


6-1-1975

Recent Developments Affecting the Scope of Executive Power to Regulate Foreign Commerce

Jeffrey B. Storer

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Commercial Law Commons](#), [International Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Jeffrey B. Storer, *Recent Developments Affecting the Scope of Executive Power to Regulate Foreign Commerce*, 16 B.C.L. Rev. 778 (1975), <http://lawdigitalcommons.bc.edu/bclr/vol16/iss5/4>

This Students Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

RECENT DEVELOPMENTS AFFECTING THE SCOPE OF EXECUTIVE POWER TO REGULATE FOREIGN COMMERCE

INTRODUCTION

Although the Constitution vests Congress with the power to "regulate Commerce with foreign Nations,"¹ congressional delegations of authority to the President and the President's independent power to conduct the foreign relations of the United States combine to invest him with substantial power to regulate foreign commerce. However, executive action in the area of foreign commerce recently has been challenged as ultra vires. Presidential attempts to deal with a balance-of-payments deficit, with injury to the domestic steel industry from a high level of steel imports, and with excessive dependence upon foreign petroleum sources, have led an importer of foreign goods,² a domestic consumers group,³ and a group of states in the Northeast⁴ to seek judicial determinations that the President had exceeded his authority.

In the first case, *Yoshida International Inc. v. United States*,⁵ the presidential action, taken pursuant to statute, was held to be outside the statutory delegation of power; in the second case, *Consumers Union of United States, Inc. v. Kissinger*,⁶ the President's choice of action in reliance on his own authority in lieu of statutory procedures was upheld; and in the third case, *Massachusetts v. Simon*,⁷ executive action, pursuant to statute, survived challenges for failure to comply with statutory procedures as well as for assertion of a power not granted by the statute.

In reaching these decisions, the federal courts have been forced to reconcile the need to give the President the flexibility to handle expediently complicated foreign commerce problems, with the constraints imposed upon his independent power by the Constitution and upon his delegated authority by Congress. Practical considerations dictate that, in certain areas, the President be given broad powers: the economic and political interdependence of modern na-

¹ U.S. Const. art. I, § 8.

² *Yoshida Int'l, Inc. v. United States*, 378 F. Supp. 1155 (Cust. Ct. 1974), appeal docketed, No. 75-6 C.C.P.A., Sept. 6, 1974 (1971 import surcharge) [hereinafter cited as *Yoshida*]. See text at note 98 infra.

³ *Consumers Union of United States, Inc. v. Kissinger*, 506 F.2d 136 (D.C.Cir. 1974), aff'g *Consumers Union of United States, Inc. v. Rogers*, 352 F. Supp. 1319 (D.D.C. 1973) (voluntary restraint arrangements on steel) [hereinafter cited as *Consumers*]. See text at note 54 infra.

⁴ *Massachusetts v. Simon*, Civil No. 74-0129 (D.D.C., Feb. 21, 1975), appeal docketed, No. 75-1202, D.C. Cir., Mar. 25, 1975 (presidential proclamation of oil tariff). See text at note 122 infra.

⁵ 378 F. Supp. 1155, 1167, 1175-76 (Cust. Ct. 1974).

⁶ 506 F.2d 136, 143-44 (D.C. Cir. 1974).

⁷ Civil No. 74-0129 (D.D.C., Feb. 21, 1975).

tions requires that the regulation of foreign commerce take account both of international factors that the President, by virtue of his control over the foreign relations apparatus of the United States, is most fully cognizant of, and of domestic factors, such as national security, that have substantial international significance. By its broad statutory delegations of power to the President, Congress has recognized that the United States cannot undertake to regulate domestically its commerce with foreign nations without considering the political and economic consequences that its action may have within those nations. On the other hand, the exercise of the President's foreign commerce powers must be in accordance with constitutional and statutory mandates.

These three recent challenges to executive action have required the courts to determine the extent to which the President may act upon his independent authority where he might have accomplished the same results with statutory authority, and the degree of flexibility that may properly be accorded the President when he acts upon Congress's mandate. In this comment, the effect of these decisions upon the scope of the President's power to regulate foreign commerce will be explored. Initially, the source and nature of the President's authority independent of legislative delegation of power will be analyzed. Next, the limits imposed upon the exercise of that power by the Constitution will be discussed. Finally, the President's authority pursuant to statutory delegation, focusing on the breadth of that mandate and the procedural limits imposed on its exercise, will be examined.

I. THE SOURCE AND NATURE OF INDEPENDENT EXECUTIVE POWER OVER FOREIGN COMMERCE

The President's independent authority to regulate foreign commerce is not directly granted by the Constitution but derives from the President's extensive power in the overlapping area of foreign affairs. Executive power to regulate foreign affairs is based on a combination of the powers expressly granted by the Constitution⁸ and the powers which have been held to be implied in those expressly granted.⁹ In addition, there is the amorphous and controversial category of the President's "inherent" powers: the President's share of the federal power inherent in sovereignty.

A. *Presidential Power Over Foreign Affairs: The Source of Power Over Foreign Commerce*

Although broad presidential authority in the area of foreign affairs is widely acknowledged,¹⁰ it finds little explicit support in the

⁸ See text at notes 11-13 *infra*.

⁹ See text at notes 14-37 *infra*.

¹⁰ See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 756 (1971) (Harlan,

Constitution. The Constitution gives the President the power, by and with the advice and consent of the Senate, to make treaties¹¹ and to appoint Ambassadors, other public Ministers, and Consuls,¹² and the function of receiving Ambassadors and other public Ministers.¹³ This is the extent of the President's enumerated independent authority in foreign affairs. From this meager constitutional grant of power has been implied complete executive control over the foreign relations apparatus, which is the means by which the United States communicates and negotiates with foreign nations.

This control over the foreign relations apparatus has in practice invested the President with power to establish foreign policy as well. The earliest formulation of this broad power was provided by John Marshall in 1800. In justifying an extradition of one Jonathan Robbins, assumed to be an American citizen, in response to a request made to the President by Great Britain, Marshall stated to the House of Representatives: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹⁴

Marshall's "sole organ" formulation was repeated and expanded more than a century later to become the current doctrinal basis for the President's broad foreign affairs power. In *United States v. Curtiss-Wright Export Corp.*,¹⁵ Justice Sutherland spoke of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . ."¹⁶ Justice Sutherland justified the President's authority not on the basis of implied powers, however, but with a different theory: the President's "inherent" powers.

Curtiss-Wright involved a presidential proclamation, pursuant to a Joint Resolution of Congress, prohibiting the sale of arms to persons or countries engaged in a certain armed conflict in South America. Curtiss-Wright Export Corporation and others, charged with the illegal sale of arms, persuaded the district court to quash the indictment on the ground that the Joint Resolution was an unlawful delegation of the legislative power of Congress to the President.¹⁷ Justice Sutherland, speaking for the Court, reinstated the indictment, holding that the delegation was constitutional: Congress could properly delegate a broader discretion to the President in

J., dissenting). See generally L. Henkin, *Foreign Affairs and the Constitution* 37-65 (1972) [hereinafter cited as Henkin]; E. Corwin, *The President* 170-226 (4th rev. ed. 1957).

¹¹ U.S. Const. art. II, § 2.

¹² *Id.*

¹³ *Id.* § 3.

¹⁴ 10 *Annals of Cong.* 613 (1800) [1799-1801], reprinted in 18 U.S. (5 Wheat.) Appendix note 1, at 26 (1820); see Henkin, *supra* note 10, at 300 n.18.

¹⁵ 299 U.S. 304 (1936).

¹⁶ *Id.* at 320.

¹⁷ *United States v. Curtiss-Wright Export Corp.*, 14 F. Supp. 230, 232, 235 (S.D.N.Y. 1936).

FOREIGN COMMERCE

foreign affairs than would be permissible in domestic matters.¹⁸ Justice Sutherland reasoned that since the President, in his role as the nation's communicator in foreign affairs, has a better opportunity of knowing the conditions that prevail in foreign countries, and may have access to confidential information, it would be unwise for Congress to lay down narrow standards for his action in executing the laws Congress enacts dealing with foreign affairs.¹⁹ Justice Sutherland also reviewed the long history of broad delegation by Congress and gave weight to the practical construction placed upon the Constitution by the long-continued legislative practice.²⁰

Although expediency and the President's control over the foreign affairs apparatus would have been sufficient to justify the decision, Justice Sutherland's distinction between domestic and foreign affairs was not based solely upon such practical considerations. He took the opportunity in *Curtiss-Wright* to propound his controversial sovereignty theory, which is the basis for the third source of executive foreign affairs powers—the President's "inherent" powers. Justice Sutherland reasoned that the power to conduct foreign relations was an attribute inherent in sovereignty, and that the states were never sovereign.²¹ Rather, sovereignty in respect of the colonies passed from Great Britain to the Union, and thence, upon the adoption of the Constitution, to the United States of America. Thus, since the states were never sovereign, they never possessed foreign affairs power, and, consequently, this was not among the powers reserved to the states by the Tenth Amendment.²² Therefore, the power to conduct foreign relations was essentially extra-constitutional and inherent in the federal government.²³

As to the distribution of this power among the branches of the federal government, Justice Sutherland, citing Marshall,²⁴ reasoned that participation in the exercise of this power was significantly limited: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."²⁵ Thus, Justice Sutherland's sovereignty theory results in the same broad formulation of the President's foreign affairs power that Marshall announced over a century earlier.²⁶

From control over the means of communication in foreign affairs, it was but a short step to a voice in the substance—the foreign policy of the United States. Although there is evidence that

¹⁸ 299 U.S. at 319-22.

¹⁹ *Id.* at 320.

²⁰ *Id.* at 322-30.

²¹ *Id.* at 316-17.

²² *Id.* at 316.

²³ *Id.* at 315-19.

²⁴ *Id.* at 319, citing John Marshall's "sole organ" statement. See note 14 *supra* and accompanying text.

²⁵ 299 U.S. at 319.

²⁶ See text at note 14 *supra*.

the Framers intended otherwise,²⁷ and despite periodic denials of the President's policy-making authority by defenders of the theoretical distribution of powers,²⁸ in practice the making of policy has proved to be an inevitable consequence of the President's communication of the attitudes, decisions, and commitments of the United States in its relations with foreign nations.²⁹

This practical power has been given doctrinal support by later decisions of the Supreme Court relying upon Justice Sutherland's broad formulation in *Curtiss-Wright*. In 1937, one year after *Curtiss-Wright*, in *United States v. Belmont*,³⁰ Justice Sutherland himself had the opportunity to extend the reach of his theory. *Belmont* was an action by the United States to recover from the executors of a private banker a sum of money that had been deposited with him by a Russian corporation.³¹ The corporation had been expropriated by the Soviet Union and the United States acquired the claim pursuant to the Litvinov Assignment³² negotiated by the President in connection with the establishment of diplomatic relations between the two countries.³³ In passing on the validity of the assignment, Justice Sutherland reiterated that foreign affairs were exclusively within the control of the federal government and observed further that this assignment and the agreements made in connection therewith were not only within the President's authority as the "sole organ," but also were not treaties so as to require the advice and consent of the Senate.³⁴ As in *Curtiss-Wright*, Justice Sutherland's statements were broader than necessary. Moreover, what they sanction is executive authority not merely to communicate and negotiate, but actually to determine the United States' foreign policy with respect to the recognition of another nation.

That the President's power in the conduct of foreign relations includes the power to determine policy was recognized in another case involving the Litvinov Assignment, *United States v. Pink*,³⁵ decided by the Supreme Court shortly after Justice Sutherland's retirement. In *Pink*, Justice Douglas, speaking for the Court, cited Marshall's sole organ statement and recognized that: "The powers of the President in the conduct of foreign relations included the power,

²⁷ For a detailed discussion of the allocation of power contemplated by the Framers, see Berger, *The Presidential Monopoly of Foreign Relations*, 71 Mich. L. Rev. 1 (1972) [hereinafter cited as Berger].

²⁸ See Berger, *supra* note 27, *passim*; Kurland, *The Impotence of Reticence*, 1968 Duke L.J. 619, 622-26.

²⁹ See Henkin, *supra* note 10, at 47.

³⁰ 301 U.S. 324 (1937).

³¹ *Id.* at 325-26.

³² The Litvinov Assignment was in the form of a letter, dated November 16, 1933, to the President of the United States from Maxim Litvinov, People's Commissar for Foreign Affairs. *United States v. Pink*, 315 U.S. 203, 211 (1942).

³³ *Id.*

³⁴ *Id.* at 330.

³⁵ 315 U.S. 203 (1942).

without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees."³⁶ Likewise, in a concurring opinion, Justice Frankfurter found it "indisputable" that "the President's control of foreign relations includes the settlement of claims [and] . . . the power to establish . . . normal relations with a foreign country . . ."³⁷

This uncritical reliance upon Marshall's statement has been attacked recently by a distinguished commentator in an article decrying the presidential monopoly over foreign relations.³⁸ He convincingly demonstrates that Marshall's statement dealt only with the President's function as the nation's communicator, and that the Framers did not intend to grant the President broad substantive powers over foreign relations, much less a monopoly.³⁹ Nonetheless, despite its uncertain legal foundation, the President's practical control over foreign affairs seems unlikely to be significantly diminished. In reality, in view of the President's exclusive control over the foreign relations apparatus, only sweeping action by Congress can change the balance of power to favor the legislative branch—action that could only be taken at the cost of crippling, at least temporarily, the foreign relations apparatus of the United States. Moreover, action by the Court to upset the distribution of power seems unlikely. As recently as 1971, Justice Harlan, in the *Pentagon Papers* case, *New York Times Co. v. United States*,⁴⁰ said of Marshall's statement: "From that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power."⁴¹

B. *Exercise of Presidential Powers Over Foreign Commerce in Reliance Upon Independent Powers*

In view of the substantial overlap between foreign commerce and foreign affairs, broad executive power to conduct foreign affairs and to determine foreign policy might be expected to give rise to executive power to regulate foreign commerce. However, unlike the power to conduct foreign affairs, which derives from a constitutional grant to the President, the power to regulate foreign commerce is expressly vested by the Constitution in the Congress.⁴² Justice Sutherland's theory that foreign affairs powers are extra-constitutional implies that the distribution of power in foreign affairs between the President and Congress is not subject to the doctrine of separation of powers. Nonetheless, the force of the

³⁶ *Id.* at 229.

³⁷ *Id.* at 240-41 (Frankfurter, J., concurring).

³⁸ Berger, *supra* note 27, at 15-16.

³⁹ *Id.* at 16-17.

⁴⁰ 403 U.S. 713 (1971).

⁴¹ *Id.* at 756 (Harlan, J., dissenting).

⁴² U.S. Const. art. I, § 8, cl. 3.

doctrine is such that a judicial determination that presidential action regulating foreign commerce taken in reliance on his independent powers was improper is likely to be expressed as a conclusion that the power exercised by the President was legislative in nature and therefore properly belonging to Congress unless specifically delegated by statute. The regulation of foreign commerce has a gray area in which a power may have both executive and legislative characteristics.⁴³ Thus, this conclusion will depend upon whether or not Congress has clearly expressed a policy by legislation in the area, and if so, whether the policy upon which the President's action is based comports or conflicts with the congressional policy.

Three basic situations are possible where the President takes action to regulate foreign commerce in reliance upon his own independent power rather than upon authority delegated by statute: (1) the policies reflected in the President's action may conflict with policies adopted by Congress in legislation; (2) Congress may not have legislated in the area in which the President acts; and (3) the President may act in harmony with congressional policies, but choose not to use available statutory procedures, that would have allowed him to achieve the same result.

1. *Presidential Action in Conflict with Congressional Policy*

When the President takes action reflecting policies that conflict directly with policies expressed by Congress pursuant to its constitutional legislative power, that action is most likely to be characterized as legislative and declared *ultra vires*. This is the kind of action that was involved in the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*.⁴⁴ In order to avert a strike threatened by steel workers during the Korean War, the President ordered the Secretary of Commerce to seize most of the nation's steel mills. The mill owners challenged the President's action. The President purported to rely upon his independent constitutional powers. The Court found, however, that the power exercised by the President was not executive, but legislative.⁴⁵ The President imposed domestic sanctions to enforce presidential policies that conflicted with congressional policies: only four years earlier, when the Taft-Hartley Act was under consideration, Congress had rejected an amendment that would have authorized emergency seizures.⁴⁶

Justice Jackson, in his well-known concurring opinion in *Youngstown*, characterized the President's illegal action as follows: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . ." ⁴⁷ Such action can be sustained "only by disabling the Congress from

⁴³ See Henkin, *supra* note 10, at 89-123.

⁴⁴ 343 U.S. 579 (1952).

⁴⁵ *Id.* at 587-88.

⁴⁶ *Id.* at 586.

⁴⁷ *Id.* at 637.

acting upon the subject."⁴⁸ Of course, in view of Article I, section 8, Congress may not be disabled from acting upon the regulation of foreign commerce.

2. *Presidential Action in an Area of Unexercised Congressional Power*

When the President acts to regulate foreign commerce in an area not occupied by statute, the President is likely to be on the firmest ground. Since Congress has enacted comprehensive statutes regulating foreign commerce by means of domestic restrictions such as import quotas and tariffs,⁴⁹ the regulation of foreign commerce in an area that Congress has not entered is likely to involve international means that are less clearly legislative and more easily characterized as within the scope of the President's broad independent foreign affairs power. Justice Jackson, in *Youngstown*, also recognized this "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain,"⁵⁰ and concluded that "[i]n this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."⁵¹ Thus, whether the President may act on his own authority in this second situation is likely to be resolved in the political arena, by congressional ratification, disapproval, or silence.⁵² The courts are unlikely to become involved in these controversies since the typical means by which the President acts in this second class of situations is the executive agreement.⁵³ Not only will a private plaintiff normally lack standing to challenge such action, but the controversy is also likely to involve a political question.

3. *Congressionally-Approved Presidential Action Taken in Contravention of Statutory Procedures: Consumers Union*

When the President, acting upon a policy not contrary to Congress's expressed will, nonetheless chooses not to use the prescribed

⁴⁸ Id. at 637-38.

⁴⁹ The principal statutes are: Tariff Act of 1930, 19 U.S.C. §§ 1202-1654 (1970), and Trade Expansion Act of 1962, 19 U.S.C. §§ 1801-1991 (1970), as amended by Trade Act of 1974, Pub. L. No. 93-618 (Jan. 3, 1975), 88 Stat. 1978, reprinted in 1974 U.S. Code Cong. & Ad. News 6956; Trade Act of 1974, 88 Stat. 1978 (adding 19 U.S.C. §§ 2101 et seq.).

⁵⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

⁵¹ Id.

⁵² See, e.g., General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3 (1947), T.I.A.S. No. 1700, and executive agreement concluded pursuant to the President's independent foreign affairs power; has never been submitted to or approved by Congress. S. Metzger, *Lowering Nontariff Barriers* 23-24 (1974).

⁵³ The legality of executive agreements has stirred much controversy, since an executive agreement excludes the Senate from its constitutional role in the making of treaties. For contrasting views, compare Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 *Yale L.J.* 664 (1944) with McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1-2), 54 *Yale L.J.* 181, 535 (1945).

statutory procedures to implement that policy, but instead relies upon his independent authority, the presidential action is subject to challenge. This kind of action presents the question whether the statutory procedures are the exclusive method for implementing the policy, thereby precluding independent executive action. This question was the focus of a 1973 challenge to the action of the executive branch in negotiating the Voluntary Restraint Arrangements on Steel, (hereinafter VRA's or agreements) in *Consumers Union of United States, Inc. v. Kissinger*.⁵⁴ The VRA's were the result of discussions between Japanese and European steel producers, on one side, and State Department officials, on the other. The agreements were expressed in letters of intent sent to the Secretary of State by the Japanese and European steel producers, wherein the producers voluntarily undertook to limit exports of steel to the United States for the years 1969, 1970, and 1971.⁵⁵ The VRA's were subsequently extended to cover 1972 through 1974.⁵⁶

The agreements were necessitated by injury to the domestic steel industry resulting from a ten-fold increase in steel imports into the United States during the period from 1958 to 1968.⁵⁷ Congress had made available statutory procedures whereby the President might have dealt with the problem: two provisions of the Trade Expansion Act of 1962⁵⁸—the national security provision⁵⁹ and the orderly marketing agreements provision⁶⁰—authorized the Presi-

⁵⁴ 506 F.2d 136 (D.C. Cir. 1974), aff'g *Consumers Union of United States, Inc. v. Rogers*, 352 F. Supp. 1319 (D.D.C. 1973).

⁵⁵ 506 F.2d at 138.

⁵⁶ *Id.* at 139.

⁵⁷ *Id.* at 138.

⁵⁸ 19 U.S.C. §§ 1801-1991 (1970).

⁵⁹ *Id.* § 1862 (1970) (originally enacted as Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 877). Section 232 was subsequently amended, substituting the Secretary of the Treasury for the Director of the Office of Emergency Planning, and adding a provision for public hearings, by the Trade Act of 1974, § 127(d), 88 Stat. 1993. Section 232(b), as amended, directs the Secretary of the Treasury, upon receipt of a request with respect to an imported article, to make an investigation and to hold hearings to determine the effect on the national security of imports of the article, and to report to the President his findings and recommendation for action or inaction. It continues:

If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

19 U.S.C. § 1862(b) (1970).

⁶⁰ 19 U.S.C. § 1982 (1970) (originally enacted as Trade Expansion Act of 1962, Pub. L. No. 87-794, § 352, 76 Stat. 901). Section 352(a) provides:

After receiving an affirmative finding of the Tariff Commission under section 301(b) [19 U.S.C. § 1901(b) (1970)] with respect to an industry, the President may . . . negotiate international agreements with foreign countries limiting the export from such countries and the import into the United States of the article causing or threatening to cause serious injury to such industry

FOREIGN COMMERCE

dent, after following procedures providing for investigation, hearings, and findings, to take action to adjust imports. The executive branch considered and rejected the statutory procedures, seeking to avoid undesirable side-effects on United States foreign relations, which it anticipated from official mandatory restrictions.⁶¹

The plaintiff, a consumer organization, sought a declaratory judgment that the export limitations were illegal and an injunction prohibiting the defendants—certain state department officials and the foreign producers—from acting in furtherance of the arrangement.⁶² Despite plaintiff's contention that the VRA's represented a regulation of foreign commerce foreclosed to the President by Article I, section 8 and by the Trade Expansion Act of 1962, the Court of Appeals for the District of Columbia Circuit upheld the district court's finding that the executive action was not *ultra vires*.⁶³ Although acknowledging that Congress has occupied the field of domestically-enforceable import restrictions, Judge McGowan, speaking for the court, found that the VRA's were within the President's independent foreign affairs powers since they were not domestically enforceable.⁶⁴ He viewed the restraint undertakings as essentially precatory in nature—mere "jawboning" as Judge Danaher characterized them in a concurring opinion⁶⁵—and not in conflict with the Trade Expansion Act of 1962, whose provisions the district court had found to be not the exclusive means by which the President could lawfully regulate steel imports.

The VRA's depended for their effectiveness upon the willingness of the foreign producers to limit their exports. In years when the exports exceeded the agreed-upon limits, the President did not attempt to stop the goods from entering the United States, but simply persuaded the producers to reduce the next year's shipments.⁶⁶ Since the President was not relying upon delegated authority to establish domestically-enforceable sanctions such as tariffs or quotas, Judge McGowan found that the President was not required to comply with the procedures established by the statutes delegating that authority, but could properly act upon his independent foreign relations powers.⁶⁷ Judge McGowan concluded that the VRA's were not exercises of legislative power since they were not enforceable by sanctions applied domestically to imported goods. Had the court found that the powers exercised were legislative, the President's

19 U.S.C. § 1982(a) (1970). Section 301(b) provides for an investigation by the Tariff Commission of injury to domestic industry from an article imported in increased quantities as a result in major part of concessions granted under trade agreements. 19 U.S.C. § 1901(b) (1970).

⁶¹ 506 F.2d at 138, 142 n.10.

⁶² *Id.* at 139.

⁶³ *Id.* at 138, 144.

⁶⁴ *Id.* at 143.

⁶⁵ *Id.* at 145 (concurring opinion).

⁶⁶ *Id.* at 144 n.12.

⁶⁷ *Id.* at 142-43.

action would of course have violated the separation of powers doctrine and would therefore have been *ultra vires*. The President would then have been forced to follow statutory procedures to control the steel imports.

In a dissenting opinion, Judge Leventhal took issue with the court's conclusion that the VRA's were not enforceable. Characterizing the arrangements as "solemn negotiated bilateral understandings,"⁶⁸ he emphasized that, in return for the self-imposed limitations, the United States Government gave assurances to the foreign producers that disadvantages would be equalized among producers and that the President would not initiate other unilateral import limitations or duty increases.⁶⁹ Moreover, Judge Leventhal argued that the President could have enforced the agreements by applying non-judicial sanctions, such as a call to Congress for reduction of assistance programs or a direction to customs officials to deny entry to the commodities, and possibly by seeking judicial enforcement as well.⁷⁰

The dissent's argument is not persuasive: the kind of executive sanctions he foresaw were not realistic possibilities. An executive call for reduction of assistance programs is not only unlikely, it is not even an executive sanction since it depends upon congressional action; an executive direction to customs officials to deny entry would be a regulation of commerce of a legislative character without reliance upon statutory procedures, which would be *ultra vires*. In his dissent, Judge Leventhal omitted the President's most likely recourse if the VRA's failed of their purpose: the invocation of those same statutory powers pursuant to the national security or orderly marketing agreements provisions of the Trade Expansion Act of 1962⁷¹ that were originally rejected by the State Department as unduly formal. Presidential forbearance to impose formal import restrictions pursuant to statute was expressly mentioned in the letters of intent, and under Judge Leventhal's view of the VRA's as bilateral agreements, was consideration for the producers' self-imposed restraints.

The essential question in *Consumers* was whether the executive action actually taken was legislative in character. To recognize that legislative authority delegated to the President by statute, not judicial authority invoked to support other sanctions, was the backstop of the VRA's is to perceive the flaw in Judge Leventhal's analysis: that the President, had his jawboning failed, would have resorted to delegated legislative authority does not mean that the jawboning itself was legislative action. On the contrary, jawboning is a type of action within the scope of the President's role as the nation's communicator in foreign affairs. The issue was not whether the result

⁶⁸ *Id.* at 149 (dissenting opinion).

⁶⁹ *Id.* at 150-51 (dissenting opinion).

⁷⁰ *Id.*

⁷¹ See text at notes 59-60 *supra*.

could also have been achieved by legislative action or whether the executive action involved a policy decision, but rather whether the executive action usurped the lawmaking function of Congress.⁷² By deciding that the agreements lacked the force of domestic law,⁷³ the majority properly answered this question in the negative.

The court's decision in *Consumers* recognized the need to accord the President the flexibility to take account of the international effects of foreign commerce regulation undertaken by the United States for the benefit of the domestic economy. Admittedly, allowing the President the choice not to use available statutory authority necessarily sacrificed statutory procedural safeguards. These safeguards, principally investigations and public hearings, are arguably important where the President's independent action has the same effect on imports that legislative action would have had. It is submitted that this concession to the President's discretion is justified by the practical advantages to be gained by its exercise. Moreover, the power of Congress to check abuses of that discretion by overriding legislation adequately compensates for the loss of the statutory safeguards.

Consumers thus resolves the third kind of situation in which the President takes action to regulate foreign commerce in favor of the President. It indicates that when the policy pursued by the President in regulating foreign commerce is consistent with that adopted by Congress⁷⁴—here, the protection of a domestic industry essential to the national security from the adverse consequences of large increases in imports—and when presidential action does not depend upon domestic sanctions to be effective, a court may find that the statutory procedures are not exclusive. As in the second situation, where Congress has not acted, this finding is likely to be expressed as a conclusion that the executive action is not legislative in character and therefore is within the President's broad foreign affairs powers.⁷⁵ This result is desirable since it allows a flexible approach

⁷² The formulation of policy is only the first component of legislative action; the second is the promulgation of a law—an enforceable sanction: "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . ." *Yakus v. United States*, 321 U.S. 414, 424 (1944).

⁷³ *Consumers*, 506 F.2d at 143. See text at notes 63-67 *supra*.

⁷⁴ The national security provision of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (1970) (originally enacted as Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 877), as amended by Trade Act of 1974, § 127(d), 88 Stat. 1993, by giving the President the power to adjust imports of articles threatening to impair the national security, expressed a congressional policy in accord with the action taken here by the President. Moreover, the VRA's, when transmitted by the Secretary of State to the Chairmen of the Senate Finance Committee and the House Ways and Means Committee were welcomed, and "[n]o mandatory import quota legislation was recommended by the committees thereafter." *Consumers*, 506 F.2d at 138 n.4.

⁷⁵ Although the availability of delegated authority contributes to the President's bargaining power and it may therefore be argued that the President should not be able to rely in effect on delegated authority without following statutory procedures, nonetheless, the delegated authority is only one source of the President's bargaining power in his role as the nation's sole organ.

to the delicate problems of foreign relations without doing violence to the constitutional allocation of powers between the President and Congress.

The holding of *Consumers* may have application beyond the regulation of foreign commerce, both internationally and domestically. *Consumers* ratifies inherent executive power to the extent that the President can achieve results without recourse to statutory authority. Where the President does not need domestically-enforceable sanctions, the promulgation of which is exclusively a legislative function, he may rely upon precatory action—"jawboning"—on the basis of the practical power inherent in his office.

III. EXECUTIVE ACTION IN RELIANCE UPON AUTHORITY DELEGATED BY STATUTE

The broad powers vested in the executive branch by the express and implied grants of the Constitution are far exceeded by the legislative authority Congress has delegated to the President by statute. Much of the legislative power to regulate foreign commerce, including large grants of its tariff-making power, has been conferred upon the President by trade legislation, principally the Tariff Act of 1930,⁷⁶ the Trade Expansion Act of 1962,⁷⁷ and the Trade Act of 1974.⁷⁸ The latter, enacted January 3, 1975, continues and expands the grants of the previous acts and renews the President's authority to negotiate trade agreements.⁷⁹ It extends his power to modify, impose, or remove import restrictions, including duties and non-tariff barriers,⁸⁰ in implementing the agreements and it grants new authority to deal with balance-of-payments deficits and surpluses.⁸¹ The President's exercise of these delegated powers may raise one or more of the following issues: (1) whether the delegation by Congress was constitutionally permissible; (2) whether the kind of presidential action taken was within the scope of the delegated power; and (3) whether the President has exercised the delegated authority in accordance with the procedures mandated by Congress.

A. *Constitutionality of Congressional Delegation of Power over Foreign Commerce to the President*

That Congress may constitutionally delegate broad power to the executive branch is well-established.⁸² Although the Constitu-

⁷⁶ 19 U.S.C. §§ 1202-1654 (1970).

⁷⁷ 19 U.S.C. §§ 1801-1991 (1970), as amended by Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978.

⁷⁸ 88 Stat. 1978 (adding 19 U.S.C. §§ 2101 et seq.). For an analysis of the provisions of the Trade Act of 1974, see Whitney, *The Trade Act of 1974: Coping With Unequal Environmental Control Costs*, 16 B.C. Ind. & Com. L. Rev. 577 (1975).

⁷⁹ Trade Act of 1974, § 101, 88 Stat. 1982 (adding 19 U.S.C. § 2111).

⁸⁰ Id. §§ 101-02, 88 Stat. 1982 (adding 19 U.S.C. §§ 2111-12).

⁸¹ Id. § 122, 88 Stat. 1987 (adding 19 U.S.C. § 2132).

⁸² See, e.g., *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (discussed in text at note 88 infra); *Field v. Clark*, 143 U.S. 649 (1892) (discussed in text at note 84 infra).

tion vests the powers of the federal government in three branches and although the doctrine of separation of powers ordains that no one branch may exercise the whole power of another branch,⁸³ it has long been clear that the three branches must cooperate with each other in order to exercise their powers effectively. Initially, the courts denied that Congress could constitutionally delegate legislative power, while upholding congressional delegations of power to the President, subject to certain restrictions on executive discretion, on the ground that the power in question was not legislative. Thus, in 1892, in *Field v. Clark*,⁸⁴ the Supreme Court, while giving lip service to the principle of nondelegation, upheld a delegation of power to the President to suspend the free introduction of certain agricultural commodities if he determined that any producing country imposed "reciprocally unequal or unreasonable" exactions upon United States products.⁸⁵ The Court found that the power delegated was not legislative but rather only a power to determine facts, "the event upon which [Congress's] expressed will was to take effect."⁸⁶ Over the years, these constraints have been loosened to the point that it may fairly be said that delegation of legislative power is now permissible.⁸⁷

The axiomatic thesis of nondelegability of legislative power was further weakened by the broad delegation of tariff-making authority that was upheld in *J.W. Hampton, Jr., & Co. v. United States*.⁸⁸ The Court in *Hampton* upheld presidential authority granted by the flexible tariff provision of the Tariff Act of 1922.⁸⁹ The statute authorized him to adjust tariffs in order to equalize differences in costs of production between domestic and foreign goods.⁹⁰ The Court likened the tariff-making authority granted to the President to the rate-setting authority of the Interstate Commerce Commission, of which it said: "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."⁹¹

Only two cases, *Panama Refining Co. v. Ryan*⁹² and *A.L.A.*

⁸³ For a discussion of the separation of powers doctrine, see Forkosch, *The Separation of Powers*, 41 U. Colo. L. Rev. 529 (1969). The essence of the doctrine is that "the whole power of one of those departments [legislative, executive, judicial] should not be exercised by the same hands which possess the whole power of either of the other departments . . ." 1 J. Story, *Constitution* 393 (5th ed. 1891), quoted in Note, 7 Vand. J. Trans. L. 137, 138 (1973).

⁸⁴ 143 U.S. 649 (1892).

⁸⁵ *Id.* at 680-94.

⁸⁶ *Id.* at 693.

⁸⁷ For an argument that the nondelegation doctrine is dead, see K. Davis, *Administrative Law Text* § 2.01, at 26-27 (3d ed. 1972).

⁸⁸ 276 U.S. 394 (1928).

⁸⁹ Act of Sept. 21, 1922, ch. 356, § 315(a), 42 Stat. 941.

⁹⁰ 276 U.S. at 413.

⁹¹ *Id.* at 409.

⁹² 293 U.S. 388 (1935).

Schechter Poultry Corp. v. United States,⁹³ both involving provisions of the National Industrial Recovery Act,⁹⁴ have invalidated congressional delegation to the President. The Court in both cases phrased the nondelegation doctrine in terms of congressional abdication of its lawmaking function, and characterized proper delegation as requiring the provision of standards for the exercise of executive discretion.⁹⁵ Later cases have applied the requirement of standards so loosely as to cast doubt on the current validity of *Panama* and *Schechter*.⁹⁶ Whatever their present worth, since courts are reluctant to intrude in an area reserved to the political branches, it is unlikely that the discretion vested in the President by the current trade legislation will be found to exceed the bounds of proper delegation.

B. *Recent Challenges to Presidential Action as Outside the Scope of Authority Delegated by Statute: Yoshida*

A question more likely to arise when the President acts to regulate foreign commerce, purportedly in reliance on his statutorily delegated authority, is whether the statute authorized the kind of action taken. Challenges on such grounds are often brought in the Customs Court by persons seeking to avoid import restrictions imposed on their products. In the past, the challenged actions have involved duties or quotas imposed upon foreign goods for the protection of specific domestic industries.⁹⁷

Recent presidential action, however, has had a broader purpose: in 1971, President Nixon proclaimed a temporary ten percent surcharge on all imports in order to alleviate a substantial balance-of-payments deficit. In the 1974 Customs Court case of *Yoshida International, Inc. v. United States*,⁹⁸ this action was successfully challenged on the ground that it exceeded the authority delegated to the President by the relevant statutes. The Customs Court interpreted narrowly the technical provisions expressly relied upon by the President in his proclamation. These provisions were section 350(a)(6) of the Tariff Act of 1930⁹⁹ and section 255(b) of the Trade Expansion

⁹³ 295 U.S. 495 (1935).

⁹⁴ Act of June 16, 1933, ch. 90, 48 Stat. 195.

⁹⁵ *Panama*, 293 U.S. at 415, 421; *Schechter*, 295 U.S. at 530.

⁹⁶ See, e.g., *American Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298 (1952); *Fahey v. Maloney*, 332 U.S. 245 (1947). See also K. Davis, *Administrative Law Text* § 2.03, at 28-30 (3d ed. 1972). For an indication that *Panama* and *Schechter* may still have vitality where individual rights are affected, see *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (denial of passport; right to travel).

⁹⁷ See, e.g., *Falcon Sales Co. v. United States*, 199 F. Supp. 97 (Cust. Ct. 1961) (clothespins); *United States v. Schmidt Pritchard & Co.*, 47 C.C.P.A. 152, cert. denied, 364 U.S. 919 (1960) (bicycles).

⁹⁸ 378 F. Supp. 1155 (Cust. Ct. 1974), appeal docketed, No. 75-6, C.C.P.A., Sept. 6, 1974.

⁹⁹ 19 U.S.C. § 1351(a)(6) (1970), formerly Tariff Act of 1930, ch. 497, § 350(a)(5) (as added by Act of June 12, 1934, ch. 474, § 1, 48 Stat. 943).

Act of 1962.¹⁰⁰ The court also construed narrowly section 5(b) of the Trading with the Enemy Act,¹⁰¹ upon which the President also relied in his defense at trial.

Section 255(b) of the Trade Expansion Act of 1962,¹⁰² substantially identical to section 350(a)(6) of the Tariff Act of 1930,¹⁰³ provides: "The President may at any time terminate, in whole or in part, any proclamation made under this subchapter." The President attempted to use the termination authority to impose the ten percent surcharge by suspending prior proclamations carrying out trade agreements "only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem."¹⁰⁴

The court concluded that this termination authority merely provided the President with a mechanical procedure for supplanting or replacing existing rates with rates that had been established by prior proclamations or by statute, and did not include the power to establish unilaterally a rate of duty that had not been previously established.¹⁰⁵ Although the court's technical analysis of section 255(b) was extremely narrow and took no account of the economic effect of its interpretation,¹⁰⁶ on principle the interpretation is correct. Section 255(b) is part of Title II of the 1962 Act, which deals with the general subject of trade agreements; section 255(a) deals with the termination of proclamations implementing trade agreements. The court was justified in reading a technical provision incident to trade agreement authority as not authorizing unilateral presidential exercise of the taxing power vested in Congress by the Constitution.¹⁰⁷ Since the power to tax is expressly vested in Congress by the Constitution, it is clearly legislative and may not fairly be included within the President's independent foreign affairs powers.¹⁰⁸ Although Congress may and has delegated the taxing power to the President to enable him to regulate foreign commerce,¹⁰⁹

¹⁰⁰ 19 U.S.C. § 1885(b) (1970) (originally enacted as Trade Expansion Act of 1962, Pub. L. No. 87-794, § 255(b), 76 Stat. 880).

¹⁰¹ 50 U.S.C. Appendix § 5(b) (1970).

¹⁰² 19 U.S.C. § 1885(b) (1970) (originally enacted as Trade Expansion Act of 1962, Pub. L. No. 87-794, § 255(b), 76 Stat. 880).

¹⁰³ 19 U.S.C. § 1351(a)(6) (1970), formerly Tariff Act of 1930, ch. 497, § 350(a)(5) (as added by Act of June 12, 1934, ch. 474, § 1, 48 Stat. 943).

¹⁰⁴ Proclamation 4074, 36 Fed. Reg. 15724 (1971).

¹⁰⁵ 378 F. Supp. at 1162.

¹⁰⁶ The result of the court's reasoning is that although the President would not have the power to establish a rate of duty intermediate between the rate being terminated and the statutory rate, he could effectively reinstate the statutory rate, thereby restoring tariffs to the levels existing in 1930, which would give a severe shock to the economy. The report of the Senate Finance Committee on the Trade Act of 1974 indicates that § 125(e) was enacted in response to a request by the executive branch for an explicit procedure to avoid this "spring back" effect. S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 8246, 8303.

¹⁰⁷ U.S. Const. art. I, § 8.

¹⁰⁸ See, e.g., *Board of Trustees v. United States*, 289 U.S. 48, 58 (1933).

¹⁰⁹ See, e.g., *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (upholding

delegation of taxing power should be found only where it clearly appears that Congress so intended. Here the President's power is at its lowest ebb; he has neither independent nor statutorily delegated authority.

In disposing of the second provision relied upon by the United States, section 5(b) of the Trading with the Enemy Act,¹¹⁰ the court, by distinguishing the power to regulate foreign commerce from the taxing power, adhered to its determination to require clear evidence of congressional intention to delegate its taxing power. The court emphasized that the two powers are granted by separate clauses of Article I, section 8, and although the taxing power may be used for the purpose of regulating commerce, it is not fairly included within the commerce power.¹¹¹ Thus, since section 5(b) authorizes the President, to "regulate . . . importation or exportation" by means of "instructions, licenses, or otherwise,"¹¹² it was necessary for the court to determine the meaning of "instructions, licenses, or otherwise." The court reviewed the history of the Act and its predecessors and found that a distinguishing feature of the Act was its "establishment of a system of licenses and permits for the control of property during a time of war and crisis,"¹¹³ which did not include license fees or duties. Again the court's conclusion is constitutionally sound. Although the language of section 5(b) may be interpreted to include the taxing power, to find such a broad grant in a statute dealing not with commerce generally but with the regulation of the importation and exportation of foreign-owned property in time of war would be a significant judicial expansion of presidential powers not intended by Congress.

Notwithstanding the sound statutory and constitutional basis for the *Yoshida* decision, there is room for dispute whether, as a practical matter, it may have been wiser for the court to uphold the presidential action. The court's opinion gives no indication that it considered the consequences of its holding in view of the thousands of protests filed.¹¹⁴ Its decision, if upheld on appeal, will involve, as the Senate Finance Committee recognized in its report on the Trade Act of 1974, "substantial loss of revenue to the U.S. Treasury and windfall gains to those importers who passed on the import surcharge to consumers."¹¹⁵ The President's action in response to a serious balance-of-payments deficit was the only expedient way of dealing with a temporary phenomenon. Since section 5(b) of the

congressional delegation of taxing power to the President by the flexible tariff provision of the Tariff Act of 1922). For examples of current provisions delegating the taxing power, see Trade Act of 1974, §§ 101, 203, 88 Stat. 1982, 2015 (adding 19 U.S.C. §§ 2111, 2253).

¹¹⁰ 50 U.S.C. Appendix § 5(b) (1970).

¹¹¹ 378 F. Supp. at 1170-71.

¹¹² 50 U.S.C. Appendix § 5(b) (1970).

¹¹³ 378 F. Supp. at 1172.

¹¹⁴ See S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 8246, 8423.

¹¹⁵ *Id.*, reprinted in 1974 U.S. Code Cong. & Ad. News at 8297.

Trading with the Enemy Act also extends to national emergencies,¹¹⁶ the court could have interpreted its language to authorize the President's actions. Although expediency does not justify disturbing the constitutional allocation of power, Congress did delegate broad power to the President to deal with emergencies and the language that empowered the President to "regulate" the "importation or exportation" of foreign-owned property by means of "instructions, licenses, or otherwise" may be read as investing the President with the tariff power.

Fortunately, the President need no longer resort to technical provisions to deal with balance-of-payments problems. Section 122 of the Trade Act of 1974¹¹⁷ gives the President broad authority to deal with both deficits and surpluses in the balance of payments, as well as with the depreciation of the dollar in foreign exchange markets.¹¹⁸ Under section 122(a), in case of a deficit, the President has the option of imposing a surcharge of not more than 15 percent, a quota, or a combination of the two. The action is authorized in the case of "large and serious" deficits; if the President determines that action under section 122(a) would be contrary to the national interest, then he is required by section 122(b) to so inform Congress and to convene a group of congressional official advisors designated by another section of the Act¹¹⁹ to consult with them as to his reasons for that determination. The section also contains a subsection authorizing termination of proclamations made under the section.¹²⁰ Thus, the Trade Act of 1974, by giving broader power to the President, will probably minimize litigation over his exercise of the tariff power.

¹¹⁶ The President, in Proclamation 4074, 36 Fed. Reg. 15724 (1971), did declare a national emergency. This proclamation, but not the emergency thereby declared, was itself terminated by Proclamation 4098, 36 Fed. Reg. 24201 (1971).

¹¹⁷ Trade Act of 1974, § 122, 88 Stat. 1987 (adding 19 U.S.C. § 2132).

¹¹⁸ Section 122(a) provides in part:

(a) Whenever fundamental international payments problems require special import measures to restrict imports—

(1) to deal with large and serious United States balance-of-payments deficits,

(2) to prevent an imminent and significant depreciation of the dollar in foreign exchange markets, or

(3) to cooperate with other countries in correcting an international balance-of-payments disequilibrium,

the President shall proclaim, for a period not exceeding 150 days (unless such period is extended by Act of Congress)—

(A) a temporary import surcharge, not to exceed 15 percent ad valorem, in the form of duties (in addition to those already imposed, if any) on articles imported into the United States;

(B) temporary limitations through the use of quotas on the importation of articles into the United States; or

(C) both a temporary import surcharge described in subparagraph (A) and temporary limitations described in subparagraph (B).

Trade Act of 1974, § 122(a), 88 Stat. 1987 (adding 19 U.S.C. § 2132(a)).

¹¹⁹ Trade Act of 1974, § 161(a), 88 Stat. 2008 (adding 19 U.S.C. § 2211(a)).

¹²⁰ Id. § 122(g), 88 Stat. 1989 (adding 19 U.S.C. 2132(g)).

In the event that *Yoshida* is reversed on appeal, a repetition of presidential action in reliance on his termination power will be averted by section 122(h), which provides: "No provision of law authorizing the termination of tariff concessions shall be used to impose a surcharge on imports into the United States."¹²¹ If the Court of Customs and Patent Appeals finds that the surcharge was authorized by section 5(b) of the Trading with the Enemy Act, the President's authority to deal with future emergencies by means of surcharges will still be open to question. Although a court might read section 122 as indicating a congressional intention that only balance-of-payments and dollar-depreciation problems be dealt with by means of surcharges, nonetheless, the court might feel bound to seek the intention of the Congress that enacted section 5(b). In that case, that a later Congress granted taxing power to deal with specified problems would not restrict the use of taxing power found to be delegated by section 5(b).

Whereas the Customs Court in *Yoshida* was faced with only the single issue of whether the President's action was within the statutory delegation, the United States District Court for the District of Columbia was recently required to decide in one action all three issues involving the President's congressionally-delegated authority: (1) whether the delegation itself was proper; (2) whether the action taken was within the delegation; and (3) whether the action was taken in accord with statutory procedures. *Massachusetts v. Simon*,¹²² brought by several northeastern states and several utilities,¹²³ questioned the President's authority to impose tariffs on petroleum imports. By Presidential Proclamation 4341,¹²⁴ the President proclaimed the exaction of a "supplemental fee" on petroleum and petroleum products, increasing from \$1.00 per barrel on imports entered on or after February 1, 1975, to \$2.00 on imports on or after March 1, 1975, and finally to \$3.00 on imports on or after April 1, 1975.¹²⁵ He relied expressly upon the authority conferred upon him by section 232 of the Trade Expansion Act of 1962.¹²⁶ Section 232, the national security provision, empowers the President, after receiving a report of findings by the Secretary of the Treasury that "[an] article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," to take action to "adjust the imports." The plaintiffs challenged this action on four grounds, three of which are relevant here: first, that section 232(b) was an unconstitutional

¹²¹ Id. § 122(h), 88 Stat. 1989 (adding 19 U.S.C. 2132(h)).

¹²² Civil No. 74-0129 (D.D.C., Feb. 21, 1975).

¹²³ Id. The actions of the states and the utilities—filed separately—were consolidated for decision.

¹²⁴ 40 Fed. Reg. 3965 (1975) (proclamation issued Jan. 23, 1975).

¹²⁵ Id. at 3967.

¹²⁶ 19 U.S.C. § 1862 (1970), as amended by Trade Act of 1974, § 127(d), 88 Stat. 1993. For a discussion of § 232, see note 59 *supra*.

delegation by Congress of legislative authority; second, that the authority to "adjust the imports" does not constitute a grant of tariff-making power; and third, that the Secretary failed to comply with requirements for investigation, hearings, and findings.¹²⁷

The court found no merit in the plaintiffs' contention that section 232(b) was an unconstitutional delegation of congressional power.¹²⁸ Acknowledging that delegation of the analogous tariff-making power¹²⁹ had always been accompanied by strict limitations and conditions, Judge Pratt nonetheless found the "general and somewhat imprecise" standards of section 232 adequate.¹³⁰ He noted that the *Panama*¹³¹ and *Schechter*¹³² cases had been undermined by recent decisions upholding delegations with only vague standards or none at all.¹³³ This result is proper: since the oil situation is arguably within the independent foreign relations power of the President, Congress should be given wide latitude in delegating its authority. Although the regulation of the importation of oil involves domestic economic considerations, it also involves international political and national security considerations. The need to give weight to these latter factors dictates that the President, not Congress, should be given the primary authority to control this commodity.

To support their second contention—that the national security clause did not delegate the power purportedly exercised—the plaintiffs relied principally on the history of the exercise of presidential power under that clause. They argued that from the time of its enactment as section 7 of the Trade Agreements Extension Act of 1955,¹³⁴ until April 1973, the President administered the national security provision without claiming that it included a power to exact license fees.¹³⁵ The court found this argument unpersuasive, reasoning that if the phrase "to adjust the imports" includes quotas and

¹²⁷ Civil No. 74-0129 (D.D.C., Feb. 21, 1975).

¹²⁸ *Id.* The court quoted Professor Davis's statement that "[l]awyers who try to win cases by arguing that congressional delegations are unconstitutional almost invariably do more harm than good to their clients' interests." *Id.*, quoting 1 K. Davis, *Administrative Law Treatise* § 2.01, at 75 (1958).

¹²⁹ The court found implicitly that the license fee was not a tariff, in order to avoid what it perceived as a jurisdictional problem. It read 28 U.S.C. § 1582 (1970) as vesting jurisdiction in the Customs Court if this were a tariff. Civil No. 74-0129 (D.D.C., Feb. 21, 1975). Whatever the validity of this determination as precedent, it was immaterial to the court's reasoning whether the license fee was a tariff or a hybrid limitation.

¹³⁰ Civil No. 74-0129 (D.D.C., Feb. 21, 1975).

¹³¹ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (discussed in text at note 92 *supra*).

¹³² *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (discussed in text at note 93 *supra*).

¹³³ Civil No. 74-0129 (D.D.C., Feb. 21, 1975). Compare note 96 *supra* and accompanying text.

¹³⁴ Act of June 21, 1955, ch. 169, 69 Stat. 162.

¹³⁵ *Complaint of States at 8-9, Massachusetts v. Simon*, Civil No. 74-0129 (D.D.C., Feb. 21, 1975).

even a complete embargo, as plaintiffs conceded, it could reasonably be read to include imports subject to fees.¹³⁶

The brevity of the discussion of this second argument does not vitiate the court's conclusion. The legislative history of the national security provision, although limited, does indicate that a major purpose of the provision was to give the President broad authority to deal with oil imports.¹³⁷ Such a purpose is clearly proper: oil is a commodity at once essential to the national defense and national security, and central to the foreign policy of the United States by virtue of the political conditions obtaining in the Middle East. The foreign policy consequences of the regulation of the importation of oil dictate that the President, as the "sole organ" of the United States in its foreign relations, be given broad authority to deal with the oil situation, which goes far toward explaining why Congress did not specify what it meant by adjusting imports.

A decisive consideration in interpreting the language of the national security provision is that section 232 was amended by Congress in the Trade Act of 1974 without changing the language "to adjust the imports."¹³⁸ That Congress, in other sections of the Act, dealt specifically with various import restrictions—principally duties and quotas¹³⁹—and yet did not elaborate on the meaning of "to adjust the imports," argues strongly that it did not intend to confine the executive action solely to import quotas. It is submitted that Congress took it as self-evident that, where the national security is concerned, the President should be given the broadest possible discretion in exercising his statutorily delegated authority.

The third issue raised by the plaintiffs in *Simon* presents the final question under the heading of delegated authority: whether the President has exercised his authority in conformity with the statutory procedures. The national security provision, as most recently amended by the Trade Act of 1974, mandates that the Secretary of the Treasury make an "appropriate" investigation and a report of his findings accompanied by a recommendation for action or inac-

¹³⁶ Civil No. 74-0129 (D.D.C., Feb. 21, 1975). The court referred to, but did not cite, statements by Senators Bennett and Milliken supporting this determination. During the Senate debates on the Trade Agreements Extension Act of 1955, ch. 169, 69 Stat. 162, Senator Milliken, a member of the Senate Finance Committee, observed of § 7, the predecessor of § 232, that "[i]t grants to the President authority to take whatever action he deems necessary to adjust imports if they should threaten to impair the national security. He may use tariffs, quotas, import taxes, or other methods of import restriction." 101 Cong. Rec. 5299 (1955). Senator Bennett, another member of the Finance Committee, also indicated that the bill gave to the President wider latitude than tariffs and quotas. 101 Cong. Rec. 5625 (1955).

¹³⁷ Senator Milliken indicated that protection from oil imports "was the purpose of writing the amendment [national security provision] and of adopting it in the committee." 101 Cong. Rec. 5565 (1955).

¹³⁸ See discussion of § 232 at note 59 supra.

¹³⁹ See, e.g., Trade Act of 1974, §§ 101, 122, 88 Stat. 1982, 1987 (adding 19 U.S.C. §§ 2111, 2232).

FOREIGN COMMERCE

tion.¹⁴⁰ In addition, the Secretary is to hold public hearings "if it is appropriate."¹⁴¹ The plaintiffs turned a shotgun on these requirements; they contended: (1) that the Secretary failed to make recommendations for action in terms contemplated by Congress; (2) that he failed to hold public hearings without offering any explanation; (3) that he failed to consult interested parties; (4) that he disregarded the comprehensive process of deliberation contemplated by Congress; and (5) that the investigation published by the Secretary provided no basis for the action taken.¹⁴²

Notwithstanding the plaintiffs' allegations, the court found that the Secretary had made an appropriate investigation, had reported his findings, and had recommended action to reduce oil imports.¹⁴³ On the hearing issue, the majority observed that the national security provision does not make a hearing mandatory, presumably to allow rapid action in the event that the national security so requires, and accordingly, refused to review the Secretary's discretion in finding a hearing not appropriate.¹⁴⁴ Although acknowledging that the process had been rapid, the court gave weight to Secretary Simon's long involvement with the formulation of oil import policy and to the extensive public exposure that the problem of United States dependence upon foreign oil had already received.¹⁴⁵

Although the provision for a hearing is an important procedural safeguard where the problem posing a threat to national security is not novel and unexpected, but rather one with which the President has been dealing continuously for a long period of time under the same authority, it is not unreasonable to accord him a degree of flexibility that might be unwarranted in the case of action responsive to a situation posing a threat to the national security for the first time. In view of the global implications of the energy policy of the United States, it may be expected that the executive branch, including the Secretary of the Treasury, maintains a continuing oversight of the oil import problem and is well aware of the interests of the various domestic groups affected by the oil situation.

The deference accorded to the congressional delegation by the court in *Simon* confirms that the nondelegation doctrine will not hinder congressional efforts to grant broad power to the President to regulate foreign commerce. *Simon* sanctions the use of the national security clause to circumvent any vestigial restraints imposed by the nondelegation doctrine, since it appears that a court will not question a President's judgment on national security matters.¹⁴⁶

¹⁴⁰ 19 U.S.C. § 1862(b) (1970), as amended by Trade Act of 1974, § 127(d), 88 Stat. 1993.

¹⁴¹ *Id.*

¹⁴² Complaint of States at 19-20, *Massachusetts v. Simon*, Civil No. 74-0129 (D.D.C., Feb. 21, 1975).

¹⁴³ Civil No. 74-0129 (D.D.C., Feb. 21, 1975).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Plaintiffs in *Simon* conceded that "the President's determination that his program is

IV. CONCLUSION

The power to regulate foreign commerce that the President derives from his independent constitutional authority is supplemented by the comprehensive authority delegated to him by trade legislation. By this delegation, Congress has recognized that, as a matter of expediency, the executive branch, by its control over the foreign relations apparatus of the United States, is, in certain categories of situations, the branch best able to deal with those foreign commerce problems for which the domestic solution may have significant effects on the foreign policy of the United States. In the past, congressional delegation, combined with acquiescence in independent presidential action, have moved commentators to denounce congressional abdication and the resultant presidential monopoly of foreign affairs as contrary to the allocation of power ordained by the Constitution.¹⁴⁷ Recently, however, there have been signs of congressional determination to reacquire a voice in United States foreign policy. The Case Bill, enacted in 1972, requires transmission of all international agreements to the Senate within sixty days of their conclusion.¹⁴⁸ The Trade Act of 1974 provides a comprehensive scheme of continuing congressional oversight, including congressional delegates to trade negotiations,¹⁴⁹ submissions of agreements to Congress,¹⁵⁰ reports,¹⁵¹ and presidential consultation with congressional advisors.¹⁵² Nonetheless, in spite of this reassertion of the right to congressional participation, it may be predicted that the scope of presidential power to regulate foreign commerce will not be significantly contracted. As interdependence among nations increases in response to the pressures of the allocation of scarce resources, the foreign affairs consequences of the regulation of foreign commerce will require that the President's broad powers be maintained and expanded. With the aid of congressional oversight, it should be possible to combine effective regulation with preservation of the constitutional allocation of power.

JEFFREY B. STORER

required in the interests of national security is a finding which is not subject to judicial review." *Id.*

¹⁴⁷ See, e.g., Berger, *The Presidential Monopoly of Foreign Relations*, 71 *Mich. L. Rev.* 1, 55 (1972).

¹⁴⁸ 1 U.S.C.A. § 112b (Supp. 1975).

¹⁴⁹ Trade Act of 1974, § 161, 88 Stat. 2008 (adding 19 U.S.C. § 2211).

¹⁵⁰ *Id.* § 162, 88 Stat. 2008 (adding 19 U.S.C. § 2212).

¹⁵¹ *Id.* § 163, 88 Stat. 2009 (adding 19 U.S.C. § 2213).

¹⁵² E.g., *id.* § 122(b)(2), 88 Stat. 1988 (adding 19 U.S.C. § 2132(b)(2)).