus, in *Baldrige III*, Justice Jackson would probably conclude, assuming the acts of Congress created a mandatory duty on the Secretary, that the executive agreement was void.

## 2. The constitutional authority for executive agreements

An executive agreement is an international agreement between the United States and a foreign nation which was entered into by means other than the treaty power.<sup>206</sup> Executive agreements are often classified into three groups—those entered into pursuant to a treaty, those entered into pursuant to an act of Congress (also referred to as congressional-executive agreements), and those entered into pursuant to the constitutional authority of the President (also referred to as sole executive agreements).<sup>207</sup> Executive agreements entered into pursuant to a treaty and those entered into pursuant to an act of Congress are considered "the Supreme Law of the Land" by the supremacy clause.<sup>208</sup> Accordingly, these executive agreements supersede prior

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202. It is often claimed that *Youngstown* only applies to domestic affairs, since the seizure of the steel plants occurred in the United States. See L. HENKIN, *supra* note 1, at 96. Yet, the President claimed in *Youngstown* that his action was justified by his express constitutional powers in foreign affairs. *Youngstown*, 343 U.S. at 582.

203. *Baldrige III*, 768 F.2d at 444.

204. *Youngstown*, 343 U.S. at 636 n.2.

205. *Id.*

206. See State Department Procedures on Treaties and Other International Agreements, partial text of Circular 175 (Oct. 25, 1974), 11 F.A.M. 700, 721.2(b) (Foreign Affairs Manual), reprinted in HOUSE COMM. ON FOREIGN AFFAIRS AND SENATE COMM. ON FOREIGN RELATIONS, 3 LEGISLATION ON FOREIGN RELATIONS THROUGH 1980 92-93 (Joint Comm. Print 1981) [hereinafter cited as Circular 175]. See U.S. CONST. art. II, § 2, cl. 1. "[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur . . ." *Id.*

207. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 206-07 (2d ed. 1983).

208. U.S. CONST. art. VI, cl. 2. See generally L. TRIBE, *supra* note 75, § 4-4 at 167-68; Note, *Superseding Statutory Law By Sole Executive Agreement: An Analysis of the American*

inconsistent acts of Congress.<sup>209</sup> Sole executive agreements, however, do not have the same status. The November Executive Agreement in *Baldrige III* was a sole executive agreement.<sup>210</sup> It is estimated that sole executive agreements constitute less than three percent of all executive agreements signed.<sup>211</sup>

Although the Constitution does not expressly grant to the President authority to enter into sole executive agreements, a sole executive agreement is considered valid if it was entered into pursuant to one of the express constitutional powers of the President in foreign affairs.<sup>212</sup> These powers include the power to act as Commander in Chief of the armed forces,<sup>213</sup> to receive ambassadors,<sup>214</sup> to represent the nation as the Chief Executive,<sup>215</sup> and to take care that the laws of the United States are faithfully executed.<sup>216</sup> Yet, as seen in *Curtiss-Wright*, the powers of the President are considered to be quite broad.<sup>217</sup> As Professor Henkin correctly points out, no executive agreement has ever been held to be invalid for a lack of authority.<sup>218</sup> Another commentator has written that "[t]he outer limits of the President's independent power to make agreements have never been clear."<sup>219</sup>

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*Law Institute's Shift in Position*, 23 VA. J. INT'L L. 671, 673 (1983). RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 143 (1965).

209. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 142-43 (1965).

210. See Summary of Discussions, *supra* note 41.

211. Stevenson, *supra* note 1, at 840. Of this three percent, even fewer actually conflict with prior acts of Congress. Thus, even if the Supreme Court affirms the court of appeals decision, there will be little significant effect on existing executive agreements.

212. See Circular 175, *supra* note 206, at § 721.2(b)(3). "The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority." *Id.* (emphasis added).

213. U.S. CONST. art. II, § 2, cl. 1.

214. U.S. CONST. art. II, § 3.

215. U.S. CONST. art. II, § 1.

216. U.S. CONST. art. II, § 3.

217. *Curtiss-Wright*, 299 U.S. at 319-21.

218. L. HENKIN, *supra* note 1, at 179.

219. Mathews, *supra* note 175, at 370-71. See also, P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 409 (1975):

[T]he Constitution does not explicitly indicate how authority over foreign affairs is allocated within the national government, and the history surrounding the adoption of the Constitution is also largely silent. For these reasons, and because so few of the issues have been submitted to adjudication, the present scheme is largely the product of assertion, acquiescence, and inertia, rather than of principled constitutional decisionmaking. The boundaries of inherent executive authority in the silence of Congress remain obscure, as does the extent of Congress' constitutional powers to constrain the executive's conduct of foreign relations.

However, Congress is also expressly granted constitutional powers in foreign affairs. Under Article I, Congress has the power to "regulate commerce with foreign Nations,"<sup>220</sup> to tax and spend "for the common Defence and general Welfare of the United States,"<sup>221</sup> to "declare War,"<sup>222</sup> to "raise and support Armies,"<sup>223</sup> and to "provide and maintain a Navy."<sup>224</sup> Further, a subsequent act of Congress voids a prior inconsistent executive agreement.<sup>225</sup> Henkin suggests that an executive agreement should supersede a prior inconsistent act of Congress, because if Congress does not approve of the executive agreement it may enact a subsequent statute that voids that agreement.<sup>226</sup> Although no Supreme Court cases have held that an executive agreement supersedes a prior act of Congress, there are some lower court decisions that suggest the contrary.<sup>227</sup>

### 3. Lower court decisions

The majority in *Baldrige III*, in effect, concluded that the November Executive Agreement did not supersede the Secretary of Commerce's statutory mandate to certify the Japanese for IWC quota violations.<sup>228</sup> Neither the majority nor the dissent, however, discussed or distinguished the few lower court cases which discuss this issue. In the following sections, these cases will be reviewed to determine the rationales supporting the decisions.

#### a. *United States v. Guy W. Capps, Inc.*

In *United States v. Guy W. Capps, Inc.*,<sup>229</sup> the United States sued a U. S. potato importer for damages arising out of an alleged breach

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*Id.*

220. U.S. CONST. art. I, § 8, cl. 3. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979). In *Gibbons v. Ogden*, Justice Marshall stated that:

[i]f, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.

*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

221. U.S. CONST. art. I, § 8, cl. 1.

222. U.S. CONST. art. I, § 8, cl. 11.

223. U.S. CONST. art. I, § 8, cl. 12.

224. U.S. CONST. art. I, § 8, cl. 13.

225. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (The Chinese Exclusion Case).

226. L. HENKIN, *supra* note 1, at 186.

227. See *infra* notes 229-315 and accompanying text.

228. *Baldrige III*, 768 F.2d at 444.

229. 204 F.2d 655 (4th Cir. 1953) *aff'd on other grounds*, 348 U.S. 296 (1955).



of a Canadian seed potato import contract. In a 1948 executive agreement between the United States and Canada,<sup>230</sup> Canada agreed to limit potato exports to the United States to potatoes that would be resold for seed purposes only; no potatoes would be exported to the United States that would be resold for table stock.<sup>231</sup> In turn, the Executive agreed not to place any quantity limitations or fees on Canadian potatoes.<sup>232</sup> According to the executive agreement, all Canadian potato export contracts had to have a clause in which the importer asserted that the potatoes would only be sold for seed purposes.<sup>233</sup> The U.S. potato importer entered into a contract to import Canadian seed potatoes, giving assurances to U.S. officials and to the Canadian exporter that the potatoes would only be used for seed purposes.<sup>234</sup> The importer then sold the potatoes to a retail grocery chain.<sup>235</sup>

Prior to the 1948 Executive Agreement between the United States and Canada, Congress passed the Agricultural Act of 1948.<sup>236</sup> Under this statute, the United States established a price support program for both table stock and seed potatoes.<sup>237</sup> However, since excessive imports could frustrate the purpose for the price supports, the Act also established a procedure to be used by the President to determine if import limitations should be imposed.<sup>238</sup> If the President suspected that imports were "rendering ineffective" the price support

230. *United States v. Guy W. Capps, Inc.*, 348 U.S. 296, 305-09 (1955) (app. to opinion). The appendix to the Supreme Court opinion contains the full text of the exchange of correspondence which established the 1948 executive agreement [hereinafter cited as 1948 Executive Agreement].

231. 348 U.S. at 306.

232. *Id.* at 307.

233. *Id.* at 306.

234. *Id.*

235. 204 F.2d at 657.

236. Agricultural Act of 1948, Pub. L. No. 80-897, 62 Stat. 1247-50.

237. *Id.* at 1248. The United States was obligated to purchase from eligible growers all Irish potatoes at 90 percent of their parity price if they could not be sold commercially. *Id.* In 1948, the United States and Canada produced one of the largest crops of Irish potatoes on record. *Capps*, 296 U.S. at 297.

238. Agricultural Act of 1948, Pub. L. No. 80-897, 62 Stat. 1247-48. The Act states that:

(a) Whenever the President has reason to believe that any article or articles are being . . . imported into the United States . . . [so] as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under this title . . . he shall cause an immediate investigation to be made . . . (b) If, on the basis of such investigation and report to him . . . the President finds the existence of such facts, he shall by proclamation impose such . . . quantitative limitations on any article or articles [as necessary so as not to render the program ineffective] *Provided*, That no proclamation . . . shall impose any limitation . . . which reduces such permissible total quantity to proportionately less than 50 per centum of the total quan-

system, he was required to order an investigation into the matter.<sup>239</sup> Based on the findings of this investigation, the President could impose import limitations as he deemed necessary, but in no event could the import limitation exceed fifty percent.<sup>240</sup>

Prior to entering into the executive agreement with Canada, the President did not request an investigation, review any findings or decide if import limitations were necessary.<sup>241</sup> Yet, by signing the 1948 Executive Agreement with Canada, the President indicated that he considered imports to be a problem. Chief Judge Parker of the Fourth Circuit held that:

Since the purpose of the agreement as well as its effect was to bar imports which would interfere with the [Agricultural Act of 1948], it was necessary that the provisions of this statute be complied with and an executive agreement excluding such imports which failed to comply with [the Agricultural Act of 1948] was void.<sup>242</sup>

The court rejected claims by the United States that the Constitution granted either express or implied powers to the Executive Branch which authorized the executive agreement.<sup>243</sup> Chief Judge Parker relied heavily on the fact that: (a) the Constitution vested sole authority in Congress to regulate foreign commerce<sup>244</sup> and (b) the Executive is constitutionally required to faithfully execute the laws, including acts of Congress which regulate foreign commerce.<sup>245</sup> Combining these two provisions, Chief Judge Parker held that “[w]hatever the power of the executive was with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such

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tity of such article or articles which was entered . . . during a representative period as determined by the President . . . .

*Id.* at 1249.

239. *Id.*

240. *Id.*

241. *Capps*, 204 F.2d at 658-59.

242. *Id.* at 659.

243. *Id.*

244. *Id.* Chief Judge Parker stated that: “the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress.” *Id.* See U.S. CONST. art. I, § 8, cl. 3. “[The Congress shall have power] [t]o regulate Commerce with foreign nations. . . .” *Id.*

245. 204 F.2d at 659 (“The duty of the President to see that the laws be executed is a *duty* that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”) (quoting *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) (emphasis added)). See U.S. CONST. art. II, § 3. “[The President] shall take Care that the Laws be faithfully executed . . . .” *Id.*

an agreement avoid complying with a regulation prescribed by Congress."<sup>246</sup>

There is much confusion, however, regarding the validity of the Fourth Circuit decision in light of the subsequent Supreme Court decision which affirmed on other grounds.<sup>247</sup> The Supreme Court held that there was insufficient evidence to conclude that the defendant breached the contract.<sup>248</sup> Therefore, the Court never discussed the Fourth Circuit's analysis of the Executive's power to enter into executive agreements contrary to prior acts of Congress.<sup>249</sup>

Nevertheless, the *Capps* case provides some insight into the issue of whether an executive agreement supersedes a prior inconsistent statute. Some courts have concluded that, according to *Capps*, any executive agreement which conflicts with a prior act of Congress is void.<sup>250</sup> This is consistent with the court's rationale that the Executive is required to faithfully execute the laws of the United States.<sup>251</sup> Yet, Chief Judge Parker also relied heavily upon the fact that only Congress is granted authority to regulate foreign trade,<sup>252</sup> suggesting

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246. 204 F.2d 659-60. In other places, Chief Judge Parker suggests that the President has no power to regulate foreign commerce, even if not contrary to an act of Congress (e.g., Imports from a foreign country are . . . subject to regulation by Congress only. *Id.* at 660.) Such statements have been correctly criticized. See, e.g., L. HENKIN, *supra* note 1, at 180-81. Numerous examples exist of Presidential action relating to foreign trade absent conflicting acts of Congress. See *id.* at 181, 429 n.29. Henkin, however, also criticizes the more limited holding of *Capps* that an executive agreement is void in light of a prior act of Congress. *Id.* at 186.

247. Compare, L. TRIBE, *supra* note 75, at 171 ("At a minimum, it seems clear that an executive agreement, unlike a treaty, cannot override a prior act of Congress.") (footnote omitted) with C. PRITCHETT, *THE AMERICAN CONSTITUTION* 260 and n.8 (3d ed. 1977) ("The Supreme Court has not determined whether an executive agreement will supersede an earlier act of Congress with which it is in disagreement.") and J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 207, at 211 ("[An] executive agreement is . . . the supreme law of the land . . . and probably prevails over earlier Congressional enactments if the President is, in fact, entering into an agreement pursuant to his presidential authority in the field of foreign relations.").

248. 348 U.S. 296, 297 (1955). Because the retail grocery distributor to whom the defendant sold the potatoes sold both table stock and seed potatoes and because the defendant had sold seed potatoes to the distributor previously, there was insufficient evidence to conclude that the defendant had breached the contract. In essence the Supreme Court affirmed the district court's decision. The district court denied the defendant's motion to dismiss for failure to state a claim. *United States v. Guy W. Capps, Inc.*, 100 F. Supp. 30 (E.D. Va. 1951). However, after argument was heard, the district court directed a verdict for defendant. The opinion was not published, but is reproduced, in part, at 348 U.S. 300-01. The Fourth Circuit Court of Appeals "[had] little difficulty in seeing in the evidence breach of contract on the part of defendant . . ." 204 F.2d at 658.

249. *Id.*

250. See, e.g., *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983).

251. *Capps*, 204 F.2d at 659.

252. *Id.*

that only executive agreements attempting to regulate areas specifically allocated to Congress by the Constitution are void.<sup>253</sup>

Thus, under this more narrow interpretation, a court must determine whether the area regulated by the executive agreement has been specifically allocated to Congress by the Constitution. The narrower interpretation, however, does not address whether executive agreements which attempt to regulate areas not specifically allocated by the Constitution to Congress or the Executive and which conflict with prior acts of Congress are valid.<sup>254</sup> In *Baldrige III*, it is undisputed that the act of Congress falls under Congress' authority to regulate foreign commerce.<sup>255</sup> Also, the November Executive Agreement was not closely tied to any of the express constitutional powers of the President.<sup>256</sup>

The *Capps* rationale is especially convincing when applied to *Baldrige III*, because the facts of the two cases and the wording of the statutes are so similar. The purpose of both the Agricultural Act of 1948 in *Capps* and the Pelly and Packwood-Magnuson Amendments in *Baldrige III* was to delegate to the Executive some discretion, but with some limitations on that delegation. Also, both of these statutes involved Congress' exclusive authority to regulate foreign commerce.

#### b. *Seery* and *Swearingen*

Besides *Capps*, two other lower court cases, *Seery v. United States*<sup>257</sup> and *Swearingen v. United States*,<sup>258</sup> seem to suggest that an executive agreement does not supersede a prior inconsistent act of Congress. In *Seery*, a United States citizen sued the United States for damages to her home in Austria which had been used by the United States Army after World War II.<sup>259</sup> Because an executive agreement between the United States and Austria had settled all damage claims against the United States as to all Austrian property owners for the time period in question,<sup>260</sup> the United States claimed that the plaintiff could not recover.<sup>261</sup> The district court held that because the use of

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253. See, e.g., *Security Pacific National Bank v. Government and State of Iran*, 513 F. Supp. 864, 872-73 (C.D. Cal. 1981).

254. See P. BREST, *supra* note 219.

255. See *supra* note 220.

256. See *supra* notes 213-16 and accompanying text.

257. 127 F. Supp. 601 (Ct. Cl. 1955).

258. 565 F. Supp. 1019 (D. Colo. 1983).

259. *Seery*, 127 F. Supp. at 602-03.

260. *Id.* at 606.

261. *Id.*

executive agreements is not mentioned in the Constitution, an executive agreement cannot impair an individual's constitutional rights.<sup>262</sup> Moreover, the court noted that Congress, by statute,<sup>263</sup> had specifically consented to suits for damage claims and had conferred jurisdiction on the courts to adjudicate such claims.<sup>264</sup> Judge Madden stated:

It would be indeed incongruous if the Executive Department alone, without even the limited participation by Congress which is present when a treaty is ratified, could not only nullify the Act of Congress consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the Constitutional right of a citizen.<sup>265</sup>

Thus, although executive agreements are usually valid instruments of international affairs, the court in *Seery* suggested that when a sole executive agreement conflicts with an act of Congress, some limited participation by Congress is required. This is partly because executive agreements are not expressly referred to in the Constitution.

Recall that in *Capps*, the court concluded that an executive agreement does not supersede a prior statute, because the Executive is required to faithfully execute the laws of the United States, and because the Constitution had expressly granted Congress the authority to regulate foreign commerce.<sup>266</sup> Yet, *Seery* suggests that an executive agreement does not supersede a prior inconsistent act of Congress because it would be incongruous with the treaty ratification procedure.<sup>267</sup> This rationale has been supported by some commentators.<sup>268</sup> For example, Professor Tribe states "[t]hat the power to conclude executive agreements coincides perfectly with the treaty power seems untenable, since such a conclusion would emasculate the Senatorial check on executive discretion that the Framers so carefully embodied in the Constitution."<sup>269</sup>

Yet, according to this "avoidance of the treaty power" rationale

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262. *Id.*

263. The court does not specify the statute in which the United States consents to be sued and confers jurisdiction on the courts to adjudicate such claims.

264. *Id.* at 607.

265. *Id.*

266. See *supra* notes 251-52 and 258-60 and accompanying text.

267. *Seery*, 127 F. Supp. at 607.

268. See, e.g., Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619, 626; Berger, *supra* note 4, at 49 ("We begin, therefore, with an unambiguous constitutional requirement that treaties—meaning all international agreements—are to be the *joint* function of President and Senate." (emphasis in original)).

269. L. TRIBE, *supra* note 75, § 4-4, at 171 (footnote omitted).

all sole executive agreements are invalid, because, by definition, a sole executive agreement is signed pursuant to only the constitutional authority of the Executive. Sole executive agreements that do not conflict with acts of Congress have never been held unconstitutional.<sup>270</sup> Some authors even suggest that a sole executive agreement is impliedly accepted if Congress does not act.<sup>271</sup> It is only when those sole executive agreements conflict with a prior act of Congress that they have been questioned. Therefore, the "avoidance of the treaty power" rationale alone seems insufficient to justify voiding a sole executive agreement if there is a prior inconsistent act of Congress.

Also, the statute in *Seery* is very different from the statutes in *Capps* and *Baldrige*. The statute in *Seery* was a jurisdictional statute that did not relate to Congress' role in foreign affairs.<sup>272</sup> Congress' authority to consent to suit for damage claims in United States courts is not a function of its role in foreign affairs, but instead, is solely related to Congress' authority in domestic affairs.<sup>273</sup> As *Curtiss-Wright* and subsequent cases have held, there is a difference between the separation of powers issue as it pertains to domestic affairs and as it pertains to foreign affairs.<sup>274</sup> Thus, a more limited interpretation of *Seery* might be that a sole executive agreement is void if it is in direct conflict with a prior act of Congress based on domestic affairs. Both *Capps* and *Baldrige*, are distinguishable from *Seery*, in that they both involve statutes that relate to Congress' foreign affairs powers.

Another case which seems to suggest that a sole executive agreement is void which conflicts with a prior inconsistent act of Congress is *Swearingen v. United States*.<sup>275</sup> In *Swearingen*, a Panama Canal

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270. See L. HENKIN, *supra* note 1, at 179.

271. *Id.* at 176; *United States v. Belmont*, 301 U.S. 324 (1937); Mathews, *supra* note 175, at 370. Article I, section 10, clause 1 of the Constitution states that "[n]o State shall enter into any Treaty, Alliance, or Confederation . . . ." It is suggested by Henkin and others, that because this clause indicates that the Founders conceived of agreements with other nations other than treaties and because the Constitution does not expressly forbid the executive from entering into agreements other than treaties, that executive agreements are therefore valid. L. HENKIN, *supra* note 1, at 173.

272. *Seery*, 127 F. Supp. at 607.

273. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

274. See *supra* notes 177-89 and accompanying text. The dissent in *Baldrige III* stated that "if this statute involved domestic affairs, I might be able to endorse a decision based on this secondary evidence of congressional intent." 768 F.2d at 448.

275. 565 F. Supp. 1019 (D. Colo. 1983).

Commission<sup>276</sup> employee sought to recover taxes which he alleged were erroneously assessed against him by the United States.<sup>277</sup> The plaintiff claimed exemption from United States federal income tax pursuant to an executive agreement with Panama exempting all taxes on income received while an employee of the Commission.<sup>278</sup> Internal Revenue Code § 61(a), however, required the employee to declare his earnings as income.<sup>279</sup> The district court held that the executive agreement could not exempt the employee from declaring this income if contrary to the Internal Revenue Code.<sup>280</sup> As its rationale, the court decided that while a treaty is the supreme law of the land, an executive agreement should not be so treated, because it "require[s] no Senate ratification and [is] not directly authorized by or described in the Constitution."<sup>281</sup> This statement is consistent with the reasoning used in *Seery*,<sup>282</sup> which alone was found to be insufficient to support the finding that a sole executive agreement is void as to a prior inconsistent statute.<sup>283</sup>

A related issue in *Swearingen* was whether the executive agreement was so closely related to the Panama Canal Treaty that it should be considered equivalent to a treaty.<sup>284</sup> In dicta, the court stated that even a treaty which created a tax exemption contrary to the Internal Revenue Code would contravene the exclusive constitutional authority of the House of Representatives to originate all bills to raise revenue and, therefore, would be void.<sup>285</sup> This is because, the court pointed out, the House of Representatives has no role in the treaty making process; only the Senate and the Executive are involved.<sup>286</sup> Similarly, a sole executive agreement, which contravenes authority granted exclusively to Congress, would be void. This is consistent

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276. The Panama Canal Commission was an agency of the United States government. *Id.* at 1020.

277. *Id.*

278. *Id.* (citing the Implementation Agreement of the Panama Canal Treaty). Article XV, para. 2 of the Agreement states that, "United States citizen employees and dependents shall be exempt from any taxes . . . on income received as a result of their work for the Commission." *Id.*

279. *Id.* at 1021.

280. *Id.* at 1021-22.

281. *Id.* at 1021.

282. *See supra* note 265 and accompanying text.

283. *See supra* notes 270-71 and accompanying text.

284. *Swearingen*, 565 F. Supp. at 1021-22.

285. *Id.* at 1022. *See*, U.S. CONST. art. I, § 7, cl. 1.

286. *See* U.S. CONST. ART. II, § 2, cl. 2.

with the narrow interpretation of *Capps*.<sup>287</sup>

The statute in *Swearingen* is significantly different from the statutes in *Capps* and *Baldrige*. While the statute in *Swearingen* applied to income earned in a foreign country, it only taxed United States citizens. Thus, the statute in *Swearingen* has purely domestic consequences. The court did not alter the relationship of the United States to Panama by voiding this provision of the executive agreement. In this way, the statute is similar to the statute in *Seery*.<sup>288</sup> However, the statutes in *Seery* and in *Swearingen* are distinguishable from the statutes in *Capps* and *Baldrige*. Both the Agriculture Act of 1948 and the Pelly and Packwood-Magnuson Amendments were clearly intended to significantly affect foreign affairs.<sup>289</sup> Both statutes were passed pursuant to Congress' constitutional authority in foreign affairs.<sup>290</sup> This distinction assumes that the concept of separation of powers is different in foreign affairs than in domestic affairs, as stated in *Curtiss-Wright*.<sup>291</sup> Thus, although the language and the rationale of the court in both *Seery* and *Swearingen* support the conclusion that an executive agreement does not supersede a prior inconsistent act of Congress, both cases are distinguishable from *Capps* and *Baldrige* based on the nature of the statutes involved.

### c. *Ozanic* and *Consumer's Union*

A few statements in *Ozanic v. United States*<sup>292</sup> seem to suggest that a sole executive agreement may supersede a prior inconsistent act of Congress. In *Ozanic*, an accident between a United States ship and a Yugoslavian ship during World War II prompted a damage claim by a British corporation which had been assigned all rights to pursue the action by the Yugoslavian government.<sup>293</sup> The assignee claimed the right to intervene pursuant to the Public Vessels Act,<sup>294</sup> in which the United States consented to be sued.<sup>295</sup> However, in 1948, the Secretary of State signed an executive agreement with Yugoslavia settling

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287. See *supra* notes 244 & 252-53 and accompanying text.

288. See *supra* note 272 and accompanying text.

289. See *supra* notes 20-22, 27-31 & 236-40 and accompanying text.

290. See *supra* notes 63 & 244 and accompanying text.

291. See *supra* notes 177-89 and accompanying text. The dissent in *Baldrige III* stated that "if this statute involved domestic affairs, I might be able to endorse a decision based on this secondary evidence of congressional intent." 768 F.2d at 448.

292. 188 F.2d 228 (2d Cir. 1951) (Hand, C.J.).

293. *Ozanic*, 188 F.2d at 229.

294. *Id.*

295. *Id.*



the United States' land-lease benefits claims against Yugoslavia in exchange for releases from several Yugoslavian maritime claims against the United States during World War II.<sup>296</sup> This executive agreement was signed under authority of the Lend-Lease Act of March 11, 1941.<sup>297</sup>

The district court held that the executive agreement prevented the British assignee from intervening.<sup>298</sup> On appeal, Judge Learned Hand affirmed, holding that the power of the Executive to settle mutual claims between the United States and a foreign nation was integrally related to the President's sole constitutional authority to recognize foreign nations.<sup>299</sup> The court relied on the need for "continued mutual amity between the nation and other powers . . ."<sup>300</sup> The court stated

these considerations alone would go far to persuade us that, even though the agreement of 1948 stood only upon the constitutional power of the President to come to an accommodation with a foreign government upon mutual claims between the two nations, it would suffice to withdraw the consent to be sued [under the Public Vessels Act] . . . .<sup>301</sup>

This statement is dicta, however, in light of the subsequent finding of the court that the Agreement of 1948 was a joint congressional-executive agreement under the Lend-Lease Act of 1941.<sup>302</sup>

Nevertheless, as the dicta in *Ozanic* suggests, a relevant consideration when determining whether a sole executive agreement should supersede a prior inconsistent act of Congress, is whether the executive agreement has been signed pursuant to one of the sole powers granted to the President under the Constitution.<sup>303</sup> This is the converse of the rule in *Capps*, which considered important whether or not the act of Congress was entered into pursuant to authority granted

296. *Id.*

297. *Id.*

298. 83 F. Supp. 4 (S.D.N.Y. 1949).

299. *Ozanic*, 188 F.2d at 231 (referring to *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Pink*, 315 U.S. 203, 229-30, 240-41 (1942)). See also U.S. CONST. art. II, § 3 ("[The President] shall receive Ambassadors and other public Ministers . . .").

300. *Ozanic*, 188 F.2d at 231.

301. *Id.* I suggest that the word "though" is an error, and should be replaced with either "if" or "had" to remove the confusion regarding this passage. These changes are consistent with the remainder of the quotation which suggests an hypothetical situation. See Note, *supra* note 208, at 687-88.

302. *Ozanic*, 188 F.2d at 232. See Note, *supra* note 208, at 687-88.

303. See *supra* note 301 and accompanying text.

solely to Congress by the Constitution.<sup>304</sup> Thus, combining these two tests, a court should consider both: whether the executive agreement was entered into pursuant to constitutional authority granted solely to the Executive; and, whether the act of Congress was enacted pursuant to constitutional authority granted solely to Congress.

A few statements in *Consumers Union of U. S., Inc. v. Rogers*<sup>305</sup> seem to suggest that a sole executive agreement does not supersede a prior inconsistent act of Congress. In *Consumers Union*, a domestic steel consumers organization sued the Secretary of State and other State Department officials, claiming that voluntary steel import restraint arrangements negotiated by the defendants were not only entered into without constitutional authority, but were also contrary to the Sherman Act and the Trade Expansion Act of 1962.<sup>306</sup> Under the Voluntary Restraint Arrangements, which the President had encouraged, foreign steel producers volunteered to reduce steel imports into the United States.<sup>307</sup> The district court held that the Sherman Act and the Trade Expansion Act of 1962 did not preempt the President or other members of the Executive Branch from negotiating these agreements with foreign producers.<sup>308</sup> Thus, the court concluded that there was no direct conflict between what the statutes required and what the President had done. The court stated that "the Executive is not preempted and may enter into agreements or diplomatic arrangements with private foreign steel concerns so long as these undertakings do not violate legislation regulating foreign commerce . . . ." <sup>309</sup>

Yet, in the voluntary restraint arrangements, the President gave binding assurances that these arrangements were legal and did not violate the Sherman Act or the Trade Expansion Act of 1962.<sup>310</sup> The district court stated that "the Executive has no authority under the Constitution or acts of Congress to exempt the Voluntary Restraint Arrangements on Steel from the antitrust laws and that such arrangements are not exempt."<sup>311</sup> On appeal, Judge McGowan, for the ma-

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304. See *supra* notes 244 & 252-53 and accompanying text.

305. *Consumers Union of U.S., Inc. v. Rogers*, 352 F. Supp. 1319 (D.D.C. 1973), *aff'd and partially vacated sub nom.*, *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974).

306. *Rogers*, 352 F. Supp. at 1321-22.

307. *Id.* at 1321.

308. *Id.* at 1323.

309. *Id.*

310. *Kissinger*, 506 F.2d at 139.

311. *Rogers*, 352 F. Supp. at 1323.

majority affirmed the district court's decision, but vacated the part of the opinion stating that the Executive did not have constitutional or statutory authority to exempt the foreign steel producers from the anti-trust laws.<sup>312</sup> Judge McGowan vacated this section of the district court's opinion, because the issue was not before the district court.<sup>313</sup>

While the holding of the district court was based on the belief that the statutes did not preempt the Executive from acting as it did, the majority in the court of appeals held that the Voluntary Restraint Arrangements did not create binding agreements between the United States and the private steel companies.<sup>314</sup> Thus, there was no binding executive agreement to conflict with a congressional statute. In *Baldrige III*, however, the November Executive Agreement was intended to be a binding agreement and was, based on the holding of the majority in the court of appeals, in direct conflict with the mandate of the Pelly and Packwood-Magnuson Amendments.<sup>315</sup> Therefore, the court of appeals decision is not in conflict with the holding of the majority in *Baldrige III*.

### C. A Seven-Step Analysis

The above discussion of Supreme Court and lower court decisions suggests a seven-step analysis to determine whether a sole executive agreement which conflicts with a prior act of Congress is valid. First, if the executive agreement is not a sole executive agreement, but rather a congressional-executive agreement or an executive agreement entered into pursuant to a treaty, then it supersedes a prior act of Congress.<sup>316</sup> Second, if the nations signing the executive agreement did not intend to create a binding relationship, then there is no executive agreement which must be voided.<sup>317</sup> Third, if the disputed terms of the sole executive agreement can be voided without altering the relationship of the United States and the other nation or nations involved, then those terms should be voided.<sup>318</sup> Fourth, if an individual's constitutional rights are jeopardized by the sole executive

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312. *Kissinger*, 506 F.2d at 140-41.

313. *Id.*

314. *Id.* at 143. Justice Leventhal, dissenting, believed that binding agreements were created and that the executive was preempted by the Sherman Act and the Trade Expansion Act of 1962. *Id.* at 146-65.

315. *See supra* note 168 and accompanying text.

316. *See supra* notes 208-09 & 302 and accompanying text.

317. *See supra* note 314 and accompanying text.

318. *See supra* notes 275-291 and accompanying text.

agreement, it is very likely that the executive agreement will be voided.<sup>319</sup> Fifth, if the act of Congress is based on a constitutional power granted solely to Congress, then it is more likely that the sole executive agreement will be struck down.<sup>320</sup> Sixth, if the sole executive agreement is entered in to pursuant to a constitutional power granted expressly to the President, then it is more likely that the executive agreement will be preserved.<sup>321</sup> Seventh, the sole executive agreement should be held valid if any or all of the following predominate: (a) important, complicated and delicate decisions are involved; (b) unity of design is necessary; (c) extreme secrecy is required; (d) quick resolution is necessary; (e) the President has superior knowledge or competency; or (f) avoidance of embarrassment to a court or the government is required.<sup>322</sup>

In *Baldrige III*, the executive agreement is a sole executive agreement in which both Japan and the Secretary of Commerce intended to create a binding relationship.<sup>323</sup> The third step does not apply to *Baldrige III*, because voiding the November Executive Agreement would affect the relationship of the United States with Japan. Because *Baldrige III* does not involve the deprivation of an individual's constitutional rights, the fourth prong is not dispositive. The fifth prong of the analysis applies to *Baldrige III*, because the Pelly and Packwood-Magnuson Amendments were based on Congress' sole constitutional authority to regulate foreign commerce.<sup>324</sup> The sixth prong does not apply to *Baldrige III*, because the November Executive Agreement is not based on a constitutional power granted solely to the President, but seems to be based on the Executive's inherent powers in foreign affairs.<sup>325</sup> As discussed above, none of the factors of the seventh prong apply to the situation in *Baldrige III*.<sup>326</sup> Therefore, because the sole executive agreement was not entered into pursuant to sole constitutional grants of authority to the President, because none of the factors mentioned in *Curtiss-Wright* apply to *Baldrige III*, and because the acts of Congress are based on Congress' sole constitutional grant

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319. See *supra* note 262 and accompanying text.

320. See *supra* note 244 and accompanying text.

321. See *supra* note 309 and accompanying text.

322. See *supra* note 186 and accompanying text.

323. See *supra* notes 41 & 168 and accompanying text.

324. See *supra* note 63 and accompanying text.

325. A much more difficult case would be where the act of Congress is based on authority granted solely to Congress by the Constitution and the sole executive agreement is based on authority granted solely to the President by the Constitution.

326. See *supra* note 187 and accompanying text.

of authority to regulate foreign commerce, it was appropriate for the court of appeals to have abrogated the November Executive Agreement.

#### V. CONCLUSION

The focus of this analysis of the *Baldrige III* decision has been on the justiciability and separation of powers issues inherent in the majority's finding that a sole executive agreement contravened a prior inconsistent act of Congress. This note has suggested that there exist troublesome standing and political question doctrine issues, but that these issues do not render *Baldrige III* nonjusticiable. This note has also suggested a seven-step analysis for determining whether a sole executive agreement which conflicts with a prior act of Congress should be held invalid. Application of this analysis to the facts of *Baldrige III* leads to the conclusion that the court of appeals correctly decided to abrogate the November Executive Agreement.

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