Catholic University Law Review

Volume 70
Issue 1 *Winter 2021*

Article 11

4-9-2021

All for Nothing?: Executive Authority and Congressional Evasion on Arms Sales

Margaret M. Murphy

All for Nothing?: Executive Authority and Congressional Evasion on Arms Sales

Cover Page Footnote

J.D., The Catholic University of America Columbus School of Law, expected 2021; A.B., Bryn Mawr College, 2012.

The author would like to thank Geoffrey Watson for his generous and thoughtful suggestions and guidance, her family for their unwavering support, and the Catholic University Law Review for its careful work on this comment.

ALL FOR NOTHING?: EXECUTIVE AUTHORITY AND CONGRESSIONAL EVASION ON ARMS SALES

Margaret M. Murphy[+]

On August 17, 2018, CNN reported that Lockheed Martin manufactured a bomb that killed dozens of Yemeni schoolchildren in Northern Yemen.[1] Saudi Arabia, a leader in the Coalition against the Houthi alliance in Yemen, purchased the bomb through an arms deal the State Department sanctioned.[2] Michael A. Newton, writing for The American Bar Association's Center for Human Rights opined in 2017 that:

> Given the *prima facie* evidence of wrongdoing by Saudi Arabia [in the conflict in Yemen], continued sale of arms to Saudi Arabia—and specifically of arms used in airstrikes—should not be presumed to be permissible based on the terms of the A[rms Export Control Act] and/or the F[oreign Assistance Act].[3]

In the Arms Export Control Act ("AECA"), Congress delegates to the President the authority "to control the import and the export of defense articles."[4] While the Act espouses lofty goals for promoting peace and avoiding war, there is a question as to the efficacy and validity of its requirements.[5] In particular,

---

[+] J.D., The Catholic University of America Columbus School of Law, expected 2021; A.B., Bryn Mawr College, 2012. The author would like to thank Geoffrey Watson for his generous and thoughtful suggestions and guidance, her family for their unwavering support, and the Catholic University Law Review for its careful work on this comment.

1. Nima Elbagir, Salma Abdelaziz, Ryan Browne, Barbara Arvanitidis & Laura Smith-Spark, *Bomb that Killed 40 Children in Yemen was Supplied by the US*, CNN (Aug. 17, 2018), https://www.cnn.com/2018/08/17/middleeast/us-saudi-yemen-bus-strike-intl/index.html.

2. *See* Oona A. Hathaway et al., *Yemen: Is the U.S. Breaking the Law?*, 10 HARV. NAT'L SEC. J. 1, 5 (2019). In 2011, under pressure in the wake of Arab Spring protests, Yemen's longstanding leader, Ali Abdullah Saleh, reluctantly stepped down after negotiating immunity for himself with the Gulf Cooperation Council (GCC). Human Rights Council, *Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014*, ANN. REP. OF THE U.N. HIGH COMM'R FOR HUM. RTS. AND REPS. OF THE OFF. OF THE HIGH COMM'R AND THE SEC'Y-GEN. 1, 24 (Sept. 9–27, 2019), https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_42_CRP_1.pdf. [hereinafter Human Rights Council]. Abdrabbuh Mansour Hadi, Saleh's vice-president, thereafter prevailed in an uncontested election and assumed the presidency. *Id.* at 25. The Houthis, a Zaydi Shi'a armed alliance, were not satisfied with this arrangement, and in early 2015, reached Sana'a, took control of the presidential palace, and placed Hadi and all his senior officials under arrest. *Id.* at 24–26. Hadi escaped to the south, and on March 24, 2015 requested that the GCC and League of Arab states intervene militarily. *Id.*

3. Michael A. Newton, *An Assessment of the Legality of Arms Sales to the Kingdom of Saudi Arabia in the Context of the Conflict in Yemen*, AM. BAR ASS'N CTR. FOR HUM. RTS. 1, 22–23 (May 19, 2017), https://www.americanbar.org/content/dam/aba/administrative/human_rights/ABACHRAssessmentofArmsSalestoSaudiArabia.authcheckdam.pdf.

4. 22 U.S.C. § 2778(a)(1) (2018).

5. *See id.*

emergency waiver provisions authorizing the President to avoid the Act's specific oversight constraints[6]—together with Supreme Court jurisprudence emphasizing executive authority[7]—complicates what appears to be a clear constitutional issue.[8]

On May 24, 2019, President Trump invoked an emergency waiver provision of the AECA—a clause that allows the President to waive Congressional reporting and waiting periods—in order to sell precision-guided munitions to Saudi Arabia and its coalition members worth approximately $8 billion.[9] Ordinarily, the AECA requires that the President report to Congress on proposed sales, and provide between fifteen and thirty calendar days for Congress to enact a joint resolution disapproving the sale.[10] However, the President can always veto this joint resolution and proceed.[11] One senator speculated the President invoked the provision because "he kn[ew] Congress would disapprove of this sale."[12] Indeed, Congress passed twenty-two joint resolutions opposing this particular sale.[13]

Given that a War Powers Resolution directing the President to remove U.S. troops from hostilities in Yemen garnered sufficient votes to pass both houses, despite the fact that support for it could not override a presidential veto, it seems possible congressional opposition to future Saudi arms sales could continue to grow as well.[14] If enough members of Congress are willing to make an issue out of arms sales and override a presidential veto, would that matter?

---

6. *See* 22 U.S.C. § 2776(c)(2) (2018).

7. *E.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

8. *See* U.S. CONST. art. I, § 8.

9. *See* Scott R. Anderson, *Untangling the Yemen Arms Sale Debate*, LAWFARE (June 24, 2019, 1:10 PM), https://www.lawfareblog.com/untangling-yemen-arms-sales-debate.

10. *See* § 2776(b).

11. *See* Anderson, *supra* note 9.

12. Press Release, Chris Murphy, Murphy Statement on New Middle East Arms Sale, (May 24, 2019), https://www.murphy.senate.gov/newsroom/press-releases/murphy-statement-on-new-middle-east-arms-sale. At Congress' request, the Office of the Inspector General at the State Department delivered initial findings to Senior State Department Officials of an investigation into the legality of the use of this provision in early March 2020. *Interview of: Steve A. Linick: Hearing Before the H. Comm. on Foreign Affs.*, 116th Cong. 29–31 (2020) (statement of Steve A. Linick, former State Department Inspector General); Edward Wong & David E. Sanger, *State Dept. Investigator Fired by Trump had Examined Weapons Sales to Saudis and Emirates*, N.Y. TIMES (May 18, 2020), https://www.nytimes.com/2020/05/18/us/politics/pompeo-trump-linick-inspector-general-firing.html. On May 15, 2020, President Trump ousted the Inspector General, Steve A. Linick. *Id.*; Edward Wong, Michael LaForgia & Lara Jakes, *Pompeo Aide who Pushed Saudi Arms Sale Said to have Pressured Inspector General*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/06/10/us/politics/pompeo-inspector-general-saudi-arms.html. As of June 2020, three congressional committees were investigating whether Linick's firing was in retaliation for inquiries into the Secretary of State he oversaw at that time, one of which concerned the use of this emergency waiver provision. *Id.*

13. Anderson, *supra* note 9.

14. JEREMY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RSCH SERV., R45046, CONGRESS AND THE WAR IN YEMEN: OVERSIGHT AND LEGISLATION 2015-2019 8–11 (2019).

Diverging from domestic affairs, it seems increasingly more common for the President and Congress to employ devices other than those that the framers memorialized in the Constitution to manage foreign affairs.[15] For example, Congress has not issued a declaration of war since World War II.[16] Nevertheless, courts and scholars have interpreted congressional authorizations of military force—like the Authorization for Use of Military Force (AUMF) following the September 11, 2001 attacks—to sanction the President to engage in war.[17] Instead of entering into treaties with the advice and consent of the senate, executive agreements, some of which are sole executive agreements, or those that do not require the advice and consent of anyone except for the President, have "become the primary instrument of international lawmaking in the United States . . . [and] far surpass Article II treaties."[18] The phrase "Executive Agreement" does not appear in the Constitution.[19] At issue in the case of arms sales is whether the rules Congress imposed in the AECA—namely its requirement that the President notify Congress, wait for Congress to issue joint resolutions in opposition, and halt sales if Congress overrides a President's veto—would actually prevent the President from selling arms.[20]

Congress enacted the AECA with the goal of achieving a "world which is free from the scourge of war and the dangers and burdens of armaments; in which the use of force has been subordinated to the rule of law; and in which international adjustments to a changing world are achieved peacefully."[21] Further, arms sales must be "consistent with the foreign policy interests of the United States, the purposes of the foreign assistance program of the United States, . . . the extent and character of the military requirement, and the economic

---

15. *See, e.g.*, Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 150 (2009).

16. *See* Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89, 90 (2008) ("[I]t seems that no nation has issued [declarations of war] since World War II.").

17. Curtis A. Bradley & Jack L. Goldsmith, *Cong. Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2060 (2005) (citing Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion)).

18. Hathaway, Presidential Power, *supra* note 15. For further criticism of sole executive agreements, *see* Samuel Estreicher & Steven Menashi, *Taking Steel Seizure Seriously: The Iran Nuclear Agreement and the Separation of Powers*, 86 FORDHAM L. REV. 1199, 1226–27 (2017) ("There is, . . . no basis for . . . a pattern of congressional acquiescence . . . creat[ing] a historical gloss on the Constitution conferring authority on the President—by political agreement with foreign states or other unilateral executive action—to disregard congressional policy . . . in the foreign claims settlement arena or another foreign relations context.").

19. *See* U.S. CONST. art I. Article I forbids states from entering into "Agreement[s] . . . with a foreign Power." *See also* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 40 (1990) (citing U.S. CONST. art I).

20. *See* 22 U.S.C. § 2776(b)(1) (2018).

21. 22 U.S.C. § 2751 (2018).

and financial capability of the recipient country."[22] Are these requirements meaningful?

Part I of this comment will identify and explore the Constitution's grants of foreign affairs powers to the various branches of government. It will then analyze the Supreme Court's jurisprudence dealing with these grants; most notably, Justice Robert Jackson's famed Steel Seizure concurrence that provided a framework for reconciling balance of power between the Congress and the executive.[23] Part I will then explore an instance of arms sales past practice: the Iran-Contra Affair. Part II sets out the arguments for and against the President's authority to sell arms over Congress' opposition and analyzes the role of the emergency waiver provisions. This section applies Justice Jackson's Steel Seizure framework to the question at hand.

Part III will suggest that the President does not possess the authority to sell arms if Congress enacts a joint resolution and overrides a presidential veto because the President's authority is at its lowest, Congress has an affirmative grant of authority over arms sales under the Constitution, and as it is much better policy for Congress to check the President in this realm, and vice versa. Nevertheless, Part III reflects on a larger pattern of imbalance in foreign affairs, the complexity the emergency provisions create, and the consequences of congressional delegation and avoidance. It recommends a solution to account for constitutional uncertainty the emergency waiver provision creates.

I. PRIOR LAW

A. Foreign Affairs and War Powers Grants Under the Constitution

Article I of the United States Constitution grants upon Congress the authority "[t]o lay and collect Taxes, Duties, Imposts and Excises, to . . . provide for the common Defence . . . of the United States;"[24] "[t]o regulate Commerce with foreign Nations[;]"[25] "[t]o establish an uniform Rule of Naturalization[;]"[26] "[t]o coin Money, regulate the Value thereof, and of foreign Coin[;]"[27] "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;"[28] "[t]o declare War, grant Letters of Marque and

22. *Id.*

23. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–39 (1952) (Jackson, J., concurring).

24. U.S. CONST. art. I, § 8.

25. *Id.* For a discussion of the Foreign Commerce Clause's original purpose and scope, *see* Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 FORDHAM L. REV. 1955, 1959 (2015) (noting that, despite the fact that it has received little attention compared to the interstate commerce clause, the framers viewed the foreign commerce clause as vital for competing economically with Britain).

26. U.S. CONST. art. I, § 8.

27. *Id.*

28. *Id.*

Reprisal, and make Rules concerning Captures on Land and Water;"[29] "[t]o raise and support Armies, but no Appropriation of Money to the Use shall be for a longer Term than two Years;"[30] "[t]o provide and maintain a Navy;"[31] "[t]o make Rules for the Government and Regulation of the land and naval Forces;"[32] '[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"[33] and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[34] In keeping with its separation of powers goals, the Constitution did not vest Congress with supreme authority in foreign affairs.

Instead, Article II vests the President with "[t]he executive Power."[35] It further provides that he "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, . . . and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except . . . Impeachment."[36] The President also possesses authority "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors,"[37] to "receive Ambassadors and other public Ministers,"[38] and "take Care that the Laws be faithfully executed."[39]

B. The Seesaw of U.S. Supreme Court Jurisprudence

In *United States v. Curtiss-Wright Export Corp.*, the issue was whether an export company could be indicted based on a joint resolution of Congress delegating to the President the authority to declare certain arms sales unlawful.[40] After first explaining that the matter at hand concerned foreign affairs as opposed to domestic, the Court stressed that the nature and character of these

29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. U.S. CONST. art. II, § 1.
36. *Id.* at § 2. While scholars debate the exact meaning of this power, it is well accepted that the phrase conferred "discretion for *defensive* actions," meaning that the President had the authority to thwart an attack on U.S. borders. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 249–50 (5th ed. 2007) (noting that part of the rationale for selecting the word "declare" as opposed to "make" war in Article I was to give the President this authority in case Congress was not swiftly able to declare war).
37. U.S. CONST. art. II, § 2.
38. *Id.* at § 3.
39. *Id.*
40. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 314–15 (1936).

foreign affairs powers are fundamental[ly] different than domestic affairs.[41] The Court further explained that the concept of a federal government of limited enumerated powers applies only to domestic authority, and not to foreign affairs powers.[42] The differentiation in powers between domestic authority and foreign affairs exists because the federal government assumed the authority of individual states with respect to domestic affairs,[43] but inherited foreign affairs authority from the colonies "in their collective and corporate capacity as the United States of America."[44] Therefore the Union, and not individual states under the Articles of Confederation "was the sole possessor of external sovereignty."[45] The Court reasoned that the United States is a sovereign nation, and its national government must possess the same authority to act as any other sovereign would.[46] Concluding that the Congress could delegate authority to the President in the area of foreign affairs, the Court remarked, "the investment of the federal government with the power of external sovereignty did not depend upon the affirmative grants of the Constitution."[47]

In dicta, the Court addressed the President's specific authority in the foreign affairs realm.[48] Pronouncing that "the President alone has the power to speak or listen as a representative of the nation," the Court nullified Congress' role in foreign affairs by focusing on the President's power to negotiate treaties.[49] Indeed, the Court described Congress as "powerless" to interfere with treaty negotiation, and quoted Chief Justice Marshall's statement that "[t]he President is the sole organ of the nation in its external relations," a persona he does not

---

41. *Id.* at 315.

42. *Id.* at 315–16.

43. *Id.* at 316.

44. *Id.* The Court stated, "[a] political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense." *Id.* at 316–17.

45. *Id.* at 317.

46. *Id. Contra* THE FEDERALIST NO. 69, at 357 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (making clear the President's authority extends to "supreme command and direction of the military and naval forces, . . . while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature.").

47. *Curtiss-Wright*, 299 U.S. at 318–20. If this is indeed the case, it begs the question why the Framers drafted the Constitution in the first place.

48. *See id.* at 319–20.

49. *Id.* at 319. These particular statements have received much criticism. Harold Hongju Koh stated the following:

> [T]he opinion contains important words of limitation. By saying that 'the President alone has the power to *speak or listen* as a representative of the nation,' Justice Sutherland could be read as recognizing only the well-established exclusive presidential power to negotiate, and not a novel executive power to conclude agreements, on behalf of the United States.

KOH, *supra* note 19, at 94. *See also* Louis Fisher, *The Staying Power of Erroneous Dicta: From* Curtiss-Wright *to* Zivotofsky, 31 CONST. COMMENT. 149, 194–99 (2016) (highlighting fifty years of criticism that scholars have levied against Justice Sutherland and *Curtiss-Wright*).

claim through an act of Congress.[50] Citing President Washington's early statement that "[t]he nature of foreign negotiations requires caution, and their success must often depend on secrecy,"[51] the Court concluded that the President, not Congress, is better equipped to make and execute foreign policy.[52]

While the dispute in *Curtiss-Wright* did not compel the Court to decide whether the President or Congress had greater authority when they disagreed, this question did reach the Court in *Youngstown Sheet & Tube Co. v. Sawyer*.[53] The issue in *Youngstown* concerned whether it was constitutional for President Truman to direct the Secretary of Commerce to seize steel mills in the midst of a labor dispute during the Korean war.[54] The majority rejected President Truman's argument that authority to seize the steel mills in order to evade a steel shortage in wartime was inherent in his Commander in Chief power under the Constitution, or in his executive vesting power.[55] Instead, the majority reasoned that the authority must come from either an act of Congress, or from a specific provision of the Constitution.[56] Because Congress had specifically rejected an amendment to the Taft-Hartley Act that would have allowed the President to seize the mills in the case of an emergency, the majority looked to authority in the Constitution, and concluded that it did not exist.[57] As the majority noted, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[58]

In his *Youngstown* concurrence, Justice Jackson focused his analysis on the relationship between the President's action and the will of Congress, noting, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[59] Justice Jackson set out the following three categories, now referred to as the Steel Seizure Framework, to organize presidential authority along a spectrum:

---

50. *Curtiss-Wright*, 299 U.S. at 319–21 (citation omitted). For an analysis of Justice Marshall's purpose in making this statement, and for criticism of *Curtiss-Wright*, *see* Fisher, *The Staying Power*, *supra*, note 49, at 150 ("In fact, the purpose of Marshall's speech was to defend President John Adams for *carrying out a treaty provision*. Nothing in Marshall's sole-organ speech promoted or advocated independent presidential authority, yet Sutherland pressed that false doctrine.") (emphasis added).

51. *Curtiss-Wright*, 299 U.S. at 320 (citation omitted).

52. *See id*. *See also* KOH, *supra* note 19, at 95 ("[w]hile accepting the notion that the president should manage foreign policy—a tradition that had begun with Washington—the *Curtiss-Wright* opinion rejected the attendant condition of congressional consultation and participation.").

53. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).

54. *Id.* at 582–83.

55. *Id.* at 586–88.

56. *Id.* at 585.

57. *Id.* at 585–87.

58. *Id.* at 587.

59. *Id.* at 635 (Jackson, J., concurring). *See also* KOH, *supra* note 19, at 108 ("Jackson's *Youngstown* concurrence squarely rejected the *Curtiss-Wright* vision.").

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, . . . may he be said (for what it may be worth) to personify the federal sovereignty. . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . [C]ongressional inertia, indifference or quiescence may . . . enable, if not invite, . . . independent presidential responsibility. . . .
>
> 3. 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.[60]

Reasoning that Congress' rejection of the amendment allowing President Truman to seize steel mills meant his conduct was at odds with the will of Congress, Justice Jackson placed President Truman's authority "at its lowest ebb" in this case, meaning he could only prevail under the framework with an affirmative grant under the Constitution.[61] Justice Jackson then rejected arguments that the Article II vesting clause and the Commander in Chief clause gave him this authority, lamenting of a broad reading of the Commander in Chief power, "no doctrine . . . would seem . . . more sinister . . . than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces."[62] Moreover, Justice Jackson cited Congress' authority under Article I "to raise and *support* Armies," and "to *provide* and *maintain* a Navy " as evidence of Congress' greater war authority under the Constitution.[63]

In *Dames & Moore v. Regan*, the Court applied Justice Jackson's framework to the question of whether the President could "block[] the removal or transfer of 'all property and interests in property of the Government of Iran,'" and suspend claims against a foreign country through executive orders under the Constitution.[64] In its analysis, the majority remarked that presidential action is not always as clear as Justice Jackson's framework might indicate.[65]

---

60. *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).
61. *Id.* at 637, 639–41 (Jackson, J., concurring).
62. *Id.* at 641–42 (Jackson, J., concurring).
63. *Id.* at 643 (Jackson, J., concurring).
64. Dames & Moore v. Regan, 453 U.S. 654, 661–62, 669 (1981).
65. *Id.* at 669.

Nevertheless, the Court resolved the question of blocking property by explaining that Congress authorized the President to thwart transfers by enacting the International Emergency Economic Powers Act ("IEEPA")—thus placing the President's action well within the Category One of the Steel Seizure framework.[66] Recognizing that no statute authorized the President to suspend claims, the Court nevertheless refused to "ignore the general tenor of Congress' legislation . . . in trying to determine whether the President is acting alone or at least with the acceptance of Congress."[67] Given the President's generous authority under the statutes at issue, and "the history of congressional acquiescence in executive claims settlement," the Court held that the President could suspend the claims.[68]

In *Hamdi v. Rumsfeld*, the Court addressed whether the President possessed authority to detain an American citizen when a statute provided that no citizen could be detained "except pursuant to an Act of Congress."[69] Justice O'Connor's plurality opinion concluded that the Authorization for Use of Military Force following the September 11, 2001 attacks was sufficient to permit the President to detain a United States citizen.[70]

In *Hamdan v. Rumsfeld*, the Court addressed whether a detainee held at Guantanamo Bay, who the President declared was subject to trial by military commission, was entitled to the protections of an act of Congress: The Uniform Code of Military Justice.[71] Though the Court recognized an independent power of the President to call military commissions, citing *Youngstown*, it reasoned that "he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers," and held that the military commission

---

66. *Id.* at 670, 672–75.

67. *Id.* at 678. Koh notes of Justice Rehnquist's majority's three-part scheme of statutory construction,

> [R]ather than construe IEEPA's silence regarding the suspension of claims as preempting the President's claim of inherent power to act, [he] construed a history of unchecked executive practice, the fact of IEEPA's existence, and the absence of express congressional disapproval of the President's action to demonstrate that Congress had *implicitly* authorized the act, thereby elevating the President's power from the twilight zone— Jackson's category two— to its height in Jackson's category one. By so holding, he effectively followed the dissenting view in *Youngstown*, which had converted legislative silence into consent, thereby delegating to the President authority that Congress itself had arguably withheld.

KOH, *supra* note 19, at 139.

68. *Dames & Moore*, 453 U.S. at 655–56, 686 ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.'" (citations omitted)).

69. Hamdi v. Rumsfeld, 542 U.S. 507, 515–19 (2004) (plurality opinion) *remanded by* 378 F.3d 426 (9th Cir. 2004), *superseded by statute* Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat. 2680 (2005) *as stated in* Gherebi v. Obama, 609 F. Supp. 2d 43, 50 (D.D.C. 2009).

70. *Id.*

71. Hamdan v. Rumsfeld, 548 U.S. 557, 568–72 (2006).

"lack[ed] power to proceed" because it did not comply with the Uniform Code of Military Justice, among other applicable legal principles .[72]

Zivotosfky v. Kerry presented a situation where the President's authority was at its lowest ebb.[73] The issue was whether a United States citizen born in Jerusalem was entitled to have Israel listed as the place of birth on a passport when an act of Congress provided that he was, but a State Department manual reflecting the President's position provided that he was not.[74] In 2002, Congress enacted the Foreign Relations Authorization Act, which provides in pertinent part that "for purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, . . . record the place of birth as Israel."[75] Though he signed the Foreign Relations Authorization Act, President Bush noted that he considered this provision to infringe upon his constitutional powers, and that the United States position on Jerusalem's status did not change with the law.[76] When President Truman recognized Israel in 1948, he did not consider Jerusalem to be within Israel's sovereignty.[77] Indeed, this had remained the position of each President since Truman's recognition, and of the State Department.[78]

Because the State Department's practice of listing Jerusalem instead of Israel on passports was in tension with the express will of Congress as embodied in the Foreign Relations Authorization Act, the majority in *Zivotofsky* "examine[d] the Constitution's text and structure, as well as precedent and history bearing on the question."[79] Ultimately, the Court found that the President's power to "receive Ambassadors and other public Ministers"—which was understood as amounting to recognition power at the time of the Constitution—and which President Washington employed to recognize the French Revolutionary government—was an exclusive recognition power.[80] In determining that this particular power was exclusive, the Court fortified its conclusion with the premise in *Curtiss-Wright* that the President alone could "make" treaties, and that diplomatic decisions and relations were ill-suited for congressional oversight.[81]

---

72. *Id.* at 593 n.23, 613 (citation omitted).

73. Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015).

74. *Id.* at 5–7.

75. *Id.* at 7 (citation omitted).

76. *Id.* at 7–8 (citation omitted).

77. *Id.* at 6 (citation omitted).

78. *Id.* at 6–8 (citation omitted).

79. *Id.* at 6–7, 10.

80. *Id.* at 11–12, 15–16 ("[T]he Reception Clause received little attention at the Constitutional Convention . . . . In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was 'more a matter of dignity than of authority,' a ministerial duty largely 'without consequence.'") (citations omitted).

81. *Id.* at 13–14, 17 ("A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations."). Despite the majority opinion's apparent dismissal of *Curtiss-Wright* as dictum, "taking the *Zivotofsky II*

Despite concluding that recognition authority belonged to the President alone, the Court rejected any assertion that the President had "exclusive authority to conduct diplomatic relations," and emphasized Congress' role in foreign affairs, simply noting that recognition is only one part of overall foreign affairs authority.[82] Nevertheless, the majority did not consider Congress' naturalization authority under the Constitution to bear on this issue.[83]

Although in *Curtiss-Wright* Justice Sutherland left open the possibility that a delegation by Congress to the President could be unconstitutional if it concerned domestic affairs,[84] this has not remained the Supreme Court's position.[85] At issue in *Federal Energy Administration v. Algonquin SNG, Inc.*, was whether Section 232(b) of the Trade Expansion Act was an unconstitutional delegation of legislative authority to the President.[86] Applying the intelligible principle test, the Court rejected the non-delegation challenge because the statute "establish[ed] clear preconditions to Presidential action, . . . the leeway that the statute gives the President . . . is far from unbounded, . . . [and because the statute] articulates a series of specific factors to be considered by the President."[87]

---

majority opinion as a whole, this disavowal doth protects too much. For much of the Court's holding on the recognition power is built implicitly—and at one point even explicitly—on this broad language in *Curtiss-Wright*." Jean Galbraith, Zivotofsky v. Kerry *and the Balance of Power*, 109 AM. J. INT'L L. UNBOUND 16, 18 (2016).

82. *Zivotofsky*, 576 U.S. at 16, 19–20 ("It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action.") (citations omitted).

83. *Id.* at 33 (Thomas, J., dissenting). In his dissent, Justice Scalia explained, "Congress's power to 'establish an uniform Rule of Naturalization,' Art I, § 8, cl. 4, enables it to grant American citizenship to someone born abroad. . . . [This] enables Congress to furnish the people it makes citizens with papers verifying their citizenship—say a consular report of birth abroad." *Id.* at 69 (Scalia, J., dissenting).

84. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936).

85. The modern standard is the "intelligible principle' test," providing that "[s]o long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." Mistretta v. United States, 488 U.S. 361, 372 (1989) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). For a thorough overview of the intelligible principle doctrine and its limits, *see* Bryan Clerk, Comment, *Refining the Nondelegation Doctrine in Light of Real ID Act Section 102(c): Time to Stop Bulldozing Constitutional Barriers for a Border Fence*, 58 CATH. U. L. REV. 851, 857–68 (2009).

86. Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558–59 (1976).

87. *Id.* at 559–60. The provisions of a trade statute provided,

> if the Secretary of the Treasury finds that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," the President is authorized to "take such action, and for such time, as he deems necessary to adjust the imports of [the] article and its derivatives so that . . . imports [of the article] will not threaten to impair the national security.

Id. at 550.

C. Past Practice

1. The Iran-Contra Affair – A Warning for the Future

In 1986, a Lebanese newspaper revealed that the Reagan administration—despite its statements to the contrary—had been selling arms to Iran in order to encourage the government to assist with release of American hostages held in Lebanon.[88] Moreover, in what came to be known as the Iran-Contra Affair, the Reagan administration used the funds secured through these sales to support the Contras in Nicaragua.[89] This conduct likely implicates Justice Jackson's framework because Congress, through legislation in 1982 and the Boland Amendment of 1984, barred the President from providing assistance to the Contras.[90]

An emphasis on individual wrongdoing in the reports of the Tower Commission, the House and Senate Select Committees and Independent Counsel, or the bodies charged with investigating Iran-Contra, produced little if any lessons for the future.[91] While David J. Scheffer identified potential unlawful aspects of the Iran-Contra Affair under the AECA, he nevertheless concedes that the sales "fall[] into a legal quagmire because of the conflict

---

88. GORDON SILVERSTEIN, IMBALANCE OF POWER: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY 146 (1997).

89. SILVERSTEIN, *supra* note 88, at 146.

90. FISHER, *supra* note 36, at 214–15.

91. *See* KOH, *supra* note 19, at 11–23 ("That focus [on the Affair's anomaly] led the [Tower] Commissioners to reject the notion that the Iran-contra affair illustrated any need for legislative reform."). The Tower Commission Report "generally favored the presidency, even while laying the blame for the affair at the door of a specific President." KOH, *supra* note 19, at 16. The committees also "virtually ignore[ed] the crucial legislative portion of their institutional mandate," KOH, *supra* note 19, at 16, and though the Majority affirmed Congress' shared role in foreign policy, it failed to "buttress[] its statements of constitutional principle with a comprehensive legislative program," and "proffered only scattered recommendations for structural reform of the national security process." KOH, *supra* note 19, at 20–21. As for the independent counsel, while it obtained a conviction for Oliver North, the case evolved into "an ordinary criminal prosecution," regarding, not foreign policy failures, but rather inquiries into "whether North has lied to Congress, [and] altered documents." KOH, *supra* note 19, at 23. Koh does seem to articulate one lesson for the future in his statement that,

> the Iran-contra affair was only the tip of a much larger iceberg that crystalized during the Vietnam War. All of the congressional-executive struggles that surrounded the affair merely replicated battles that transpired during the earlier period. That history should have repeated itself across so many spheres of foreign affairs, even after Congress had passed so many statutes to avoid repetition of the Vietnam-era evasions, suggests that the Iran-contra affair exposed systemic, rather than localized, problems in the American foreign-policy process.

KOH, *supra* note 19, at 62. If there is a lesson for the future, then, perhaps it is that Congress' practice of delegation, and its failure to alter its practices after the Vietnam War and repeats such as Iran-Contra shows that Congress deserves primary culpability for the emergency waiver provision of the Arms Export Control Act.

between the laws governing the export of military arms and the laws governing cover activities."[92]

D. The Arms Export Control Act's Meaning and Requirements

Congress enacted the AECA's predecessor, the Foreign Military Sales Act in 1968, in recognition of a "need for a consolidation and revision of the basic authority for the U.S. Government to sell military equipment abroad."[93] As Gordon Silverstein argues, the dawn of the Cold War and an era of nuclear weapons marked a change in Congress' approach to war powers; it chose to delegate and "centralize authority."[94] The Foreign Military Sales Act's legislative history makes clear Congress' "concern that a large military sales program, unless it is carefully managed, may contribute to the development of regional arms races."[95]

While the initial Foreign Military Sales Act "required the Secretary of State to report 'significant' arms sales semiannually to Congress,"[96] Congress sought to greatly expand its oversight powers through the 1974 Nelson-Bingham Amendment to the Foreign Assistance Act of 1974.[97] As Silverstein and others note, executive conduct and the Vietnam War prompted Congress to carve out a place in several foreign policy arenas.[98] This particular amendment likely responded to President Nixon's covert sale of weapons to the Shah of Iran in

---

92. David J. Scheffer, *Current Development: U.S. Law and the Iran-Contra Affair*, 81 AM. J. INT'L L. 696, 698 (1987). As David J. Sheffer noted,

> [C]urrent arms export . . . laws suffer from two glaring deficiencies. First, there is no single standard in the law for (1) determining whether a state supports international terrorism; (2) identifying which U.S. official should make that determination; (3) identifying which arms are subject to restrictions; (4) identifying the criterial that empower the President to waive statutory restrictions; and (5) informing Congress of arms exports, including covert exports. The law is riddled with overlapping standards that can lead to confusion and misuse.

Id. Although Scheffer identifies provisions of the AECA that the Affair likely violated, *id.* at 699–707, what does it say about the Act's meaning and validity that violations do not have meaningful consequences? Was it even illegal under the AECA? *See* KOH, *supra* note 19, at 51 (questioning whether covert sales are in fact illegal if the President justifies covert arms sales by using intelligence law frameworks).

93. S. REP. NO. 90-1632, at 4474 (1968).

94. SILVERSTEIN, *supra* note 88, at 123.

95. S. REP. NO. 90-1632, at 4474.

96. COMM. ON FOREIGN AFFS., WAR POWERS RESOLUTION: A SPECIAL STUDY OF THE COMMITTEE ON FOREIGN AFFAIRS, at 257 (1982) [hereinafter *War Powers Resolution*].

97. The War Powers resolution became "the touchstone and model of other bills and resolutions aimed at similarly perceived problems," the AECA Act among them. *War Powers Resolution*, *supra* note 96, at 255. Silverstein argues that the War Powers Resolution and subsequent laws based on that model are fundamentally flawed because Congress gives away or delegates its authority—even though it attempts to retain and restrict that authority—and in so doing, suggests that the executive take the initiative. SILVERSTEIN, *supra* note 88, at 139.

98. SILVERSTEIN, *supra* note 88, at 125.

1972, over objection of both the State and Defense Departments.[99] Critically, Congress began to associate arms with diplomacy and foreign affairs more so than with trade, which also accounts for its renewed interest in the subject.[100] Like the War Powers Resolution, the Nelson-Bingham Amendment required that the Executive notify Congress before any proposed sale above a threshold amount, and provide a sufficiently detailed report on proposed sales.[101] Congress then possessed the authority under the Act to halt any such sales by concurrent resolution.[102]

Congress attempted to pass more wide reaching legislation in the Ford Administration in 1974, in order to expand its authority.[103] Failing to muster sufficient votes to override a presidential veto for an earlier version of the AECA, Congress and the President eventually agreed on and passed a now-modified AECA in 1976.[104] Although Congress originally inserted seven legislative veto provisions,[105] the compromise eliminated most.[106] Heralding human rights as an "area[] of deep concern to all Americans," President Ford signed the bill despite his belief that the remaining concurrent resolution provision was "constitutionally objectionable."[107]

1. Legislative Veto and its Demise – Yet Another Wake-Up Call?

In *INS v. Chadha*, the United States Supreme Court concluded that a legislative veto not adhering to the "step-by-step, deliberate and deliberative process" of bicameralism and presentment in Article I § 7 of the United States Constitution, was unconstitutional.[108] In the wake of this decision, Congress

99. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1266 (1988) [hereinafter *Why the President (Almost) Always Wins]*.

100. SILVERSTEIN, *supra* note 88, at 164.

101. *War Powers Resolution*, *supra* note 96, at 257.

102. Koh, *Why the President (Almost) Always Wins*, *supra* note 99, at 1266.

103. Kevin P. Sheehan, *Executive-Legislative Relations and the U.S. Arms Export Control Regime In the Post-Cold War Era*, 33 COLUM J. TRANSNAT'L L. 179, 192–94 (1995).

104. Gerald R. Ford, Statement, President Signs Security Assistance and Arms Export Control Act (Jul. 1 1976), *in* LXXV THE DEP'T OF STATE BULL. 198, 198 (1986) [hereinafter Ford].

105. 122 CONG. REC. 14,434 (daily ed. May 19, 1976) (statement of Rep. Morgan).

106. *Id.*

107. *Ford*, *supra* note 104, at 198. Ford also stated, "My approval of H.R. 13680 will enable us to go forward with important programs in the Middle East, in Africa, and elsewhere . . . aimed at achieving our goal of international peace and stability." *Id.* at 199.

108. I.N.S. v. Chadha, 462 U.S. 919, 958–59 (1983). *See also* KOH, *supra* note 19, at 143 ("*Chadha's* broadest impact in foreign affairs derives not from what it says the President may do, but from what it implies Congress may not do."). Koh argues that with respect to trade, *Chadha* did not diminish Congress' role. Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After* I.N.S. v. Chadha, N.Y.U. J. INT'L L. & POL. 1191, 1233 (1986) ("[R]eports of the death of Congress' role in international trade policymaking after Chadha have been greatly exaggerated. If anything, the demise of the legislative veto has breathed new life into Congress' determination to claim an active role in trade matters . . . ."). *Contra* Timothy Meyer &

amended the AECA by replacing concurrent resolutions with joint resolutions, or the usual process of bicameralism and presentment.[109] Though he notes that Congress has rarely invoked a joint resolution to prevent arms sales, Silverstein credits Congress with some success in oversight—reasoning that the legislative veto, and the prospect of a joint resolution after *Chadha*—send a message to the President to proceed with more caution in this arena.[110] One interesting case study is President Reagan's attempt to sell arms to none other than Saudi Arabia in 1986.[111] After a majority in both houses of Congress voted in a joint resolution to prevent arms sales, the President modified the agreement to convince enough senators to sustain his presidential veto by only one vote.[112]

E. The Modern Law

The current version of the AECA delegates to the President the ability to "control the import and the export of defense articles."[113] The Act permits such arms sales, transfers and leases "solely" for enumerated purposes such as:

> [I]nternal security, . . . legitimate self-defense, for preventing . . . the proliferation of weapons of mass destruction . . . permit the recipient country to participate in regional or collective arrangements or measures . . . requested by the United Nations for . . . international peace and security, or for . . . enabling foreign military forces in less developed . . . countries to . . . engage in other activities helpful to the economic and social development of such friendly countries.[114]

F. 22 U.S.C. § 2776 – Requirements or Suggestions?

22 U.S.C. § 2776 sets out the President's reporting and consultation requirements with Congress under the AECA.[115] In addition to providing periodic unclassified reports concerning letters of offer for defense equipment,[116] the President must submit certifications to the Speaker of the House of Representatives, the Committee on Foreign Affairs of the House of Representatives, and to the chairman of the Committee on Foreign Relations of the Senate detailing the circumstances of a sale, either in the form of a government-to-government transfer or a commercial transfer in which case the

---

Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CAL. L. REV. 583, 610 (2019) (rejecting Koh's premise because the reforms that replaced the legislative veto diminished Congress' influence).

109. 132 CONG. REC. E3,175-03 (daily ed. Sept. 18, 1986) (statement of Rep. Levine).

110. SILVERSTEIN, *supra* note 88, at 153.

111. Vanessa Patton Sciarra, Note, *Congress and Arms Sales: Tapping the Potential of the Fast-Track Guarantee Procedure*, 97 YALE L.J. 1439, 1448 (1988).

112. *Id.*

113. 22 U.S.C. § 2778(a)(1) (2018).

114. 22 U.S.C. § 2754 (2018).

115. *See* 22 U.S.C. § 2776 (2018).

116. *See* § 2776(a).

President issues a license to private companies.[117] However, the President may waive waiting periods in which Congress has an opportunity to issue a joint resolution of disapproval to halt arms sales if he certifies that "an emergency exists."[118]

II. ANALYSIS

Saudi Arabia's worsening reputation beginning with the Saudi-led Coalition's record at home and in Yemen,[119] and culminating in Jamal Khashoggi's murder,[120] seems to show that Congress taking a stand on arms sales with respect to Saudi Arabia is not beyond the realm of possibility.[121] If enough members of Congress are persuaded to override a presidential veto, could the President still engage in the sales?

---

117. *See* § 2776(c)(1).

118. 22 U.S.C. § 2776. The waiver relevant to this dispute provides that the President must report to Congress unless he certifies that "an emergency exists which requires the proposed export in the national security interests of the United States." § 2776(c)(2). The President must also provide a "detailed justification . . . including a description of the emergency circumstances." *Id.* The emergency provisions of the AECA originated as a product of negotiations between the Ford administration and Congress in 1974. Christopher M. Blanchard, Jeremy M. Sharp & Clayton Thomas, CONG. RSCH. SERV., 7-5700, MEMORANDUM: EMERGENCY ARMS SALES TO THE MIDDLE EAST: CONTEXT AND LEGISLATIVE HISTORY, 9–10 (2019). Citing concerns around how delays could affect relations with allies, President Ford rejected a proposal that would have allowed him to proceed with a sale for thirty days before seeking Congress' approval—arguing the October 1973 war as an example of a situation where—if enemies knew the United States would stop providing arms after thirty days—the war might have escalated. *Id.* (noting that Ford mischaracterized the thirty-day waiting period as it would not have resulted in an immediate and indefinite halt to sales).

119. Newton, *supra* note 3, at 11. *See also* U.S. DEP'T OF STATE, SAUDI ARABIA 2018 INTERNATIONAL RELIGIOUS FREEDOM REPORT 2 (2018), https://www.state.gov/wp-content/uploads/2019/05/SAUDI-ARABIA-2018-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf ("Since 2004, Saudi Arabia has been designated as a 'Country of Particular Concern' (CPC) under the International Religious Freedom Act of 1998 for having engaged in or tolerated particularly severe violations of religious freedom.").

120. In October of 2018, Jamal Khashoggi, a Saudi journalist who wrote for the Washington Post, was assassinated in the Saudi consulate in Istanbul, Turkey. Bill Hutchinson, *Timeline of the Disappearance and Killing of Journalist Jamal Khashoggi*, ABC NEWS (Dec. 12, 2018 9:59 AM), https://abcnews.go.com/International/timeline-disappearance-journalist-jamal-khashoggi/story?id=58505659. *See also* CONG. RSCH. SERV., R45046, CONGRESS AND THE WAR IN YEMEN, *supra* note 14, at 13 (discussing a senate resolution from December 2018 proclaiming that it was the sense of the Senate that the Saudi Crown Prince, Mohammad bin Salman, had ordered the killing).

121. *See* CONG. RSCH. SERV., CONGRESS AND THE WAR IN YEMEN, *supra* note 14, at 2–8 (noting that when the coalition first emerged, providing arms was not controversial, and tracking the growing opposition to United States involvement in general, eventually culminating with the passage of a resolution consistent with the War Powers Resolution).

A. The President's Argument

In suggesting that the President does possess authority to sell arms over Congress' objection, advocates for a broad executive power might approach this question by arguing first that as in *Dames & Moore* and *Hamdi*, such action might not actually be the President at his lowest ebb under Justice Jackson's Steel Seizure framework.[122] Next, advocates might contend that even if the President is at his lowest ebb, the affirmative grants to the President under the Constitution would allow him to prevail. A third argument might involve past practice.

Advocates of a strong executive authority in foreign affairs would first look to the reasoning the United States Supreme Court in *Dames & Moore*, where the Court understood "the general tenor of Congress' legislation" to authorize the President's conduct though no statute expressly allowed it, thus shifting his status from a zone of twilight to his authority at its strongest.[123] Advocates could also point to *Hamdi*, where O'Connor's plurality reasoned that the AUMF allowed the President to ignore a statute that seemingly prevented his conduct as a further example of flexibility in Justice Jackson's framework.[124] Although in this case the AECA refuses to allow the President to sell arms if Congress passes a joint resolution preventing him,[125] the President might suggest that the overall intent of the statute is to allow the President wide latitude because it is a delegation of the authority to control the sale of arms, and because of the emergency waiver provisions.[126] Alternatively, he could contend that, pursuant to *Hamdi*, there is an unrelated congressional act that authorizes it.[127] Not only is the President given the authority to take the initiative by arranging sales under the AECA, which only requires that he report and wait for Congress to approve them, the President also has the ability to waive these requirements by declaring that an emergency exists.[128]

---

122. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38. (1952) (Jackson, J., concurring).

123. Dames & Moore v. Regan, 453 U.S. 654, 678 (1981).

124. Hamdi v. Rumsfeld, 542 U.S. 507, 517–19 (2004) (plurality opinion). For a critique of O'Connor's reasoning, *see* Sarah H. Cleveland, Wartime Security and Constitutional Liberty: *Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence And The Detention Of "Enemy Combatants"*, 68 ALBANY L. REV. 1127, 1139 (2005) ("O'Connor's preference for seeking congressional authorization . . . rather than deriving the authority from the President's constitutional powers under Article II, is facially consistent with Jackson's approach. . . . O'Connor failed to demand . . . clear congressional authorization that Jackson . . . required. Her conclusion that the Court should broadly infer congressional approval . . . was contrary to Jackson's . . . application . . . .").

125. *See* 22 U.S.C. § 2776(b)(1) (2018).

126. *See id.* (requiring the President to report to Congress about sales, suggesting he conduct negotiations regarding sales).

127. *See Hamdi*, 542 U.S. at 517–19 (2004) (plurality opinion). An analysis of other statutes potentially supplying authority is beyond the scope of this comment.

128. One of these provisions provides:

In addition to the AECA itself, the President could point to the many foreign affairs statutes which also delegate Congress' authority to the President, and suggest that, in aggregate, these statutes evince a "general tenor" of approval to executive action in the foreign affairs arena.[129] Thus, the President's authority is not in Category Three under Justice Jackson's framework, but Category Two; and this zone of twilight is "likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[130]

Even if the President were to concede that selling arms to Saudi Arabia over congressional opposition would place his authority "at is lowest ebb" under Justice Jackson's framework, the President could argue that he should prevail because of his affirmative grants under the Constitution.[131] The President will first explain that Article II's vesting clause, because it vests him with "the executive Power"[132] as opposed to "all legislative Powers herein granted" inherently bestows to him more authority than Congress.[133] Next, the President will argue that his Commander in Chief power of Article II supplies the authority to conduct arms sales because it concerns the realm of war, and these are arms sales to be used in war.[134]

In the alternative, the President would contend that arms sales are now understood as mechanisms of diplomacy and treaty-like as opposed to trade and commerce.[135] Under *Curtiss-Wright*, the President has greater authority in the realm of treaties than does Congress because he "makes" or negotiates them, a process over which Congress has no control.[136] The President might also suggest that Congress' authority is even less significant given the proliferation of executive agreements to which the United States is a party.[137] As of 2008 the State Department provided data stating that the United States had entered into

---

> If the President states in his certification that an emergency exists which requires the proposed export in the national security interests of the United States, thus waiving the requirements of subparagraphs (A) and (B) of this paragraph, he shall set forth in the certification a detailed justification for his determination, including a description of the emergency circumstances which necessitate the immediate issuance of the export license and a discussion of the national security interests involved.

See, e.g., § 2776(c). For a discussion of ambiguity or a possible drafting error in this provision of the AECA, *see* CONG. RSCH. SERV., LSB10304, WAIVER OF CONGRESSIONAL NOTIFICATION PERIOD IN THE ARMS EXPORT CONTROL ACT 1–4 (2019).

129. Dames & Moore v. Regan, 453 U.S. 654, 678 (1981); *see* SILVERSTEIN, *supra* note 88, at 123.

130. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring).

131. *Id.*

132. U.S. CONST. art. II, § 1, cl. 1.

133. U.S. CONST. art. I, § 1.

134. U.S. CONST. art. II, § 2 cl. 1.

135. *See* SILVERSTEIN, *supra* note 88, at 159.

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

137. Hathaway, Presidential Power, *supra* note 15, at 149.

nearly 200 executive agreements with other nations, some with no congressional approval.[138]

The President might also justify his conduct based on the Reception Clause.[139] As discussed in *Zivotofsky* and *Curtiss-Wright*, the President does possess considerable authority in diplomatic affairs because they often involve negotiation.[140] Given that it was a dispute around the President's authority over arms sales that convinced the Court in *Curtiss-Wright* to affirm the President as the "sole organ . . . in its external relations," such autonomy extends to arms sales.[141]

Last, the President might argue that past practice indicates he possesses authority to engage in arms sales over Congress' opposition. In addition to the tradition of sole executive agreements, the President could summon the Iran-Contra Affair as an example of where the President both sold arms covertly—without following the AECA's directives—and avoided an act of Congress that sought to prevent the President from aiding the Contras.[142]

B. Congress' Argument

Advocates for a more restrained view of executive authority, or Congress, would argue that the imagined scenario is well within the Category Three of Justice Jackson's framework, that the President must then have an affirmative grant from the Constitution minus any authority that Congress possesses, and that he does not.[143] Nevertheless, the emergency waiver provisions, and the strong statements in *Curtiss-Wright* are a quandary, and not susceptible to easy answers.

Congress would first contend that the President proceeding with arms sales over congressional opposition falls well within Justice Jackson's Category Three.[144] Unlike the case of *Dames & Moore*, where there was no express bar

---

138. Hathaway, Presidential Power, *supra* note 15, at 149–50.

139. *See* U.S. CONST. art. II, § 3.

140. Zivotofsky v. Kerry, 576 U.S. 1, 17 (2015); *Curtiss-Wright*, 299 U.S. at 319.

141. *Curtiss-Wright*, 299 U.S. at 319–21 (citation omitted). The President might suggest affirmative grants under the Constitution are less important or even immaterial when Congress has delegated the authority through the AECA. *See* Fisher, *The Staying Power*, *supra* note 49, at 165–66 ("[*Curtiss-Wright*] itself did not concern independent or plenary presidential power. . . . [but] whether Congress had delegated *legislative* authority too broadly when it authorized the President to declare an arms embargo on South America. . . . In imposing the embargo, President . . . Roosevelt relied solely on statutory—not inherent executive—authority.") (emphasis added). Indeed, it is very challenging for Congress to complain about executive action that it enabled.

142. FISHER, *supra* note 36, at 214–15. Because this was not the first time a President had sold arms covertly, could the President argue the commissions' failure to introduce meaningful changes operates as a waiver?

143. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring).

144. *Id.* at 637–38 (Jackson, J., concurring).

against the President's conduct in some act of Congress,[145] the AECA makes clear that the President may not proceed with the sale "if the Congress, within that [waiting] period, enacts a joint resolution prohibiting the proposed export."[146] Therefore, the "general tenor" of statutes in the foreign affairs arena are unnecessary to resolve the dispute because the AECA supplies a clear answer.[147] With respect to the President's argument that the existence of waivers suggests that the President was meant to have discretion under the AECA, the legislative history makes clear Congress' intent that it also speak in arms sales.[148]

Having established that this situation would render the President's authority at its lowest ebb, Congress would argue that the President lacks authority to sell arms over Congress' objection because Congress alone possesses it under the plain language of the Constitution.[149] Here, Congress will point to the plain language of Article I, which grants it authority to "regulate Commerce with foreign Nations," making clear that Congress, *and only Congress*, has the power to regulate the sale of arms.[150] According to Chief Justice Marshall, this power "relates to commerce, in the proper acceptation of the term: 'the exchange of one thing for another; the interchange of commodities; trade or traffic.'"[151] As arms are commodities and the AECA provides regulations for their exchange, the clause applies.[152] Thus, the President in this case, like President Truman in *Youngstown*, would not prevail at the lowest ebb.[153]

Despite the President's argument that Iran-Contra shows he possesses authority to sell arms over Congress' objection, there is other evidence suggesting the President and Congress have both thought that the AECA's requirements are binding. One example is President Reagan's efforts to sell weapons to Saudi Arabia in 1986.[154] In this circumstance, President Reagan knew that Congress opposed the sale, and he made concessions in order to sway enough votes to sustain his veto.[155] Why would he have gone to the trouble if the law meant nothing? Another instance of arms sales to Saudi Arabia

145. *See* Dames & Moore v. Regan, 453 U.S. 654, 681–82 (1981).

146. 22 U.S.C. § 2776(c)(2)(A) (2018).

147. *See Dames & Moore*, 453 U.S. at 678.

148. *See War Powers Resolution*, *supra* note 96, at 257–58 (quoting S. Rep 94-605) (noting how the War Powers Resolution also influenced other legislation that placed checks and balances on presidential authority). As Harold Koh notes, "[t]he vast majority of the foreign affairs powers the President exercises daily are not inherent constitutional powers, but rather, powers that Congress has expressly or implicitly delegated to him by statute." KOH, *supra* note 19, at 45.

149. *See* U.S. CONST. art. I, § 8, cl. 3.

150. *Id.*

151. Gibbons v. Ogden, 22 U.S. 1, 115 (1824).

152. *See* 22 U.S.C. § 2776(c) (2018).

153. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 633–34 (1954); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

154. Sciarra, *supra* note 111, at 1448.

155. *Id.*

illustrates the binding power of the AECA's reporting and waiting period provisions.[156] Two years earlier, in 1984, President Reagan reported to Congress a proposed sale in the midst of the Iran-Iraq war.[157] After it seemed clear Congress would oppose the sale, President Reagan withdrew his proposal and invoked an emergency waiver provision instead.[158] Again, it makes little logical sense for a President to follow a law if he or she believes that it is not binding.

C. The Troubling Presence of the Emergency Waiver Provisions

The emergency waiver provisions in § 2776 of the AECA complicate the analysis. Because the legislative history seems to make clear that the executive should have broad discretion under the emergency clauses, the President could argue that the "general tenor" of the AECA *itself* is to offer him wide discretion.[159] Although President Reagan's move to inform Congress of a sale pursuant to a non-emergency, and then invoke an emergency when Congress disapproved, suggests he thought the non-emergency requirements of the AECA did bind him at some level,[160] this episode also illustrates that requirements are effectively meaningless if the President can discharge them by declaring an emergency. More important, are there any limits?

Under the Steel Seizure analysis then, could the President's conduct ever reside in Category Three if he invokes the emergency provision?[161] Even if Congress attempted to pass a law specifically prohibiting his sale, is the President not acting pursuant to the emergency waiver provision, which allows him to ignore Congress in the case of an emergency?

III. COMMENT – TIME TO RECONSIDER CURTISS-WRIGHT?

According to UNICEF, "Yemen is the largest humanitarian crisis in the world, with more than 24 million people—some 80 per cent of the population—in need of humanitarian assistance, including more than 12 million children."[162] Famine conditions and an outbreak of cholera also contribute to the suffering of the Yemeni people.[163] Experts in a recent United Nations Human Rights Council report cite a number of airstrikes the Saudi-led Coalition undertook that killed civilians—among them—the August 2018 strike on a bus in Sa'dah, a March 2019 attack on a busy hospital that killed eight civilians, and four airstrikes in

156. *See* 22 U.S.C. § 2776(c) (2018).

157. Blanchard, Sharp & Thomas, *supra* note 118, at 13.

158. *Id.*

159. Dames & Moore v. Regan, 453 U.S. 654, 678 (1981); § 2776(b)(1).

160. Blanchard, Sharp & Thomas, *supra* note 118, at 13–14.

161. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

162. *Yemen Crisis*, UNICEF, https://www.unicef.org/emergencies/yemen-crisis (last visited Oct. 26, 2019).

163. *Human Rights Council*, *supra* note 2, at 175–76 ("In March 2019, the World Food Programme (WFP) declared Yemen 'the world's largest food crisis.'") (citation omitted).

Al-Hundaydah that resulted in deaths and injuries.[164] Based on the results of these airstrikes, the experts concluded this pattern of attack might not comport with international humanitarian law.[165]

In his report for the American Bar Association, Newton concludes that, assuming human rights reports are reasonably accurate, there is sufficient evidence to suggest that "the government of Saudi Arabia has engaged in a consistent pattern of gross human rights violations in Saudi Arabia[,]"[166] and "*prima facie* evidence of [a] consistent pattern of flagrant denials of the right to life, namely, serious violations of the prohibition on indiscriminate or disproportionate acts."[167]

Should Congress seek to halt arms sales under the AECA, and garner enough support to override a presidential veto, the President should not then be able to proceed with the sale. By the same token, Congress should not possess unlimited authority to halt or execute arms sales either. This view is fully consistent with the plain language of the Constitution and Justice Jackson's Steel Seizure Framework. The particular case of Yemen illustrates the importance of arms sales, and many related policy decisions. One branch possessing authority to circumvent another sets a dangerous precedent. Unfortunately, the emergency waiver provisions of the AECA, together with the dictum in *Curtiss-Wright* make this result less certain.

Unlike in *Curtiss-Wright* and *Dames & Moore*, the AECA would likely bar the President from proceeding with a sale in the absence of an emergency.[168] Although the President's conduct seemed to be at odds with the statute in *Hamdi*, Justice O'Connor's plurality reasoned that the AUMF, another act of Congress, authorized it.[169] Not only is there not another act of Congress present in this case, but also the United States is not a member in the Saudi-led coalition.[170] It

164. *Id.* at 107–11.

165. *Id.* at 111–12.

166. Newton, *supra* note 3, at 9–11 (noting that The U.S. Department of State has routinely included in human rights reports accounts of torture, and prolonged arbitrary detention). *See also* U.S. DEP'T OF STATE, SAUDI ARABIA 2018 INTERNATIONAL RELIGIOUS FREEDOM REPORT 2 (2018) https://www.state.gov/wp-content/uploads/2019/05/SAUDI-ARABIA-2018-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf ("Since 2004, Saudi Arabia has been designated as a 'Country of Particular Concern' (CPC) under the International Religious Freedom Act of 1998.").

167. Newton, *supra* note 3, at 13, 19 (explaining that indiscriminate attacks are violations of international humanitarian law).

168. *See* 22 U.S.C. § 2776(c)(2) (2018).

169. Hamdi v. Rumsfeld, 542 U.S. 517, 517 (2004) (plurality opinion).

170. As previously discussed, analysis of other statutes that might provide authority for the President is beyond the scope of this comment. For a list of coalition members, *see* Reuters, *Which Counties are Part of Saudi Arabia's Coalition Against Yemen's Houthis?*, HUFFINGTON POST (Mar. 26, 2015, 7:21 AM), https://www.huffpost.com/entry/saudi-coalition-yemen_n_6946092.

is therefore conduct "incompatible with the expressed or implied will of Congress," and in Category Three under Justice Jackson's framework.[171]

As a result of disastrous commercial transactions between the states and foreign nations under the Articles of Confederation, "there was widespread agreement that Congress should regulate at least some aspects of foreign commerce."[172] Indeed, the framers did just that, granting Congress the authority "to regulate Commerce with foreign Nations."[173] Under Chief Justice Marshall's definition of commerce as an "interchange of commodities," sales of arms for money likely qualifies.[174] There is no doubt that the President has authority in both the treaty clause and the recognition clause to conduct diplomacy.[175] It is also true that arms sales are a mechanism of diplomacy and war, an identity they arguably assumed rather recently.[176] Like many constitutional issues, perhaps the answer is that arms sales fall into a number of categories.

Even if the President were to cast these sales as within his Commander in Chief power, *Youngstown* suggests that the Commander in Chief power does not confer universal authority because Truman was a wartime President and the Court still managed to find that he did not possess authority to seize the steel mills.[177] Likewise, in *Hamdan*, the President's constitutional authority did not permit him to deny rights to a detainee when an act of Congress demanded it.[178] Even if arms sales are more akin to foreign affairs than commerce, Congress also has significant authority "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Capture on Land and Water[,]"[179] "[t]o raise and support Armies,"[180] "[t]o provide and maintain a Navy,"[181] "[t]o make Rules for the Government and Regulation of the land and naval Forces,"[182] and "[t]o provide for calling forth the Militia to . . . suppress Insurrections and repel

---

171. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

172. Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 413 (2000).

173. U.S. CONST. art. I, § 8, cl. 3.

174. Gibbons v. Ogden, 22 U.S. 1, 189 (1824).

175. *See* U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. II, § 3.

176. SILVERSTEIN, *supra* note 88, at 157.

177. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

178. Hamdan v. Rumsfeld, 548 U.S. 557, 613 (2006).

> [W]e do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is *bound* to comply with the rule of law that prevails in this jurisdiction.

Id. at 635. (emphasis added).

179. U.S. CONST. art. I, § 8, cl. 11.

180. U.S. CONST. art. I, § 8, cl. 12.

181. U.S. CONST. art. I, § 8, cl. 13.

182. U.S. CONST. art. I, § 8, cl. 14.

Invasions."[183] Because the United Nations and Newton suggest Saudi Arabia may not have complied with international humanitarian law, Congress' authority to "define and punish . . . Offenses against the Law of Nations" is highly relevant in this case.[184] Moreover, if the President benefits from inherent authority through his Commander in Chief or vesting power, Justice Jackson's framework would be meaningless. Under Justice Jackson's framework then, it seems likely that the President would not possess authority to sell arms over Congress' opposition.

The analysis presented above considers the requirements of the AECA in the absence of an emergency waiver, and in many respects, *Curtiss-Wright*. The existence of these emergency waivers—together with their broad interpretation—complicate the analysis under Justice Jackson's framework.[185] Because they are interpreted so broadly,[186] they both suggest that Congress intended to give the President wide latitude and deference, and also essentially make optional the requirements of the AECA.[187] After all, President Reagan invoked the waiver after it seemed clear Congress would oppose his arms sale.[188] A proposed solution would be for courts to construe this emergency waiver provision more strictly because any other interpretation might be an unconstitutional delegation. Unlike the statute at issue in *Algonquin*, the emergency waiver provision here depends on the President's own determination,

183. U.S. CONST. art. I, § 8, cl. 15.

184. U.S. CONST. art. I, § 8, cl. 10. *See supra* note 166–167 and accompanying text.

185. *See* Blanchard, Sharp & Thomas, *supra* note 118, at 11–12 (discussing President Carter's 1979 use of the emergency waiver provision in which he sold arms to North Yemen—paid for by Saudi Arabia—in an effort to counter Soviet and Iranian influence after Southern Yemen gained independence and established a socialist government).

186. *See id*. at 15–16. On August 26, 1990, President Bush notified Congress pursuant to the terms of the emergency waiver provision that an emergency existed, and that the United States needed to sell weapons to Saudi Arabia after Iraq invaded Kuwait and placed troops on Saudi Arabia's border. *Id.* at 15–16.

187. *But see* Estreicher & Menashi, *supra* note 18, at 1239 ("President Obama invoked the various waiver provisions—some of which explicitly must be applied 'on a case by case basis' and all of which are time-limited—effectively to repeal seventeen different sanctions [on Iran] . . . ." (citations omitted)). Estreicher and Menashi question this conduct as it relates to *Youngstown*, explaining, "[i]t would be difficult to argue that such an action is compatible 'with the expressed or implied will of Congress' so as to be consistent with the *Steel Seizure* principle." *Id.* In the absence of analogous time limits and other meaningful restrictions imposed in the AECA's waiver provisions, it is possible to distinguish President Obama's conduct as it relates to the Iran Nuclear Agreement from the present situation. Nevertheless, perhaps what Estreicher and Menashi suggest is that Congress—despite including a waiver which enables the President to escape its requirements—can still articulate some intent and will. Given the proliferation of "delegation[s] of a unilateral power to negate the legal force or effect of statutory text," in many arenas such as environmental law, immigration, trade, and foreign affairs, this seems a reasonable proposition. R. Craig Kitchen, *Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text*, 40 HASTINGS CONST. L. Q. 525, 528–29 (2013).

188. Blanchard, Sharp & Thomas, *supra* note 118, at 13–14.

and not on that of "clear preconditions," meaning that the President is free to proceed with a sale as long as he provides a justification, and there are no factors or definitions to guide the President's determination that an emergency exists.[189] While advocates for the President may point to guiding purposes articulated in the AECA as sufficient to constitute an intelligible principle, there should be cause for concern from a non-delegation perspective that, unlike in *Algonquin*, there appear to be no limits on the President's ability to declare anything an emergency.[190] In fact, this very scenario bears a resemblance to Justice Jackson's fears about the "sinister" prospect of a President invoking the Commander in Chief power in order to extend his authority.[191]

As discussed in Section II, despite the Court in *Zivotofsky's* protests that many of the statements about executive authority made in *Curtiss-Wright* were mere dicta, it does seem clear that *Curtiss-Wright* influenced the Court's holding.[192] *Curtiss-Wright* was also an appeal from a criminal conviction, meaning the Court allowed Congress to delegate to the President authority to make and enforce a criminal law.[193] This proposition seems highly problematic from a constitutional perspective.[194] Not only does *Curtiss-Wright* appear contrary to the framer's intent to separate foreign affairs powers by dividing them among the executive and legislative branches, it would also seem to preclude the holding in *Youngstown* because President Truman justified his conduct based on

189. Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558–60 (1976).

190. *Id.* In *Gundy v. United States*, a plurality of justices affirmed the intelligible principle test, and held that portions of the Sex Offender Registration and Notification Act (SORNA) at issue in the case passed the test. Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (plurality opinion). However, in his concurrence, Justice Alito made clear his willingness to revisit the intelligible principle approach should a majority of justices wish to do so. *Gundy*, 139 S. Ct. at 2131 (plurality opinion) (Alito, J., concurring). Three justices in dissent questioned the intelligible principle test itself, and labeled the statute at issue in the case, "delegation running riot." *Gundy*, 139 S. Ct. at 2140–48 (plurality opinion) (Gorsuch, J., dissenting) (citations omitted). *See* Aditya Bamzai, *The Supreme Court 2018 Term: Comment: Delegation and Interpretive Discretion:* Gundy, Kisor, *and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 167 (2019) ("*Gundy* addressed a fundamental disagreement between plurality and dissent on how to operationalize nondelegation as a matter of constitutional doctrine. All of the Justices agreed that Article I prohibited the delegation of 'legislative Power' to administrative agencies, but they disagreed on where to draw the line.").

191. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

192. *See* Galbraith, *supra* note 81, at 18–19.

193. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 314–15 (1936).

194. *Youngstown*, 343 U.S. at 587 ("[T]he 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.") (emphasis added). *See generally* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 750 (2003) (describing William Blackstone's contention that "executive power is the power to execute the laws," and that "combining the legislative and executive powers would result in tyranny because tyrannical legislation would more likely be followed by tyrannical law execution." (citations omitted)).

war powers.[195] Given the Constitution and Justice Jackson's framework's endurance, *Curtiss-Wright's* dubious contentions likely deserve further scrutiny.

Not only would a result that the President lacks the authority to disregard a joint resolution opposing arms sales be consistent with the Constitution and Justice Jackson's framework, it is good policy. Leaving aside the unconscionable suffering of the Yemeni people to which the United States contributes, deals between the executive or Congress alone are often less advantageous because there is no pressure to secure a better deal, and negotiating partners are well aware if a branch is not accountable to others.[196] In this particular case, as Newton warns, there is "cause for concern that the United States' ongoing support of the Saudi-led coalition may provoke more violent extremism in the long term in light of the highly questionable patterns of attacks affecting the civilian population."[197] This problem of rash decision-making evincing questionable results is not new.[198] Arms sales are only part of the larger foreign policy framework, but they matter. Arms sales matter to the parents who lost their children in the August 2018 airstrike.[199] They should not be the domain of one unaccountable branch.

IV. CONCLUSION

With the strong language of the AECA, it is hard to understand why time and time again, the United States seems to supply arms that cause suffering to civilians. While it is easy to blame the President in the case of a covert arms sale, Congress is equally culpable for delegating authority in the first instance, and declining to reign in the President's conduct once it lost use of a legislative veto not subject to the presidential veto.[200] At the same time, maybe Congress believes that the President should have discretion to act quickly on arms sales given the complex and evolving nature of foreign affairs matters. Perhaps courts

195. *Youngstown*, 343 U.S. at 582–83. On the other hand, where *Curtiss-Wright* obviously involves foreign affairs, perhaps *Youngstown* really does concern domestic affairs, despite the fact that President Truman sought to justify his conduct based on foreign affairs powers.

196. Hathaway, Presidential Power, *supra* note 15, at 147 ("[I]f the executive branch is free to negotiate the best arrangement it can, it may be unable to make any position stick and may end by conceding controversial points because its partners know, or believe obstinately, that the United States would rather concede than terminate the negotiations." (internal citations omitted)). *See also* Louis Fisher, *Presidential Residual Power in Foreign Affairs*, 47 CAP. U. L. REV. 491, 526–27 (2019) (questioning the wisdom of more executive authority since Truman, and discussing the risks of one entity making all decisions).

197. Newton, *supra* note 3, at 22.

198. Koh, *Why the President (Almost) Always Wins*, *supra* note 99, at 1319 ("As the Iran-Contra Affair revealed, secretive unilateral executive decisionmaking guarantees neither wise nor efficient foreign policymaking.").

199. Nima Elbagir, Salma Abdelaziz, Ryan Browne, Barbara Arvanitidis & Laura Smith-Spark, *Bomb that Killed 40 Children in Yemen was Supplied by the US*, CNN (Aug. 17, 2018), https://www.cnn.com/2018/08/17/middleeast/us-saudi-yemen-bus-strike-intl/index.html.

200. Hathaway, Presidential Power, *supra* note 15, at 168.

should undertake their duty of impartial judicial review. Arms sales are not merely diplomatic tools. They have consequences, as the present conflict in Yemen demonstrates. Justice Jackson's framework is a clear mechanism for resolving conflicts between the President and Congress, and the Courts should employ it more in the interest of the Constitution, national security, and humanity.