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UNITED STATES CONSTITUTIONAL ALLOCATION OF POWER IMPACTING UPON EASTERN EUROPEAN TRADE

*Fletcher N. Baldwin, Jr.**

I. INTRODUCTION

In the United States, the executive branch of government established under Article II of the United States Constitution, has historically perceived itself to be the carrier of national values, domestically and internationally.[1] The legislative branch of government established under Article I of the Constitution has been considered the focus for localized or regional needs.

This national posture of executive power has been periodically challenged in an attempt to determine the parameters of the Faithful Execution Clause in Article II of the Constitution. The Faithful Execution Clause is the main source of executive power. Beginning with the administration of Franklin D. Roosevelt, in 1933, this clause assumed a dynamic vitality that propelled the work of the executive

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1. *See generally*, Miller, *Implications of Watergate: Some Proposals for Cutting the Presidency Down to Size*, 2 HAST. CONST. L.Q. 33 (1975)

branch far beyond what was anticipated by the constitutional framers of Article II in 1787.[2] The Roosevelt administrative agency state implemented executive concepts of "Quality of Life"[3] whether at the local, regional, national or transnational level. Meanwhile, the Congress, appearing awed by the complexity of the post-technological environment, seemed to abdicate much of its Article One powers. The abdication came in the form of congressional cooperation in executive restructuring.[4] With the abdication of congressional power, the strength of the executive increased until the present administration inherited an executive department that had developed far out of proportion despite a built-in system of checks and balances.

One such dramatic area of expansion is the role and scope of presidential power over foreign commerce. The power of the President in the foreign commerce arena has traditionally been great. However, so often, the expansion has come at the expense of congressional constitutional authority. Indeed, as recently as 1975, the Court of Customs and Patent Appeals observed, "Congress, beginning as early as 1794 and continuing into (the Trade Act of) 1974 has delegated the exercise of much of the power to regulate foreign commerce to the Executive."[5]

Thus, with almost two hundred years of precedents to examine, this paper will concentrate upon the theories permitting executive growth, and the impact of that growth upon the role of the President in the critical area of foreign trade. Next, the paper will examine certain principles for determining the legality of congressional delegation of authority to the Executive in the foreign commerce arena. Furthermore, the vitality of these guidelines will be illustrated by an examination of their use in recent cases. Finally, the paper will apply those guidelines to the Trade Act of 1974, as amended in 1979, to determine the legality of the congressional delegation of power and the constitutionality of the overextended role of the executive in foreign trade matters.

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2. *Id.* at 45-52.

3. *Id.*

4. *Id.* at 48. *For an example* of the Executive State Out of Constitutional Control, see Immigration & Naturalization Service v. CHADHA, 462 U.S. 919 (1983).

5. United States v. Yoshida International, Inc., 63 C.C.P.A. 15, 526 F.2d 560 (1975). *See also* Davidow, *Hegemony With a Vengeance: U.S. Trade Law Attacks on Foreign Government Equity Participation in Exporting Enterprises*, 24 COLUM. J. TRANSNAT'L L. 279 (1986).

II. BACKGROUND

To understand the role of the President in foreign commerce first requires an assessment of the Article III responsibility of the United States Supreme Court.[6]

The conspicuous failure of the Court historically to address the basic issue of executive power vis-à-vis the Congress may be viewed as a *sub rosa* application of the political question doctrine. Generally, the application of this doctrine is believed to serve at least one of three functions. *First*, in its "prudentialist" role,[7] the political question doctrine permits the Court to avoid emotional issues which are found to be inexpedient to decide. *Second*, in its "functionalist" role,[8] it permits the Court to decline to consider issues which lie outside the Court's traditional competence and which the Constitution, as interpreted by the Court, has relegated to other branches of the government. *Finally*, in its "classicist" role,[9] the doctrine works to give the Justices expansive reviewing power by positing a duty to determine judicially all issues properly placed before the Court.[10] Following the landmark decision in *Baker v. Carr*,[11] the Court appeared to adopt a classicist approach; however, more recently the Supreme Court has given far greater consideration to "functionalist" and "prudentialist" values. Prior to an analysis of the substantive effect of the present Court's application, both overt and *sub rosa*, of the political question doctrine, it is necessary to understand the Court's view of the procedural effect of the doctrine on the constitutional issues to which the doctrine is applied.

Although the political question doctrine is primarily a form of judicial avoidance, similar to "standing" and other related doctrines, its effect is quite different from avoidance on jurisdictional or procedural grounds. For example, a denial of *certiorari* will not affect the decision of the lower court, and thus will not preclude the Court's later reso-

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6. *See generally*, Baldwin, *The United States Supreme Court: A Creative Check of Institutional Misdirection?* 45 IND. L.J. 550 (1970).

7. *See generally*, — BICKEL, THE LEAST DANGEROUS BRANCH (1962); Ligan, *Political Question Doctrine*, 17 UCLA L. REV. 1135 (1970). *See also* United States v. O'Brien 391 U.S. 367 (1968).

8. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also* Mora v. McNamara, 389 U.S. 934 (1967); Gilligan v. Morgan, 413 U.S. 1 (1973).

9. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (I966). *See also* Baker v. Carr, 369 U.S. 186 (1962); Powell v. McCormark, 395 U.S. 486 (1969).

10. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

11. *See supra* note 9.

lution of a case involving similar issue and facts. Similarly, lack of "ripeness" will preclude a constitutional decision, but the same party, upon a later showing of more concrete interference with protected rights, may obtain a decision. If avoidance takes the form of lack of standing or non-adversarialness of the case, the party before the Court will be unable to raise the constitutional issue, but a "better" party is not precluded from doing so. In short, all of the traditional forms of judicial avoidance affect only the individual case, not the constitutional issue.

By contrast, the political question doctrine attaches solely to the issue presented by the case.[12] An analysis of the most important political questions to reach the Court[13] supports the observation that the doctrine is not employed merely to avoid individual cases, since all of these cases reached the Court by way of the discretionary *writ of certiorari*. Whereas the traditional procedural grounds for avoidance present a virtually limitless variety of substantive issues, the political question doctrine can be defined by reference to a limited number of questions of substantive law.[14] Once the doctrine attaches to an issue, precedent and *stare decisis* operate to prevent a judicial determination of this issue in any future case.

When the Court employs the procedural technique of abstention, it nevertheless retains ultimate responsibility for defining and enforcing the constitutional principle at stake. However, when holding a question "political" rather than "judicial," the Court renounces this responsibility in favor of other political institutions. Abstention of this type is not intended to prepare the ground for a more effective vindication of the issue under more auspicious circumstances, but rather to abdicate the responsibility "to say what the law is."[15] Such action by the Court is viewed, under the "classicist" theory, as a dereliction of the judicial duty to decide cases properly within the jurisdiction of the Court.

The acme of classicist application of the political question doctrine was marked by the Court in *Baker*. Having ruled in *Baker* that chal-

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12. The point of *Baker* was that the doctrine involves "political questions," not "political cases." *Id.*

13. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Ludecke v. Watkins, 335 U.S. 160 (1948); Mexico v. Hoffman, 324 U.S. 30 (1945); United States v. Pink, 315 U.S. 203 (1942); Coleman v. Miller, 307 U.S. 433 (1939).

14. *Baker*, 369 U.S. at 211-226. Justice Brennen delineated the following categories; foreign relations, dates of duration of hostilities, validity of enactments, the status of Indian tribes, and republican form of government.

15. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-178 (1803).

lenges to malapportioned legislatures presented a justiciable issue, the Court went a step further when it declined to invoke the political question doctrine in *Bond v. Floyd*,[16] holding instead that judicial review of the Georgia Legislature's refusal to seat anti-war activist Julian Bond was available. Likewise, in *Powell v. McCormack*,[17] the Court ruled that the political question doctrine did not preclude judicial review of Congress' refusal to seat Representative Adam Clayton Powell. In both *Bond* and *Powell*, the Court appeared to be following the expansive course set in *Baker*, whereby the political question doctrine was viewed as a product of constitution interpretation, rather than of judicial discretion.[18] As Justice Douglas noted in his concurring opinion in *Baker*, "[w]here the Constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene,"[19] but as *Bond* and *Powell* indicate, this *caveat* does not preclude resolution of issues simply because they are political in nature.

The present trend toward conservatism manifested by the Supreme Court in recent decisions is indicative of a shift to a more functionalist/prudentialist construction of the political question doctrine. Thus, in *O'Brien v. Brown*,[20] where delegates from California and Illinois challenged the recommendations of the Credentials Committee of the Democratic National Convention denying them seating, the Court stayed the order of the court below. Although citing the availability of the National Convention as a forum to review recommendations of the Credentials Committee and the lack of *stare decisis* as bases for its ruling, the factor exerting primary influence on the Court was the "large public interest" in allowing the political processes to function free from judicial intervention. In holding that the judiciary should defer directly to the Democratic National Convention and indirectly to "public interest," the Court was assuming a functionalist/prudentialist posture toward the constitutional issues. Nowhere in its opinion did the majority point to a specific constitutional provision denying the Court competence to reach the merits. On the contrary, by implication, the Court seemed to intimate that the complex political nature of the issues was itself sufficient to warrant judicial avoidance. The

16. 385 U.S. 116 (1966).
17. *See supra* note 9.
18. *Baker*, 369 U.S. at 210-211.
19. *Id.* at 246.
20. 409 U.S. 1 (1972).

Court wanted to avoid the charge of judicial manipulations of party candidates for the office of President. The Court feared that the ultimate candidate could appear as a "judicial" and not a party choice.

Although the political question doctrine is applicable in cases where judicial resolution "would lead a court into conflict with one or more of the coordinate branches of government,"[21] to hold that it is likewise applicable in cases involving political processes and parties seems to ignore the "political" party cases such as *Terry v. Adams*[22] and *Smith v. Allright*,[23] as well as *Baker*.

On either "functionalist" or "prudentialist" grounds, the decision in *O'Brien* falls outside the parameters of the political question doctrine, both because the power to decide the basic constitutional issues is not constitutionally delegated to any other branch of government and because public opinion has not traditionally lacked the competence to reach the merits of a given case. Certainly the controversiality of the issue in *O'Brien*, or for that matter *Dames & Moore v. Regan*,[24] could not have been more hotly contested than the constitutional questions concerning the Missouri Compromise,[25] child labor legislation,[26] President Truman's seizure of the steel mills,[27] or school segregation.[28] The Court has shown many times in the past that it will not seek shelter under the political question doctrine merely because determination of the issue might be unpopular. Likewise, the political question doctrine has had no place where the Court was presented with conflicting claims of competence among the other departments of government.[29] Such issues have been decided on their merits even in the field of the foreign affairs power.[30] The *Steel Seizure Case*[31] and *The Pocket Veto Case*[32] confirm the rule of allocation of competence in the

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21. *Id.* at 15.
22. 345 U.S. 461 (1953).
23. 321 U.S. 649 (1944).
24. 453 U.S. 654 (1981).
25. 60 U.S. (19 How.) 393 (1857); *Dred Scott*, 60 U.S. at 393.
26. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).
27. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
28. Brown v. Board of Educ., 347 U.S. 483 (1954).
29. *See, e.g.*, I.N.S. v. CHADHA, 462 U.S. 9I9 (1983)
30. *See, e.g.*, United States v. Guy W. Copps, Inc., 348 U.S. 296 (1955); United States v. Belmont 301 U.S. 324 (1937); Missouri v. Holland, 352 U.S. 416 (1920). *See also* Borchard, *Shall The Executive Agreement Replace The Treaty*? 53 YALE L.J. (1944), 54 YALE L.J. 616 (1945).
31. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
32. 279 U.S. 655 (1929).

fields of executive emergency and legislative power. If the Court had deferred to the claims asserted by one of the conflicting departments, such a decision would have delegated to that department's general competence under the Constitution and would have been a constitutional decision of much greater import than a decision on the merits.

When competing claims of competence between the executive and the legislative branches surface in the Court, the failure of the Court to define and address the issues is usually a *sub rosa* application of the political question doctrine on functionalist grounds. Ultimately, however, *sub rosa* applications are stop gap only. Perhaps the Court has resolved the basic issue by in reality allocating a realistic delegation of competence not constitutionally anticipated, but in any event, in the foreign affairs arena, the separation of power between the coordinate branches of government continues to hang in uncertain balance.

III. THE OBLIGATION OF THE "FAITHFULLY EXECUTE" CLAUSE

In *Dames & Moore*, the Executive argued that the "faithfully execute" clause of Article II of the Constitution confers the right to selectively enforce or "harmonize" allegedly conflicting statutes and foreign policy programs.[33]

This argument implicitly interprets "faithfully execute" as a grant of discretion and authority. In fact, the "faithfully execute" clause should represent a duty to perform rather than a grant of discretion. The Executive is expected to execute the laws in good faith — not circumvent the intent of Congress.[34] The concept of faithful execution

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33. This statement is not intended as an entry into the Jackson-Roosevelt-Taft debate of a strong versus a weak executive. Where Congress, as law maker and in the exercise of a legitimate Constitutional power, has spoken the executive must execute unless a veto is sustained. Where Congress has not spoken to a matter within its constitutional province, the executive cannot take on the role of legislator by doing what Congress fails or refuses to do. There does seem to be an exception in the field of foreign affairs. The powers of the executive as spelled out in Article II have been interpreted to (a) confer specific non-legislative powers; (b) confer certain types of discretionary powers upon the executive by the legislative branch; (c) confer certain types of nondiscretionary power upon the executive by the legislative brands and (d) foreign affairs power that has been surgically grafted onto Article II by the United States Supreme Court. *See, e.g.*, United States v. Curtis Wright Export, Corp, 299 U.S. 304 (1936); United States v. Nixon, 418 U.S. 683 (1974); Nixon v. Administration of General Services, 433 U.S. 425 (1977).

34. *See generally* R. TUGWELL, THE ENLARGEMENT OF THE PRESIDENCY (1960); W. TAFT, THE PRESIDENT AND HIS POWERS (1916). *But see Curtiss-Wright Export*, 299 U.S. at 304 (possible exception for foreign Affairs). *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972). However there is no exception to the Faithful Execution clause that would permit the Executive to assert a doctrine of immunity from for example the suits in impoundment cases.

was tested in *Youngstown Sheet & Tube Co. v. Sawyer*,[35] wherein the Court, in a series of seven complex opinions, struck down the President's attempted seizure of the steel mills, holding, albeit with a degree of timidity, that the seizure could not be justified under his constitutional powers. The reason was that in 1947, Congress had rejected amendments granting power to the President to seize private industries in emergencies;[36] thus, Congress had expressed its view that it would prefer to deal with such problems itself on an *ad hoc* basis pursuant to presidential recommendations.[37]

In effect, the jurisprudence to emerge from the *Steel Seizure Case* was that the President cannot unilaterally do that which he can only recommend. As Justice Clark concurring argued, "[w]here Congress

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Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 495 (4th Cir. 1973); State Highway Comm'n v. Volpe, 479 F.2d 1099, 1123 (8th Cir. 1973); Louisana v. Weinberger, 369 F. Supp. 856, 861-62 (E.D. La. 1973); Guadamuz v. Ash, 368 F. Supp. 1233, 1238 (D.D.C. 1973); Brown v. Ruckelshaus, 364 F. Supp. 258, 261 (C.D. Cal. 1973); National Council of Community Mental Health Centers Inc. v. Weinberger, 361 F. Supp. 897, 900 (D.D.C. 1973); Local 2677, AFGE v. Phillips, 358 F. Supp. 60, 68-69 (D.D.C. 1973). *But see* Housing Authority of San Francisco v. HUD, 340 F. Supp. 654, 656 (N.D. Cal. 1972). San Francisco Redevelopment Agency v. Nixon, 329 F. Supp. 672 (N.D. Cal. 1971). Therefore, it is clear that sovereign immunity claims do not present a bar to justiciability. Rejection of sovereign immunity is supported by the rationale that the doctrine is not intended to protect actions outside the law. The doctrine of sovereign immunity has been continually eroded both through specific waivers, (two major examples of general waivers of immunity are the Tucker Act, 28 U.S.C. § 1491 (1970), and the Tort Claims Act of 1946, 28 U.S.C. § 1346(b) (1970); specific statutes also allow suit against individual agencies, *see, e.g.*, Housing Act of 1937, 42 U.S.C. §§ 1401-35 (1970) and a general narrowing of the doctrine, *see, e.g.*, Land v. Dollar, 330 U.S. 731 (1974); although it is routinely raised by the Government. *See Hearings on "Sovereign Immunity" Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 28-30, 64-75 (1970). *See also* United States v. Nixon, 418 U.S. 683 (1974).

35. 343 U.S. 579, 587 (1952).

36. Notably, the prior congressional rejection of the power exercised by President Truman is directly analogous to the case at abr. In recent action on the public debt, Congress increased the borrowing power of the Government while rejecting a limit on fiscal 1973 expenditures. Pub. L. No. 92-599 (Oct. 27, 1972), § 201, 86 Stat. 1324, *reprinted in* 1972 U.S. CODE CONG, & ADMIN. NEWS 1542. Congress specifically voted on and rejected two amendments which would have given the Executive the discretionary power to impound appropriated funds. 118 CONG. REC. H10282-84 (daily ed. Oct. 18, 1972) *Id.* at H10224-34, § 18506, 18510, 18512-30 (daily ed. Oct. 17, 1972); *Id.*, H9363-401 (daily ed. Oct. 10 1972). *Compare* H.R. REP. No. 1614, 92d Cong. 2d Sess. 3-4, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4976-77, 21th H.R. REP. No. 1606, 92nd Cong., 2d Sess. 3-4 (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN, NEWS 4972-73; *see* S. REP. No. 1292, 92nd Cong., 2d Sess. 1-2, 7-9 (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4948-49, 4954-56.

37. *Youngstown Sheet & Tube*, 60 U.S. at 599-600 (Frankfurter, J., Concurring); *see also* 93 CON. REC. 3637-45 (1974).

has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis. . . ."[38] One point in the *Steel Seizure Case* appeared to be clear, and that is when a subject is within the purview of congressional power, and Congress has acted, the President may not act in contravention of the stated legislative policy.[39] This conclusion of the Court in the *Steel Seizure Case* is compatible with the Faithful Execution Clause of Article II. Reason and precedent dictate that the direction to "faithfully execute" is not a *carte blanche* invitation to the President to implement arbitrarily his agenda for the nation.[40] In a memo written while an Assistant Attorney General, Mr. Chief Justice William Rehnquist reasoned: "[i]t seems an anomalous proposition that because the executive branch is bound to execute the laws, it is free to decline to execute them."[41] Further, the Supreme Court has stated: "To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and entirely inadmissable."[42]

In the Federal Convention of 1787, the States unanimously rejected a motion "that the National Executive have a power to suspend any Legislative act . . . ."[43] As the Court stated in the *Steel Seizure Case*,[44] "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." However, Congress has allocated such broad powers to the President that the quoted language the *Steel Seizure Case* appears to be meaningless within the context of foreign affairs in general, and foreign commerce in particular, at least when the concept of Inherent Executive Power is considered.

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38. *Id.* at 662.

39. *Id.* at 586-589.

40. *See* National Council of Community Mental Health Centers, Inc. v. Weinberqer, 361 F. Supp. 897, 901 (D.D.C. 1973). *See also* National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974).

41. Memo from William Rehnquist reproduced in *Joint Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., lst Sess. 390, 394 (1973).

42. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838).

43. H.R. DOC. No. 398, 69th Cong., lst Sess. 152 (1927) (documents illustrative of the Union of American States).

44. *See Youngstown Sheet & Tube*, 343 U.S. at 587.

IV. INHERENT EXECUTIVE POWER

Executives have argued that within the context of foreign affairs they have inherent power on the basis of the Article II constitutional provision that "[t]he executive power shall be vested in a President of the United States of America." In determining the extent of power inherent in the presidency, three criteria generally exist: (1) the lack of an express constitutional commitment of power to a coordinate branch, or of an express prohibition of its exercise by the President; (2) the historical and customary exercise of a power by the Executive over a long period of time, coupled with tacit or express congressional approval; and (3) the existence of a situation that necessitates executive action for the public interest.[45]

No provision of the Constitution clearly commits foreign affairs power to a coordinate branch or explicitly prohibits its exercise by the President.[46] Article I of the Constitution vests the legislative power in the Congress. This implies that Congress alone shall determine national policy except when: (1) a veto is sustained, (2) a statute is declared unconstitutional, or (3) the Constitution commits certain policymaking power to another branch.[47] One of the principal methods by which Congress can determine national and international policy is by enacting authorization or appropriation bills. Thus, if the Executive impounds funds or refuses to spend the money on congressional programs, thereby frustrating the congressional policy underlying the authorization or appropriation, he clearly usurps the policymaking power of Congress.[48]

Where the test is unclear, the standard is whether the practice is one of long standing and whether action or inaction of Congress has added a gloss to presidential powers. In *United States v. Curtiss-Wriqht Export Corp.*,[49] the Supreme Court ruled that the President

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45. *See id.* at 585-89; Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 534-35 (1871).

46. *But see*, Salomon, *The Case Against Impoundment*, 2 HAST. CONST. L.Q. 277 (1975).

47. *See* Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 193 (1974).

48. *See, e.g.*, Louisana V. Weinberger, 369 F. Supp. 856, 864-65 (E.D. La. 1973); *Guadamuz v. Ash*, 368 F. Supp. 1233, 1241, 1243-44 (D.D.C. 1973); Community Action Programs Executive Directors Ass'n of New Jersey, Inc. v. Ash, 365 F. Supp. 1355, 1360-61 (D.N.J. 1973); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 901 (D.D.C. 1973); Oklahoma v. Weinberger, 360 F. Supp. 724, 728 (W.D. Okla. 1973); Local 2677, AFGE v. Phillips, 358 F. Supp. 60, 76-78 (D.D.C. 1973); Train v. New York, 420 U.S. 35 (1975).

49. 299 U.S. 304 (1936).

was the nation's representative in foreign affairs and cited prior congressional acts which took cognizance of that fact. In *United States v. Midwest Oil Co.*,[50] the Court found that even congressional silence could acknowledge the existence of an executive power. The Court emphasized, however, that the holding did not "mean that the Executive [could] by his course of action create a power."[51] Thus, even though an act may continually occur, it may still be unconstitutional.

The public interest factor, the third criterion for recognition of inherent executive power, applies only to short-term reactions to emergency situations,[52] or where legislative ratification is expected.[53] However, even a purported "national emergency" is not always sufficient to sustain a claim of inherent power. Recall that in *Youngstown Sheet & Tube Co. v. Sawyer*, the Court ruled that the President was not empowered to seize the steel mills in order to maintain production for the war effort.

Another limitation to inherent power was developed by the Court in *Curtiss-Wright*. In *Curtiss-Wright* the Court recognized that there must be a distinction between inherent power in the realms of foreign policy and domestic affairs. The Court noted that inherent power must be much more restricted in the domestic arena, because the Constitution identifies domestic issues in much greater detail.[54] The distinction between the President's domestic and foreign affairs powers is meaningful only upon the assumption that certain activities are regarded as being too remote from foreign affairs.

However, no constitutional authority in the Executive, inherent or otherwise, grants the power to usurp prerogatives of another branch or ignore duly enacted laws. The Constitution specifically recognizes the Executive's role regarding the enactment of laws. And *Marbury v. Madison*[55] established the concept of judical review in all constitutional matters.

Against this background Presidents have assumed powers far beyond constitutional expectations. In most instances, the Court has been reluctant to utilize its machinery to resolve the issues. Usually

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50. 236 U.S. 459 (1915).

51. *Id.* at 474. *See also*, Dames & Moore v. Regan, 453 U.S. at 654.

52. *In re* Neagle, 135 U.S. 1 (1890).

53. United States v. Midwest Oil Co., 236 U.S. 459 (1915). The new Congressional Budget and Impoundment Control Act of 1974 has restricted authority to accomplish withholding such as that accomplished in the instant case.

54. *Curtiss-Wright Export*, 299 U.S. at 320.

55. 1 U.S. [1 Cranch] 137, 2 L. Ed. 60 (1813).

the matter involves congressional delegation of broad power coupled with an executive agenda far exceeding either congressional delegation or constitutional authorization.

V. INTERNATIONAL COMMERCE

The first of many cases involving just such a challenge to the congressional delegation of power to the President in the foreign commerce area was *The Aurora v. United States*.[56] The case came up on an appeal from the District Court of New Orleans condemning the British cargo of the brig Aurora imported in violation of an 1809 trade act.[57] The case involved the right of Congress to enact legislation which predicated the revival of an expired law upon a proclamation by the President. It was argued that this procedure amounted to an unconstitutional delegation of legislative powers. In upholding the act, the Supreme Court stated:

> We can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March lst, 1809, either expressly or conditionally, as their judgment should direct. The 19th section of that act, declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation, without limitation upon the occurrence of any subsequent combination of events.[58]

Field v. Clark[59] involved a suit brought by importers to obtain a refund of duty which they claimed had been illegally exacted upon imported merchandise under the Tariff Act of 1890. The plaintiffs charged, inter alia, that section 3 of the act was an unconstitutional delegation of legislative and treaty-making powers. The section provided:

> That with a view to secure reciprocal trade with countries producing the following articles . . . whenever, and so often as the President shall be satisfied that the Government of any country producing . . . such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of

56. 11 U.S. [7 Cranch] 382 (1813).
57. *Id.* at 383.
58. *Id.* at 384.
59. 143 U.S. 649 (1892).

> . . . [such articles] 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 articles] for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon . . . [such articles].[60]

After reviewing the acts, the first of which was passed during the Washington administration, the Court stated:

> It would seem to be unnecessary to make further reference to acts of Congress to show that the authority conferred upon the President by the third section of the act of October 1, 1890, is not an entirely new feature in the legislation of Congress, but has the sanction of many precedents in legislation. While some of these precedents are stronger than others, in their application to the case before us, they all show that, in the judgment of the legislative branch of the government, it is often desirable, if not essential, for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, *to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.* If the decision in the case of 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.[61]

The Court concluded with a principle that has been a part of constitutional jurisprudence ever since: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[62]

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60. *Id.* at 652.
61. *Id.* at 656 [emphasis added].
62. *Id.*

In 1927 the Supreme Court again had an opportunity to consider this issue. In *J.W. Hampton, Jr. & Co. v. United States*,[63] the plaintiff had imported barium dioxide assessed at six cents per pound, two cents more than was provided for by the Tariff Act of 1922. The increase had been levied pursuant to a proclamation by the President issued by virtue of section 315 of the act. The act provided, inter alia, that the United States Tariff Commission should assist the President in determining the rates of duty by undertaking investigations. Furthermore, the act stated that no proclamation should be issued until the investigations had been completed. The Customs Court sustained the rate of duty increase by the proclamation of the President. The Court of Customs Appeals affirmed, and the Supreme Court, in upholding the judgment, concluded:

> 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. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under congressional authority. This conclusion is amply sustained by a case in which there was no advisory commission furnished the President — a case to which this Court gave the fullest consideration nearly 40 years ago.[64]

In *Curtiss-Wright Export Corp.*, the Court considered a joint resolution of Congress which gave the President power to prohibit by proclamation the sale of arms to certain South American countries if he found that such prohibition would contribute to the re-establishment of regional peace.[65] The resolution was attacked as an unconstitutional delegation of legislative power, and in discussing that allegation, the Supreme Court stated:

> Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, *which either leave the exercise of the*

63. 276 U.S. 294 (1927).
64. *Id.* at 410.
65. United States v. Curtiss-Wright Export Corp., 299 U.S. 302, 304 (1936).

> *power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs* . . . and while this Court may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if, beyond all rational doubt, it finds them to be so, an impressive array of legislation, such as we have just set forth, enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem. A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined.[66]

The decisions of the Supreme Court in this area appear to follow a discernible, though at times confusing, pattern. Nevertheless, the principles established in these decisions are the fundamental guides in ascertaining whether Congress and the President have adhered to all relevant constitutional limitations.

VI. Adduction of Principles From the Case Law

The first principle found in the case law is that all permissible congressional delegation of power to the Executive occur in the field of foreign commerce or other foreign affairs. Thus, any delegation of such authority will be given great deference by the courts. As the Supreme Court said in a 1974 decision, "[t]he plenary authority of Congress to regulate foreign commerce, and to delegate significant portions of this power to the Executive, is well established."[67]

A more recent example of such deference is *Florsheim Shoe Co. v. United States*,[68] wherein petitioner, a domestic manufacturer of footwear, challenged the congressional delegation of power to the President under the Trade Act of 1974 as unconstitutional. The Court stated: "[c]ongressional authorizations of presidential power [in the foreign commerce area] should be given a broad construction and not 'hemmed in' or 'cabined, cribbed, confined' by anxious judicial blin-

66. *Id.* at 327-328 [emphasis added].
67. California Bankers Ass'n. V. Schultz, 416 U.S. 21 (1974).
68. 744 F.2d 787 (Fed Cir. 1984).

ders."[69] The principle is again well illustrated in *United States Cane Sugar Refiners' Ass'n v. Block.*[70] In that case, petitioners also challenged the delegation of authority to the Executive by Congress to raise the duty costs on raw sugar imports. The Court noted:

> As aptly observed by Chief Judge Re in his recent decision, Bar Zel Expenditers, Inc. a/c Ben Clements & Sons, Inc. v. United States, 3 CIT—, Slip Op. 82-25, 544 F.Supp. 868 (1982): "It is pertinent that there is a long history in the field of international commerce for Congress to delegate power to the President to carry out legislative policy." See *J.W. Hampton, Jr. & Co. v. United* . 276 U.S. 394 (1928); Field v. Clark 143 U.S. 649 (1892) . . . . [T]his court, therefore, *must accord appropriate deference to Presidential action which finds authority in specific statutes.* In the recent case of Zenith Radio Corp. v. United States, 437 U.S. 443 (1978), in which the Supreme Court upheld a determination by the Treasury Department that a remission of a certain Japanese tax was not a bounty or grant within the purview of section 303 of the Tariff Act of 1930, as amended, the Court, quoting Udall v. Tallman, 380 U.S. 1, 16 (1965), stated: "When faced with a problem of statutory construction, this Court shows great deference to the intepretation given the statute by the officers or agency charged with its administration."[71]

Finally, in *South Puerto Rico Sugar Co. Trading Corp. v. United States*,[72] the Court, relied on *Curtis-Wright* and dismissed a challenge of unconstitutional congressional delegation of power to the President in the foreign commerce arena. The Court stated:

> The presence of foreign factors adds still more to the range of the powers transmitted by the phrase because, as the Supreme Court has explicitly recognized, a delegation of unusually extensive discretion to the President is not uncommon in the external realm.
>
> In the external sector of the national life, Congress does not ordinarily bid the President's hands so tightly that he

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69. *Id.* at 793 (quoting South Puerto Rico Sugar Co. v. United States 334 F.2d 622, 632 (1964), *cert denied*, 379 U.S. 964 (1965)).

70. 544 F. Supp. 883 (Ct. Int'l Trade 1982).

71. *Id.* at 894 (emphasis added).

72. 334 F.2d 622 (Ct. Claims, 1964).

> cannot respond promptly to changing conditions or the fluctuating demands of foreign policy.[73]

It is clear that the first of the recurring principles, *i.e.* that of judicial deference to most congressional delegation of authority to the President in the foreign commerce arena, is at work today but it is not without limits. The limitations on such congressional delegation is the focus of the second major recurring principle, that of an express policy or objective for the President to execute.

Congress must establish a standard or "intelligible principle" that makes clear when presidential action is proper.[74] The congressional standard in theory should confine the President's discretion and guarantee that any authorized action will tend to promote rather than to circumvent the legislative purpose. However, it is "not necessary that the guides be precise."[75] In *Mast*[76] the district court, interpreting the language of the Agriculture Act of 1956, concluded:

> Statutes granting broad discretion to the President to implement trade agreements are common, and they often contain language similar to that in Section 204. See, e.g., Section 201(a) of the Trade Expansion Act of 1962, U.S.C. § 1821(a),

That section provides:

> (a) Whenever the President determines that any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that any of the purposes stated in section 1801 of this title will be promoted thereby, the President may —
>
> (1) after June 30, 1962, and before July 1, 1967, enter into trade agreements with foreign countries or instrumentalities thereof; and
>
> (2) 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.

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73. *Id.*

74. *See* Starkist Foods, Inc. v. United States, 275 F.2d 472 479 (CCPA, 1959).

75. *Id.* at 473.

76. 596 F. Supp. 1567 (Ct. Int'l Trade 1984).

(b) Except as otherwise provided in this subchapter, no proclamation pursuant to subsection (a) of this section shall be made —

(1) decreasing any rate of duty to a rate below 50 percent of the rate existing on July 1, 1962; or

(2) increasing any rate of duty to (or imposing) a rate more than 50 percent above the rate existing on July 1, 1934.[77]

Once a federal court determines that such a policy or objective has been provided in the relevant statute, the President's action is unreviewable.

In *Florsheim Shoe*, the Court noted that the purpose of the legislation was, through trade agreements, to foster mutual trade benefits. The Court pointed out that:

> It is now well established by a long line of authorities that the exercises of broad discretionary authority delegated by Congress to the President in the sphere of international trade, where the President is acting essentially as an agent of Congress, is reviewable by the courts only to determine whether the President's action falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conformed with procedural requirement (if any). Neither the President's findings of fact nor his motivations may be inquired into by the judiciary.[78]
>
> * * *
>
> Concerning review of the Executive's findings and exercise of discretion as an agent of Congress, the following observations of the Appellate Term of the former Customs Court in *Ellis K. Orlowitz Co. v. United States*, 47 Cust.Ct. 583, 585, A.R.D. 136, 200 F.Supp. 302, 305 (1961), aff'd 50 CCPA 36, C.A.D. 816 (1963), are pertinent:
>
> > Congress can, and often does, delegate to the President, or other executive officer or agency, authority to make findings in prescribed situations, and, on the basis of such findings, to promulgate orders. This is a permissible delegation of legislative authority to the executive branch of our Government. It is axiomatic that courts

77. *Id.*

78. Florsheim Shoe Co. v. United States, 570 F. Supp. 734, 743 (Ct. Int'l Trade, 1983).

> are not to review the discretion exercised by the President, or other executive officer or agency, in arriving at findings in such matters. Citation of authority is not necessary to support this well-recognized rule, requiring judicial noninterference in legislative authority constitionally conferred by Congres on the Executive.[79]

From the foregoing it is suggested that the two major principles adduced from the case law are still viable today. However, the application of these principles to the Trade Act of 1974 demonstrates congressional and judicial deference to an executive agenda often at odds with constitutional principles.

VII. THE TRADE ACT OF 1974[80]

In *Florsheim Shoe*,[81] the authority of the President to act under section 504(a) of the Trade Act of 1974 (hereinafter "Trade Act") was challenged. Petitioner challenged as unconstitutional the denial of duty free treatment of certain leather goods pursuant to the Trade Act. Section 504(a) declares:

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79. *Id.* at 743.

80. Although this is a trade it is certainly a powerful political weapon in the President's hands. Witness Proclamation No. 5610 lifting sanctions from Poland.

February 19,1987

RESTORATION OF THE APPLICATION OF COLUMN 1 RATES OF DUTY OF THE TARIFF SCHEDULES OF THE UNITED STATES TO THE PRODUCTS OF POLAND

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BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

1. On October 27, 1982, by Proclamation No. 4991, I suspended the application of column 1 rates of duty of the Tariff Schedules of the United States (TSUS) to the products of Poland. This followed from my determination that the Government of the Polish People's Republic had failed to meet certain import commitments under its Protocol of Accession to the General Agreement on Tariffs and Trade (19 UST 4331), and that the Polish martial law government had increased its repression of the Polish people, leaving the United States without any reason to continue withholding action on its trade complaints against Poland.

2. Since issuance of that Proclamation, the Polish Government has taken steps that lead me to believe that Poland should be given a renewed opportunity to

> The President may withdraw, suspend, or limit the application of the duty-free treatment accorded under section 2461 of this title with respect to any article or with respect to any country; except that no rate of duty may be established in respect of any article pursuant to this section other than the rate which would apply but for this subchapter. In taking any action under this subsection, the President shall consider the factors set forth in sections 2561 and 2462(c) of this title.

The Court in *Florsheim Shoe* agreed with the lower court's interpretation of this subchapter as "an explicit grant to the President of plenary authority — just as the statutory text indicates — to 'withdraw, suspend, or limit' the [Generalized System of Preferences, "GSP"] duty free treatment after consideration of the factors in sections 501 and 502(c)."[82] This broad, discretionary reading is fully supported by the legislative history. The House Report says with respect to the provision which became section 504(a):

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address its trade obligations with the benefit of most-favored-nation tariff treatment.

3. The President may, pursuant to his constitutional and statutory authority, including Section 125(b) of the Trade Act of 1974, as amended, terminate in whole or in part Proclamation No. 4991.

4. I have determined in this case that the national interest requires expeditious action.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by the authority vested in me by the Constitution and the statutes of the United States, including, but not limited to, the Trade Expansion Act of 1962, as amended, and the Trade Act of 1974, as amended, do hereby proclaim as follows:

1. Proclamation No. 4991 of October 27, 1982, is hereby revoked.

2. General Headnote 3(d) of the TSUS is modified:

(a) by deleting "or pursuant to Presidential Proclamation No. 4991, dated October 27, 1982" and

(b) by deleting "Polish People's Republic from the list of countries therein.

3. This Proclamation shall take effect with respect to articles entered, or withdrawn from warehouse for consumption, on or after the date of publication of this Proclamation in the *Federal Register*.

IN WITNESS WHEREOF, I have hereunto set my hand this nineteenth day of February, in the year of our Lord nineteen hundred and eighty-seven, and of the Independence of the United States of America the two hundred and eleventh.

RONALD REAGAN

81. *Florsheim Shoe Co.*, 570 F. Supp. at 734.
82. *Id.* at 793.

> The President would be authorized to withdraw, suspend, or limit preferences *at any time* with respect to any article or any beneficiary developing country. In taking such action, the President would be required to consider the factors taken into account in granting preferential treatment initially and in designating beneficiary countries.
>
> (Emphasis added.) H.R.Rep. No 571, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.CODE CONG. & Ad. NEWS 7186, 7355-56. In contrast, the next paragraph of the legislative history, describing the future section 504(c), sharply limits the Executive's discretion:
>
> The President would be *required* to withdraw or suspend preferential treatment from any country which ceases to be eligible under the requirements of section 502(b). . . . The competitive need formula is in general designed to provide an *express requirement governing the withdrawal or suspension of preferential treatment* in those cases where it can no longer be justified . . . . (emphasis added.) *Id.* at 7356-57. Use of the term "may" (in section 504(a)) in the phrase "The President may withdraw, suspend, or limit preferences. . . ." likewise strongly indicated that Congress granted the President broad discretion to take the described actions. *See* Southern Railroad Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 455, (1979).[83]

Petitioner in *Florsheim Shoe* also challenged Congress' delegation of authority to the President as an unconstitutional use of its commerce power.[84] The Court responded:

> In this instance Congress has in fact circumscribed the President's discretionary authority under section 504(a) with general guidelines for its exercise. Prior to taking action under that section, the President must consider the factors set forth in sections 501 and 502(c). *See supra* note 8. In addition, the President's authority under section 504(a) is limited — although he may withdraw preferential treatment entirely, he may not adjust rates of duty. He is also required to report to Congress pursuant to section 505. These restrictions are certainly adequate to insure that the statute is not an improper delegation of legislative authority. *See* United States v.

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83. *Id.*
84. *Id.* at 794.

> Yoshida International, Inc., 526 F.2d 560, 582-83 (CCPA 1975).[85]

Once determined to have appropriate boundries within which to operate, executive action pursuant to a lawful delegation of authority by Congress is not reviewable by the judiciary unless other constitutional principles are implicated.

Thus, in determining the validity of the congressional delegation of power to the President, the *Florsheim Shoe* Court applied the first principle developed from the case law, did the congressional delegation contained a general purpose or policy to avoid granting the President unfettered discretion. The court found that it did.[86] The Court then discussed the second principle and found that the Trade Act concerned foreign affairs.[87]

Finally, the court noted: "[a]bove all, we must remember that this is a statute giving broad discretionary authority to the President in a field trenching very closely upon foreign affairs and on our relations with other countries."[88]

In summary, it does seem that the two major principles or guidelines that courts will use to determine whether congressional delegation of authority to the Executive is constitutional are:

1) the delegation contains some type of policy or objective which caps the discretion of the President by setting outer parameters within which he must work, and

2) the delegation must relate to foreign affairs or commerce.

Using these two criteria, the Court has struck down nearly every challenge of unconstitutional delegation of authority to the President in the foreign commerce arena for the past 180 years. The case law indicates no change in the future.

VIII. Treaty Powers of the President

An analysis of the external powers of the President would not be complete without an examination of the constitutional power of the President to enter into treaties.

The constitutional provisions relevant to this discussion are:

> Article II, section 2: He [the President] shall have power, by and with the advice and consent of the Senate, to make

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85. *Id.*
86. *Id.* at 796.
87. *Id.* at 793.
88. *Id.* at 795.

> treaties, provided two-thirds of the Senators present concur . . . .
> Article I, section 9: No money shall be drawn from the treasury but in consequence of appropriations made by law . . . .
> Article IV, section 3: The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . .
> Article VI: This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . .

Under Article II, the treaty-making power is vested exclusively with the Chief Executive and the Senate. Upon ratification, Article VI declares a treaty to be the supreme law of the land. Judicial construction under Article VI, however, appears to limit the treaty-making power where an act of Congress is required to put the treaty into operation. The central issue is whether the treaty is self-executing or requires enabling legislation.[89]

In *Foster v. Neilson*,[90] Chief Justice John Marshall stated:

> A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.[91]

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89. *See generally* Henry, *When is a Treaty Self-Executing*, 27 MICH. L. REV. 776 (1929). *See also* Kennedy, *Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development*, 80 AM. J. INT'L L. 854 (1986).

90. 27 U.S. (2 Peters) 253, 314 (1829).

91. 24 Fed. 344, Case (1852) No. 14, 251, at 245-46.

The doctrine of *Foster v. Neilson* was again recognized in *Turner v. American Baptist Missionary Union*:[92]

> A treaty under the Federal Constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of the money is required, the treaty is not perfect. It is not operative, in the sense of the Constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government can be regarded as a law until it shall have all the sanctions required by the Constitution to make it such.[93]

When the subject matter of a treaty involves a power, which under the Constitution has been specifically delegated to the Congress, ratification by an act of Congress is necessary to bring the treaty into operation and effect. Under this judicial treatment a treaty does not become the supreme law of the land until ratified by the full legislative body.[94] An example of a specific delegation is the appropriations clause in Article I. A treaty requiring appropriations also requires an act of Congress.[95] There appears however, to be at least one instance in which appropriations were not made by the Congress.[96]

Under Article IV, Congress has the authority to dispose of and regulate property belonging to the United States. This power is not contingent upon the exercise of sovereign rights over the property.[97] The authority of the President and Senate to dispose of United States property by treaty, without the consent of the entire Congress, is a less settled question than the appropriation power under Article I. In *Parker v. Duff*,[98] the Court held that Article IV required an act of

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92. *See* Anderson, *The Extent and Limitations of The Treaty Making Power under The Constitution*, 1 AM. J. INT'L L. 636, 644-645 (1907).

93. *See* Prevost v. Breneaux, 19 HOW. L.J. 7 (1856).

94. *See* Stone, *The House of Representatives and The Treaty- Making Power*, 17 KY. L.J. 216, 235 (1929). *But see* Feidler & Dwan, *The Extent of the Treaty-Making Power*, 28 GEO. L.J. 184, 192 (1939) for a different interpretation of Art. I, § 9.

95. *See* Vermilya-Brown Co. v. G. W. Connell, 335 U.S. 377 (1948).

96. 47 Cal. 554 (1874).

97. 17 U.S. (Wall.) 211 (1872).

98. For a general discussion, see *Anderson*, *supra* note 92, at 652-53.

Congress to dispose of land under a treaty. However, in *Holden v. Joy*,[99] in dicta, the Court indicated that the President and Senate could convey title to land under the treaty-making power without congressional consent.[100]

The constitutional issues as developed in the case law revolve around the assertion by the House that where the Constitution grants the power to Congress to deal with the subject matter, it cannot be divested of this authority by the treaty-making power. In other words, ratification of a treaty is within the discretion of the full legislative body. Conversely, under Article VI, a treaty once ratified pursuant to Article II becomes the supreme law of the land, thus imposing an obligation upon the Congress to enact enabling legislation to give effect to the treaty. These questions have not been directly answered by the United States Supreme Court. The unresolved issues seem to center on the following questions: Is the House under a moral or constitutional obligation to enact appropriate legislation? Can it exercise its discretion, if such exists, and refuse to provide enabling legislation? If there is no congressional discretion in regard to treaty-making functions, then does this not upset the balance of powers which pervade our constitutional scheme? If the role of Congress in these matters consists merely of a perfunctory rubber-stamping of executive decisions, then what will provide the safeguards and checks on that discretion as the subject matter of treaties encroaches upon domestic rights and privileges?[101]

The Supreme Court continues to skirt the issues presented through the political question mechanism. It does seem that the more prevelant view supports the supremacy clause impact upon treaties and, hence, legislative implementation should flow therefrom.

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99. The major concern behind the proposed amendment which would alter the treaty-making power was due to the signing of the U.N. charter. *See* Chafee, *Stop Being Terrified of Treaties: Stop Being Scared of the Constitution*, 38 A.B.A. J. 431 (1952) and the reply, Deutsch, *The Need For a Treaty Amendment: A Restatement of a Reply*, 38 A.B.A. J. 735 (1952). For consideration of the possibility of domestic interference from the grant of powers to a foreign nation under a treaty, see *Deutsch, Eminent Domain Under a Treaty: A Hypothetical Sup. Ct. Opinion*, 43 A.B.A. J. 699 (1957); Ely, Note, *Eminent Domain Under a Treaty*, 44 A.B.A. J. 751 (1958) (a reply to Deutsch).

100. *See generally*, L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37-65 (1972). *See also* Baldwin, *A Commentary on Nuclear Weapons and Constitutional Law*, in NUCLEAR WEAPON AND LAW 24 (Miller & Feinrider ed. 1984).

101. *See generally, Annual Survey of Developments In International Trade Law*, 15 GA. INTN'L & COMP. L.J. 474 (1986); Davidow, *Hegemony With a Vengence: U.S. Trade Law Attacks on Foreign Government Equity Participation in Exporting Enterprises*, 24 COLUM. TRANS. L.J. 277 (1986).

IX. CONCLUSION

Although the Constitution begins with an identification of the powers in Congress, the caselaw suggests that the "law" of foreign relations including foreign trade begins with the President. The "law", however, is so complex that in recent years the executive branch of government has deferred to the legislative for guidance and support. To date, the combination of legislation, treaties, and agreements results in an allocation of power never envisioned by the constitutional framers.