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The Import Surcharge of 1971: A Case Study of Executive Power in Foreign Commerce

David Pollard

David A. Boillot

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I. INTRODUCTION

The importance of foreign trade in the conduct of foreign affairs demonstrates that many foreign commerce questions contain foreign affairs overtones. For example, President Nixon has recently noted that congressional restrictions on granting the Soviet Union most-favored-nation treatment would be "a hurdle to further detente."[1] Although article I, section 8 of the Constitution vests the power to regulate foreign commerce in the legislative branch,[2] the Congress has delegated a great deal of that power to the Executive. Moreover, it appears that the President possesses certain inherent powers in foreign commerce as a result of his extensive, albeit undefined, authority in foreign affairs. An examination of the President's foreign affairs power, therefore, is required to determine the extent of this derivative authority in the field of foreign commerce. The Import Surcharge of 1971, pursuant to which the President imposed a ten per cent surcharge on goods imported into the United States in an effort to correct the balance of payments deficit, provides a useful vehicle for conducting an examination of the convergence of the statutory delegation in the area of tariff regulation and the Executive's inherent powers in foreign commerce.

II. CONSTITUTIONAL INTERPRETATIONS

Executive authority over foreign commerce stems from statutory delegations and the Executive's power to conduct foreign affairs, which, in turn, is based on further statutory delegations, specific grants of power by the Constitution and the inherent powers that are derived from the President's position as the sole executive of the nation as defined in the opening clause of article II of the Constitution. Challenges to the exercise of executive authority in the area of foreign commerce have focused on the extent of the authority under these sources.

A. *The "Delegation" Question*

To effectuate its legislation in the area of foreign trade, Congress

1. Wall Street J., Sept. 28, 1973, at 3, col. 1.
2. U.S. CONST. art. I, § 8.

often has delegated its power over foreign commerce to the President.[3] The constitutionality of such congressional delegation has been challenged, but, for the most part, the challenges have been unsuccessful.

Constitutional construction of the delegation of powers is rooted in the tripartite system of government. Although the framers of the Constitution provided for a separation of powers,[4] it has been denied that they contemplated a strict application of that separation.[5] Thus, in his treatise on the Constitution, Mr. Justice Story commented:

> But when we speak of a separation of the three great departments of government and maintain that separation is indispensable to public liberty we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct and have no common link of connection or dependence, the one upon the other in the slightest degree. The true meaning is that the whole power of one of those departments should not be exercised by the same hands which possess the whole power of either of the other departments . . . .[6]

Despite the liberal interpretation of the separation doctrine itself, however, the principle that the powers vested in the three branches of government are separate remains deeply imbedded in constitutional law. The doctrine, as applied in the context of the delegation of powers, means that legislative power is vested in Congress and executive power in the President; a transfer of power from one to the other would undermine the balance of the governmental structure.[7]

The doctrine of separation of powers does not mean, however, that the branches of government are not to coordinate their efforts in making foreign policy.[8] Many early delegations of power evidenced cooperation between Congress and the Executive.[9]

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3. U.S. CONST. art. I, § 8.

4. The doctrine of separation of powers is traceable to the common law maxim of agency; *delegata potestos non potest delegari*. *See* Duff & Whiteside, *Delegate Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168 (1929).

5. *See* 1 J. STORY, CONSTITUTION 393 (5th ed. 1891); Cheadel, *Delegation of Legislative Functions*, 27 YALE L.J. 892 (1918); 18 VA. L. REV. 424 (1932).

6. 1 J. STORY, *supra* note 5, at 393.

7. *See* K. MACKENZIE, TARIFF-MAKING AND TRADE POLICY IN THE UNITED STATES AND CANADA 14 (1968).

8. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

9. For example, a 1794 act authorized the President, "whenever, in his opin-

Judicial interpretations of the delegation question have been given sparingly. Chief Justice John Marshall explained the hesitant attitude of the courts in this way:

> The difference between the departments undoubtedly is, that the legislative makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.[10]

Courts that have decided the issue of the constitutionality of delegability have premised their interpretations on the important distinction between the legislature's delegating power to make law and merely conferring authority and discretion to execute the law.[11] Courts have sanctioned delegations of powers to nonlegislative bodies when those powers have "not in any real senses" been legislative.[12] Thus, a great deal of power not "strictly" or "exclusively" or "essentially" legislative has been delegated to administrative and executive bodies.[13]

Determining the differences between valid and invalid delegations has depended on the presence or absence of standards by which the administrator may be guided in exercising his discretion.[14] Courts sustaining delegations have reasoned that actual leg-

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ion, the public safety shall so require, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nations, under such regulations as the circumstances of the case may require, and to continue or revoke the same whenever he shall think proper." Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372. Similarly, numerous embargo and nonintercourse statutes were passed with caveats authorizing the President to impose, modify or suspend their provisions. *See, e.g.*, Act of March 3, 1805, ch. 41, § 5, 2 Stat. 341.

10. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

11. Cincinatti, W., & Z.R.R. v. Comm'rs, 1 Ohio St. 77, 88 (1852). *See* Field v. Clark, 143 U.S. 649, 693-94 (1892).

12. *See, e.g.*, Buttfield v. Stanahan, 192 U.S. 470 (1904) (Secretary of the Treasury was given the power to establish tea standards).

13. *See, e.g.*, Mahler v. Eby, 264 U.S. 32 (1924) (Secretary of Labor was empowered to deport aliens); Inter-Mountain Rate Cases, 234 U.S. 476 (1914) (Interstate Commerce Commission was given authority to fix railroad rates); United States v. Grimaud, 220 U.S. 506 (1911) (Secretary of Agriculture was given power to make rules and regulations for the protection of the government forest reserve); Union Bridge Co. v. United States, 204 U.S. 364 (1907) (Secretary of War was permitted to condemn bridges interfering with navigation); 36 YALE L.J. 573 (1927).

14. *See* 15 CALIF. L. REV. 408 (1927).

islative powers were not delegated, merely the power to find a *fact* on which the statute was to become operative.[15] Thus in *Field v. Clark,*[16] the Supreme Court upheld the legislative delegation, since the President's function was limited to the *factual* determination of whether the custom duties were "unequal and unreasonable." At issue was section 3 of the Tariff Act of 1890,[17] which authorized the President to suspend the free entry of certain articles from countries imposing certain restrictions on United States products when he deemed those restrictions to be "reciprocally unequal and unreasonable."[18] The Court concluded, however, that section 3 did not conflict with the separation of powers doctrine. Once the President found, *as a fact,* that the foreign import restrictions were unequal and unreasonable, the imposition of the penalties and their amount were dictated by the statute rather than the President's discretion. Justice Harlan explained:

> [The Act of 1890] does not, in any real sense, invest the President with the power of legislation . . . . Legislative power was exercised when Congress declared that the suspension [of the free introduction of specified products] should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.[19]

The Court relied on the early decision of *The Brig Aurora,*[20] in which the Supreme Court upheld a presidential embargo on goods imported from Great Britain. Congress, in an act of 1809,[21] had authorized the embargo conditioned on the determination of cer-

15. *See* State v. Hinkel, 131 Wis. 103, 111 N.W. 217 (1907); 36 YALE L.J. 573 (1927).

16. 143 U.S. 649 (1892).

17. Ch. 1244, § 3, 26 Stat. 612. Section 3 of the Act provided in pertinent part: "[W]henever, and so often as the President shall be satisfied that the Government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties, on other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such [above products] . . . into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such [above products] . . . the production of such country, for such time as he shall deem just . . . ."

18. 143 U.S. at 692.

19. 143 U.S. at 692-93.

20. The Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813).

21. Act of March 1, 1809, ch. 24, §§ 4, 11, 2 Stat. 528.

tain facts found by the President.[22] The Court in *Field v. Clark* noted that even if the decision in *The Brig Aurora* had never been rendered, "the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land."[23] The Court thus validated the delegation of authority by Congress to the Executive.

The approval of the limited delegation of authority contemplated by *Field v. Clark* was extended in *J. W. Hampton, Jr. & Co. v. United States,*[24] in which the Supreme Court established a new criterion for determining the status of future delegations. The emphasis in *Field v. Clark* was the definiteness of the "fact" to be ascertained by the President.[25] Evaluated by this test, section 315 of the Tariff Act of 1922,[26] which was at issue in the *Hampton* case, went much further in giving the President the power to determine, with the aid of advisors, the differences in costs of production at home and abroad and to adjust the customs rates to equalize such costs. The statutory provision was attacked on the ground that "[t]he difference in cost of production at home and abroad cannot be found as a fact without using discretion and judgment, choice between different results, at every stage, thus expressing the exercise of the legislative will."[27] In overruling the contention, Chief Justice Taft analogized to interstate commerce legislation: "The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all . . . ."[28] The critical question for the Court was whether Congress

22. *See generally* K. MACKENZIE, *supra* note 7, at 4-5.

23. 143 U.S. at 691. *See also* Downes v. Bidwell, 182 U.S. 244, 286 (1901); Ames v. Kansas, 111 U.S. 449, 469 (1884); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).

24. 276 U.S. 394 (1927).

25. *See* E. CORWIN, THE PRESIDENT 124, (3d ed. 1957).

26. Ch. 356, § 315, 42 Stat. 941 (1922).

27. 276 U.S. at 395. The importers in this case had three main points in contending that the flexible provisions of § 315 were unconstitutional: (1) that it is an illegal attempt to delegate legislative and taxing power to the Executive; (2) that the difference between costs at home and abroad was not a "fact" definitely ascertainable, and thus the President must depend on his judgment in fixing new rates of duty, thereby violating the whole plan of the flexible provisions; and (3) that to levy an avowedly protective tax irrespective of revenue considerations transcends the power of Congress.

28. 276 U.S. at 407. The Court said: "The same principle that permits Congress to exercise its rate-making power in interstate commerce, by declaring the

had provided some standard to govern the exercise of presidential discretion. In answering, the Court stated: "If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[29] The Court found little difficulty in deeming the equalization feature of the Act constitutional, since the Act established an "intelligible principle"—"equality"—to which the President was to conform. The Executive was not performing a legislative function by writing the tariff; he was merely fleshing out the particulars of an expressed policy too intricate for Congress to prescribe in detail.[30]

The courts thus generally have agreed that Congress may grant to the President the authority to act in the area of foreign commerce, a field traditionally occupied by the Congress itself. Due largely to the increased complexity not only of international commercial activities but also of the internal operations of the Government itself, Congress has delegated much of its constitutionally granted power over foreign commerce to the President, who has been able to effectuate foreign commercial policy more efficiently and expeditiously. As long as Congress includes in such legislation an "intelligible principle" to serve as a standard to guide executive conduct, a delegation of power to the Executive to act in the foreign commerce area will likely survive attacks on its constitutionality.

B. *The President's Inherent Powers in Foreign Commerce*

In *United States v. Guy W. Capps, Inc.*,[31] the Government brought suit against an importer who had violated the terms of an

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rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise." 276 U.S. at 409.

29. 276 U.S. at 409 (emphasis added).

30. Appellant contended that, although there was an apparent standard, the production factors were so varied and indefinite that the "fact" could never be found. Therefore, since the standard was incapable of definite ascertainment, the President, by making his determinations, was in effect setting the standard himself. This contention was not directly answered by the Court. *See* 76 U. PA. L. REV. 868 (1928). It has been said that, "[a]ll in all, if the President exercised every power delegated to him in section 315 of the Tariff Act of 1922, he could rewrite the entire bill as soon as the Congress had finished it." J. LARKIN, THE PRESIDENT'S CONTROL OF THE TARIFF 2 (1936).

31. 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

executive agreement with Canada. The Court of Appeals for the Fourth Circuit, finding that the President had failed to follow the procedures established by the Agricultural Adjustment Act of 1922,[32] which authorized him to limit certain imports based on the Tariff Commission's investigations, findings and recommendations, held that the executive agreement was invalid because it thus contravened provisions of a statute dealing with the very matter to which the agreement related. The court explained:

> We think that whatever the power of the executive 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 an agreement avoid complying with a regulation prescribed by Congress. Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The executive may not by-pass congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports. Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is the latter which must be accepted as the expression of national policy.[33]

The court concluded that the President had acted outside constitutional limits by entering into an international compact that ran counter to explicit congressional legislation. Noting that the President does possess certain inherent powers in conjunction with his position as Commander in Chief and his power to insure that the laws are faithfully executed, the court nevertheless refused to acknowledge that these inherent powers could preempt the express delegation to Congress in the field of foreign commerce.

The view espoused by the court in *Guy W. Capps* may be considered overly restrictive when read in conjunction with the sources and extent of the executive's foreign affairs power. In *United States v. Curtiss-Wright Export Corp.*,[34] defendants were indicted for violating a presidential proclamation, issued pursuant to a joint resolution of Congress, prohibiting the sale of arms to countries engaged in the Chaco conflict.[35] Defendants demurred on the

32. Act of September 1, 1922, ch. 356, 42 Stat. 858.

33. 204 F.2d at 659-60.

34. 299 U.S. 304 (1936).

35. A Joint Resolution of May 28, 1934, provided "[t]hat if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may con-

ground that the resolution was an unconstitutional delegation of power to the President. Justice Sutherland, writing for the majority, distinguished the powers of the federal government in foreign affairs and domestic affairs. He propounded the theory that the powers of external sovereignty possessed by the federal government do not depend on affirmative grants of the Constitution, but passed directly from the British crown to the colonies as a collective whole. The individual colonies never possessed any external sovereignty and, therefore, had none to delegate to the federal government under the Constitution. Moreover, participation in the conduct of foreign affairs is limited; the President alone has the authority to act as the representative of the nation. Justice Sutherland noted that the Court was not dealing merely with authority delegated by Congress to the President, "but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . ."[36] Since "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved,"[37] Justice Sutherland concluded that the joint resolution and proclamation were valid.

Justice Sutherland's theories concerning the origin of the federal government's external sovereignty and the plenary authority of the President in foreign affairs have been questioned.[38] The most significant criticism is that the constitutional underpinnings of the President's powers in foreign affairs and the relationships of these

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tribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress." H.R.J. Res. 347, ch. 365, § 1, 48 Stat. 811 (1934). The President issued two proclamations, one on the date of the Resolution, putting it into operation (48 Stat. 1744); the other on November 14, 1935, revoking the first proclamation (49 Stat. 3480).

36. 299 U.S. at 320.

37. 299 U.S. at 320.

38. *See, e.g.*, Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946).

powers to those of Congress remain undefined.

The only foreign affairs powers given to the President by the Constitution are "the executive Power,"[39] the power to make treaties and appoint ambassadors (with the advice and consent of the Senate)[40] and the powers under the President's role as Commander in Chief.[41] The Constitution also states that the President shall receive ambassadors and other public ministers and see that the laws are faithfully executed.[42] These enumerated powers, however, are not sufficient to justify the wide range of powers exercised by the Executive in foreign affairs.

Some commentators have attempted to support the President's authority by looking beyond the enumerated powers.[43] For example, from the power to appoint and receive ambassadors, some have implied the powers to recognize governments and establish diplomatic relations with them. Others have stated that the grant of all executive powers is capable of sustaining the President's foreign affairs authority. The first advocate of this position was Alexander Hamilton. Writing in support of Washington's neutrality proclamation in 1793, Hamilton contended that the opening clause of article II is a grant of power.[44] Furthermore, Hamilton wrote, the succeeding enumerated powers served to interpret the initial general grant. Finally, Hamilton argued that foreign policy is an inherently executive function.[45] James Madison, on the other hand, refuted Hamilton's expansive view of executive power in foreign affairs. He emphasized that Congress' power to declare war included the power to determine foreign policy.[46]

Hamilton's theories comport with the political philosophies on which the framers of the Constitution relied. Locke and Montesquieu had a great influence on the framers, as evidenced by the structure of the government created.[47] Locke distinguished a feder-

39. U.S. CONST. art. II, § 1: "The executive Power shall be vested in a President of the United States of America. . . ."

40. U.S. CONST. art. II, § 2, cl. 2.

41. U.S. CONST. art. II, § 2, cl. 1.

42. U.S. CONST. art. II, § 3.

43. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 41-42 (1972).

44. Hamilton, writing over the pseudonym "Pacificus," first presented this argument in a series of (1787-88) articles in *The Gazette of the United States.*

45. Hamilton's theory is discussed in E. CORWIN, *supra* note 25, at 179.

46. Madison, writing as "Helvidius," refuted Hamilton's arguments in a series of articles also appearing in the *Gazette. See* E. CORWIN, *supra* note 25, at 180-81.

47. L. HENKIN, *supra* note 43, at 43.

ative power from the executive power. The former dealt with external affairs, while the latter was concerned with the execution of the municipal laws within the society.[48] Yet, he recognized that both powers are usually united.[49] Furthermore, this executive power required "prerogative" in fulfilling its functions.

> For since in some [G]overnments the [L]aw-making [P]ower is not always in being and is usually too numerous, and so too slow, for the dispatch requisite to [E]xecution: and because also it is impossible to foresee, and so by laws to provide for, all [A]ccidents and [N]ecessities, that may concern the publick [sic]; or to make such [L]aws, as will do no harm, if they are [E]xecuted with inflexible rigour, on all occasions, and upon all [P]ersons, that may come in their way, therefore there is a latitude left to the [E]xecutive power, to do many things of choice, which the laws do not prescribe.[50]

Montesquieu also divided executive power into that "in respect to things dependent on the law of nations" and that "in regard to matters that depend on the civil law."[51] Furthermore, he noted that this branch is better administered by one than by many because of the need for dispatch.[52]

The inadequacies of legislative control of foreign affairs, amply demonstrated from 1783 to 1787 under the Articles of Confederation, also affected the framers. John Jay's desperate attempts to obtain definite instructions from Congress to guide him in his negotiations with the Spanish and the subsequent failure to reach any agreement must have indicated the weakness of the system.[53] Discussing the treaty-making power under the proposed Constitution, Jay later wrote that "[s]o often and so essentially have we

48. J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 383 (P. Laslett ed. 1960).

49. *Id.*

50. *Id.* § 160.

51. 1 MONTESQUIEU, THE SPIRIT OF THE LAWS Book XI, Ch. V, at 182 (Aldine ed. 1900).

52. *Id.* Book XI, Ch. VI, at 195-96.

53. The crux of the disagreement with Spain was that Spain had no intention of abiding by the boundaries established by the English in the treaty of 1783 or of admitting the right of Americans freely to navigate the Mississippi to its mouth. Difficulties were also encountered with England, whose troops continued to occupy territory along the northern border. Congress also desired to negotiate a commercial agreement with the English. The inadequacy of the Confederation was also demonstrated in the failure to halt the taking of American seamen by the Barbary pirates. *See* A. MCLAUGHLIN, THE CONFEDERATION AND THE CONSTITUTION 89-107 (1905).

heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects."[54]

It is apparent that the framers of the Constitution intended to grant the President substantial authority in the field of foreign affairs, even though the constitutional underpinnings of the authority and its scope and extent are less than certain. Nevertheless, in light of recent history, it is accurate to conclude that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[55] The courts frequently have given the President wide latitude in the conduct of foreign affairs.[56] In any particular activity, however, it is often difficult to characterize the elements of the activity. For example, in *Chicago & Southern Airlines v. Waterman Corp.*,[57] the Supreme Court considered the possibility of judicial review of the Civil Aeronautics Board's determination on applications by civilian carriers to engage in overseas and foreign air transportation. The Board's decisions were subject to approval by the President under section 801 of the Civil Aeronautics Act.[58] The Court recognized both the foreign commerce and foreign affairs considerations. The Court held that prior to presidential approval the orders of the Board were not mature, and, therefore, not susceptible of judicial review; after approval the orders contained executive discretion and were therefore "political questions." In reaching this decision, the Court noted that presidential review was the result of legislative and executive powers.

> Congress may of course delegate very large grants of its power over foreign commerce to the President . . . . The President also possesses in his own right certain powers conferred by the Constitution on him as Commander in Chief and as the Nation's organ in foreign affairs. For present purposes, the order draws vitality from either or both sources. Legislative and Executive powers are pooled obviously

54. THE FEDERALIST No. 64, at 435 (J. Cooke ed. 1961) (J. Jay).

55. E. CORWIN, *supra* note 25, at 177. The statement was originally made by John Marshall in the House of Representatives in 1799. Marshall was defending President John Adams's extradition of one Jonathan Robbins under the Jay Treaty. 10 ANNALS OF CONG. 613 (1800). The statement was taken out of context by the Supreme Court in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

56. *See, e.g.*, United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

57. 333 U.S. 103 (1948).

58. 49 U.S.C. § 1461 (1970), *formerly* ch. 601, § 801, 52 Stat. 1014 (1938).

> to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies.[59]

The implication is that if an activity impinges on foreign affairs, the Executive may assert a certain degree of control. Thus, in addition to statutory authority, the Executive cited constitutional authority to enter the General Agreement on Tariffs and Trade.[60] The Executive relied on the broad language contained in *Curtiss-Wright,* in which, as discussed above, the Court held that the President's authority to impose an arms embargo was supported by statutory authority and the plenary and exclusive power of the President as the sole organ of the federal Government in the area of foreign affairs.[61]

As noted in *Curtiss-Wright*, there are limitations on the President's power; for example, the applicable provisions of the Constitution.[62] An additional limitation is the foreign affairs power possessed by Congress. Adhering to the views of Locke and Montesquieu, the framers sought to insure that the Executive could not overpower the legislative branch. Congress possesses important foreign affairs powers in the power to regulate foreign commerce[63] and the power to declare war.[64] In discussing the relationship of Washington's neutrality proclamation to Congress' power to declare war, Alexander Hamilton wrote:

> This serves as an example of the right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The legislature is still free to perform its duties, according to its sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative branch.

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59. 333 U.S. at 109-10.

60. *Hearings on the Extension of the Reciprocal Trade Act Before the Senate Finance Comm.*, 81st Cong., 1st Sess. 1051-55 (1949) [hereinafter cited as *Hearings*]. For a general discussion of the role the General Agreement on Tariffs and Trade plays in United States domestic law see Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250 (1967).

61. *Hearings, supra* note 60, at 1051.

62. 299 U.S. at 320. *Cf.* Reid v. Covert, 354 U.S. 1 (1954) (executive agreement held to be subject to guarantees of Bill of Rights).

63. U.S. CONST. art. I, § 8, cl. 3.

64. U.S. CONST. art, I, § 8, cl. 11.

> The division of the executive power in the Constitution creates a *concurrent* authority in the cases to which it relates.[65]

Therefore, unless the Constitution vests an applicable power elsewhere, the Executive has the initiative in foreign affairs. He can confront Congress with a *fait accompli,* although Congress is under no obligation to support these decisions.[66] As Professor Louis Henkin has noted, "[c]oncurrent power often begets a race for initiative and the President will usually 'get there first'."[67]

In *Youngstown Sheet & Tube Co. v. Sawyer,*[68] however, it was determined that Congress had taken the initiative. President Truman, relying on his powers as Commander in Chief, had ordered the seizure of steel mills to avert a nationwide strike of steel workers during the Korean War. Justice Black, writing for the majority, held that the seizure was beyond the power of the President because it was essentially lawmaking, a function reserved for Congress.[69] Four of the six justices in the majority,[70] however, noted that not only had Congress not authorized the seizure technique, but previously had refused to adopt a provision authorizing plant seizure.[71] The implication of the holding is that the President's act would have been upheld if Congress had not acted at all.[72]

In a concurring opinion, Justice Jackson distinguished three categories of Presidential action:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it in-

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65. Quoted in E. CORWIN, *supra* note 25, at 179.

66. *Id.* at 180.

67. L. HENKIN, *supra* note 43, at 105.

68. 343 U.S. 579 (1952).

69. "The President's order does not direct that congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control." 343 U.S. at 588.

70. Justices Frankfurter, Jackson, Burton and Clark.

71. Congress had denied the President the power to seize plants in the Labor Management Relations Act of 1947. "It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant to power which Congress consciously withheld." 343 U.S. at 609 (Frankfurter, J., concurring).

72. L. HENKIN, *supra* note 43, at 340-41 n.11.

cludes all that he possess in his own right plus all that Congress can delegate.

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.

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.[73]

Justice Jackson concluded that the President's act fell within the third category and that his inherent powers were not sufficient to sustain the seizure.[74]

From this brief overview, one can conclude that the President possesses some inherent powers in foreign commerce as a result of his power to conduct foreign affairs. A foreign commerce issue often will fall within Justice Jackson's "zone of twilight" as a result of the foreign affairs implications. Moreover, in this zone of twilight, presidential freedom of action will depend on congressional inaction. Professor Henkin has stated that the area of concurrent powers often involves presidential pretensions when congressional authority is clear; therefore, in cases of conflict, Congress should prevail, regardless which branch acted first.[75] As he notes, this position is consistent with the power of Congress to supercede treaty provisions as domestic law.[76] Furthermore, if the President acts, and Congress remains silent, a justifiable presumption arises that Congress has acquiesed in, or even approved, the President's actions.[77] Although Congress can act subsequent to the Executive's action, often the President will present a *fait accompli* that Congress will be hesitant to repudiate. The President, however, cannot

73. 343 U.S. 635-37 (Jackson, J., concurring).

74. 343 U.S. at 654.

75. L. HENKIN, *supra* note 43, at 106.

76. *Id.* at 349 n.40. "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing." Whitney v. Robertson, 124 U.S. 190, 194 (1888).

77. L. HENKIN, *supra* note 43, at 105.

ignore Congress for various political reasons; congressional cooperation is required on many matters in addition to foreign policy.[78] Moreover, herein lies the ultimate check in the system of checks and balances: knowing that Congress can repudiate his actions, the President will be hesitant to go too far without congressional cooperation. This situation also adds a dangerous element—if Congress perceives the need to reassert its authority as greater than the need to present a united front in the international arena, the system may come to an impasse. "In the end, while insisting on its constitutional autonomy, Congress has generally sensed that in the strange contraption which the Fathers created for conducting foreign policy, the Congress are the rear wheels, indispensable and usually obliged to follow, but not without substantial braking power."[79]

Judicial decisions sustaining the validity of executive agreements demonstrate the extent of the executive power in foreign affairs. Under article II of the Constitution, the President is vested with important powers, including the power to make treaties, with the advice and consent of the Senate.[80] Today, no one seriously contends, however, that a treaty signed with the advice and consent of the Senate is the exclusive means by which the United States, under the Constitution, may enter into binding international agreements.[81] Professor Quincy Wright has expressed the long-prevailing sentiment: "the power to make agreements is vested in the national government, and apparently the Constitution vests it in two authorities, the President acting alone, and the President acting with the advice and consent of two-thirds of the Senate."[82] The President, relying largely on his powers as "the Executive"[83] and "the Commander-in-Chief,"[84] and on his author-

78. *Id.* at 123. For example, the President relies on Congress for appropriations to carry out domestic programs.

79. *Id.*

80. U.S. CONST. art. II, § 2.

81. *See* McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 216 (1945).

82. Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 233 (1922). For an excellent analysis of the historical basis for executive agreements see McDougal & Lans, *supra* note 81. *See generally* W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941); Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944); Catudal, *Executive Agreements: A Supplement to the Treaty-Making Procedure*, 10 GEO. WASH. L. REV. 653 (1942).

83. *See* E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 131-63 (1917); McDougal & Lans, *supra* note 81, at 248-52; N. SMALL, SOME PRESIDENTIAL

ity to "receive ambassadors"[85] and to "take care that the laws be faithfully executed,"[86] has freely negotiated agreements with other nations. The present inquiry, then, is not *whether* the President can enter into executive agreements, but rather, what is the scope of such agreements.[87]

Although executive power in this area has been practically unbound, it has not gone unchallenged. Early cases dealing with the President's power to enter into agreements pertained to such matters as annexation of territory,[88] reciprocal trade,[89] postal regulation,[90] and jurisdiction.[91] The challenges to executive agreements that have had the greatest legal impact are the cases of *United States v. Belmont*[92] and *United States v. Pink.*[93]

INTERPRETATIONS OF THE PRESIDENCY 20-25 (1932); Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS §§ 151, 209-10, 214-24 (1922).

84. *See, e.g.*, Tucker v. Alexandroff, 183 U.S. 424 (1901); C. BERDAHL, THE WAR POWERS OF THE EXECUTIVE IN THE U.S. (1921); Gilmore, *War Power—Executive Power and the Constitution*, 29 IOWA L. REV. 463 (1944); Simpson, *Legal Aspects of Executive Agreements*, 24 IOWA L. REV. 67 (1938); White, *The War Powers of the President*, 1943 WIS. L. REV. 205.

85. *See* E. CORWIN, *supra* note 25, at 213.

86. *See, e.g., In re* Neagle, 135 U.S. 1, 64 (1890), in which Justice Miller stated that the President's duty is not limited "to the enforcement of the Acts of Congress or of treaties in the United States according to their express terms," but embraces also "the rights, . . . international relations, and all the protection implied by the nature of the government under the Constitution." *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Todd, *The President's Power to Make International Agreements*, 11 CONST. REV. 160, 165-67 (1927).

87. E. CORWIN, *supra* note 25, at 213.

88. *See* Hawaii v. Mankichi, 190 U.S. 197 (1903); Texas v. White, 74 U.S. (7 Wall.) 700 (1868); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866).

89. *See, e.g.* B. Altman & Co. v. United States, 224 U.S. 583 (1912); Field v. Clark, 143 U.S. 649 (1892); cases cited in McDougal & Lans, *supra* note 81, at 309 n.8. In the *Altman* case, the Supreme Court recognized that not all commercial contracts are treaties, saying: "While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the U.S., it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President." 224 U.S. at 601.

90. *See* Cotzhausen v. Nazro, 107 U.S. 215 (1882); United States v. Eighteen Packages of Dental Instruments, 222 F. 121 (E.D. Pa. 1915).

91. *See, e.g.*, Tucker v. Alexandroff, 183 U.S. 424 (1902).

92. United States v. Belmont, 301 U.S. 324 (1937).

Both *Belmont* and *Pink* were concerned with the United States recognition of the Soviet Union in 1933. The statement of recognition included the Litvinov Agreement, under which the Soviet Union assigned to the United States all claims it had against funds located in the United States in exchange for the release of all United States claims arising out of the Soviet nationalizations. In *Belmont,* the issue was whether funds deposited by a Russian corporation in a New York bank prior to 1918 were subject to the Agreement. The New York courts refused to recognize the extraterritorial effect of the nationalizations since these violated New York public policy. The courts found that the Soviet Union did not have a valid claim to funds which it could assign to the United States. Therefore, the courts held that the funds were not subject to the Agreement and denied the United States claim to the funds. The Supreme Court found that in connection with the President's independent power to receive ambassadors, which includes the power to recognize governments, he is authorized to take whatever steps are necessary to carry out this function. The recognition, the establishment of diplomatic relations, and the assignment were found to be part of one transaction, which resulted in international compacts that did not require the advice and consent of the Senate. Therefore, since the Litvinov Agreement was a necessary part of the conduct of foreign relations, it prevailed over New York public policy. "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist."[94]

This position was reaffirmed in *United States v. Pink.* A Russian insurance company had established a branch in New York in 1907, but the branch discontinued operations in 1925. The Superintendent of Insurance of New York took possession of its assets and settled claims with domestic creditors. The United States brought suit under the Litvinov Agreement to recover the remaining assets after New York state courts had ordered that the funds be distributed to foreign creditors and then to the former directors of the

93. United States v. Pink, 315 U.S. 203 (1942). The first implied recognition by the Supreme Court that the President has power to make executive agreements occurred in the earlier case of Monaco v. Mississippi, 292 U.S. 313 (1934), in which Chief Justice Hughes stated: "The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, *through treaty, agreement, or other wise.*" 292 U.S. at 331 (emphasis added).

94. 301 U.S. at 331.

Russian company who had immigrated to France. The Supreme Court found that the Litvinov Agreement was necessary to normalize relations between the United States and the Soviet Union. Since the Agreement was a prerequisite to recognition, New York could not interfere with the establishment of friendly relations by reinjecting some of the irritants that had hindered relations. The executive agreements in question were held to cancel the rights of the foreign creditors under New York law as a result of the power of the national government over foreign affairs, including the executive's authority to recognize governments.

The *Belmont* and *Pink* cases, then, recognize that the President can act constitutionally when making international agreements despite the absence of congressional participation. The executive agreement rests on a more solid ground when the President and Congress work to achieve the same end—that is, when legislation has expressly authorized the President's action. Thus in *Star-Kist Foods, Inc. v. United States,*[95] the court upheld an executive agreement that had been negotiated pursuant to section 350(a) of the Trade Agreements Act of 1934.[96] An American producer of canned tuna contended that the trade agreement with Iceland, which reduced tariffs on certain imported tuna, was void because it had not received the advice and consent of the Senate. In sustaining the executive agreement in question, the court stated:

> From reading the act, it is apparent that Congress concluded that the promotion of foreign trade required that the tariff barriers in this and other countries be modified on a negotiated basis. Since the President has the responsibility of conducting the foreign affairs of this country generally, it gave to him the added responsibility of negotiating the agreements in pursuance of the spirit of the act.[97]

The court then relied on the opinions in *Curtiss-Wright, Belmont* and *Pink* in holding that the executive agreement with Iceland and the accompanying proclamation were valid.

Therefore, when the President enters an international agreement pursuant to an explicit legislative authorization, as in *Star-Kist,* his action has firm constitutional underpinnings. When the President takes measures that are at odds with clear congressional mandates, however, his authority is extremely weak, as noted above in

95. 275 F.2d 472 (C.C.P.A. 1959).

96. 48 Stat. 943 (1934), *amending* 46 Stat. 590 (1930).

97. 275 F.2d at 483. The court also quoted a passage from B. Altman & Co. v. United States, 224 U.S. 583 (1912).

Guy W. Capps. The resolution of this issue is more difficult when there is no legislation on point.

III. Delegation of Tariff Regulation.

Under the powers "to lay and collect taxes, duties, imposts and excises" and "to regulate commerce with foreign nations,"[98] Congress historically has maintained legislative authority over the entire field of foreign trade regulation.[99] Pursuant to these constitutional mandates, Congress has passed a number of acts that have delegated foreign commerce powers to the President. The early statutes usually gave to the Executive the authority to alter tariff rates, to lay or lift embargoes or to close ports to vessels of particular nations whenever the commerce of the United States would be benefited thereby.

The Act of June 4, 1794, was the earliest important legislative act that gave to the executive branch power in the area of foreign trade. The Act authorized the President to lay, regulate and revoke embargoes, whenever, in his opinion, the safety of the public so required. Specifically, he was authorized "to lay the embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper."[100] Of significance are the proviso to this section of the Act that prevented the President from exercising the delegated authority when the Congress was not in session, and the short duration of the power granted by the Act.[101]

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98. U.S. Const. art. I, § 8.

99. This power has been unchallenged in the courts except in the context of regulation of state action that would infringe on commerce. The power is deemed inherent in a sovereign and has been held to lie in Congress whether or not sanctioned by the Constitution. Lichter v. United States, 334 U.S. 742, 755, 757-58 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316-18 (1936); Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 86 (1875); Penhallow v. Doane, 3 U.S. (3 Dall.) 54 (1795). *See* Bassiouni & Landau, *Presidential Discretion in Foreign Trade and Its Effect on East-West Trade*, 14 Wayne L. Rev. 494, 495-96 (1968).

100. Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372.

101. The Act provided that the embargo would automatically terminate fifteen days after Congress was back in session, and that the Act itself was to last only up to the following session of Congress. A prior joint resolution of May 7, 1794, had conferred *unqualified* power on the President to grant clearances, not withstanding an existing embargo, to ships or vessels belonging to citizens of the United States bound for any port beyond the Cape of Good Hope. S.J. Res. 5, 3d

Tariff regulation is perhaps the most significant aspect of foreign commerce over which the President has been delegated great power.[102] Prior to 1934, Congress imposed tariffs and other restrictions on imports, subject only to the limited influence of the President's power of persuasion and the threat of his possible veto of legislation.[103] The Executive did attempt to enter into a number of agreements with other countries for reciprocal reductions in customs duties, but most of these attempts were frustrated in the Senate.[104]

The initial step toward providing the Executive with advance authority to implement tariff concessions granted under trade agreements was made in the Tariff Act of 1890.[105] To secure reciprocal trade with countries producing certain articles, the President was authorized whenever he found that countries exporting these articles were imposing on them duties or other exactions that he deemed to be "reciprocally unequal and unreasonable," to suspend for such time as he deemed just the provisions of the Act relating to the free introduction of such articles.

The Tariff Act of 1897,[106] typical of the early tariff acts, was a revenue statute designed to "provide revenue for the Government and to encourage the industries of the United States." The Act permitted the President to proclaim specified duty reductions on a limited number of items in return for equivalent concessions granted by the parties importing those items.[107] Nine agreements

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Cong., 1st Sess., 1 Stat. 401 (1794). *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1936). Similarly, the President has been given broad authority to suspend embargo legislation if the suspension of hostilities abroad has rendered United States commerce sufficiently safe. *See, e.g.*, Act of April 22, 1808, ch. 52, 2 Stat. 490. Congress also has passed a number of acts laying tonnage and other duties on foreign ships in retaliation for duties enforced against United States vessels. The President, however, was authorized to suspend the duties whenever he was satisfied that the countervailing duty was repealed or abolished. *See, e.g.*, Act of January 7, 1824, ch. 4, § 4, 4 Stat. 3.

102. *See generally* F. TAUSSIG, TARIFF HISTORY OF THE UNITED STATES (1923).

103. K. MACKENZIE, *supra* note 7, at 1.

104. An agreement negotiated with the German Customs Union in 1844 was brought before the Senate as a treaty but failed to receive the necessary two-thirds majority. Although most of the other attempts to implement trade treaties met a similar fate, the 1875 treaty with Hawaii and the 1902 treaty with Cuba were successfully concluded. K. MACKENZIE, *supra* note 7, at 2.

105. Act of October 1, 1890, ch. 1244, § 3, 26 Stat. 567.

106. Act of July 24, 1897, ch. 11, § 3, 30 Stat. 151, 203.

107. Section 4 of the Act contemplated duty reductions of up to twenty per cent on items in the tariff generally. Agreements under § 4 required both Senate

were put into effect under the Act and remained in force until terminated by the Act of 1909.[108] Although these statutes delegated to the President increased authority in the area of foreign trade, the Executive in the first quarter of the twentieth century still was limited by the historical congressional preemption in this field. Thus, in 1914, President Wilson, faced with strong pressure from Great Britain as a result of his Mexican policy, found it necessary to go before Congress to urge repeal of the Panama Canal Act of 1911 (which imposed tolls on the Panama Canal).[109]

> I ask this of you in support of the foreign policy of the Administration. I shall not know how to deal with other matters of even greater delicacy and nearer consequences if you do not grant it to me in ungrudging measure.[110]

It has been suggested that "[n]o more striking acknowledgement has ever been made by a President of the actual power of Congress in the foreign relations field."[111]

In the 1920's and early 1930's, tariffs rose to unprecedented levels. The high tariffs provided for by the Fordney-McCumber Tariff Act of 1922[112] reflected the post-War sentiment toward isolationism, nationalism and peace at any price.[113] Under the Act, if the President found that the duties fixed in the Act did not equalize the differences in costs of production between United States goods and the like goods of competing foreign nations, he was empowered to adjust rates of duty up to fifty percent to equalize the costs of production.[114] The Act, moreover, was viewed as an emergency measure:

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ratification and congressional approval and, therefore, did not enhance the powers that the President already had.

108. Act of June 29, 1909, ch. 1, § 4, 36 Stat. 1, 83. *See* K. MACKENZIE, *supra* note 7, at 2 & n.6.

109. Ch. 390, § 5, 37 Stat. 560.

110. Message of March 5, 1914, *quoted in* E. CORWIN, *supra* note 25, at 191.

111. E. CORWIN, *supra* note 25, at 191. Another factor that may have influenced President Wilson's admission of preeminent congressional power in this area was the recently passed Underwood Tariff Act of 1913, which gave the President the authority to negotiate trade agreements, but which required such agreements to be submitted to Congress (not just the Senate, as in the case of a treaty) for ratification or rejection. Act of October 3, 1913, ch. 16, § 4, 38 Stat. 114, 192.

112. Ch. 356, 42 Stat. 858. As to the Act's requirement of a hearing see Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933); 33 COLUM. L. REV. 528-29 (1933); 81 U. PA. L. REV. 764-65 (1933).

113. *See* I C. HULL, THE MEMOIRS OF CORDELL HULL 124 (1948).

114. Ch. 356, § 315, 42 Stat. 941.

> Whenever the President shall by proclamation declare an emergency to exist by reason of a state of war, or otherwise, he may authorize the Secretary of the Treasury to extend during the continuance of such emergency the time herein prescribed for the performance of any act.[115]

Rising prices and inflationary conditions in the United States market precipitated an even more drastic congressional measure in 1930. Hearings began in the spring of 1929[116] on the bill that a year later became the Smoot-Hawley Tariff Act.[117] The majority members of the House Ways and Means Committee and the Senate Finance Committee initially wrote the tariff bill to suit their own local and regional interests.[118] The new Act was envisioned largely as an accommodation to farm interests, who sought increased tariff protection against agricultural imports. A great deal of log-rolling[119] provided something for almost everyone through a proliferation of protectionist amendments, owing largely to the stock market crash in the fall of 1929 and the consequent decline of economic activity early in 1930.[120] The 1930 Act specifically granted to the President the authority to impose higher tariffs on imports. Unlike previous provisions, section 338 of the Act[121]

115. Ch. 356, § 622, 42 Stat. 988.

116. *Hearings on H.R. 2067 Before the House Comm. on Ways and Means,* 70th Cong., 2d Sess., (1929); *Hearings on H.R. 2067 Before a Subcomm. of the Senate Comm. on Finance,* 71st Cong., 1st Sess., (1929).

117. Ch. 497, 46 Stat. 590 (1930), *as amended,* 19 U.S.C. §§ 1301-1654 (1970).

118. *See* K. MACKENZIE, *supra* note 7, at 2-3.

119. Cordell Hull, at that time a member of the House of Representatives and an outspoken opponent of high tariffs, wrote that he himself saw many instances of log-rolling among members of Congress. For instance, Senator Grundy of Pennsylvania "was open and avowed in his methods, stating in effect that the interests which put up the money for campaigns should be compensated in this way by high tariffs." I C. HULL, *supra* note 113, at 132.

120. *See* Metzger, *The Escape Clause and Adjustment Assistance: Proposals and Assessments,* 2 LAW & POL. INT'L BUS. 352 (1970).

121. Section 338 of the Act (ch. 497, 46 Stat. 590, 704 (1930), *as amended,* 19 U.S.C. § 1338 (1970)) provides, in pertinent part: "(a) Additional duties.—The President when he finds that the public interest will be served shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of, or imported in a vessel of, any foreign country whenever he shall find as a fact that such country—

"(1) Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country; or

reached "unreasonable" as well as "unjustifiable" restrictions on commerce, but it was more clearly limited to those restrictions that discriminated in the sense of placing domestic commerce at a disadvantage compared with that of any *third country*. Section 338 directed the President to retaliate against such discrimination by imposing countervailing import duties. If this form of retaliation proved ineffective, the President was authorized, in his discretion, to refuse entry to articles produced in the offending country or transported in its vessel.[122]

The Smoot-Hawley Act of 1930 was a disastrous piece of legislation. As one writer has observed, the Act was "the outstanding example of Congressional tariff-making at its worst."[123] Thirty-four nations protested the passage of the Act, and many retaliated by enacting their own high-tariff legislation.[124] Coupled with the general economic collapse, the adverse effect on United States commerce was overwhelming. Trade was being adjusted worldwide, and the United States was losing out in every respect. In 1929, the United States share of the world's foreign trade was 13.8 percent; by 1933 it had fallen to 9.9 percent. All domestic exports declined appreciably.[125] Consequently, drastic steps were needed to improve the United States position in the international commercial market.

A. *The Trade Agreements Act of 1934*

Congress responded to the prevailing commercial crisis by enacting the Trade Agreements Act of 1934,[126] the principal purpose of

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"(2) Discriminates in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country."

122. 46 Stat. 704 (1930), *as amended,* 19 U.S.C. § 1383 (1970). *See* Matthews, *Non-tariff Import Restrictions: Remedies Available in United States Law,* 62 MICH. L. REV. 1295, 1342-43 (1964).

123. K. MACKENZIE, *supra* note 7, at 2.

124. *See* I C. HULL, *supra* note 113, at 355.

125. *Id.* at 354, 357. *See* BUREAU OF FOREIGN AND DOMESTIC COMMERCE, U.S. DEP'T OF COMMERCE, FOREIGN COMMERCE YEARBOOK 1935, at 373; SENATE COMM. ON FINANCE, ECONOMIC ANALYSIS OF FOREIGN TRADE OF THE UNITED STATES IN RELATION TO S. DOC. NO. 180, 72d Cong., 2d Sess., pt. 2 (1933); Metzger, *supra* note 120, at 354; Message by President Roosevelt to Congress, Mar. 2, 1934, in H.R. Doc. No. 273, 73d Cong., 2d Sess. (1934).

126. An Act to Amend the Tariff Act of 1930, ch. 474, 48 Stat. 943 (1934), *amending* 46 Stat. 590 (1930). Pertinent sections thereof are as follows: "Sec. 350.

which was to expand United States exports. Although the Act was an amendment to the Smoot-Hawley Tariff Act of 1930, it is fully effective and operates independently in the same way as a separate enactment.[127] Two features of the Act are important for the purposes of the present discussion: first, the President could reduce

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(a) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time— (1) to enter into foreign trade agreements with foreign governments or instrumentalities thereof; and (2) to proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists. The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: *Provided,* That the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts or policies which in his opinion tend to defeat the purposes set forth in this section; and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. The President may at any time terminate any such proclamation in whole or in part.

Sec. 2. . . . (b) Every foreign trade agreement concluded pursuant to this Act shall be subject to termination, upon due notice to the foreign government concerned, at the end of not more than three years from the date on which the agreement comes into force, and if not then terminated, shall be subject to termination thereafter upon not more than six months' notice."

127. Cordell Hull, who became Secretary of State in 1933, felt that "it would have been folly to go to Congress and ask that the Smoot-Hawley Act be repealed or its rates reduced by Congress. This had been the old system; and, with the exception of the Underwood Act in 1913, it always resulted in higher tariffs because the special interests enriched by high tariffs went to their respective Congressmen and insisted on higher rates." I C. HULL, *supra* note 113, at 358.

tariffs by as much as fifty percent for countries that did not discriminate against the United States; and secondly, the President was given the authority to negotiate trade agreements without Senate approval.

The first feature is the so-called "unconditional most-favored-nation clause."[128] As it pertains to tariff reductions it means that when the United States reduces the tariff rates on certain articles imported from country A the rates are likewise reduced on the same articles imported from countries B to Z — provided, however, that countries B to Z afford United States exports the same low rates of duty and as much freedom from restrictions as they allow any other country. If country B put higher rates of duty or more restrictions on United States products than on goods coming into B from any other country, then B's exports to the United States would still incur the high Smoot-Hawley rates.[129] Thus application of the most-favored-nation principle affords a means by which to achieve substantial tariff reductions, while at the same time it allows the President discretion in the application of the principle to nations that discriminate against the United States.

Secondly, the 1934 Act shifted the tariff-making function from Congress to the executive branch.[130] Formerly, trade agreements were in the form of treaties, which had to be submitted for Senate approval. Due to the prevailing congressional sentiment, however,

128. The most-favored-nation principle has been a historic trade policy of the United States. Originally, it was applied in a conditional form—*i.e.* countries accorded the most-favored-nation treatment were entitled to the benefits of trade agreements between the United States and other countries only if they gave equivalent compensation for the benefits received. The change to unconditional most-favored-nation treatment, which automatically extends trade agreement benefits to third countries without requiring compensation, was made by the Fordney-McCumber Tariff Act, ch. 356, 42 Stat. 858 (1922), after the conditional policy became increasingly ineffective in protecting American exports abroad. *See* 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 57-61 (1941); J. JACKSON, WORLD TRADE AND THE LAW OF GATT 249-72 (1969); K. MACKENZIE, *supra* note 7, at 41. *See generally* E. LUDWIG, COMMENTS ON THE MOST-FAVORED-NATION CLAUSE (1913); R. SNYDER, THE MOST-FAVORED-NATION CLAUSE (1948).

129. *See* I C. HULL, *supra* note 113, at 359-60. Applying the conditional most-favored-nation treatment under the same situation would mean that, when the United States made a tariff treaty with country A, she did not apply her tariff reductions to countries B to Z unless countries B to Z agreed to give to the United States concessions equivalent to those given to the United States by country A. For the reasons for the failure of the conditional form see *id.* at 360-61.

130. K. MACKENZIE, *supra* note 7, at 3. The Act based this delegation of authority on the existence of an emergency and the need of reviving United States foreign trade. *See* Stowell, *Editorial Comment,* 29 AM. J. INT'L L. 280 (1935).

treaties containing substantial tariff reductions were hopeless tools to effect trade agreements. Other nations hesitated to negotiate trade agreements because they were aware of the Senate's adverse actions regarding tariff-reducing treaties.[131] Many other nations could raise or lower tariff rates by executive order and thus could negotiate agreements without cumbersome legislative involvement. What the Trade Agreements Act of 1934 did, then, was to free the hand of the President to negotiate trade agreements with other nations without having to ask the Senate for prior or subsequent approval,[132] thereby establishing the pattern of the present foreign trade policy.[133]

B. *Post-1934 Legislation*

As an emergency relief measure, the Trade Agreements Act of 1934 was designed to improve the depressed conditions of the United States economy through an expansion of exports. Although the Act contemplated reciprocal cuts in United States customs duties in return for foreign tariff reductions, which would encourage exports, the proponents of the legislation made it clear that no American industries would be sacrificed in the process.[134] President Roosevelt emphasized this point in his message to Congress that accompanied the Trade Agreements Bill:

> The exercise of the authority which I propose must be carefully weighed in the light of the latest information so as to give assurance that no sound and important American interest will be seriously disturbed. The adjustment of our foreign trade relations must rest on the promise of undertaking to benefit and not to injure such interests.[135]

Industries concerned about injury from imports, nevertheless, were dissatisfied. Despite the assurances emanating from the legis-

131. *See* I C. HULL, *supra* note 113, at 354-55.

132. Proposed amendments to the 1934 Act suggested that Congress should retain some type of approval function as provided for in effecting treaties. For instance, Senator Johnson of California proposed that "no foreign trade agreement entered into under the provisions of the act shall become effective until submitted to the Congress by the President and approved by both the House and the Senate by majority vote . . . ." This proposal was defeated (by a vote of 50-34); similar proposals met the same fate. S. JOUR. 492, 73d Cong., 2d Sess. (May 28, 1934).

133. For an account of the machinery that was set up to execute the 1934 Act see I C. HULL, *supra* note 113, at 366-77.

134. *See* K. MACKENZIE, *supra* note 7, at 73-74.

135. 78 CONG. REC. 5256 (1934) (remarks of Representative Doughton).

lative and executive branches, industries feared that the trade concessions, once negotiated, might bring about an increase in imports, thereby threatening serious injury to the competing domestic industry. Accordingly, an "escape clause" was inserted at the request of the United States in the bilateral trade agreement with Mexico in 1942.[136] The clause provided that a concession could be suspended or modified if increased imports resulting therefrom caused serious injury to a domestic industry.

While escape clauses were to be incorporated into future trade agreements, no formal procedures were available to private parties to petition for relief.[137] In response to congressional pressure to remedy this alleged defect, a 1947 Executive Order[138] required the Tariff Commission to investigate whether "as a result of unforeseen developments and of the concession granted on any article by the United States . . ., such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury."[139] If injury was found, a recommendation of remedial action, in the form of withdrawal or modification of the concession, was to be made to the President.[140]

Despite attempts by the Executive to assuage the industrial

136. Agreement with Mexico Respecting Reciprocal Trade, Dec. 23, 1942, 57 Stat. 833 (1943), E.A.S. No. 311 (effective Jan. 30, 1943). *See* Metzger, *supra* note 120, at 356-57.

137. Although Congress extended the President's authority under § 350 of the 1930 Act (as amended by the 1934 Act) for a further three-year period, there was no specific inclusion of an "escape clause." Act of July 5, 1945, ch. 269, § 350, 59 Stat. 410. The Act of 1945 did, however, authorize further reductions in tariffs by permitting the Executive to reduce duties by 50% of the rates effective on January 1, 1945, which meant that a duty that had been reduced by 50% could be further reduced by another 50% in a trade agreement.

138. Exec. Order No. 9832, 3 C.F.R. 624 (1943-1948 Comp.). At this same time preparations were being made for the negotiation of the General Agreement on Tariffs and Trade (GATT). Article XIX of GATT contains an escape clause provision (61 Stat. A58). *See generally* J. JACKSON, *supra* note 128.

139. Exec. Order No. 9832, 3 C.F.R. 624 (1943-1948 Comp.) This policy of precautionary review prior to trade agreement negotiation was later codified and made more restrictive by § 3 of the 1951 Trade Agreements Extention Act, ch. 141, § 3, 65 Stat. 73, the so-called "peril points" provision. *See* note 152 *infra* and accompanying text.

140. Exercising its discretion, the Commission dismissed fourteen of the seventeen applications processed under the Executive Order without a formal investigation, and it found serious injury in only one case. Kelly, *The "Expanded" Trade-Agreements Escape Clause 1955-61*, 70 J. POL. ECON. 37, 41 (1962). *See* U.S. TARIFF COMM'N, Pub. No. 116, INVESTIGATIONS UNDER THE ESCAPE CLAUSE OF TRADE AGREEMENTS 8-12 (15th ed. 1963).

uneasiness over the new tariff policy, dissatisfaction with the operation of the escape clause continued. Relief was not immediately in sight, however, since post-war conditions necessitated even more stringent controls. The 1945 Act gave the President the power to raise tariffs by fifty per cent.[141] Drastic wartime controls over exports were continued each year after World War II until February 28, 1949, when the Export Control Act[142] was enacted as the first comprehensive system of export controls ever adopted by Congress in peacetime.[143] Congress stated the policy of the Act as follows:

> Sec. 2. The Congress hereby declares that it is the policy of the United States to use export controls to the extent necessary (a) to protect the domestic economy from the excessive drain of scarce materials and to reduce the inflationary impact of abnormal foreign demand; (b) to further the foreign policy of the United States and to aid in fulfilling its international responsibilities; and (c) to exercise the necessary vigilance over exports from the standpoint of their significance to the national security.[144]

To effectuate this policy the President was given the broad power to prohibit or curtail the exportation from the United States of any articles, materials or supplies, including technical data.[145]

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141. Act of July 5, 1945, ch. 269, § 2, 59 Stat. 410.

142. Ch. 11, 63 Stat. 7 (1949), *as amended,* 50 U.S.C. APP. §§ 2021-32 (1964) (expired on December 31, 1961, and now covered by 50 U.S.C. APP. §§ 2401-13 (1970)).

143. Since certain materials (steel, chemicals, drugs and building supplies) continued in short supply at home and abroad, unrestricted exports of such materials without regard to the potential economic impact could have adversely affected national security. Congress, therefore, deemed it necessary to impose strict controls on exports. *See* Berman & Garson, *United States Export Control—Past, Present, and Future,* 67 COLUM. L. REV. 791 & n.1 (1967).

144. Shortly after the passage of the Act, a coordinating committee (CoCom) was formed with other nations for the purpose of cooperating on a list of items that the member nations would not export to Communist nations. Member nations first consisted of the United States, Belgium, Canada, Denmark, France, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, United Kingdom, and West Germany. *See* Bassiouni & Landau, *supra* note 99, at 510. Despite CoCom, many items still were exported by other friendly nations to the Sino-Soviet bloc. S. REP. No. 1287, 86th Cong., 2d Sess. (1960), 1960 U.S. CODE CONG. & AD. NEWS 2011-12. Congress felt that this problem could be resolved in part by stating a policy (to be implemented by the President) of widening the coordination of prohibitions to include these other friendly countries. *See* S. REP. No. 1576, 87th Cong., 2d Sess. 511 & n.95 (1962).

145. 50 U.S.C. APP. § 2023(a) (1964) (now embodied in 50 U.S.C. APP. § 2403 (1970)). The constitutionality of this broad delegation has never been challenged.

The Act also authorized the President to redelegate the power given to him,[146] which the President did in 1961.[147] It has been said that no other prior single piece of legislation gave more power to the President to control United States commerce than the Export Control Act of 1949.[148] Subject only to the vague standards of "foreign policy" and "national security and welfare," he was given authority to cut off the entire export trade of the United States or to deny "export privileges" to any person. Additionally, the procedures for implementing this power were left almost entirely to his discretion, and at the same time serious administrative and criminal sanctions could be imposed for violation of any export regulations he might introduce.[149]

The President's authority under the Export Control Act was renewed in seven subsequent legislative approvals,[150] but perhaps the most significant was the initial renewal by the Trade Agree-

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Virtually identical delegations under earlier acts of this type, however, were upheld in United States v. Rosenburg, 47 F. Supp. 406 (E.D.N.Y. 1942), *aff'd*, 150 F.2d 788 (2d Cir.), *cert. denied*, 326 U.S. 752 (1945), and in United States v. Bereno, 50 F. Supp. 520 (D. Md. 1943). *See* Bassiouni & Landau, *supra* note 99, at 502-03, 512.

146. 50 U.S.C. APP. § 2023(b) (1964) (now embodied in 50 U.S.C. APP. § 2403(d) (1970)).

147. The President redelegated his power to the Secretary of Commerce by Exec. Order No. 10,945, 3 C.F.R. 473 (1959-63 Comp.), 50 U.S.C. APP. § 2023 (1964).

148. Berman & Garson, *supra* note 143, at 792.

149. Under the Act, the President could regulate all exports from the United States regardless of destination. Moreover, he could invoke the Trading with the Enemy Act of 1917 against designated countries. Ch. 106, 40 Stat. 411, *as amended*, 50 U.S.C. APP. §§ 1-44 (1970). The amended Act was employed by the President in December 1950, following the entrance of foreign forces into Korea, as the basis for the issuance of regulations designed to prevent virtually all economic dealings (including imports and financial transactions, as well as exports) with Communist China and North Korea. *See* Berman & Garson, *supra* note 143, at 792-93.

150. The Export Control Act was renewed in the years 1951, 1953, 1956, 1958, 1960, 1962 and 1965. In 1969, however, Congress did not renew the Act, per se, but embodied a major portion of the substance of the Act in the Export Administration Act of 1969, 50 U.S.C. APP. §§ 2401-13 (1970). From 1945, which marked the legislative highpoint of the trade liberalization program (*see* note 137 *supra*), until 1962, extensions of the tariff-cutting power were modest. The 1955 Act authorized fifteen per cent reductions. Act of June 21, 1955, ch. 169, 69 Stat. 162. The 1958 Act, which authorized twenty per cent reductions, extended until June 30, 1962, the period during which the President was authorized to enter trade agreements with foreign countries. Act of August 20, 1958, 72 Stat. 673.

ments Extension Act of 1951.[151] Under the 1951 Act, which was an extension of the authority given to the President under the Tariff Act of 1930, the President was required to submit any proposed foreign trade agreement to the Tariff Commission. The Commission was required to investigate the President's list of articles "imported into the United States to be considered for possible modifications of duties and other import restrictions, imposition of additional import restrictions, or continuance of existing customs or excise treatment." The Commission was then to report to the President its findings for each such article on:

> (1) The *limit* to which such modification, imposition, or continuance may be extended in order to carry out the purpose of such section 350 [of the Tariff Act of 1930] without causing or threatening serious injury to the domestic industry producing like or directly competitive articles; and (2) if increases in duties or additional import restrictions are required to avoid serious injury to the domestic industry producing like or directly competitive articles the *minimum* increases in duties or additional import restrictions required (emphasis added).[152]

The italicized words in the above-quoted section of the Act have been construed to constitute so-called "peril points." In other words, the Tariff Commission would provide the President with its educated guess concerning the lowest possible noninjurious rate—the "limit" or "minimum"—on *each* separate article on the President's list. This called for the Commission to forecast the effect of duty reductions on thousands of articles. The President, in subsequent trade negotiations, might breach these "peril points," but would then have to report his reasons for so doing to Congress. Determination of the peril points became such an onerous task that they were not included in the statutory scheme of the Trade Expansion Act of 1962.[153]

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151. Act of June 16, 1951, ch. 141, 65 Stat. 72, *as amended,* Trade Expansion Act of 1962, 19 U.S.C. §§ 1801-1991 (1970).

152. As under prior law, the Commission was required to hold hearings before it made its final report to the President. The Commission's report was to be sent to the President not later than 120 days after the Commission received the list from the President. The President could make no foreign trade agreements until the Commission had made its report to the President or until the expiration of the 120-day period. Act of June 16, 1951, § 3(a)(2), ch. 141, 65 Stat. 72. *See* Metzger, *supra* note 120, at 356-57.

153. 19 U.S.C. §§ 1801-1991 (1970). *See* notes 156-60 *infra* and accompanying text.

C. *The Trade Expansion Act of 1962.*

On January 25, 1962, President Kennedy sent to Congress his message concerning the trade agreements program. The President requested extensive new tariff-cutting authority, citing five new developments to support his request: (1) the growth of the European Common Market; (2) the growing pressures on the United States balance of payments; (3) the need to accelerate economic growth; (4) the Communist aid and trade offensive; and (5) the need for new markets for developing nations.[154] The Trade Expansion Act of 1962 (TEA), responding to these developments, made three significant changes in the existing legislation:

> (1) it expanded substantially the authority of the President to negotiate tariff reductions in trade agreements, with Common Market countries and with others; (2) it changed materially the 'safeguards against injury' provisions of the program; (3) it added an 'adjustment assistance' program to firms and employees harmed by imports, to be used in place of or in combination with tariff relief.[155]

Section 201 of the Act provides the basic authority for trade agreements. Under this section the President was authorized to enter trade agreements that could decrease the rate of duty to a rate 50 per cent below the rate existing on July 1, 1962, or increase the rate no more than 50 per cent above the rate existing on July 1, 1934. This power expired on July 1, 1967,[156] and has not been renewed. Section 211 sets forth specific provisions pertaining to the European Economic Community (EEC). If the President determines that the United States and the countries of the EEC together account for 80 per cent or more of the aggregate world export value of the articles in any category, he can eliminate the duty.[157] The most significant aspect of these provisions is that they allow for across-the-board reductions, as opposed to the item-by-item negotiations under the Trade Agreements Act.[158] Moreover, specific peril points were eliminated.[159] Another important change was the major modification in the escape clause proceedings.[160]

The TEA also enlarged the scope of the President's power to

154. S. METZGER, TRADE AGREEMENTS AND THE KENNEDY ROUND 1-10 (1964).
155. *Id.* at 19.
156. 19 U.S.C. § 1821(a)(1) (1970).
157. 19 U.S.C. § 1831 (1970).
158. S. METZGER, *supra* note 154, at 20.
159. *Id.* at 23. *See* note 152 *supra* and accompanying text.
160. S. METZGER, *supra* note 154, at 44-54.

suspend the operation of a concession granted under a trade agreement. Section 350(a) (5)[161] of the Trade Agreements Extension Act authorized the President to suspend the application of any trade agreement to articles of any country discriminating against United States commerce or maintaining policies that tend to defeat the purpose of the Act. Subsection (a) (6) provides that "[t]he President may at any time terminate, in whole or in part, any proclamation made pursuant to this section."[162] Section 350(a) (6) remains in effect and is repeated in section 255(b)[163] of the TEA. Section 350(a) (5), however, was repealed by section 257(b)[164] of the TEA. Section 252(c) currently provides for retaliation in response to "unreasonable import restrictions which either directly or indirectly substantially burden United States commerce . . . ."[165] It has been suggested that the expanded scope of section 252 evidences a congressional desire "that the President make greater use of this retaliatory tool than in past years in order to end discrimination or 'unreasonable' or 'unjustifiable' treatment of American exports"[166] and that this change is an expression of concern over the impact of the Common Market on American agricultural exports.[167]

161. Act of June 21, 1955, ch. 169, § 3(a)(4), 69 Stat. 164: "Subject to the provisions of section 5 of the Trade Agreements Extension Act of 1951 (19 U.S.C., sec. 1367) [Suspension or withdrawal of concessions from Communistic areas], duties and other import restrictions proclaimed pursuant to this section shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly or indirectly: *Provided,* that the President shall, as soon as practicable, suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts (including the operations of international cartels) or policies which in his opinion tend to defeat the purpose of this section."

162. 19 U.S.C. § 1351(a)(6) (1970).

163. 19 U.S.C. § 1885(b) (1970).

164. Act of October 11, 1962, Pub. L. No. 87-794, § 257(b), 76 Stat. 882.

165. 19 U.S.C. § 1882(c) (1970): "Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may, to the extent that such action is consistent with the purposes of section 1801 of this title, and having due regard for the international obligations of the United States—(1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or (2) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality."

166. S. METZGER, *supra* note 154, at 32.

167. *Id.* at 36-37. For an example of this impact see Walker, *Dispute Settlement: The Chicken War,* 58 AM. J. INT'L L. 671 (1964).

Two other provisions authorize the President to increase tariffs. Section 301,[168] the escape clause, provides that a trade association, firm or union may petition the Tariff Commission for tariff adjustment. The President may grant the adjustment if the Tariff Commission finds that increased imports cause, or threaten to cause, serious injury to the domestic industry producing an article that is directly competitive with the imported article, and that the increased imports have been the major factor in causing or threatening to cause the injury.[169] Section 232[170] also permits the President to restrict imports when he deems there is a threat to the national security. There are no material differences between this section and prior law.[171]

An additional provision was included by the Senate Finance Committee in reporting the bill. Section 353 would have authorized the President, if he found it to be in the national interest, to proclaim the increase of any existing duty to such rate as he might have found necessary. Moreover, this proposed section would have allowed the imposition of duties on items not otherwise subject to duty and the imposition of quotas or other import restrictions as the President might have found necessary.[172] Section 353 was included in the Senate version of the bill. This provision, however, was withdrawn by the Senate in the conference committee.[173]

IV. THE IMPORT SURCHARGE OF 1971

On August 15, 1971, President Nixon announced the New Economic Plan, which comprised a series of proposals to combat inflation and improve the United States balance of payments problems. The President imposed a 90-day wage and price freeze, temporarily suspended the convertibility of dollars into gold or other reserve assets, and proclaimed the ten per cent import surcharge.[174] The authority to impose the wage and price freeze had been delegated to the President in the Economic Stabilization Act of 1970.[175] In Presidential Proclamation No. 4074, proclaiming the surcharge, it

168. 19 U.S.C. § 1901 (1970).
169. 19 U.S.C. § 1902 (1970).
170. 19 U.S.C. § 1862 (1970).
171. S. METZGER, *supra* note 154, at 39.
172. S. REP. No. 2059, 87th Cong., 2d Sess. 8 (1962).
173. H.R. REP. No. 2518, 87th Cong., 2d Sess. 13 (1962).
174. For the full text of the President's address see N.Y. Times, Aug. 16, 1971, at 14, col. 1.
175. Pub. L. No. 91-379, tit. II, 84 Stat. 799 (1970).

was noted that the President had entered various trade agreements and proclaimed tariff rates under them pursuant to the authority vested in the Executive "by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended, and the Trade Expansion Act of 1962."[176] Acting under the same

176. Presidential Proclamation No. 4074, 3 C.F.R. 80 (1971):

"Imposition of Supplemental Duty for Balance of Payments Purposes By the President of the United States

A Proclamation

"WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

"WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

"WHEREAS, pursuant to the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended (hereinafter referred to as 'the Tariff Act') and the Trade Expansion Act of 1962 (hereinafter referred to as the 'TEA'), the President entered into, and proclaimed tariff rates under, trade agreements with foreign countries;

"WHEREAS, under the Tariff Act, the TEA, and other provisions of law, the President may, at any time, modify or terminate, in whole or in part, any proclamation made under his authority;

"NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

"A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

"B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

"(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 per cent ad valorem. Such supplemental duty shall be imposed on all dutiable articles imported into the customs territory of the United States from outside thereof, which are entered, or withdrawn from warehouse, for consumption after 12:01 a.m., August 16, 1971, provided, however, that if the imposition of an additional duty of 10 per cent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

"C. To implement section B of this Proclamation the following new subpart shall be inserted after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States: SUBPART C—TEMPORARY MODIFICATIONS FOR BALANCE OF PAYMENTS PURPOSES

Subpart C headnotes:

authority, the President proceeded to terminate temporarily and modify prior presidential proclamations implementing those trade agreements insofar as those proclamations were inconsistent with Proclamation No. 4074. "Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to ten per cent ad valorem."[177] The supple-

1. This subpart contains modifications of the tariff schedules proclaimed by the President in Proclamation 4074.

2. *Additional duties imposed*—The duties provided for in this subpart are cumulative duties which apply in addition to the duties otherwise imposed on the articles involved. The provisions for these duties are effective with respect to articles entered on and after 12:01 a.m., August 16, 1971, and shall continue in effect until modified or terminated by the President or by the Secretary of the Treasury (hereinafter referred to as the Secretary) in accordance with headnote 4 of this subpart.

3. *Limitation on additional duties*—The additional 10 per cent rate of duty specified in rate of duty column numbered 1 of item 948.00 shall in no event exceed that rate which, when added to the column numbered 1 rate imposed on the imported article under the appropriate item in schedules 1 through 7 of these schedules, would result in an aggregated rate in excess of the rate provided for such article in rate of duty column numbered 2.

4. For the purposes of this subpart—

(a) *Delegation of authority to Secretary*—The Secretary may from time to time take action to reduce, eliminate or reimpose the rate of additional duty herein or to establish exemption therefrom, either generally or with respect to an article which he may specify either generally or as the product of a particular country, if he determines that such action is consistent with safeguarding the balance of payments position of the United States.

(b) *Publication of Secretary's actions*—All actions taken by the Secretary hereunder shall be in the form of modifications of this subpart published in the FEDERAL REGISTER. Any action reimposing the additional duties on an article exempted therefrom by the Secretary shall be effective only with respect to articles entered on and after the date of publication of the action in the FEDERAL REGISTER.

(c) *Authority to prescribe rules and regulations*—The Secretary is authorized to prescribe such rules and regulations as he determines to be necessary or appropriate to carry out the provisions of this subpart.

5. *Articles exempt from the additional duties*—In accordance with determinations made by the Secretary in accordance with headnote 4(a), the following described articles are exempt from the provisions of this subpart:

mental duty was imposed on "all dutiable articles."[178] The President, therefore, did not propose to assess a surcharge; he merely suspended previously negotiated concessions to the extent required to achieve the equivalent of a ten per cent surcharge. This procedure was, in fact, realistic since any concession proclaimed in carrying out a trade agreement pursuant to the Trade Expansion Act or the Trade Agreements Act was accorded most-favored-nation treatment.[179] Moreover, the concessions negotiated during the Kennedy Round were extended to all members of the General Agreement on Tariffs and Trade[180] through operation of the most-favored-nation clause in article I of the Agreement.[181] The President was able, in effect, to assess a ten per cent surcharge by suspending concessions. The issue is his authority to suspend or temporarily terminate these concessions in order to correct a balance of payments deficit.

Item	Article	RATES OF DUTY	
		1	2
948.00	Articles, except as exempted under headnote 5 of this subpart, which are not free of duty under these schedules and which are the subject of tariff concessions granted by the United States in tariff agreements	10% ad val... (See headnote 3 of this subpart.)	No change.

D. This Proclamation shall be effective 12:01 a.m., August 16, 1971.

IN WITNESS WHEREOF, I have hereto set my hand this fifteenth day of August in the year of our Lord nineteen hundred and seventy-one, and of the Independence of the United States of America the one hundred and ninety-sixth.

/s/ Richard Nixon

177. Proclamation No. 4074, § B(2), 3 C.F.R. 80, 81 (1971).

178. Proclamation No. 4074, § B(2), 3 C.F.R. 80, 81 (1971).

179. Most-favored-nation treatment was accorded under § 350(a) of the Trade Agreements Act, ch. 474, 48 Stat. 943 (1934). The most-favored-nation clause in the Trade Expansion Act is found in § 251. 19 U.S.C. § 1881 (1970). The products of Communist countries have been excluded from most-favored-nation treatment since 1951. Ch. 141, § 5, 65 Stat. 73 (1951). This exclusion has been continued under the Trade Expansion Act. 19 U.S.C. § 1861 (1970).

180. General Agreement on Tariffs and Trade, *done* October 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. For a general discussion of GATT see K. DAM, THE GATT, LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); J. JACKSON, *supra* note 128.

181. GATT, art. I.

A. *Statutory Authority Supporting the Import Surcharge*

Four provisions of the Trade Expansion Act authorize duty increases: (1) section 232 (safeguarding national security); (2) section 252 (foreign import restrictions); (3) section 255 (termination); and (4) section 320 (presidential action after Tariff Commission determination). Moreover, section 201, which provides the basic authority for trade agreements, grants the President the power to "proclaim such modification or continuance of any existing duty or other import restriction, such continuance of existing duty-free or excise treatment, or such additional import restrictions, as he determines to be required or appropriate to carry out any such trade agreement."[182] Although the President's authority to enter into trade agreements lapsed in 1967, it appears that the time limitation found in section 201(a) (1) is not applicable to section 201(a) (2).[183]

Proclamation No. 4074 does not specify the provisions of the Trade Agreements Act or the Trade Expansion Act on which the Executive relied. The Office of the General Counsel, Department of the Treasury, however, subsequently issued Opinion No. 822,[184] which states that the statutory authority is found in section 350(a) (6) of the Trade Agreements Act and section 255(b) of the Trade Expansion Act.[185] These provisions appear to be logical bases for the surcharge since both are unlimited. Section 302, on the other hand, requires specific findings by the Tariff Commission[186] and

182. 19 U.S.C. § 1821(a)(2) (1970).

183. Although this interpretation may be questioned, it does not appear to be unreasonable in light of the fact that subsection (a)(2) merely provides the President the authority required to carry out existing trade agreements, analogous to the continued vitality of § 252(c). For a discussion of the relation of § 252(c) of the most-favored-nation clause see United States v. Star Indus. Inc., 462 F.2d 557 (C.C.P.A. 1972).

184. Office of General Counsel, Dep't of Treasury, Opinion No. 822 (Sept. 29, 1971) [hereinafter cited as Opinion No. 822].

185. The import surcharge is the subject of current litigation in the Customs Court. Yoshida Int'l Inc. v. United States, Civil No. 72-2-00314 (Cust. Ct.). The Government contends that the President had the power to terminate trade agreement proclamations, in whole or in part, at any time. Brief for Defendant at 4-5. The Government distinguishes between terminating the agreements themselves, and terminating the proclamations implementing the agreements. Thus, the Government argues, the President may terminate the proclamations under an agreement without terminating the agreement, and, subsequently, proclaim new proclamations under the agreement. In addition, the Government relies on § 5(b) of the Trading with the Enemy Act. Brief for Defendant at 55.

186. Presidential action under § 302 is predicated on a finding by the Tariff

section 232 requires findings by the Office of Emergency Preparedness.[187] In addition, the existence of foreign import restrictions is a prerequisite to action under section 252. No such prerequisites were cited by the President in announcing the surcharge. On the contrary, the President stated that the surcharge was "an action to make certain that American products will not be at a disadvantage because of unfair exchange rates."[188]

Therefore, the question naturally arises whether section 350(a) (6) of the Trade Agreements Act and section 255(b) of the Trade Expansion Act are sufficient to support the imposition of the surcharge. A difficult problem is presented by the language of these provisions. Both sections utilize the phrase "terminate, in whole or in part." This language suggests a more permanent action than a mere suspension. The Executive, however, clearly interpreted the terms "terminate" and "suspend" as synonomous. The President stated in paragraph B(1) of Proclamation 4074 that "I hereby *terminate* in part for such period as may be necessary and modify prior Presidential Proclamations" while in paragraph B(2) stating that "[s]uch proclamations are *suspended.*" (emphasis added)[189]

In *Star Industries, Inc. v. United States*,[190] the Customs Court distinguished the termination power of section 350(a) (6) of the Trade Agreements Act and the suspension power of section 252(c) of the TEA. The President had suspended tariff concessions on brandy valued at over $9.00 per gallon, trucks valued at over $1,000, potato starch and dextrine in retaliation to increased tariffs on American poultry by the EEC.[191] The court noted that the President has the power to terminate the concessions under section 350(a) (6), but that the President actually had attempted merely to modify the duty rates.[192] The court concluded that the require-

Commission that "as a result in major part of concessions granted under trade agreements, an article is being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to the domestic industry producing an article which is like or directly competitive with the imported article." 19 U.S.C. § 1901(b) (1) (1970).

187. The Director of the Office of Emergency Preparedness must find that the article is being imported in such quantities or under such circumstances as to threaten or impair the national security. 19 U.S.C. § 1862(b) (1970).

188. N.Y. Times, Aug. 16, 1971, at 14, col. 5.

189. Presidential Proclamation No. 4074, 3 C.F.R. 80 (1971).

190. 320 F. Supp. 1018 (Cust. Ct. 1970).

191. This increase in duty was the final action in the "chicken war." *See* Walker, *supra* note 167.

192. 320 F. Supp. at 1023.

ments of section 252(c), dealing with the President's suspension power, would be controlling.[193] On appeal, the Court of Customs and Patent Appeals held that the President had complied with the requirements of section 252(c), and, therefore, did not rule on the Customs Court holding concerning section 350(a) (6).[194] Nevertheless, the analysis of the Customs Court appears to be sound and is supported by *Falcon Sales Co. v. United States*.[195] Plaintiff had protested the suspension of tariff concessions negotiated under the Trade Agreements Act, which resulted in an increased duty on spring clothespins. The Government relied on section 350(a) (6), arguing that the President had merely terminated the previously granted concessions. The Customs Court noted that the difference between termination and suspension is one of intent. To terminate is to halt an existing condition with no present thought of reactivating it in the future, whereas to suspend is to place an existing condition in a state of dormancy with future reinstatement a presently considered possibility.[196]

Under the *Falcon* rationale, Proclamation No. 4074 clearly intended to effect a suspension of tariff concessions. The proclamation itself demonstrates this fact by means of such language as "modify prior Presidential Proclamations" and "such proclamations are suspended."[197]

Opinion No. 822 relies on section 201(a) (2) of the TEA and section 350(a) (1) (b) of the Trade Agreements Act for authority to revive the operation of the concessions.[198] Section 201(a) (2) of the Trade Expansion Act, however, might be utilized more effectively to sustain the initial suspension. One difficulty in this regard is that the modification must "be required or appropriate to carry

193. 320 F. Supp. at 1024.

194. United States v. Star Indus. Inc., 462 F.2d 557 (C.C.P.A. 1972).

195. 199 F. Supp. 97 (Cust. Ct. 1961).

196. 199 F. Supp. at 102.

197. In *Yoshida,* the Government refutes plaintiff's argument that termination "in whole or in part" is limited to a complete termination of certain concession rates under a proclamation while leaving other concessions unaffected. Brief for Defendant at 27. The Government contends that under General Headnote 4(d) to the Tariff Schedules of the United States whenever a proclaimed rate is suspended or terminated the rate reverts to the statutory rate, unless there is another intervening proclaimed rate. Terminating the prior rate and imposing a new rate, the Government argues, constitutes a *termination in part* of the trade agreement proclamation of the existing rate. Brief for Defendant at 27-28. This argument, however, cannot be sustained under the rationale of *Star Industries* and *Falcon.*

198. Opinion No. 822, *supra* note 184.

out any such trade agreement."[199] This requirement might be met by relying on the purpose of trade agreements negotiated pursuant to the Trade Agreements Act or the TEA. The purpose of trade agreements under the Trade Agreements Act, according to section 301(a) (1), is to expand foreign markets for products of the United States.[200] Likewise, the purposes of the TEA are to maintain and enlarge foreign markets, to strengthen economic relations with foreign countries, and to prevent Communist economic penetration.[201] The purpose of the surcharge was to improve United States balance of payments,[202] a problem that is inextricably bound to the balance of trade problem. In conjunction with the temporary suspension of conversion of dollars into gold or other reserve assets, the goal of the surcharge was to stabilize exchange rates, a result that would necessarily enhance the position of United States products in foreign markets. Moreover, just as the most-favored-nation clause insures that the benefits of trade agreements will flow to the contracting parties to prior trade agreements, the most-favored-nation clause in the TEA states that, except as otherwise provided, any duty or other import restriction shall apply to products of all foreign countries, whether imported directly or indirectly.[203] The logical result is that this clause would operate to suspend the concessions to all countries that gained the benefit of the concessions through most-favored-nation treatment.[204] Thus, after the proclamation of the surcharge, there was speculation that the surcharge would not be applicable to the products of Communist nations, since these nations have been excluded from most-favored-nation treatment by section 231 of the TEA,[205] and their products have not been receiving the benefit of the concessions that were suspended.[206]

Therefore, section 201(a) (2) appears to provide a sounder basis

199. 19 U.S.C. § 1821(a)(2) (1970).
200. 19 U.S.C. § 1351(a)(1) (1970).
201. 19 U.S.C. § 1801 (1970).
202. *See* note 188 *supra* and accompanying text.
203. 19 U.S.C. § 1881 (1970).
204. In United States v. Star Indus., Inc., the court determined that § 252(c) is an exception to the operation of the general application of most-favored-nation treatment. Interpreting the language of § 252(c) and the legislative history, however, the court held that the concessions should be suspended on a most-favored-nation basis, since the action was taken under article XXVIII of GATT, which contemplated most-favored-nation treatment. 462 F.2d at 561-63.
205. N.Y. Times, Aug. 19, 1971, at 20, col. 3.
206. *See* note 179 *supra.*

for the imposition of the surcharge than section 255(b). The Executive, however, undoubtedly chose to rely on the termination provision because it is completely unrestricted, whereas section 201(a)(2) requires that the modification be required or appropriate to carry out a trade agreement. This is the type of problem to which the proposed section 353 of the TEA was addressed. This section would have alleviated the problem by authorizing the President to raise or lower tariffs whenever he felt such action would be in the national interest. An argument could be made that the proposed section 353 is analogous to the proposals authorizing plant seizure that were considered in *Youngstown*. Section 353, however, was a general grant of power, whereas the proposal in *Youngstown* was much more specific. Moreover, in 1971, the President had additional statutory authority in the absence of section 353. President Truman, on the other hand, relied almost exclusively on his powers as Commander in Chief. Although there is a superficial similarity, the failure of Congress to enact section 353 is not sufficiently explicit to warrant a conclusion that Congress had preempted presidential action, as four justices felt was the case in *Youngstown*.

Therefore, the most persuasive statutory argument is that section 201(a)(1) of the Trade Expansion Act of 1962 authorized the President to impose a surcharge. Although this argument is far from conclusive, additional support may be found if the Executive's inherent powers in foreign affairs can be invoked.

B. *Inherent Powers*

In *Chicago & Southern Airlines*, the Court stated that the President possesses certain inherent powers in foreign commerce.[207] The factual situation in that case, which involved foreign overflights, had greater foreign affairs overtones than the present situation. As these foreign affairs overtones in what is basically a foreign commerce problem diminish, the President's inherent powers correspondingly diminish. Therefore, an examination of the degree to which the Executive's foreign affairs powers will apply requires an analysis of the foreign commerce problem in terms of foreign affairs.

The Trade Expansion Act of 1962 was titled "a Bill to promote the general welfare, foreign policy, and security of the United States."[208] The House Ways and Means Committee Report noted three primary reasons for enacting the bill. First, the Committee

207. *See* note 59 *supra* and accompanying text.

208. *See* H.R. REP. No. 1818, 87th Cong., 2d Sess. 1 (1962).

noted that the EEC was a political necessity to bring the European countries together to present a strong united front to the Soviet threat. The need for close coordination with the EEC was cited as a primary consideration. Secondly, the report stated that expanded trade with the less developed countries would lead to greater stability and growth in those countries, thereby reducing their vulnerability to Communist pressures. Thirdly, the Committee considered the bill to provide alternate markets to countries that were the targets of Communist bloc economic pressure.[209]

In light of this background, one might conclude that the area of trade agreements is an area in which the President, possessing broad powers in foreign affairs, has certain inherent powers, even though the regulation of foreign commerce is vested in Congress. Indeed, the foreign affairs overtones in this area may be sufficient to characterize it as one in which concurrent powers are exercised.

One must distinguish, however, between inherent and delegated powers. The exercise of executive powers pursuant to a congressional delegation is not the equivalent of the exercise of inherent powers. The former is subject to greater restriction by Congress than is the latter. In *Shurtleff v. United States*,[210] the Supreme Court considered whether the President could remove an executive officer for any causes other than those cited in the statute creating the office. The Court noted that the President, by virtue of his general power of appointment, may remove an officer, even in the absence of a constitutional or statutory provision. The Court assumed, for the purposes of the case only, that Congress could attach conditions to the removal of the officer. This congressional action, however, was not sufficient to deprive the President of his general power of removal. The Court ruled that the power could not be restricted by implication or inference. "The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by Constitution or statute. It requires plain language to take it away."[211]

This holding is essentially that of the four concurring justices in *Youngstown*. They found that Congress had clearly circumscribed the President's war power, a concurrent power, by refusing to authorize plant seizure.[212] In *Guy Capps*, the court also found that

209. *Id.* at 1-12.
210. 189 U.S. 311 (1903).
211. 189 U.S. at 316.
212. *See* note 72 *supra* and accompanying text.

Congress had provided exclusive procedures, which the President failed to follow. An essential difference between *Youngstown* and *Guy Capps* is that the former involved an inherent power, *i.e.* the President's power as Commander in Chief, while in the latter the court stated that the President's source of power was derived from a congressional delegation. In the case of the surcharge, the language of the Trade Agreements Act and Trade Expansion Act is broader than that of the Agricultural Adjustment Act of 1948, thereby giving rise to the conclusion that its procedures are not exclusive. Moreover, the background of the TEA evinces more of a foreign affairs concern that the 1948 Act.

Therefore, it appears that the Executive can invoke his inherent powers in addition to the statutory delegation. The conclusion to be drawn is that any congressional limitation must be explicit, for, as shown by *Shurtleff* and *Youngstown*, the courts will not imply the restrictions. This conclusion, however, is based on a finding that trade agreements is an area in which concurrent powers are exercised—Congress' power to regulate foreign commerce and the Executive's broad power over foreign affairs.[213]

The same policy considerations that dictate that the President possess great flexibility in the conduct of foreign affairs are present in the area of foreign trade, as recognized by Congress through its authorizing foreign trade agreements. The Framers, recognizing the need for discretion in the conduct of foreign affairs, created a system of government in which the Executive is granted wide latitude in this area. Alexander Hamilton spoke of the need for

213. In the recent case of Consumers Union v. Rogers, 352 F. Supp. 1319, (D.D.C. 1973), the court rejected the argument that the Sherman Anti-Trust Act and the Trade Expansion Act of 1962 preempted presidential power to enter into agreements with private companies. The court declared that the President does possess certain authority in the field of foreign commerce. "[T]here is nothing in the Trade Expansion Act of 1962 that makes its processes exclusive. Nor can it be said that a general statute of uncertain application like the Sherman Act was intended to preempt from the President his independent authority over foreign commerce. Compare the legislation and facts involved in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 . . . (1952). While the legislative pattern is indeed comprehensive and the President's authority has been narrowed, these acts cannot be read as a congressional direction to the President prohibiting him from negotiating in any manner with private foreign companies as to commercial matters. Far more explicit legislation would be required to deprive the President of this authority in foreign affairs where his preeminent role has quite properly long had firm constitutional recognition." 352 F. Supp. at 1322-23. The court held, however, that the President could not exempt the companies from the operation of the Sherman Act.

"[a]ccurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and dispatch . . . ."[214] The entire history of tariff regulation demonstrates that this aspect of foreign commerce is inextricably bound to foreign affairs, with the necessary result that the Executive possesses inherent powers in this field. Trade Agreements, therefore, may be characterized as an area of concurrent powers. Congress may be the ultimate decision maker, as in *Youngstown*, but until that decision is made the President has a great deal of freedom to act.

Trade agreements and tariff regulation, however, are but one facet of foreign commerce. There are other areas of foreign commerce in which the Executive undoubtedly possesses some inherent powers. To determine the extent of those powers, however, each individual area must be scrutinized to ascertain the foreign affairs impact. Nevertheless, this examination of trade agreements and tariff regulation indicates that although section 201(a) (2) of the Trade Expansion Act, standing alone, may not be sufficient to sustain the imposition of an import surcharge, when read in the light of the underlying requirements for discretion in the field of foreign affairs that provision does provide a satisfactory basis for the surcharge.

V. CONCLUSION

A threshold question to a determination of how the courts would rule on the import surcharge is whether the courts would rule at all; that is, whether the validity of the import surcharge is a "political question." It should be noted at the outset that the determination of the existence of a political question is the exclusive responsibility of the judiciary.[215] In making this determination, the Supreme Court analyzes many factors;[216] the determinative factor, however, is an analysis of the grounds on which the Court will have to base its ultimate decision.[217] Thus, to a certain degree, ascertain-

214. THE FEDERALIST No. 75, at 507 (J. Cooke ed. 1961) (A. Hamilton).

215. Baker v. Carr, 369 U.S. 186, 211 (1962).

216. In discussing the analysis of political questions in the field of foreign affairs, the Court has stated: "Our cases in this field seem invariably to show 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." 369 U.S. at 211-12.

217. This conclusion is evident in Justice Brennan's discussion of political

ing the existence of a political question goes to the merits of the issue presented to the Court. Discussing the act of state doctrine, Justice Harlan stated that "[i]t should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice."[218] In the recent case of *First National City Bank v. Banco Nacional de Cuba*,[219] Justice Rehnquist stated that the act of state doctrine is designed primarily to avoid embarrassment to the executive branch.[220] Justice Brennan's dissent takes issue with this point of view; the act of state doctrine is a political question, which has its roots in the lack of consensus concerning the applicable law.[221] Therefore, the Department of State's statement of position, which, if followed by the Court, would preclude future embarrassment to the Executive, did not affect Justice Brennan's conclusion that a political question had been raised.[222] Since the state of the law is unsettled as a result of changing attitudes and policies, the Court would be forced to make decisions based on political, as

questions: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217.

218. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

219. 406 U.S. 759 (1972).

220. 406 U.S. at 765.

221. "To the contrary, the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed all point toward the existence of a 'political question.' " 406 U.S. at 788.

222. Justice Brennan's position may be of great importance in the future since Justices Stewart, Marshall and Blackmun joined in his dissent. Justice Douglas favored adjudication of the issue on the grounds that the issue was raised in a counter-claim and National City Bank v. Republic of China, 348 U.S. 356 (1955), was controlling. In a future case, these five Justices could constitute the majority.

opposed to legal grounds. Such decisions are beyond the domain of the Court, since at that point the Court ceases to function as a judicial body and enters the realm of political conflict.

Applying the political question doctrine to the import surcharge, it appears that the Court, in effect, would be making a political decision, unless the Court could uphold the surcharge solely on statutory grounds. If the statutory grounds are insufficient, however, the Court could resort to the inherent powers of the President. Since the scope of the President's powers in foreign commerce is not defined, the Court would be making a political decision. This situation should be contrasted to the one in *Youngstown*, in which Congress had preempted presidential action. In *Youngstown*, the congressional action provided the basis for a "legal" determination, a basis that is lacking in this situation. This analysis does not predetermine the Court's holding; the Court will examine the legal grounds before reaching a decision. The legal grounds, however, must be present. Without legal grounds, that is, congressional action, the case lies within Justice Jackson's "zone of twilight." Into this zone the Court should not venture. Within the area of concurrent powers Congress and the Executive struggle for power. This struggle is an essential element in the system of checks and balances. The struggle continues within a framework that is constantly moving forward. The Court should enter the struggle only when an impasse has been reached and the movement of the entire framework has been halted.

David Pollard
David A. Boillot