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1995

## International Trade Relations and the Separation of Powers under the United States Constitution

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### Recommended Citation

John Linarelli, International Trade Relations and the Separation of Powers under the United States Constitution, 13 DICK. J. INT'L. L. 203 (1995).

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## ARTICLES

# International Trade Relations and the Separation of Powers Under the United States Constitution

John Linarelli\*

### I. Introduction

"Economic diplomacy" has acquired an increased prominence in the post Cold War era.<sup>1</sup> U.S. national security policy no longer focuses primarily on the conventional notions relating to the use of force, arms control and arms proliferation, national defense, and superpower conflict. Rather, the increasing emphasis is on national economic power in a diffuse global economy.<sup>2</sup> It is claimed that this policy focus constitutes

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1. With the fundamental changes in the post-Cold War era, the U.S. national interest also has shifted. Economics is increasingly at the forefront of our foreign policy. Economic growth and development, spurred by open markets and increasing economic integration, are critical to U.S. objectives of promoting peace and democracy in the post-Cold War period.

Joan E. Spero, *Economics and Foreign Policy: The New Pacific Community*, Address before the Asia Foundation (Sept. 21, 1993), in 4 DEP'T ST. BULL., Oct. 11, 1993. See also Mortimer B. Zuckerman, *The Limits to Leadership*, 117 U.S. NEWS & WORLD REP., Sept. 12, 1994, No. 10, at 96; Joan E. Spero, Undersecretary for Economic and Agricultural Affairs, *Economic Diplomacy: Key to Domestic Prosperity*, Statement before the Subcommittee on International Economic Policy, Trade, Oceans and Environment of the Senate Foreign Relations Committee (May 27, 1993), in 4 DEP'T ST. BULL., June 14, 1993; President William Clinton, *American Leadership and Global Change*, Address at the Centennial Celebration, The American University, Washington, D.C. (Feb. 26, 1993), in 4 DEP'T ST. BULL., Mar. 1, 1993.

2. See generally WAYNE SANDHOLTZ ET AL., *THE HIGHEST STAKES: THE ECONOMIC FOUNDATIONS OF THE NEXT SECURITY SYSTEM* (1992). Cf. Walter F. Mondale, *Beyond Detente: Toward International Economic Security*, 53 FOREIGN AFF. 1-2 (1974).

a post-Cold War approach at dynamically connecting policies on domestic economic growth to international relations with foreign nations.<sup>3</sup>

Trade has dominated the foreign policy agenda of the executive branch, regardless of whether a Republican or Democrat holds the presidency. Both Presidents Bush and Clinton, for example, vigorously pursued the completion of the North American Free Trade Agreement [hereinafter NAFTA]<sup>4</sup> and the Uruguay Round of the General Agreement on Tariffs and Trade.<sup>5</sup> Moreover, trade has dominated the relationship between the United States and its major allies. Consequently, despite occasional anti-trade rhetoric from some members of Congress and others, free trade, at least in theory, has become a paradigm in executive branch policy.

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3. Michael Kantor, Trade Central to America's Future in the World, Address Before the National Press Club, Washington, D.C. (May 5, 1993), in 4 DEP'T ST. BULL., May 17, 1993. As Mr. Kantor has explained:

Gone are the days when this nation could subordinate trade concerns to "national security" in the traditional sense of the term. The strategy of containment was appropriate during the Cold War, but it was a static strategy, aimed at halting Soviet expansionism. In those years, we worried about the "doomsday clock" — with hands perilously close to the midnight of nuclear war. For a long time, our strategy was mutually assured destruction.

Today our challenges are dynamic, not static. Economic strength, founded on human resources and nourished by trade, is a pillar of national security in this new Post-Cold War age. Our security interests — and those of others — are inextricably linked to the growth and fairness of the global trading system.

*Id.*

4. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296 [hereinafter NAFTA]. NAFTA is a significant trade agreement, involving a market of over \$6 trillion and 360 million consumers. William A. O'rae, Jr., *The NAFTA Debate: Myth Versus Facts: The Whole Truth About the Half-Truths*, 72 FOREIGN AFF. 1, 3 (1993). While NAFTA, as foreign policy, generated very little in the way of concern or attention by any significant constituency, NAFTA may have been a significant act of foreign policy. As explained by Congressman Jim Kolbe:

Since President Salinas has taken office, Mexico has extended a hand of cooperation to the United States. It has dismantled a state-owned economy, has defended human rights, and embarked upon a path of steady political liberalization.

By successfully implementing NAFTA, the United States will solidify and further enhance the Salinas vision of *perestroika* and *glasnost*. And as its economy expands and its middle class grows, Mexico will continue along its path of increased democratization.

*The North American Free Trade Agreement: Environment and Labor Agreements: Joint Hearing Before the Subcomm. on Economic Policy, Trade and Environment and Western Hemisphere Affairs of the House Committee on Foreign Affairs*, 103d Cong., 1st Sess. 15 (1993). As explained by Congressman Bill Richardson:

[O]n foreign policy grounds, I could think of no more serious setback in our relationship to Latin America than a denial of NAFTA or a delay of NAFTA to President Salinas. It would be a trip wire negative effect for the rest of the hemisphere, where Chile and many other nations want to proceed with free trade. It is the wave of the future.

*Id.* at 21. See also Paul Krugman, *The NAFTA Debate: The Uncomfortable Truth about NAFTA: It's Foreign Policy, Stupid*, 72 FOREIGN AFF. 13, 18-19 (1993).

5. See General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125.

## INTERNATIONAL TRADE RELATIONS

It would appear that the President would require great flexibility in international trade matters, as there may often be a need to use the tools of economic diplomacy to respond to international situations and crises. The methods of implementing trade policy that have been used to a significant extent throughout U.S. history are the granting of most-favored-nation status, the negotiation of trade agreements, export controls and the imposition of economic sanctions.<sup>6</sup> Can the President, however, grant Cuba or North Korea most favored nation status or other trade concessions in exchange for, say, concessions on nuclear non-proliferation, or to stop intervention in the internal affairs of neighboring states? Furthermore, could the President pursue a policy of constructive engagement through the negotiation of a trade agreement, without congressional involvement? What is the President's constitutional authority to regulate international trade as an incident to or in conjunction with foreign policy generally?

Constitutional law, specifically the separation of powers doctrine, should direct which branch—Congress or the President—has preeminence in determining and implementing foreign policy. Historically, however, trade policy has not been the subject of major constitutional confrontation between the political branches. Rather, most constitutional confrontations have arisen from issues regarding the use of military force. Nevertheless, as trade becomes more prominent as a foreign policy issue, constitutional battles in the trade area may become more frequent. Such battles will inevitably occur if the President were to attempt to act either without congressional approval or without a congressional delegation of authority.

Congress has express powers in the Constitution to regulate tariffs and foreign commerce.<sup>7</sup> On occasion, however, Congress has delegated significant aspects of this constitutional authority to the President.<sup>8</sup> One

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6. In fact, most recently, the House of Representatives favored denying most-favored trade status to China in an attempt to pressure it to improve its human rights practices. See H.R. REP. NO. 640, 103d Cong., 2d Sess. (1994).

7. U.S. CONST. art. I, § 8, cls. 1, 3.

8. The delegation doctrine is a corollary to the separation of powers doctrine. *U.S. v. Yoshida Int'l, Inc.*, 526 F.2d 560, 572 (C.C.P.A. 1975). To the extent powers are separated between Congress and the President, Congress may delegate certain of its powers to the President. Since 1813, decisions in the international trade area have dealt with the parameters of permissible delegation by Congress to the President in matters involving foreign commerce. See *Cargo of Brig Aurora*, *Burn Side v. U.S.*, 11 U.S. (7 Cranch) 382 (1813). Although the Supreme Court sets forth the most important precedent on constitutional issues, many of the decisions addressing the delegation doctrine are by lower courts with special jurisdiction in international trade matters. See, e.g., *Florsheim Shoe Co. v. U.S.*, 744 F.2d 787 (2d Cir. 1984); *Mast Industries v. Regan*, 596 F. Supp. 1567 (Ct. Int'l Trade 1984); *U.S. Cane Sugar Refiners' Ass'n v. Block*, 544 F. Supp. 883 (Ct. Int'l Trade 1982); *U.S. v. Yoshida Int'l Inc.*, 526 F.2d 560 (C.C.P.A. 1975); *South Puerto Rico Sugar Co. Trading Corp. v. U.S.*, 334 F.2d 622 (Cl. Ct. 1964); *Star Kist Foods, Inc. v. U.S.*, 275 F.2d 472, 480

such delegation is in legislation that confers to the President the power to impose economic sanctions upon other countries.<sup>9</sup> At the same time, however, this legislation also limits the President's use of the delegated authority.<sup>10</sup> Additionally, in the area of trade agreements, Congress has historically passed legislation delegating to the President the authority to negotiate specific trade agreements. Nevertheless, Congress has limited its delegation to negotiate trade agreements. Specifically, since 1974, Congress has imposed the fast track procedure upon the President for approval of trade agreements.<sup>11</sup> Congress also has promulgated the

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(C.C.P.A. 1959).

One standard for determining whether a delegation is proper, the intelligible principle standard, was first set forth in *J.W. Hampton, Jr., & Company v. United States*, 276 U.S. 394 (1928), in which the Supreme Court upheld a delegation of power to the President to increase or decrease duties. Specifically, the Court held that "[i]f 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." *Id.* at 409. This standard has been relied upon in numerous subsequent decisions. The *Hampton* Court further said that:

The same principle that permits Congress to exercise its rate-making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions for the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.

*Id.* at 409. Thus, the Court made no distinction between interstate or domestic commerce and international or foreign commerce. Note that *Hampton* was decided in 1928, eight years before the Supreme Court's 1936 decision in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

In *Curtiss-Wright*, the Supreme Court, in an opinion by Justice Sutherland, set forth one of the most famous statements of the inherent power of the Executive in foreign affairs in the Court's history. The *Curtiss-Wright* Court explained that the Executive has far greater powers in matters of international concern than it does in matters of domestic concern. *Id.* at 319. See *infra* notes 157-58, 192-96 and accompanying text. Decisions after *Curtiss-Wright* have held that delegations grant even more authority and will be given even more deference when foreign affairs are implicated. See *Florsheim Shoe*, 744 F.2d at 793; *Yoshida Int'l*, 526 F.2d at 582; *Star Kist Foods*, 275 F.2d at 480; *South Puerto Rico Sugar*, 334 F.2d at 631.

The last invalidation of a delegation as unconstitutional occurred in 1935, prior to *Curtiss-Wright*. Notably, the case, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), dealt with purely domestic issues. Cf. *National Cable Television Ass'n. Inc. v. U.S.*, 415 U.S. 352, 353-55 (1974) (Brennan, J., dissenting) (asserting that the delegation doctrine is an outmoded doctrine of the 1930s, except in the area of rights in the criminal context); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 91 (1974) (Brennan, J., dissenting) (asserting that the Bank Secrecy Act reporting and recordkeeping requirements constituted impermissibly broad delegation).

9. See *infra* notes 121-24 and accompanying text.

10. *Id.*

11. See *infra* notes 88-107 and accompanying text. On December 1, 1994, Congress passed important legislation implementing the agreements reached in the Uruguay Round of the General Agreement on Tariffs and Trade. In that legislation, Congress legislatively delegated to the President the power to enter into the agreements and promised to use the fast track procedure to initiate legislation for the agreement. See *infra* notes 88-107 and accompanying text.

Jackson-Vanik Amendment,<sup>12</sup> which prohibits the President from granting most favored nation status to countries with nonmarket economies that restrict the freedom of emigration of its nationals.<sup>13</sup> The Amendment has proven at times to be a significant limitation on Presidential authority since its inception in 1974.<sup>14</sup>

Thus, Congress has placed, or at least has attempted to place, significant restrictions on Presidential authority in trade matters. This article examines whether the President may ignore these limitations and still act in a constitutional manner. In essence, this article assesses when the President may abandon political compromise with the Congress, declare trade relations with a particular country or region to be a national security priority, and enter into a trade agreement or take some other action in the trade area without congressional involvement. In the last few decades, the executive branch has chosen the route of expediency and has not challenged congressional involvement in trade matters. Nevertheless, the question remains as to whether the President has the constitutional authority to bypass congressional involvement in trade matters.

Part II of the article examines congressional action in international trade matters. Throughout history, Congress has delegated broad powers to the President, but it has in no way abdicated its prerogative over the regulation of foreign commerce. In fact, Congress has more vigorously asserted its authority in recent trade legislation by imposing substantial limitations on the President's authority. Part III of the article contains a constitutional analysis of presidential authority in trade and foreign policy matters. The President's constitutional power over pure trade matters has been determined to be relatively weak. The President, however, predominates in foreign affairs. Court precedent could be interpreted to allow the President to recognize a government, institute a blockade, or even invade a country, on the basis of the President's sole constitutional authority and without a congressional delegation of power, but not to decrease a trade barrier as a part of a peaceful settlement. Finally, Part IV of the article attempts some general conclusions on separation of powers arguments in international trade matters.

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12. 19 U.S.C. § 2432 (1988).

13. The Amendment as it is currently applied has been a constant irritant in relations between the United States and the People's Republic of China. *See China: Most-Favored-Nation Treatment and U.S. Policy on the Chinas*, 87 PROC. AMER. SOC'Y INT'L L. 432 (1993). *See also infra* notes 108-16 and accompanying text.

14. *See infra* notes 108-16 and accompanying text.

## II. Congressional Assertions of Power

An historical examination of the congressional and executive involvement in trade matters reveals that Congress and the President shared power with no apparent conflict prior to 1930. Indeed, the President took the initiative in entering commercial treaties with foreign governments, while Congress set tariffs and passed legislation to implement the various embargoes and blockades of the time.<sup>15</sup> In 1930, Congress passed the Smoot Hawley Tariff Act, which imposed extremely high tariffs and contributed to the beginning of the Great Depression.<sup>16</sup> Then, from 1934 to 1962, Congress acquiesced to the President, and the President enjoyed significant leverage in trade matters, without significant congressional interference.<sup>17</sup> From 1962 to 1974, however, Congress began imposing itself on Presidential initiative, and from 1974 to the present, Congress has asserted dominance in international trade matters, involving itself in even the early stages of negotiation of trade agreements.<sup>18</sup>

### A. Early Practice

From 1778 until the passage of the General Agreement on Tariffs and Trade, the primary vehicle for trade relations between the United States and other countries were bilateral treaties of friendship, commerce, and navigation, all of which were negotiated and entered into by the President.<sup>19</sup> As treaties, they required the final advice and consent of the Senate.<sup>20</sup> The President, however, did not seek advance approval or involvement of either house of Congress while negotiating these treaties.<sup>21</sup>

The United States entered the first of such commercial treaties with France in 1778.<sup>22</sup> This treaty was not entered into by the President, but rather was entered when the country was a confederation under the

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15. See *infra* part II.A.

16. See *infra* part II.B.

17. See *infra* part II.C.

18. See *infra* parts II.D, II.E.

19. TSUNG-YU SZE, CHINA AND THE MOST-FAVORED-NATION CLAUSE, 11-29 (1925); Paul Lansing & Eric C. Rose, *The Granting and Suspension of Most-Favored-Nation Status for Nonmarket Economy States: Policy and Consequences*, 25 HARV. INT'L L.J. 328, 333-34 (1984).

20. U.S. CONST. art. 2, § 2, cl. 2 ("He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.").

21. TSUNG-YU SZE, *supra* note 19, at 11-29.

22. Treaty of Amity and Commerce Between the United States and France, 8 Stat. 12, T.S. No. 83 (1778), reprinted in 2 BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW 7-20 (1991).

Articles of Confederation.<sup>23</sup> Accordingly, the Continental Congress entered into the treaty with France.<sup>24</sup>

The President developed a substantial treaty practice in the trade area prior to the beginnings of congressional regulation of trade agreements, specifically The Reciprocal Trade Agreements Act of 1934.<sup>25</sup> In these pre-1934 bilateral commercial treaties, the United States used the conditional most-favored-nation (MFN)<sup>26</sup> clause.<sup>27</sup> Conditional MFN, which was developed by the United States, was a significant departure from European practice.<sup>28</sup> The United States entered into treaties specifying conditional MFN until 1923, at which time the President began to enter treaties containing unconditional MFN clauses.<sup>29</sup>

Parallel with the use of commercial treaties by the President, Congress from 1789 to 1930 exercised plenary power in regulating tariffs. Accordingly, the second trade act passed by the Congress<sup>30</sup> was a tariff

23. 2 CLUBB, *supra* note 22, at 7.

24. *Id.*

25. The Reciprocal Trade Agreements Act of 1934 appears to be the first comprehensive legislation in which the Congress attempted to regulate the powers of the President in the making of trade agreements with other countries. *See infra* notes 43-74 and accompanying text. It would be an interesting point for future research to determine when, why, and how the United States stopped using treaties and began using agreements. Such research is beyond the scope of this Article. This author suspects that the change occurred with the passage of the Trade Agreements Act of 1934.

26. Hereinafter "MFN."

27. *See* Lansing & Rose, *supra* note 19, at 333. The most-favored-nation (MFN) provisions have been generally described as obligating parties "to extend all concessions or favors made by each in the past, or which might be made in the future to . . . any other state in such a way that their mutual trade will never be on a less favorable basis than is enjoyed by that state whose commercial relations with each in on the most favorable basis." R. SNYDER, *THE MOST-FAVORED-NATION CLAUSE* 10 (1948), *quoted in* Lansing & Rose, *supra* note 19, at 331-32. As for the difference between conditional and unconditional MFN:

In its pristine form, the most-favored-nation (MFN) concept embodies a broad nondiscrimination principle: countries linked by a MFN obligation will not treat each other worse (in terms of trade barriers) than they treat any other country. In the years before GATT, most bilateral trade treaties included MFN clauses that committed the signatories to extend to each other any trade concessions (typically lower tariffs) subsequently ceded to any other state. This core obligation was subject to competing interpretations. Developing countries, especially the nineteenth-century United States, limited their MFN commitments by insisting that the extension of a subsequent concession to a MFN partner was conditional on that partner's providing compensating concessions. Developed countries, particularly the United Kingdom and (after World War I) the United States, insisted on unconditional MFN obligations that would kick in whenever a trade concession occurred.

PAUL B. STEPHAN III ET AL., *INTERNATIONAL BUSINESS AND ECONOMICS LAW AND POLICY* 667 (1993).

28. TSUNG-YU SZE, *supra* note 19, at 18.

29. *See* STEPHAN ET AL. *supra* note 27, at 667 (explaining that conditional MFN was used until after World War I); TSUNG-YU SZE, *supra* note 19, at 18-19; Lansing & Rose, *supra* note 19, at 333.

30. *See* 2 CLUBB, *supra* note 22, at 21.



act, in which Congress promulgated duties "necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protections of manufacturers . . . ." <sup>31</sup> Subsequent tariff legislation was enacted, culminating in the now infamous Smoot Hawley Tariff Act of 1930. <sup>32</sup> Congress also passed legislation implementing various blockades and embargoes. <sup>33</sup>

Thus, in the period from the founding of the country to the Great Depression, both Congress and the President had roles in the development of trade policy. The President took the initiative and negotiated commercial treaties with many countries. <sup>34</sup> These treaties often required the passage of legislation to carry them into effect. <sup>35</sup> Congress, on the other hand, enacted general legislation implementing tariffs and duties, and other trade legislation. <sup>36</sup> In this early period, there does not appear to have arisen much direct conflict between the two branches.

#### *B. The Smoot Hawley Tariff Act of 1930*

It became painfully obvious through the experience of The Smoot Hawley Tariff Act of 1930 <sup>37</sup> that Congress could no longer engage in direct tariff regulation. The Smoot Hawley Tariff Act was the ultimate protectionist legislation passed by Congress. <sup>38</sup> In the Act, Congress did not delegate any of its powers in the foreign commerce area to the President. <sup>39</sup> Congress set very high tariff levels, manifesting a policy

31. Act of July 4, 1789, 1 Stat. 23 (1789), reprinted in 2 CLUBB, *supra* note 15, at 21-25.

32. See *infra* notes 37-42 and accompanying text.

33. See 2 CLUBB, *supra* note 22, at 31-65.

34. See *supra* notes 14-29 and accompanying text.

35. In the 1800s, two Supreme Court decisions set forth important principles on the interpretation of treaties in U.S. domestic law. These decisions concerned commercial treaties granting MFN status. Specifically, the Court held in *Whitney v. Robertson*, 124 U.S. 190 (1888), and *Bartram v. Robertson*, 122 U.S. 116 (1887), that (1) as between a self-executing treaty and legislation, the later in time must control; and (2) if a treaty is not self-executing, its implementing legislation is treated as any other legislation, which is subject to repeal or revision by Congress. The Court in *Whitney* and *Bartram* reconciled potential conflicts by setting forth these rules and by confirming the conditional nature of the treaties.

36. See *supra* notes 30-33 and accompanying text.

37. The Smoot Hawley Tariff Act, Pub. L. No. 71-361, 46 Stat. 590 (1930).

38. Under the Smoot Hawley Tariff Act, Congress set the highest tariff levels in U.S. history. Harold E. Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 201 (1987) [hereinafter *Legal Markets of International Trade*].

39. Professor Harold Koh has written several articles that set forth an historical analysis of congressional assertions of power in the international trade area. See Harold H. Koh, *The Fast Track and United States Trade Policy*, 18 Brook. J. Int'l L. 183 (1992) [hereinafter *The Fast Track*]; *The Legal Markets of International Trade*, *supra* note 38; Harold H. Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, N.Y.U. J. INT'L L. & POL. 1191 (1986).

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of extreme protectionism.<sup>40</sup> Other countries also set very high tariffs, and the result was a severe shrinkage of world trade.<sup>41</sup> Smoot Hawley demonstrated the difficulties in having a legislative body, whose members owe allegiance to regions and factions, micro-manage international trade for a country. In fact, many view the Smoot Hawley Act as one of the primary causes of the Great Depression.<sup>42</sup> The Reciprocal Trade Agreements Act of 1934 was passed in an attempt to rectify the dire situation.

### *C. The Reciprocal Trade Agreements Act of 1934 and Subsequent Extensions*

An uncontrollable Congress recognized the folly of placing itself in the position of managing the international trade affairs of the nation. As a result of the disastrous consequences of The Smoot Hawley Tariff Act of 1930, Congress wanted to increase exports of U.S. products. To do so, tariff levels of other countries had to be reduced. Accordingly, Congress enacted The Reciprocal Trade Agreements Act of 1934<sup>43</sup> to delegate to the President the authority to negotiate and conclude reciprocal tariff-cutting executive agreements with foreign nations.<sup>44</sup> The Act has been viewed as successful, at least in comparison to the disastrous Smoot Hawley regime.<sup>45</sup> In fact, it is viewed as the "beginning of the modern trade agreements era."<sup>46</sup>

During the period from 1934 to 1962, on eleven occasions, Congress extended the Act to apply to various trade contexts.<sup>47</sup> It appears that from the beginning of this modern era, at least until 1962, the President had the predominant authority in trade matters. The Reciprocal Trade Agreements Act of 1934, as extended, gave the President the initiative in

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[hereinafter *Congressional Controls After I.N.S. v. Chadha*]. Professor Koh analyzes congressional action in five regimes. The first regime is the "Smoot Hawley regime," in which Congress managed tariff levels and trade, with no authority delegated to the President.

40. *The Legal Markets of International Trade*, *supra* note 38, at 202; *Congressional Controls After I.N.S. v. Chadha*, *supra* note 39, at 195-97.

41. *The Legal Markets of International Trade*, *supra* note 38, at 201-02.

42. *The Legal Markets of International Trade*, *supra* note 38, at 202; *Congressional Controls After I.N.S. v. Chadha*, *supra* note 39, at 195-97.

43. The Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (1934).

44. *The Legal Markets of International Trade*, *supra* note 38, at 202; *Congressional Controls After I.N.S. v. Chadha*, *supra* note 39, at 195-97. Professor Koh classifies the Reciprocal Trade Agreements Act and its extensions as the second regime of congressional action in trade matters.

45. *Congressional Controls After I.N.S. v. Chadha*, *supra* note 39, at 196.

46. 2 CLUBB, *supra* note 22, at 151.

47. See EUGENE L. STEWART, THE TRADE AGREEMENTS LEGISLATION, COMPENDIUM OF PAPERS ON UNITED STATES FOREIGN TRADE POLICY 507 (1957).

international trade matters. The Act contained a broad delegation of power granted to the President.<sup>48</sup> This delegation augmented the President's already broad powers in foreign affairs established independently in the Constitution.<sup>49</sup> The Act provided in pertinent part:

[T]he President, whenever he finds as a fact, that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time —

(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and

(2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.<sup>50</sup>

One notable feature of the Act is the proclamation powers of the President. It has been asserted that this power gave the President the ability to proclaim an agreement as domestic law.<sup>51</sup> To appreciate the broad scope of this delegation, one need only review the detailed provisions of contemporary fast track legislation governing the NAFTA and the Uruguay Round of the General Agreement on Tariffs and Trade, in which Congress has asserted a far more dominant position in trade matters.<sup>52</sup>

The ostensible purposes of the Act were to alleviate a temporary emergency situation.<sup>53</sup> The Act contained very few substantive

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48. *Legal Markets of International Trade*, *supra* note 38, at 202; *Congressional Controls After I.N.S. v. Chadha*, *supra* note 39, at 1195.

49. *See supra* note 8 and accompanying text.

50. The Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, § 350(a), 48 Stat. 943 (1934). "Duties and other import restrictions" were defined as including (1) "rate and form of import duties and classification of articles," and (2) "limitations, prohibitions, charges, and exactions other than duties, imposed on importation or imposed for the regulation of imports." *Id.* § 350(c). This definition did not change very much in subsequent 1962 legislation. *See infra* note 79 and accompanying text.

51. John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 281-85 (1967).

52. *See infra* notes 88-107 and accompanying text.

53. The Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (1934).

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standards that could be applied to restrict Presidential discretion.<sup>54</sup> The President exercised hegemony over trade matters and Congress abdicated. This separation of powers interplay, however, should be interpreted in the context of the times. The legislative history for the original Act could be read to indicate that its purpose was to assist the country out of the Great Depression by expanding export markets.<sup>55</sup> During the Great Depression, a President that actively decreased tariffs abroad was seen as vital to domestic economic recovery. Similarly, a strong and efficient presidential presence in international trade matters was also perceived as necessary when the Act was extended to apply to other world situations and crises, such as post-World War II efforts to rebuild countries and to develop world economic cooperation or the handling of the Cold War.<sup>56</sup>

The President negotiated and entered into twenty-one agreements before 1940 and thirty-two agreements before 1945.<sup>57</sup> With the exception of one agreement, these agreements were all bilateral.<sup>58</sup> Notably, the Act was read broadly to encompass virtually any type of matter involving international trade, yet Congress never objected to executive branch practice in this respect.<sup>59</sup>

Finally, in 1947, the President negotiated the General Agreement on Tariffs and Trade Act [hereinafter GATT],<sup>60</sup> without doubt one of the most significant trade agreements ever made.<sup>61</sup> GATT, however, was never specifically approved or reviewed by either house of Congress.<sup>62</sup> Rather, the United States agreed to adhere to the GATT after an authorized executive branch official signed a document titled "The Final Act and Protocol of Provisional Application" and the President then issued a proclamation for the Act.<sup>63</sup> The executive branch has not

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54. The basic limitation was that the President could not alter duties by more than 50%. *Id.*

55. See STEWART, *supra* note 47, at 507.

56. *Id.*

57. Jackson, *supra* note 51, at 257, 264; Lansing & Rose, *supra* note 19, at 334.

58. Jackson *supra* note 51, at 258.

59. *Id.* at 260-65.

60. General Agreements on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT].

61. Jackson, *supra* note 51, at 250-51; Lansing & Rose, *supra* note 19, at 334-37. Originally, 23 nations were signatories to the treaty. 2 CLUBB, *supra* note 22, at 174. The GATT was the first multilateral agreement of consequence, and it signalled a fundamental change from the United States' previous approach to trade relations, which were effected primarily through bilateral trade agreements. See *supra* notes 25-29 and accompanying text.

62. Jackson, *supra* note 51, at 265; 2 CLUBB, *supra* note 22, at 174.

63. 2 CLUBB, *supra* note 22, at 174. See also *supra* note 51 (discussing the proclamation powers of the President). Although the President wanted the creation of the International Trade Organization (ITO) as the organization to administer GATT, the ITO never came into existence because of a lack of congressional support. As explained by Professor John Jackson, "[t]he

always been entirely clear on whether its authority for its acceptance of the GATT is based on either delegated authority or a combination of delegated authority and the independent constitutional authority of the President.<sup>64</sup> Under either theory, however, the executive branch has contended that it was not required to submit the GATT to Congress.<sup>65</sup>

Thus, while Congress played, at best, a very minor role in the initial approval of GATT, it nevertheless has accepted GATT and in fact has sought to delimit the President's authority in negotiating successive rounds to the GATT.<sup>66</sup> After GATT was negotiated, Congress continued to extend The Reciprocal Trade Agreements Act another six times.<sup>67</sup> The 1951 Extension Act contained the following provision concerning GATT, which was repeated in the 1953, 1954, 1955 and 1958 extensions of the Act:<sup>68</sup> "The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade."<sup>69</sup> This reaction was one of the weakest Congress could take. Congress did not attempt to pass legislation to effectively repeal GATT, but rather, continued to grant the President authority to enter into further trade agreements.

While in general, The Reciprocal Trade Agreements Act affords broad authority to the President, the Act and its extensions nevertheless contained some limitations by which Congress sought to control the initiative of the President. For example, a significant provision in the 1951 extension of the Act was the direction to the President to withdraw MFN status for virtually all communist countries.<sup>70</sup> Congress imposed

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Administration had repeatedly stated to Congress that, while GATT was being negotiated pursuant to authority which the executive already possessed, the ITO would be submitted to Congress for approval." Jackson, *supra* note 51, at 252, n.13. The Congress rejected the ITO. *Id.*

64. *Id.* at 254. As explained by one author:

A protocol of provisional application made it unnecessary to change any U.S. Laws to comply with the GATT, and so the President's authority to enter into it could not be challenged effectively either in the Congress or the courts. Nonetheless, many legislatures believed that in making such a broad agreement on regulatory matters, the President had exceeded the authority granted him in the Trade Agreement Extension Act.

2 CLUBB, *supra* note 22, at 174.

65. *Id.* at 265.

66. See *supra* notes 60-64 and accompanying text.

67. Jackson, *supra* note 51, at 265-69; STEWART, *supra* note 47, at 507-20.

68. Jackson, *supra* note 51, at 267.

69. The Trade Agreements Extension Act of 1951, 65 Stat. 72 (1951), reprinted in Jackson, *supra* note 51, at 267.

70. See H.R. REP. 575, 103d Cong., 2d Sess. at 1 (1994) (discussing the U.S. history of MFN treatment); Lansing & Rose, *supra* note 19, at 388. The result was that MFN status was revoked from Hungary, Poland, and Czechoslovakia. Lansing & Rose, *supra* note 19, at 388.

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the higher duty rates of the Smoot Hawley Tariff Act on Communist countries.<sup>71</sup> This 1951 provision was the first MFN restriction on communist states, and was the precursor to the Jackson Vanik Amendment found in the 1974 Trade Act.<sup>72</sup>

From a procedural perspective, the Act imposed a notice requirement on the President, which required him to furnish "reasonable public notice" of his intention to negotiate a trade agreement, so that "any interested person" may have an opportunity to present his views.<sup>73</sup> This notice requirement is significantly less onerous than the procedural requirements of the current fast track legislation.<sup>74</sup>

### *D. The Trade Expansion Act of 1962*

From 1962 through 1967, Congress' delegation to the President of the authority to enter into trade agreements was embodied in The Trade Expansion Act of 1962.<sup>75</sup> Under this legislation, Congress sought to inject itself into the process of trade negotiations through the requirement that the President obtain congressional approval for multilateral trade agreements. Congress delegated powers to negotiate trade matters to the President, but required congressional approval of trade agreements.<sup>76</sup> Underlying this restriction was Congress' concern that the President might agree to reduce nontariff barriers, such as antidumping restrictions, during the Kennedy Round of the GATT.<sup>77</sup>

One legal scholar has explained Congress' concern as follows:

Such nontariff concessions not only potentially threatened domestic antidumping laws, which congressmen guarded zealously, but on their face, nontariff restrictions also seemed to fall outside Congress' constitutionally enumerated power to "lay and collect Taxes, Duties, Imposts and Excises." Thus Congress feared that a runaway President

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71. Lansing & Rose, *supra* note 19, at 338.

72. *Id.* at 338-39.

73. The Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, § 4, 48 Stat. 943 (1934); The Trade Agreements Extension Act of 1951, § 3, 65 Stat. 70 (1951). By 1951, the requirement was formalized into a hearing requirement.

74. See *infra* notes 88-107, 117-20 and accompanying text.

75. The Trade Expansion Act, Pub. L. No. 87-794, 76 Stat. 872 (1962). Professor Koh's third regime began with the Trade Expansion Act of 1962. This third regime corresponds with the Kennedy Round of the GATT, which concluded in 1967. *Legal Markets of International Trade*, *supra* note 38, at 203-04; *Congressional Controls After I.N.S. v. Chadha*, *supra* note 39, at 1197-1200.

76. See *Legal Markets of International Trade*, *supra* note 38, at 203-04; *Congressional Controls After I.N.S. v. Chadha*, *supra* note 39, at 1197-1200.

77. *Legal Markets of International Trade*, *supra* note 38, at 203-04; *Congressional Controls After I.N.S. v. Chadha*, *supra* note 39, at 1197-1200.

might, instead, negotiate and accept nontariff barriers reductions without congressional authorization, relying upon his independent constitutional authority to accept sole agreements.<sup>78</sup>

The Act permitted the President to enter into trade agreements with foreign governments between June 30, 1962 and July 1, 1967, and to "proclaim such modification or continuance of any existing duty or other import restriction, such continuance of existing duty free or excise treatment, or such additional import restrictions, as he determines to be required or appropriate to carry out any such trade agreement."<sup>79</sup> Yet, the Act also contained some substantive restrictions on the President's authority.<sup>80</sup> As in the prior legislation, the President was required to provide the opportunity for "any interested person" to present his or her views on a purposed trade agreement, in hearings held after "reasonable notice."<sup>81</sup>

The 1962 Act was the first trade legislation that required that the President have members of Congress as part of his accredited negotiating delegation.<sup>82</sup> As did the 1951 Extension Act, the 1962 Act contained a provision denying the President the discretion to grant MFN status to communist countries.<sup>83</sup>

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78. *Congressional Controls After I.N.S. v. Chadha*, *supra* note 39, at 1198. In fact, Congress' fears were realized. President Johnson accepted the GATT Antidumping Code over congressional objection, relying on both his congressional delegation of authority and his inherent authority to enter into sole executive agreements. *Id.* Congress reacted negatively to President Johnson's action and attempted passage of a resolution to prohibit the Code from becoming U.S. domestic law. *Id.* at 1199 n.23. Congress ultimately settled for legislation that allowed the Code to become domestic law to the extent that it did not contravene the current domestic law already governing antidumping. *Id.* See Renegotiation Act Amendments of 1968, Pub. L. No. 90-634, § 201, 82 Stat. 1345, 1347 (codified at 19 U.S.C. § 160 (1988)). See also STEPHEN ET AL., *supra* note 27, at 654 n.20.

79. The Trade Expansion Act of 1962, Pub. L. No. 87-794, § 201(a), 76 Stat. 872 (1962). "Duty or other import restriction" was defined as including (A) the rate and form of an import duty, and (B) a limitation, prohibition, charge, and exaction other than duty, imposed on importation or imposed for the regulation of imports. *Id.* § 405(2).

80. See *id.* § 201(b) (providing that the President could not alter duties by more than 50%).

81. *Id.* § 223.

82. Section 243 of the 1962 Act provides:

Before each negotiation under this title, the President shall, upon the recommendation of the Speaker of the House of Representatives, select two members (not of the same political party) of the Committee on Ways and Means, and shall, upon the recommendation of the President of the Senate, select two members (not of the same political party) of the Committee on Finance, who shall be accredited as members of the United States delegation to such negotiation.

*Id.* § 243. The presence of members of Congress in negotiations was to "influence . . . actions by leaking damaging information and threatening obstruction. Their participation in the negotiations also open[ed] an independent channel of information to Congress." STEPHEN ET AL., *supra* note 27, at 653.

83. The Trade Expansion Act of 1962, Pub. L. No. 87-794, § 231, 76 Stat. 872, 876 (1962).

*E. The Trade Act of 1974 and Contemporary Trade Legislation, Including The Omnibus Trade and Competitiveness Act of 1988*

The provisions of the Trade Act of 1974 are "the foundations for the current regime of U.S. trade policymaking"<sup>84</sup> and have been deemed "the first comprehensive restructuring of U.S. trade law since 1934."<sup>85</sup> The most significant feature of the 1974 Act was its introduction of the fast track procedure for congressional approval of international trade agreements negotiated by the President.<sup>86</sup> Essentially, the fast track procedure can be viewed as an assertion of congressional dominance in international trade matters.<sup>87</sup> Also important is the Act's addition of the Jackson-Vanik Amendment to U.S. trade law.

*1. The Fast Track Procedure.*—The fast track procedure marks the first time after Smoot Hawley that Congress became significantly involved in the details of international trade.<sup>88</sup> The fast track procedure was not just included in the 1974 Trade Act, but has become a more or less permanent feature in contemporary trade legislation.<sup>89</sup> It seems that it will play a significant role in contemporary trade legislation, at least for the near future. It is the subject of current controversy from a separation of powers perspective.<sup>90</sup> As explained in one authoritative text:

The interaction among [federal agencies involved in international trade matters], other components of the Executive Branch and

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In 1965, President Johnson created the Special Committee on U.S. Trade Relations with East European Countries and the Soviet Union, led by Chairman J. Irwin Miller, to assess this restriction. Lansing & Rose, *supra* note 19, at 341. The Committee issued a report in 1966 which recommended, among other things, the linkage of MFN status for Soviet Bloc countries on the basis of political and foreign policy factors. *Id.* Specifically, the Committee recommended a repeal of the lack of discretion in then current law, and instead recommended the vesting of discretion in the President to grant MFN status to a communist country if to do so would advance the interests of the United States. *Id.* at 341 n.75. In 1966, President Johnson unsuccessfully sought legislation from Congress to implement the Miller Committee's recommendations. *Id.* at 341 n.76.

84. *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, *supra* note 39, at 1201. Professor Koh's fourth regime is the GATT Tokyo Round Regime, for which Congress delegated power to the President in the Trade Agreements Act of 1974. *The Legal Markets of International Trade*, *supra* note 38, at 205-07; *Congressional Controls After I.N.S. v. Chadha*, *supra* note 39, at 1200-08. See also Trade Act of 1974, 19 U.S.C. §§ 2101-2486 (1988).

85. STEPHAN ET AL., *supra* note 27, at 644.

86. *Legal Markets of International Trade*, *supra* note 38, at 205-07; *Congressional Controls After I.N.S. v. Chadha*, *supra* note 39, at 1201.

87. *Legal Markets of International Trade*, *supra* note 38, at 209.

88. Professor Koh's fourth and fifth regimes are versions of the fast track procedure of the Trade and Tariff Act of 1984. *Id.* at 208-10.

89. See, e.g., Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2515 (1988); Omnibus Trade & Competitiveness Act of 1988, 19 U.S.C. §§ 1901-2906 (1988).

90. STEPHAN ET AL., *supra* note 27, at 653.



Congress is complex and fraught with separation-of-powers issues. Politicians and scholars have devoted particular attention to interbranch conflicts inherent in the operation of the fast track approval mechanism for trade agreements. The 1974 Act cheated this architecture, which no President has yet found expedient to challenge; the 1979, 1984 and 1988 trade acts all tinkered with it, generally in the direction of increasing congressional discretion.<sup>91</sup>

Set forth herein is a summary description of the fast track procedure, based on current trade legislation. One caveat to this analysis is that the current legislation could be amended by the current Congress. At best what can be provided in this article is an analysis of the basic points that may be relevant to the constitutional focus of this article. At present, no fast track authority exists, probably because there are no major trade agreements under consideration at the present time, with the successful completion of NAFTA and the GATT Uruguay Round.<sup>92</sup> The President's most recent negotiating authority expired on June 1, 1993, except for the authority for GATT Uruguay Round, which expired on April 16, 1994.<sup>93</sup> The significance of these time periods is that they provide authority or delegation from the Congress to the President to negotiate trade agreements.

The fast track procedure has included notification requirements, consultation requirements, and submission requirements. The President has been required to notify both houses of Congress of his intent to enter into a trade agreement between ninety and 120 days before entering into the agreement.<sup>94</sup> Shortly after providing notice of his intention, the President has been required to then publish notice in the *Federal Register*.<sup>95</sup> With respect to bilateral agreements, an additional notice requirement has been imposed, which has required the President to provide, at least sixty days before the above notice, a notice to the Senate Committee on Finance and the House Committee on Ways and Means of his intent to negotiate a bilateral trade agreement.<sup>96</sup>

The time period created by the above notices allow Congress "to hold 'nonmarkup' sessions and 'nonhearings,' which it can use to negotiate the final content of the agreement and the text of the

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91. *Id.*

92. *See supra* notes 4, 5 and accompanying text.

93. 19 U.S.C. §§ 2902(a)-(b), 2902(c) (1988). The President may seek extensions of time, and either house of Congress may veto the request. *See id.* § 2903(b)(1)(B)(ii) (1988).

94. *Id.* §§ 2903(a)(1)(A), 2902(e)(3)(A).

95. *Id.* § 2903(a)(1)(A).

96. *Id.* § 2902(c)(3)(C)(i).

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implementing bill with the Executive.”<sup>97</sup> The President has been required to consult with the House Committee on Ways and Means, the Senate Committee on Finance and any other committee with jurisdiction over subjects to be affected by the trade agreement at issue.<sup>98</sup> Given the broad scope of trade agreements today, including among others, such subjects as labor and the environment, this consultation requirement is significant.

Upon entering an agreement, the President has been required to submit the text of the agreement, an implementing bill, and other documentation to Congress for approval.<sup>99</sup> Upon receipt of these submissions, Congress must, within sixty days, vote on the implementing bill, making no amendments.<sup>100</sup> At any time during this process, Congress can terminate the use of fast track procedures if both houses of Congress pass disapproval resolutions.<sup>101</sup> In the event that Congress passes such resolutions, the implementing bill presumably will be treated as any other bill in the Congress.

Prior legislation, notably the 1962 Act, imposed requirements on the President to hold public hearings and seek advice from the public.<sup>102</sup> Contemporary legislation also contains such provisions. Moreover, as in the 1962 Act, Congressmen still serve as advisors to the trade delegations of the President.<sup>103</sup> The fast track procedure, however, imposes significantly greater procedural requirements on the President, in the nature of substantially increasing congressional participation in decision making over international trade matters.

Through the fast track procedure, Congress has been able to assert control by reframing the constitutional issue. Congress has articulated the fast track procedure as a matter of its internal rules of procedure. Congress has the constitutional authority to amend or reject its own rules.<sup>104</sup> Congress has not characterized the fast track procedure as implicating the issue of which branch has authority over international trade matters.<sup>105</sup> Because of this characterization by Congress, the

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97. STEPHAN ET AL., *supra* note 27, at 653-54.

98. 19 U.S.C. § 2902(c)(3)(C)(ii)-(d).

99. *Id.* § 2903(a)(1)(B) (1988).

100. *Id.* §§ 2191-2192.

101. *Id.* § 2903(c)(1); STEPHAN ET AL., *supra* note 27, at 654.

102. *See supra* notes 73, 74 and accompanying text.

103. 19 U.S.C. § 2211 (1988). *See also supra* notes 82, 83 and accompanying text.

104. 19 U.S.C. § 2191(a) (1988). The Constitution provides that “[e]ach House [is to] determine the Rules of its Proceedings.” U.S. CONST. art. I, § 5, cl. 2. *See also* STEPHAN ET AL., *supra* note 27, at 654; *The Fast Track*, *supra* note 39, at 152.

105. *See The Fast Track*, *supra* note 39, at 151-52.

contention is that Congress may reject the procedure or amend its rules at any time, even in the midst of considering a trade agreement and its implementing bills.<sup>106</sup> Congress thus diverts the focus from the key issue, namely the separation of powers issue of which branch has authority over international trade matters.<sup>107</sup>

2. *The Jackson Vanik Amendment*.—After negotiating the Soviet-American Trade Agreement in 1973,<sup>108</sup> President Nixon introduced in Congress the Trade Reform Act,<sup>109</sup> which allowed for unlinked MFN status with states with nonmarket economies.<sup>110</sup> Congress, however, instead included the Jackson-Vanik Amendment in the Trade Act of 1974.<sup>111</sup> The Jackson-Vanik Amendment permits the President to extend MFN status to countries with nonmarket economies if the President determines that the countries do not violate certain conditions allowing for freedom of emigration.<sup>112</sup>

The disagreement between the Congress and the President concerning the Jackson-Vanik Amendment shows the contours of the separation of powers debate. The Amendment was promulgated during the Cold War, when President Nixon was vigorously pursuing a policy of detente with the Soviet Union and the Soviet Bloc countries.<sup>113</sup> Nixon's detente policy included "economic detente," in which he sought to use trade to advance foreign policy objectives.<sup>114</sup> Thus, Nixon viewed the Amendment as incompatible with the means used by the

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106. STEPHAN ET AL., *supra* note 27, at 654.

107. See *The Fast Track*, *supra* note 39, at 151-52.

108. Agreement with the Government of the Union of Soviet Socialist Republics Regarding Trade, Oct. 18, 1972, U.S.-U.S.S.R., 23 U.S.T. 2910, T.I.A.S. No. 7478.

109. H.R. 4767, 93d Cong., 1st Sess. (1973).

110. Lansing & Rose, *supra* note 19, at 341-42. The agreement was not ratified because Congress did not pass implementing legislation. *Id.* See also Jessica Korn, *Institutional Reforms that Don't Matter: Chadha and the Legislative Veto in Jackson-Vanik*, 29 HARV. J. ON LEGIS. 455, 458-61 (1992); Michael W. Beasley et al., Comment, *An Interim Analysis of the Effects of the Jackson-Vanik Amendment on Trade and Human Rights: The Romanian Example*, 8 LAW & POL'Y INT'L BUS. 193, 196-97 (1976).

111. Lansing & Rose, *supra* note 19, at 343-44. The Amendment in its current form is located at 19 U.S.C. § 2432 (1988). Congress initially intended the Amendment to pressure the Soviet Union to ease its emigration policies applicable to Soviet Jews. Lansing & Rose, *supra* note 19, at 343-44.

112. 19 U.S.C. § 2432(c) (1988). The Amendment, however, did not go nearly as far as the Miller Committee recommendations, which proposed linkage requirements relating to broad foreign policy and political concerns. Lansing & Rose, *supra* note 19, at 343. The Jackson-Vanik Amendment is applied presently much more broadly than it was intended, as it is applied not only to emigration requirements but to human rights concerns generally.

113. Korn, *supra* note 110, at 458-61.

114. *Id.*

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Executive to implement foreign policy through trade.<sup>115</sup> Nevertheless, neither Nixon nor any other President, for reasons of expediency, politics or otherwise, has ever sought to challenge the Amendment as an unconstitutional restriction on the President's foreign affairs power.<sup>116</sup>

3. *Other Congressional Assertions of Dominance.*—Congress has imposed several additional restrictions on the President. More than ever before, contemporary legislation contains detailed substantive objectives and standards for the President to follow in trade negotiations.<sup>117</sup> One major restriction on bilateral agreements is that they cannot be entered into unless a foreign country requests the negotiation of the agreement.<sup>118</sup>

In addition, the President's proclamation powers are currently significantly curtailed. The President may now only proclaim in the area of duties. There is no longer statutory proclamation power for "other import restrictions".<sup>119</sup> Notably, Congress has delegated significant authority over tariff issues to the President, but not over non-tariff issues.<sup>120</sup>

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115. As explained by Jessica Korn:

The interbranch struggle surrounding the enactment of this statute sprang from debates over the Nixon Administration's policy of detente. The Nixon administration viewed the trade bill, which authorized the extension of MFN status to communist countries, "primarily as a vehicle to advance its detente objectives." A variety of forces within Congress, however, intended to prevent the Nixon administration from unilaterally implementing detente through trade policy.

*Id.* (quoting Walter F. Mondale, *Beyond Detente: Toward International Economic Security*, FOREIGN AFF., Oct. 1974, at 1, 15). See also Lansing & Rose, *supra* note 19, at 342; Beasley et al., *supra* note 110, at 196-97.

116. The substantive debate as to the soundness of the Amendment as policy continues, as even today, there is debate over the renewal of China's MFN status. Current policies toward China are similar to the detente policies of the Nixon Administration towards the Soviet Bloc. In 1993, President Clinton advocated conditionality of China's MFN status on progress on human rights. H.R. REP. 575, 103d Cong., 2d Sess., at 1 (1994). In 1994, the Clinton Administration took a position that is similar in substance to President Nixon's detente policy. *Id.* The Administration currently implements a "new comprehensive China policy, which seeks to address and balance the host of U.S. strategic, commercial, political, and human rights interests in China." *Id.*

117. See, e.g., 19 U.S.C. §§ 2901 (1988) (outlining "overall and principal trade negotiating objectives of the United States"); 19 U.S.C. § 2905 (1988) (providing accession of state trading regimes to GATT).

118. 19 U.S.C. § 2902(c)(3)(B) (1988).

119. *Id.* § 2902(a)-(b).

120. It is noteworthy that the apparent design of the fast track procedure is that it applies to "Agreements regarding non-tariff barriers" and "Bilateral Agreements regarding tariff and non-tariff barriers." *Id.* §§ 2902(b), (c)-(d); 2903(b).

### F. Export Controls and Sanctions Powers

In numerous statutes, Congress has delegated substantial authority to the President to impose economic sanctions.<sup>121</sup> Two principal laws apply in national emergencies, namely the Trading with the Enemy Act<sup>122</sup> and the International Emergency Economic Powers Act.<sup>123</sup> Moreover, many other statutes exist that deal with economic sanctions, such as those governing exports from the United States.<sup>124</sup>

## III. Constitutional Analysis

From the preceding section, one can conclude that, at present, Congress currently asserts a dominant role in trade matters. Indeed, the current trend appears to be that Congress takes an increasingly active and intrusive role, involving itself in the core of decisions on international trade relations. Some assert, however, that the President has significant inherent constitutional powers to undertake international trade activities independent of the powers delegated to the President in trade legislation.<sup>125</sup> Thus, there arises the question as to the extent the President can lawfully act independent of or in conflict with trade legislation. Consequently, this section examines the President's authority to act alone despite extensive congressional controls in trade matters.

### A. The Text of the Constitution

The threshold analysis centers upon the text of the Constitution. Specifically, one must determine how the Constitution delineates the separation of powers in the foreign trade area. The Constitution, however, provides no easy answers on the permissible scope of powers of the executive and legislative branches.<sup>126</sup>

*1. Congressional Powers.*—The Constitution provides Congress with many enumerated powers in the international arena.<sup>127</sup> While these

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121. John P. Giraudo, *Waging Economic Warfare: The Sanctions Power Under the Constitution*, N.Y.U. INT'L L. & POL. 935 (1987); See generally BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME* (1988).

122. Trading with the Enemy Act, 50 U.S.C. app. §§ 1-5 (1988).

123. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 (1988).

124. See CARTER, *supra* note 121, at 63-98.

125. Giraudo, *supra* note 121, at 936-38; CARTER, *supra* note 121, at 209-19.

126. As explained by legal scholar, Professor Karl Llewellyn, a "working constitution" such as the United States Constitution, is "a living institution built (historically, genetically) in the first instance around a particular Document," and "[t]he device of enumerating blanket powers leaves the Document, in appearance, still 'controlling,' despite range or mass of concrete action taken 'under' them." Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934).

127. Edwin Marino, Jr., Note, *Public Citizen, Sierra Club, and Friends of the Earth v. Office of*

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powers often are taken for granted in any analysis of congressional power in foreign affairs, Congress has at least seven expressly enumerated powers in foreign affairs, in the following areas: (1) the power to impose tariffs and duties;<sup>128</sup> (2) the power to regulate foreign commerce;<sup>129</sup> (3) the advice and consent power of the Senate in the treaty process;<sup>130</sup> (4) advice and consent power in the appointments process;<sup>131</sup> (5) the power to declare war;<sup>132</sup> (6) authority over naturalization;<sup>133</sup> and (7) the power to organize and fund military forces for the nation.<sup>134</sup> It has been found that Article I of the Constitution “gives Congress almost all of the enumerated powers over foreign affairs, and Article II gives the President almost none of them.”<sup>135</sup> Yet, ironically, the President traditionally has seized the initiative in foreign affairs.<sup>136</sup>

Article I, Section 8 of the Constitution stipulates that Congress has the authority to “lay and collect . . . Duties, Imposts and Excises”<sup>137</sup> and to “regulate Commerce with Foreign Nations.”<sup>138</sup> Congress, under this same section, also has the authority to “regulate Commerce . . .

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*the United States Trade Representative: Environmentalists, the Courts, and Trade Agreements — Meritorious Ideas, But Let's Not Forget the Constitution*, 39 S.D. L. REV. 204, 220, 221 (1994).

128. U.S. CONST. art. I, § 8, cl. 1.

129. *Id.* art. I, § 8, cl. 3.

130. Article II of the Constitution, which concerns the executive branch, provides for the following with respect to presidential power:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, . . . and all other officers of the United States, whose Appointments are not herein otherwise provided for, and shall be established by Law . . .

*Id.* art. II, § 2, cl. 2.

131. *Id.*

132. Under Article I of the Constitution, the Congress shall have the power to “declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.” *Id.* art. I, § 8, cl. 11.

133. Congress shall have the power to “establish a uniform rule of naturalization . . . .” U.S. CONST. art. I, § 8, cl. 4.

134. The Constitution provides in pertinent part:

The Congress shall have the power to . . . raise and support armies . . . [t]o provide and maintain a navy . . . [t]o make rules for government and regulation of the land and naval forces . . . [and t]o provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions.

*Id.* art. I, § 8, cls. 12-15.

135. Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1292 (1988).

136. *Id.* at 1292-93.

137. U.S. CONST. art. I, § 8, cl. 1.

138. *Id.* art. I, § 8, cl. 3.

among the several States and with the Indian Tribes."<sup>139</sup> Thus, Congress has an explicit textual preeminence in matters of commerce.

In contrast, Article II, governing the executive branch, says nothing about the power of the Executive over either interstate or international commerce. In fact, Article II, Section 3 merely requires the President to "take Care that the Laws be faithfully executed."<sup>140</sup> It is this clause that has been interpreted as resulting in shared responsibilities or concurrent powers over matters of international trade.<sup>141</sup>

Hardly anything can be found in the documentation relating to the drafting of the Constitution so as to glean any intent on the separation of powers in the area of foreign commerce.<sup>142</sup> Presumably, this lack of information is because the significant issues at the time of the Constitution's drafting were focused on the division of power between the federal and the state governments in the regulation of commerce, and not in the separation of powers between Congress and the President.<sup>143</sup> Indeed, Alexander Hamilton, who propounded broad, unenumerated powers in foreign relations for the President,<sup>144</sup> asserted in *The Federalist* that the President "can prescribe no rules concerning the commerce or currency of the nation," in contrast to the King of Great Britain, who "is in several respects the arbiter of commerce, and in this capacity can . . . lay embargoes for a limited time."<sup>145</sup>

It is important to note that as trade legislation has progressed throughout the years, Congress appears to have lost interest in the regulation of tariffs and duties. Indeed, Congress has delegated the most sweeping powers to the President in the tariff area.<sup>146</sup> The President does not need fast track authority for multilateral agreements involving tariff barriers and has been able to retain proclamation powers only for duties.<sup>147</sup> This loss of interest by Congress coincides with the increase in focus of trade agreements on nontariff barriers such as subsidies, national standards, and barriers in public procurement. The paradox is that the Constitution grants Congress express powers to regulate duties.

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139. *Id.*

140. *Id.* art. II, § 3.

141. Jacques J. Gorlin, *Foreign Trade and the Constitution*, in FOREIGN POLICY AND THE CONSTITUTION 54 (Robert A. Goldwin & Robert A. Licht eds., 1990).

142. *Id.* at 56-59.

143. *Id.*

144. See *infra* notes 188-89 and accompanying text.

145. Gorlin, *supra* note 141, at 58-59 (quoting THE FEDERALIST No. 69 (Alexander Hamilton)).

146. See *supra* notes 60-72 and accompanying text.

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

## INTERNATIONAL TRADE RELATIONS

Congress has attempted to justify fast track legislation on the basis of the provision in the Constitution that “[e]ach House [is to] determine the Rules of it proceedings.”<sup>148</sup> This justification results in a tautology. It seems almost axiomatic to conclude that congressional rules of procedure must not violate the Constitution, just as rules of procedure for a court must not violate the Constitution. The contention that fast track legislation is constitutionally proper simply because it concerns rules of congressional procedure ignores other substantial and detailed constitutional provisions and Supreme Court precedent on the separation of powers.<sup>149</sup> Moreover, merely because Congress says that the fast track legislation modifies its rules does not make it so.

2. *Executive Powers.*—The President has relatively few enumerated powers in the Constitution. Indeed, it has fewer enumerated powers than Congress on matters of international concern.<sup>150</sup> Under Article II of the Constitution, the President has the following enumerated powers: (1) The President is the “Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States;”<sup>151</sup> (2) The President has “[p]ower, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;”<sup>152</sup> (3) The President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls,”<sup>153</sup> and (4) The President “shall receive Ambassadors and other public Ministers.”<sup>154</sup>

An analysis of the text of the Constitution is a necessary but not sufficient condition for assessing separation of powers issues. This is particularly true in foreign affairs, where the President has inherent authority and unenumerated powers.<sup>155</sup>

### *B. The Power to Negotiate*

One important early step in any trade relations between the United States and a foreign country is negotiations between government representatives. Generally, the accepted view is that “the President and

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148. See *supra* note 106 and accompanying text.

149. See *infra* part III.B.

150. See *supra* notes 128-145 and accompanying text.

151. U.S. CONST. art. II, § 2, cl. 1.

152. *Id.* § 2, cl. 2.

153. *Id.*

154. *Id.* § 3. This is the President’s power to recognize foreign governments.

155. See *infra* part III.B.



his officers can negotiate on any subject at any time."<sup>156</sup> Nevertheless, there has been little judicial discussion of the President's negotiation powers, except for the much-criticized Supreme Court decision of *United States v. Curtiss-Wright Corp.*<sup>157</sup> In *Curtiss-Wright*, the Court articulated the following:

Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is 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. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>158</sup>

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156. John H. Jackson, *U.S. Constitutional Law Principles and Foreign Trade Law and Policy*, in 8 NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 65, 71 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 311 cmt. b (1986) ("As the 'sole organ' of the United States in its international relations . . . the President himself has authority to represent the United States in negotiating or concluding international agreements.").

157. 299 U.S. 304 (1936).

158. *Id.* at 319. The Court continued with the following quote from an 1816 report from the Senate Committee on Foreign Relations:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible under the Constitution. The committee consider [sic] this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of the transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

*Id.* See also John G. Tower, *Congress Versus the President: The Formulation and Implementation of American Foreign Policy*, 60 FOREIGN AFF. 229 (1981).

It has been asserted that the "sole organ" quote has been relied upon out of context, and that what Mr. Marshall really was referring to was the President's authority under congressional delegation. Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 25 (1983). Professor Lofgren provides the following analysis and quotation to Mr. Marshall:

Since these words of Marshall have often been quoted, it is worthwhile to put them in context. At issue was whether President John Adams had acted properly in extraditing a British subject to England on a murder charge pursuant to the Jay Treaty of 1795. After the [often quoted] statement, Marshall continued:

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Thus, after *Curtiss-Wright*, it appears that the President has the inherent constitutional authority to negotiate international agreements.<sup>159</sup> Yet, no constitutional distinction has been articulated in the “external realm” for trade agreements. Further, some characterize *Curtiss-Wright*’s pronouncement of broad executive power in foreign affairs matters as *dicta*, since the decision could have rested on a finding that the President’s action in the case before the Court was within the scope of a congressional delegation.<sup>160</sup> Nevertheless, for the most part, the holding of *Curtiss-Wright* is well-recognized and is a part of constitutional doctrine.

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Of consequence, the demand of a foreign nation can only be made on [the President].

He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.

He is charged to execute the laws. A treaty is declared to be law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nations, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been described? *Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract*; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.

*Id.* (quoting 10 ANNALS OF CONG. cols. 613-14 (emphasis added)).

159. As explained by Senator John C. Spooner in 1906:

The Senate has nothing to do whatever with the *negotiation* of treaties or the conduct of our foreign intercourse and relations save the exercise of the one constitutional function of advice and consent which the Constitution requires as a precedent condition to the making of a treaty . . . .

From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases — and they are multifarious — of the conduct of our foreign relations exclusively in the President. And, Mr. President, he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined.

I do not deny the power of the Senate . . . to pass a resolution expressive of its opinion as to matters of foreign policy. But if it is passed by the Senate or by the House or by both Houses it is beyond any possible question purely advisory, and not in the slightest degree binding in law or conscience upon the President . . . .

Statement of Senator John C. Spooner, 40 CONG. REC. 1417-20 (1906), *reprinted in* JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 777 (1990).

160. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 n. 2 (Jackson, J., concurring); Lofgren, *supra* note 158, at 6-7; David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 YALE L.J. 467, 468-69 (1946).

Given *Curtiss-Wright* and its holding that the President has the authority to initiate and conduct negotiations, the restrictions imposed by the fast track procedure may be unconstitutional. Additionally, the Jackson Vanik Amendment, to the extent it restricts the President's negotiating authority, also may be unconstitutional. These provisions are especially problematic when the President wants to use trade negotiations as an adjunct to other foreign policy mechanisms, since the President has undisputed authority in foreign affairs matters that do not involve foreign trade.

A constitutional impasse on the issue of negotiating authority is possible in the very near future. For instance, the Clinton Administration may encounter congressional resistance to its proposal to negotiate with the government of Chile for Chile's contemplated accession to NAFTA, especially since Congress has yet to enact legislation delegating negotiating authority to the President for this purpose.<sup>161</sup> The executive branch's position is that fast track legislation is unnecessary to negotiate an agreement, and that it is necessary only at "the moment before you sign the agreement."<sup>162</sup> It is unlikely, however, that Congress and the President will engage in a constitutional confrontation concerning this new stage of NAFTA negotiations.<sup>163</sup>

That the President has clear constitutional authority to conduct negotiations with foreign officials does not end the analysis. There still remain important questions on the authority to accept trade agreements; the implementation of negotiated agreements as part of U.S. domestic law; and the affect of agreements as or on domestic law. There is also the question of whether Congress or the President can make substantive trade policy. Arguably, the President may be able to control the process of negotiations, but the substance of those negotiations may have other constitutional influences.

### C. The Power to Formulate Trade Policy

Although the President has the authority to negotiate freely with foreign governments, the substance of the negotiations may be subject to delimitation by Congress. As explained by one legal scholar:

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161. *Representative Matsui Says Congress Will Pass New Fast-Track Legislation Next Year*, 11 Int'l Trade Rep. (BNA) 1831 (Nov. 30, 1994); *NAFTA "Amigos" Invite Chile to Begin Accession Talks*, 11 Int'l Trade Rep. (BNA) 1914 (Dec. 14, 1994).

162. *Representative Matsui Says Congress Will Pass New Fast-Track Legislation Next Year*, 11 Int'l Trade Rep. (BNA) 1831 (Nov. 30, 1994) (statement of U.S. Trade Representative Mickey Kantor).

163. *See id.* The President plans to consult with Congress concerning Chile negotiations and new fast track legislation is contemplated in 1995. *Id.*

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[A]lthough the President alone can act in foreign affairs, the content of presidential options is defined partly — and increasingly — by congressional enactments and limited by constitutional strictures. Hence, while it may be symbolically correct to say that the President is the sole national “actor” in foreign affairs, it is not accurate to label the President the sole national policy maker. It would be equally inaccurate, however to cast the role of the Executive in foreign affairs as exclusively instrumental; the President is surely accorded a more vital role in foreign relations than that of a mere medium whose charge it is to effect exogenously posited ends.<sup>164</sup>

No clear guidance exists to determine when it is presidential or congressional prerogative to make policy. Practice suggests that each branch asserts authority based on reliance to various references to the text of the Constitution.<sup>165</sup> Moreover, Congress in the most recent fast track legislation commingles negotiation and policy formulation functions by providing negotiating authority in conjunction with detailed statements of what it considers to be permissible negotiating objectives.<sup>166</sup>

No meaningful judicial precedent exists on this issue. The concurring opinion of Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>167</sup> may provide guidance, although the decision does not make a distinction between policy and action.

### *D. Constitutional Validity of Presidential Action*

In *Youngstown*, the Supreme Court held that an executive order issued by President Truman to seize steel mills during time of war violated the Constitution.<sup>168</sup> In the constitutional confrontation that was the subject of *Youngstown*, Congress had refused to promulgate legislation permitting such seizures.<sup>169</sup> While *Youngstown* “has not been considered a foreign affairs case,”<sup>170</sup> Justice Jackson’s concurring opinion has nevertheless become an oft-cited formulation for assessing the constitutionality of executive action in foreign affairs matters.<sup>171</sup>

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164. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 219 (2d ed. 1988).

165. *Id.* at 219-24.

166. See *supra* notes 88-107 and accompanying text.

167. 343 U.S. 578, 634 (1952).

168. *Id.* at 586-88.

169. *Id.* In *Youngstown*, steel workers went on strike due to a labor dispute during a time of high demand for steel during the Korean war. *Id.* at 582-83.

170. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 314, n.11 (1972), quoted in MOORE ET AL., *supra* note 159, at 773.

171. See, e.g., Letter from Walter Dellinger, U.S. Department of Justice, Office of Legal Counsel, to the Honorables Robert Dole, Alan K. Simpson, Strom Thurmond, William S. Cohen, 1, 3 (Sept. 27, 1994) (on file with the author).

Accordingly, set forth below is an analysis of the President's authority to act independent of Congress' current comprehensive trade legislation, using the tripartite analysis of Justice Jackson in *Youngstown*.

1. *Factor One: Pursuant to Congressional Authorization.*—Justice Jackson acknowledged that there is “a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his power . . .” based on the fluctuation of powers between Congress and the President.<sup>172</sup> Thus, Jackson delineated the first factor for assessing executive power as follows:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what if may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.<sup>173</sup>

Through the Trade Act of 1974 and other trade legislation, Congress has provided detailed delegations that concern both the substance and the procedure for trade negotiations. Thus, when acting according to these provisions, the President is acting pursuant to express congressional delegation. In such situations, according to Justice Jackson, the President is acting in his maximum capacity, as he is acting under both the authority delegated to him by Congress and his inherent constitutional powers to conduct foreign affairs.<sup>174</sup>

2. *Factor Two: The Zone of Twilight.*—Justice Jackson designated the second factor for assessing executive power as follows:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which the distribution is uncertain.

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172. *Youngstown*, 343 U.S. at 635.

173. *Id.* at 635-37.

174. See *supra* note 8, 156-60 and accompanying text. A related issue is whether the Congress imposes too many standards and too many procedural restrictions on the President, namely whether the Congress is encroaching upon presidential powers over foreign affairs. The principal justification for congressional activity in the trade area is that the text of the Constitution provides Congress with the authority. This justification, however, fails to address the issue of whether the President has concurrent authority. No questions are definitively answered by referring to blanket statements of the text of the Constitution.

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Thereafter, congressional inertia, indifference or acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent professional responsibility. In this area, any actual test of powers is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.<sup>175</sup>

Justice Jackson's "zone of twilight" factor can not be easily applied to trade contexts, as there is a substantial and aggressive congressional presence in recent trade legislation, both on a substantive and a procedural basis.<sup>176</sup> Congress may have exhibited indifference or acquiescence in prior regimes of trade regulation, such as those existing before 1962 or 1974,<sup>177</sup> but today's regime is one in which Congress seeks if not to preempt the field, then at least to substantially control it.<sup>178</sup>

3. *Factor Three: The Lowest Ebb.*—Justice Jackson prescribed the third and final factor as follows:

When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>179</sup>

A President's action on his own, outside of the realm of current trade legislation, plainly is in the "lowest ebb." Applying this factor, one may question whether the President can indeed act in contradiction to trade legislation.

At a threshold level, Justice Jackson's third factor may be attacked, at least as far as trade matters are concerned. As explained above, *Youngstown* did not involve the foreign affairs power.<sup>180</sup> Several scholars have suggested that "Justice Jackson's third hypothetical ought to be reversed — extending foreign affairs powers of Congress and the

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175. *Youngstown*, 343 U.S. at 637.

176. See *supra* part II.E.

177. See *supra* part II.A.

178. See *supra* part II.E.

179. *Youngstown*, 343 U.S. at 637-38.

180. See *supra* note 170 and accompanying text.

Senate no further than is essential to their execution. This, at any rate, would be consistent with the understandings of Hamilton, Jefferson, and, arguably, the early Madison."<sup>181</sup> Limited support for this proposition can be found in the concurring opinion of Justice Rehnquist in *Goldwater v. Carter*,<sup>182</sup> a case where several Senators challenged President Carter's decision to recognize the People's Republic of China and to withdraw recognition of the Republic of China (Taiwan). As stated by Justice Rehnquist:

The present case differs in several important respects from *Youngstown* . . . . In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the nation's steel industry, an action of profound and demonstrable domestic impact . . . . Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs."<sup>183</sup>

The problems with relying on *Goldwater* are two-fold: (1) Unlike the context of recognizing foreign governments, Congress does have enumerated authority within the Constitution to regulate foreign commerce; and (2) It is widely understood that foreign trade has a significant effect on the domestic economy.

Alternatively, one can accept Justice Jackson's analysis and rely on some authority of the President that is entirely independent of Congress' power. The specific question in the context of trade agreements is whether the President may enter into a sole executive agreement in a manner and in substance inconsistent with current trade legislation regime of the fast track procedure and the Jackson Vanik Amendment.<sup>184</sup> While the scope of the President's power to enter into sole executive agreements "has not been authoritatively determined",<sup>185</sup> the widely accepted view is that the President is the dominant authority in foreign affairs, with powers far greater than Congress.<sup>186</sup> The foundation of this authority is inherent, afforded by Article II, Section 1 of the Constitution, which provides that "[t]he executive Power shall be vested in a President of the United States of America."<sup>187</sup> Alexander

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181. MOORE ET AL., *supra* note 159, at 773.

182. 444 U.S. 996 (1979) (Rehnquist, J., concurring).

183. *Goldwater*, 444 U.S. at 1004 (1979).

184. See *supra* part II.E.

185. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303, cmts. i-j (1986).

186. MOORE ET AL., *supra* note 159, at 749-817.

187. U.S. CONST. art. II, § 1. See TRIBE, *supra* note 164, at 210-11.

Hamilton's view was that this statement reflects an affirmative grant of power beyond the enumerated powers set forth in Article II of the constitution.<sup>188</sup> Hamilton's view has since become law.<sup>189</sup>

In contrast, congressional power exists only as specifically granted in the Constitution.<sup>190</sup> There are no inherent powers in the foreign affairs area which are resident in the Congress, as the Constitution provides that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States . . . ."<sup>191</sup>

In *Curtiss-Wright*, the Supreme Court spoke of the President's powers in foreign affairs in sweeping terms. Justice Sutherland explained in *Curtiss-Wright* that "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."<sup>192</sup> As such, federal powers in internal affairs were taken from the powers held by the states.<sup>193</sup> The states, however, never possessed "international powers" or "external sovereignty."<sup>194</sup> The United States, rather, obtained powers in the international realm from the British Crown.<sup>195</sup> In this analysis, the President was found to have broad inherent authority to conduct international relations on behalf of the nation.<sup>196</sup>

Because these articulations of executive power are very broad, they are often not very helpful in resolving specific cases. While there have been a few additional court decisions on this issue, none provide clear guidance. The case law does suggest the following parameters.

(a) *Actions Within the Scope of the President's "Primary Constitutional Authority."*<sup>197</sup>—It has been suggested that presidential

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188. See *supra* notes 144, 145 and accompanying text.

189. *Myers v. U.S.*, 272 U.S. 52, 118, 164 (1926); see Tribe, *supra* note 164, at 210-211. In *Myers*, the Supreme Court, in an opinion by Chief Justice Taft, wrote that "[t]he executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed . . . ." *Myers*, 272 U.S. at 164.

190. See *supra* note 189 and accompanying text.

191. U.S. CONST. art. I, § 1; see Tribe, *supra* note 164, at 210.

192. *Curtiss-Wright*, 299 U.S. at 315-16.

193. *Id.*

194. *Id.* at 316-18.

195. *Id.* at 319-20. Cf. *In Re Neagle*, 135 U.S. 1, 63-65 (1889) (holding that the President has inherent authority in domestic and international affairs).

196. *Curtiss-Wright*, 299 U.S. at 319-20.

197. This language is suggested by RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 n.4 (1986).



action in the form of a sole executive agreement may be appropriate in matters within the President's "primary constitutional authority."<sup>198</sup>

The President has considerable powers in the authority to recognize foreign governments.<sup>199</sup> The power of recognition, moreover, necessarily implies the power of "de-recognition."<sup>200</sup> The Republic of China controversy of the late 1970s provides ample authority for this proposition.<sup>201</sup> These latent powers may furnish some inherent authority over matters involving foreign commerce. In the de-recognition of the Republic of China, President Carter decided to retain only economic and cultural ties with Taiwan, while establishing exclusive political ties with the People's Republic of China as the sole political entity for the nation-state of China.<sup>202</sup>

The basic authorities for sole presidential authority over recognition are *United States v. Belmont*<sup>203</sup> and *United States v. Pink*,<sup>204</sup> both of which concerned the recognition of the Soviet government by the United States government. In *Belmont* and *Pink*, the Supreme Court upheld the Litvinov Assignment, a sole executive agreement between the United States and the Soviet government assigning private claims, as an incident to recognition of the Soviet government by the U.S. government.<sup>205</sup> There is no direct constitutional argument against extending these decisions to areas other than recognition, so long as these other areas are within the President's primary constitutional authority. The following explanation in *Pink* is encouraging:

The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees . . . . That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts . . . Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest

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198. *Id.*

199. Giraudo, *supra* note 121, at 937.

200. *Id.*

201. See *supra* notes 182, 183 and accompanying text.

202. In contrast, in the case of the People's Republic of China, the President and some members of Congress have at times sought to retain political ties while restraining trade due to human rights concerns.

203. 301 U.S. 324 (1937).

204. 315 U.S. 203 (1942).

205. *Belmont*, 301 U.S. at 330-33; *Pink* 315 U.S. at 233-34.

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implied power of the President who is the "sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Corp* . . . Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs . . . is to be drastically revised. It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent.<sup>206</sup>

Thus, it appears that certain latent powers exist in the President's primary constitutional authority. The Congress, however, has explicit textual authority over foreign commerce. Thus, there still remains a serious question as to whether foreign commerce is within the scope of the President's primary authority, unless, as in *Belmont* and *Pink*, authority over foreign commerce is clearly exercised by the President as incidental to the exercise of one of his primary constitutional powers.

(b) *Presidential Action That Can Be Harmonized With Congressional Action*.—One principle of interpretation is that a federal statute should be construed to avoid conflicts with international law or international agreements.<sup>207</sup> In *Consumers Union of U.S., Inc. v. Kissinger*,<sup>208</sup> the District of Columbia Circuit Court of Appeals upheld agreements between the executive branch and foreign steel producer associations, in which the steel producers agreed to voluntary import restraints. The Court held that the President did not have to adhere to the 1962 Trade Act when making these voluntary agreements.<sup>209</sup> *Consumers Union*, although limited in its scope, indicates that there may be as yet undefined classes of agreements that do not fall within trade legislation.

A case which is somewhat of a counterweight to *Consumers Union* is *U.S. v. Guy W. Capps, Inc.*,<sup>210</sup> in which the Fourth Circuit Court of Appeals found a sole executive agreement unenforceable under the third *Youngstown* factor. The Court in *Capps* held that a Presidential

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206. *Pink*, 315 U.S. at 229-30.

207. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1986).

208. 506 F.2d 36 (D.C. Cir. 1974).

209. *Id.* at 144.

210. 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1953).

agreement that did not comply with statute was unconstitutional because "[t]he power to regulate foreign commerce is vested in Congress, not in the executive or the court . . . ." <sup>211</sup>

In *Capps*, the Supreme Court scrupulously avoided the issue of the authority of the President to enter into agreements without following applicable legislation.<sup>212</sup> Thus, no Supreme Court guidance exists on the subject, and the issue is unsettled.

*Capps* should not be considered determinative. The analysis in *Capps* goes too far. The Court "finds the President has no power because Congress does."<sup>213</sup> This zero-sum analysis would inevitably lead to excessive friction between the branches. It would unduly limit the President's power to act only where Congress has no power to legislate.<sup>214</sup> This would lead to nonsensical results and rob the President of significant power, as there is not much at all that the Congress cannot deal with in legislation.<sup>215</sup> Notably, *Capps* concerned a "pure" trade agreement that had no relation to any other foreign policy issues.<sup>216</sup> The stark proposition of *Capps* will not work when the President can refer to enumerated powers in the Constitution. The Court in *Capps* creates a hierarchy of powers, namely that enumerated powers are better than inherent powers, and that is not supportable in any accepted analysis of the U.S. Constitution.<sup>217</sup>

This "harmonization" concept suggests that areas exist for the President to explore, outside of or complementary to trade legislation that is in existence at any one point in time, in which the President may act on his own authority. Harmonization, however, could be interpreted to really be an aspect of Justice Jackson's "zone of twilight" factor, applied when Congress has not legislated on a matter. Still it merits treatment as

211. *Capps*, 204 F.2d at 658.

212. BERNARD SCHWARTZ, *SUPREME CHIEF — EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY* 165-66 (1983), *quoted in* JOHN H. JACKSON & WILLIAM S. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 91-92 (2d ed. 1986).

213. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 178-82 (1972), *quoted in* LOUIS HENKIN, RICHARD C. PUGH ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* 220-21 (2d ed. 1987).

214. *Id.*

215. *Id.*

216. *Capps*, 204 F.2d at 657.

217. The answer is that while the President has certain inherent powers under the Constitution such as the power pertaining to his position as Commander in Chief . . . and the power necessary to see that the laws are faithfully executed, the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress.

*Id.* at 659.

a distinct situation since, as in *Consumers Union*, it applied where Congress had promulgated significant trade legislation and could be said to have preempted the field of regulation of enforceable trade agreements.

(c) *Presidential Action as a Necessary Incident to the Resolution of a Major Foreign Policy Dispute.*—A standard similar to that of “primary constitutional authority” was suggested in *Dames & Moore v. Regan*.<sup>218</sup> In *Dames & Moore*, the Supreme Court upheld a sole executive agreement in which the President suspended litigation against the Iranian government and required U.S. persons with claims against the Iranian government to adjudicate the resolution of their claims in the Iran-United States Claims Tribunal.<sup>219</sup> The requirements were part of an agreement reached between the President and the Iranian government for the release of U.S. diplomatic personnel held as hostages in the aftermath of the overthrow of the Shah of Iran in 1979.<sup>220</sup>

In *Dames & Moore*, the Supreme Court found no legislation specifically delegating to the President the authority to suspend claims and to impose a mandatory dispute resolution procedure upon private claimants.<sup>221</sup> The Court nevertheless upheld the agreement because (1) claims settlement was determined to be “a necessary incident to the resolution of a major foreign policy dispute,” and (2) Congress acquiesced in the President’s activities, determined on the basis of consistent legislative practice or silence on the subject.<sup>222</sup> The resolution of major foreign policy disputes are within the President’s primary constitutional authority, and this *Dames & Moore* standard thus could be read as a subset of the *Belmont* and *Pink* standard.<sup>223</sup>

Moreover, *Dames & Moore* is similar to *Consumers Union* in the sense that legislation in the disputed area at issue existed, which the Court in *Dames & Moore* interpreted “in the looser sense of indicating congressional acquiescence of a broad scope of executive action in circumstances such as those presented in this case.”<sup>224</sup> Although the Court fit the *Dames & Moore* facts into Justice’s Jackson’s second “zone of twilight” factor, the decision could be read to indicate broad deference

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218. 453 U.S. 654 (1981).

219. *Id.* at 654-58.

220. *Dames & Moore* also dealt with other issues, such as the nullification of attachments of Iranian assets. The Court found these other actions to have been accomplished pursuant to congressional authorization. *Id.* at 656, 673-74.

221. *Id.* at 688.

222. *Id.*

223. See *supra* notes 203-06.

224. *Dames & Moore*, 453 U.S. at 677.

to the President when a matter is related to a significant foreign policy matter. More to the point, *Dames & Moore* should not be read so restrictively so as to prohibit the President from taking action inconsistent with legislation when necessary to deal with a foreign policy crisis of major proportions.

(d) *Presidential Action Predominantly in the External Realm.*—Finally, since the President has great powers in foreign affairs, another possible standard is that the President may be able to act on his own, possibly in a manner in conflict with legislation, when a matter has no appreciable link to domestic matters.<sup>225</sup> Of course, the advice and consent requirement would still apply to treaties.<sup>226</sup> This is a modest proposal, given *Pink* and *Belmont*, in which arguably significant domestic impact occurred in the process of recognizing the government of the Soviet Union, an ostensibly external matter.<sup>227</sup> The standard may not be justiciable, however, because of the substantially increased relationships between domestic and foreign affairs.<sup>228</sup>

#### *E. Presidential Authority to Implement Negotiated Agreements as Domestic Law*

If the President can undertake certain activities in international trade in a constitutional manner without the involvement or approval of Congress, the question arises as to the domestic law effect of such activities. The President does not have the ability to enact legislation in our constitutional system.<sup>229</sup> Thus, in the context of a sole executive agreement, the President would have to make any such agreement either self-executing or promulgate an executive order to implement it.<sup>230</sup> Similarly, for other activities, such as the issuance of trade sanctions, the President could implement such sanctions through executive order.

Congress, however, could simply enact subsequent legislation to nullify Presidential action. A well-established hierarchical principle in United States law, established in connection with the early MFN treaties, is that a later act of Congress supersedes an earlier international

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225. See *supra* notes 192-96 and accompanying text. See also Restatement (Third) of the Foreign Relations Law of the United States § 303 n. 11 (1986).

226. See *supra* note 130 and accompanying text.

227. See *supra* notes 203-06 and accompanying text.

228. See *supra* notes 1-5 and accompanying text.

229. The Constitution directs that "[a]ll legislative Powers . . . granted shall be vested in a Congress of the United States." U.S. CONST. art. 1, § 1, cl. 1.

230. See *supra* note 35 and accompanying text.

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agreement.<sup>231</sup> It is doubtful in our constitutional system that a President could then enact a subsequent executive order to nullify the legislation. The President, if he stands on firm constitutional ground, could always ignore the legislation as unconstitutional, and refuse to enforce it. However, such activities appear excessively confrontational from a practical standpoint.

### IV. Conclusion

A separation of powers analysis could sustain the assertion that Congress has the authority, through the command of legislation, to stop the President's activities undertaken on the basis of his sole executive authority. Such an argument places the executive and legislative branches back at "square one." That is, there would still remain the question as to whether trade legislation is an unconstitutional encroachment on the President's authority. The branches would be presented with a conundrum.

Supreme Court cases have indicated some potential standards for when the President may possibly ignore legislation in the international trade area and yet still act within the Constitution.<sup>232</sup> These standards, however, appear to merely seek to allow one political branch to exercise its primary functions without undue encroachment on the primary functions of the other branch, and do not adequately define the parameters of the President's independent authority.

The difficulties with the standards, moreover, are procedural as well as substantive. Can it be left to executive discretion to determine when the President can ignore legislation? Presumably, the difficulty of the judicial branch in defining the parameters for the President's inherent constitutional authority in trade matters lies in the fact that the separation of powers doctrine, despite having been given the status of law by the framers of the Constitution, nevertheless remains a political theory.<sup>233</sup>

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231. See *supra* part II.A. See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1986).

232. See *supra* part II.E.

233. See Marino, *supra* note 127, at 217.

